Relations industrielles
Industrial Relations

Incompetence vs. Culpable Non-Performance: The Canadien Arbitration and Adjudication Experience

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Volume 47, numéro 3, 1992

URI : https://id.erudit.org/iderudit/050793ar
DOI : https://doi.org/10.7202/050793ar

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

Knight, T. R., McPhillips, D. C. & Shetzer, L. (1992). Incompetence vs. Culpable Non-Performance: The Canadien Arbitration and Adjudication Experience. *Relations industrielles / Industrial Relations*, *47*(3), 529–545. https://doi.org/10.7202/050793ar

Résumé de l'article

La jurisprudence arbitrale fait une distinction entre les manquements

volontaires, ou intentionnels, et les manquements involontaires, ou hors du contrôle de l'individu. Tandis que le premier type est soumis à la règle de la gradation des sanctions, le second suit de plus en plus un courant jurisprudentieile voulant que des étapes additionnelles soient entreprises pour justifier un congédiement. Celles-ci comprennent la communication à l'employé des normes de rendement, la mise en place de moyens pour aider ce dernier à augmenter son rendement et la connaissance par celui-ci qu'un manquement prolongé pourrait conduire à la rupture de son lien d'emploi. Cette étude analyse les sentences portant sur ces deux sortes de manquement et rendues par des arbitres et des juges en vertu du Code canadien du travail.

Les décisions arbitrales analysées ont été déposées entre 1984 et 1989.

L'échantillon est constitué de causes entendues en Colombie-Britanique (n=72: 46 volontaires et 26 involontaires), en Alberta (n=42: 34 volontaires, 8 involontaires) et de sentences prononcées à l'échelle du pays rapportées dans Labor Arbitration Cases (n=25: 12 volontaires, 13 involontaires). De plus des décisions renversant des congédiements ont également été échantillonnées (n=84: 57 volontaires, 27 involontaires).

Pour toutes les juridictions canadiennes, les employeurs, dans un nombre significatif, ont moins de succès à obtenir le maintien d'un congédiement pour manquements involontaires que volontaires. Par juridiction, le geste de l'employeur a été supporté par le tribunal dans les proportions suivantes: Colombie Britanique 61 % volontaires, 38 % involontaires; Alberta 71 % volontaires, 25 % involontaires; Labour Arbitation Cases, 66 % volontaires, 30 For a fuller discussion relating to the appropriateness ot giving déférence, the reader is referred to the paper by John Rogers and Laura Parkinson, "Promotions: The Correctness Test", CLE-Labour Arbitration-1989, June, 1989. 38 % involontaires: décisions en vertu du Code Canadien du Travail 57 % volontaires, 38 % involontaires (de plus, des indemnités tenant lieu de réintégration ont été accordées dans 30 % des manquements volontaires contre 59 % pour les manquements involontaires). D'ailleurs, le congédiement a été plus souvent substitué par une sanction moins sévère dans les cas de manquements volontaires.

Les résultats démontrent clairement qu'il faudra que les employeurs saisissent la différence entre les manquements volontaires et involontaires. Les employeurs devront considérer davantage les descriptions d'emploi et les normes de rendement de même que leur processus d'évaluation du rendement. Tel que soulevé dans l'article, ces éléments sont importants surtout dans les cas de manquements involontaires: et malgré le débat en cours sur le degré d'acceptation, il est évident que toutes les parties ont la responsabilité et un intérêt à préserver la distinction entre les manquements volontaires et involontaires dans les situations où le rendement de l'employé est insatisfaisant.

Incompetence vs. Culpable Non-Performance
The Canadian Arbitration and Adjudication Experience

Thomas R. Knight
David C. McPhillips
Larry Shetzer

Inadequate work performance and incompetence have often been considered by labour arbitrators in Canada within the context of promotion, demotion and transfer cases. However, during the last decade these issues have frequently arisen as the primary issues in discipline and discharge cases as well.

This paper will begin with a discussion of the legal issues which arise when dealing with performance and incompetence. The following section will set out the data compiled from arbitration awards related to these areas. The next section will set out similar data from adjudication awards in the Federal section. The data from the preceding sections will be analyzed and the paper will conclude with a discussion of the policy implications of the conclusions drawn from the legal issues and the data analyses.

LEGAL ISSUES

Broadly speaking, inappropriate employee behavior falls into two categories, namely culpable and nonculpable behaviour. Culpable behaviour (from the Latin word "culpa", meaning fault) describes actions which are blameworthy or have occurred through the intentional actions of the employees. In other words, it is within the employee's conscious control. Nonculpable behaviour, on the other hand, refers to behaviour which, although not acceptable from the point of view of the employer, is not considered to be a function of fault on the part of the employee. A

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well recognized application of this dichotomy in arbitral jurisprudence is the case of absenteeism. The industrial relations community frequently distinguishes between culpable absenteeism (an employee who improperly misses work to travel, engage in sports or relaxation) and nonculpable absenteeism (where an employee is frequently unable to attend work due to a chronic physical ailment).

This distinction has also been applied to the area of work performance although the application has been uneven at best. A nonculpable failure to perform one's job will be referred to as incompetence. It can be defined in a number of way including: so lacking in ability, skill and training that assigned duties cannot be performed; permanent inability, immunity to any scheme of progressive discipline, and incapability of improvement.[1]

A culpable failure to perform one's duties will be referred to as nonperformance. It can be defined as inefficiency, which suggests a probability of remediation.[2] It exists where an employee "has the necessary knowledge and experience, but is unable or temperamentally unwilling to translate that knowledge and experience into adequate performance."[3]

Culpable Nonperformance

In cases of culpable behaviour, a disciplinary approach is appropriate, and indeed required. In British Columbia, arbitrators must apply the *William Scott*[4] principles as set down by British Columbia Labour Relations Board. This approach is similar in all other jurisdictions. Essentially, three questions must be posed, namely:

1) Has the employee given just and reasonable cause for some form of discipline by the employer?
2) If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case?
3) If the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

Once it has been established that the employer did have just cause to impose some form of discipline on employees, the issue of what the

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1 *Erie County BOCES* v. *Kaminsky,* N.Y.S. Ed.Dept. at 9 (1978); *Onandaga Centr. School District* v. *Harshaw,* N.Y.S. ed. Dept. at 10 (1979); *Board of Education of New York* v. *Dibello,* N.Y.S. ed. Dept., at 4 (1984); *Island Trees Union Free School District* v. *Butcher,* N.Y.S. ed. Dept., at 18 (1981).

2 *Onondaga Cent. School Dist.* v. *Harshaw,* N.Y.S. ed. Dept. at 10 (1979).

3 *Travis* v. *U.B.C..,* 1989, unreported.

4 *William Scott & Co.,* [1977] 1 Can L.R.B.R. (B.C.L.R.B.).

appropriate penalty arises. In determining this issue, arbitrators apply a number of criteria, the most familiar of which at the national level are those set out in *Steel Equipment Co. Ltd.*

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negativing intent, e.g., likelihood that the grievor is understood the nature of the intent of an order given to him, as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.[5]

The above catalogue of circumstances which an arbitration board should take into consideration in determining whether disciplinary action taken by the company should be varied is neither exhaustive nor conclusive.

When dealing with culpable nonperformance problems, it is generally appropriate to rely on the well-known principles of progressive discipline. The major purpose of progressive discipline has been described as follows:

...the standard collective agreement also provides the employer with a broad management right to discipline its employees. If an individual employee has

5 (1964) 14 L.A.C. 356 (Reville).

caused problems in the work place, the employer is not legally limited to the one, irreversible response of discharge. Instead, a broad spectrum of lesser sanctions are available: verbal or written warnings, brief or lengthy suspensions, even demotion on occasions. Because the employer is now entitled to escalate progressively its response to employee misconduct, there is a natural inclination to require that these lesser measures be tried out before the employer takes the ultimate step of dismissing the employee, and thus cutting him off from all of the benefits associated with the job and stemming from the collective agreement.[6]

G.W. Alexander states that "...the principle of corrective discipline requires that management withhold the final penalty of discharge from errant employees until it has been established that the employee is not likely to respond favourably to a lesser penalty."[7] However, it has been made abundantly clear that a progressive discipline approach has not been mandated by the statutes or by labour relations policy in Canada.[8]

As a result, it is commonly accepted that oral warnings, written warnings and suspensions would all be appropriate penalties for alleged inadequate work performance. Specifically, suspensions are an appropriate and customary response to culpable incompetence or carelessness.[9] In fact, in cases where there has been a discharge upheld for culpable incompetence, suspensions generally have preceded the final disciplinary step.[10]

The general rules which are applicable in all discipline matters apply equally to cases of nonperformance; for example, the burden of proof rests with the employer and the case must be demonstrated on the balance of probabilities. However, there are some additional factors which are particularly important to nonperformance cases.

To justify a disciplinary approach to work performance problems the employer must not only show "some failure to meet reasonable standards but also some degree of culpable behaviour on the part of the employee which gives rise to the failure."[11] Additionally, it has been held that an employer has the right to establish a single standard for all employees

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6 *William Scott & Co., supra,* p. 3.

7 "Comment", Management Rights and Arbitration Process, 9th Annual *Proceedings of National Academy of Arbitrators* (1956), p. 79.

8 *UBC,* B.C.L.R.B. No. L28/80; *Manning Kumagai Joint Ventures,* I.R.C. No. C145/87, upheld on appeal, I.R.C. No. C58/88; *Vancouver General Hospital,* I.R.C. No. C301/88.

9 *Great Atlantic and Pacific Co. Ltd.,* 3 L.A.C. (3d) 403 (Brown); *Re Alcan Smelters* v. *Chemicals Ltd.,* 12 L.A.C. (3d) 324 (Hope); *Re Waferboard Corp. Ltd.,* 26 L.A.C. (3d) 241 (David); *Re Canteen of Canada Ltd.,* 31 L.A.C. (3d) 39 (Thorne); *Re Eastern Canadian Greyhound Lines Ltd.,* 7 L.A.C. (3d) 279 (Prichard); *Re Overland Express,* 25 L.A.C. (3d) 284 (Springate); *Re Livingston Industries,* (1982) 6 L.A.C. (3d) 4 (Adams); *Re Goodyear Canada Inc.,* 30 L.A.C. (2d) 100 (Kennedy).

10 *Re Mack Canada Inc.,* 3 L.A.C. (3d) 320 (Kennedy); *Re Livingston Industries Ltd., supra,* (Adams); *Canadian Forest Products Ltd.,* May 4, 1983 (Vickers).

11 *De Havilland Aircraft of Canada Ltd.,* (1970) 22 L.A.C. 13 (Johnston).

and to discipline those employees who fail to meet that standard.[12] However, the employer must not only demonstrate that the standards are reasonable but there must have been adequate communication of these to the employee as well. Brown and Beatty, in *Canadian Labour Arbitration,* summarize the law in this area:

> However, in the absence of such a provision, it has been held that it is not sufficient for the employer simply to prove that the grievor was the least efficient employee in the plant, or that his work methods were too elaborate. In the words of one arbitrator, what is required to be shown is a pattern of persistent behaviour or performance which on balance indicates that the employee is unsuitable or unsatisfactory. Further, if the employer is unable to satisfy the board of arbitration that the grievor had been fully apprised of the duties she was alleged to have carried out improperly, that she had received adequate training on the job, that the determination that the grievor was unsuitable was drawn against relevant and defined standards which had been communicated to her, or that it was the grievor rather than some other person who was responsible for the defective performance, any discipline imposed will not likely be sustained. Similarly where the employee's poor attitude and lack of co-operation was found to be, in substantial measure, the responsibility of others, the discipline imposed was modified.[13]

It must also be remembered that an arbitrator is encouraged to undertake a broad review of the employee's record in determining whether the employer's disciplinary action was appropriate. This is particularly germane in nonperformance cases and factors other than the formal record will likely be placed before the arbitrator.[14]

Finally, in cases of nonperformance the issue of substitution of remedy is often the most difficult question. There are a number of circumstances in which demotion has been held to be a proper

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12 *Re MacDonalds Consolidated Ltd.* v. *Retail Wholesale and Department Store Union, Local 580,* (1989) 1 L.A.C.(4th) 89 (McKee).

13 *Canada Law Book,* 3rd edition, p. 7-94: footnotes omitted; see also: *Medical Services Association,* No. A.11/90, January 24, 1990 (Greyell).

14 *Re District of Burnaby* v. *C.U.P.E., Local 23,* (1983) 11 L.A.C. (3d) 418 (Hope); *White Spot* v. *Food and Service Workers of Canada,* 19th October 1983, No. A384/83, (Hope); *B.C. Credit Union* v. *O.T.E.U., Local 15,* [1979] 1 W.L.A.C. 518 (McColl), aff'd by B.C.L.R.B. Decision No. 7/81; *B.C. Telephone Co.* v. *Telecommunication Workers' Union (Sierpinski grievance),* [1980] 2 W.L.A.C. 547 (P.A. Smith); *West Fraser Timber* v. *I.W.A. Local No. 1-425,* B.C.L.R.B., Decision No 64/80; *Molson Brewing Ltd.* v. *Brewery Workers Union, Local No. 300,* B.C.L.R.B. Decision No. 37/79; *Brewery, Winery and Distillery Workers' Union, Local No. 300* v. *Carling O'Keefe Breweries of Canada Ltd.,* 29th May, 1989 (Hickling); *Re Island Farms Dairies Co-operative Association* v. *Teamsters Union, Local 464,* (1989) 4 L.A.C. (4th) 24 (MacIntyre); *Re Newton Ready Mix* v. *Teamsters Union, Local 213,* (1984) 17 L.A.C. (3d) 333 (MacIntyre); *Forest Industrial Relations (Bay Forest Products Ltd.)* v. *I.W.A. Local 1 - 217,* B.C.L.R.B. No. 69/79.

disciplinary response.[15] There is substantial authority to the effect that the demotion or transfer must be for a limited period after which the employee will be reassessed for suitability.[16]

However, cases of incompetence require a totally different approach. It is accepted that where the performance problems arise from involuntary inability to perform to an expected standard then discipline of the employee is not the appropriate response. Nevertheless, in appropriate circumstances the employer is ultimately entitled to discharge the employee. Brown and Beatty state in *Canadian Labour Arbitration* that in the context of such nondisciplinary, deficient work performance, the employer may exercise its power of termination only where it has established that the employee's shortcomings are such as to undermine the employment relationship and when it is also established that the situation is not likely to improve.[17]

The most frequently cited case dealing with incompetence is the decision by Arbitrator Allan Hope in *Edith Cavell Private Hospital* v. *Hospital Employees Union, Local 180.*[18] However, six months after that award, Arbitrator Hope in *National Harbours Board* set out eight conditions which must be met before a discharge for incompetence will be upheld:

1) Has the employer identified in objective terms the nature of the work to be performed and the standard expected?
2) Has the employer established that the employee was aware of the standard?
3) Has the employer established that the work performance of the grievor was below that standard?

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15 *Crane Canada Inc.*, March 20, 1990, (Hickling); *Re Int'l Woodworkers, Local 1 - 217* v. *MacMillan Bloedel Ltd.*, (1966) 16 L.A.C. 369; *Re Canron Ltd.* v. *Int'l Ass'n. of Bridge, Structural or Ornamental Iron Workers, Shopmen's Local 743*, (1973) 2 L.A.C. (2d) 273; *Re District of Kitimat* v. *Canadian Union of Public Employees Local 707*, (1980) 26 L.A.C. (2d) 316.

16 *Collegiate/Arlington Sports, A Division of Imasco Retail Inc.*, (1984) 15 L.A.C. (3d) 220 (Beck); *Wire Rope Industries Ltd.*, (1983) 13 L.A.C. (3d) 261 (Hope); *Whitby Boat Works Ltd.*, (1982) 5 L.A.C. (3d) 327 (McLaren); *District of Kitimat*, (1980) 26 L.A.C. (2d) 316 (MacIntyre); *City of Vancouver*, (1977) 16 L.A.C. (2d) 80 (Larson); *Canadian Johns Manville Co. Ltd.*, (1976) 12 L.A.C. (2d) 195 (Ferguson); *Consumers Glass Co. Ltd.*, (1976) 12 L.A.C. (2d) 40 (Abbott); *Dartmouth District School Board*, (1983) 12 L.A.C. (3d) 425 (Flemming); *City of Windsor*, (1986) 25 L.A.C. (3d) 22 (Brunner); *Air Canada*, (1979) 22 L.A.C. (2d) 371 (Adams), at p. 382; *British Columbia Ry. Co.*, (1988) 1 L.A.C. (4th) 72 (Hope); *Pacific Forest Products Ltd. (Sooke Logging Division)*, (1984) 17 L.A.C. (3d) 435 (Munroe); *Government of British Columbia* v. *B.C.G.E.U.*, (1982) 2 W.L.A.C. 32 (Black).

17 *Canadian Labour Arbitration*, 3rd edition, *Canada Law Book*, p.7-90, footnotes omitted.

18 (1982) 6 L.A.C. (3d) 229 (June 29, 1982) (Hope).

4) Did the employer provide supervisory direction to the employee to assist him in achieving the standard?

5) Did the employer take reasonable steps to move the employee into other work within the bargaining unit that was or might have been within his qualifications and competence?

6) Did the employer bring home to the grievor the fact that his performance was unsatisfactory and that dismissal might result from a continued failure or inability to meet the standard?

7) Did the employer afford the grievor a proper opportunity to challenge its assessment of his work or grievance?

8) Does the evidence support the influence of a continuing inability on the part of the employee to meet the standard?[19]

In that award Mr. Hope summarized the requirements as including "the definition of an objective standard, communication of the standard to the employee, measurement of his performance against the standard, evidence of a proper supervisory response to assist the grievor in meeting the standard and advice to him that dismissal was a consequence of a continued failure to meet the standard."[20]

The arbitral jurisprudence in cases on nonculpable incompetence generally establishes that the employer must have clearly defined the level of job performance required. Further, the employer must show that the standards against which the grievor was measured were established in a fair and reasonable manner and relate to the actual duties of the job. There must also be at a minimum a communication of the standards to the employee and a reasonable opportunity afforded her to meet those standards. Additionally, the employee must be given a clear warning concerning the consequences of a failure to meet the requisite standard.[21] In incompetence cases, it is also required that the employer have a "proper and appropriate occasion" for determining that the employee should be discharged[22]; this requirement is analogous to the culminating incident requirement in culpable cases.

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19 No. C36/82 (October 2, 1982), at p. 10

20 *Ibid.*, p.31

21 See: *Steel Co. of Canada Ltd.*, (1972) 23 L.A.C. 221 (Rayner); *Vancouver General Hospital* v. *H.E.U. Local 180,* December 15, 1987 (Kelleher); *Vancouver General Hospital* v. *H.E.U. Local 180,* July 23, 1987 (Greyell); *Re Western Marine Ltd.,* 12 L.A.C. (3d) 260 (Albertini); B.C. Telephone Co., February 16, 1978 (Slutsky); *College of New Caledonia,* July 6, 1983 (Greyell); *B.C. Hydro,* 14 L.A.C. (3d) 69 (MacIntyre); *Delta Hospital,* March 17, 1986 (Munroe).

22 *Re City of Vancouver,* 11 L.A.C. (3d) 121 (Hope); *Re Victoria Hospital,* (1979) 24 L.A.C. (2d) 172 (Weatherill).

Finally, in cases of nonculpable performance problems, the employer should also be able to demonstrate it has exhausted other possible solutions, such as transferring the employee to a job which he/she is able to perform if one is available and if that can be done consistent with other provisions of the collective agreement; demoting him/her to a job which he/she is able to perform if one is available and if that can be done consistent with other provisions of the collective agreement; or placing the employee on layoff if no such job is available.[23]

Having set out the legal issues involved in each case, we will now turn to analysis of data compiled from a number of sources.

DATA - ARBITRATION

From a sample of all arbitration awards in British Columbia between 1985 and 1989, there were 72 cases identified which dealt strictly with discipline or discharge applied to either nonculpable incompetence or culpable nonperformance. Of the seventy-two cases, forty-six (46) dealt with culpable nonperformance and twenty-six (26) with nonculpable incompetence. In terms of penalty imposed, fifty-two (52) involved discharge and twenty (20) involved some form of lesser discipline imposed by management. Table 1 sets out the success rates for the Employers and the Trade Unions in each type of case.

TABLE 1

Total Results - British Columbia (1985-1989)
Culpable/Nonculpable Work Performance Cases

	Employer success	*Union succes*	*Partial**	*Total*
Culpable	28 (61 %)	6 (13 %)	12 (26 %)	46 (100 %)
Nonculpable	10 (38 %)	16 (62 %)	0	26 (100 %)
Total	38 (53 %)	22 (30 %)	12 (17 %)	72 (100 %)

* Refers to cases where there is a finding that the employee is subject to discipline but the arbitrator has reduced the penalty.

This table indicates that the Employer's success rate in culpable cases of nonperformance was 61 %; in nonculpable cases of incompetence, the success rate was only 38 %. From the other

23 Pekeles, R., *CLE - Labour Arbitration 1987,* British Columbia Continuing Legal Education, Chapter 8, p. 8.1.05; Brown and Beatty, *supra,* p. 7-90; *Government of the Province of Alberta and Alberta Union of Provincial Employees; K. Jethani Grievance,* 29 July, 1985 (D.P. Jones).

perspective, the Union was completely successful in 62 % of the cases in the nonculpable category but only in 13 % of the culpable cases (with a further 26 % of the cases resulting in a partial success). Overall, the Employer was completely successful 53 % of the time and 17 % of the cases resulted in a "partial" success. Omitting the partial success cases, the Employer versus Union success rates for the culpable and nonculpable categories in Table 1 were found to differ significantly (c^2 = 12.2, df=1, p< 01), with f=.45. This reflects a strong correlation between success (Employer versus Union) and culpability, or, conversely, a significant tendency for employers to lose cases of nonculpable incompetence.

From a review of all arbitration awards in the Province of Alberta during the period 1984-1989, there were forty-two (42) cases identified dealing strictly with inadequate work performance. Thirty-four (34) of the cases dealt with culpable nonperformance; the remaining eight (8) involved nonculpable incompetence.

TABLE 2

Total Results - Alberta (1984-1989)
Culpable/Nonculpable Work Performance Cases

	ER Success	*Union success*	*Partial*	*Total*
Culpable	24 (71 %)	3 (9 %)	7 (20 %)	34 (100 %)
Nonculpable	2 (25 %)	5 (63 %)	1 (12 %)	8 (100%)
TOTAL	26 (62 %)	8 (19 %)	8 (19 %)	42 (100 %)

This table indicates that the Employers were successful 71 % of the time in culpable cases and were partially successful in a further 20 % of them. In nonculpable cases, the rate of Employer success was only 25 % with one further case being a "partial" success (a demotion was ordered). Overall, the Employer was successful in 62 % of the cases and 19 % resulted in partial successes. Omitting the partial success cases, the Employer versus Union success rates for the culpable and nonculpable categories in Table 2 were also found to differ significantly (c^2 = 11.2, df=1, p< 01), with f=.56, indicating again a strong correlation between success (Employer versus Union) and culpability.

The final sample to be discussed includes data from across Canada. It reflects all the cases dealing solely with incompetence or nonperformance which have been reported in *Labour Arbitration Cases* between 1985-89. Because the L.A.C. is a reporting service this is, in no

way, a complete catalog of relevant decisions from across the country. Further, it must be noted that these cases are not random and are often chosen for their specific content. The published cases are chosen from all jurisdictions in Canada, including the Federal sector. A summary of the data for all jurisdictions is contained in Table 3.

TABLE 3

L.A.C. Reported Cases 1985-1989 - Total Results - All Jurisdictions* Culpable/Nonculpable Work Performance Cases

	ER Success	*Union Success*	*Partial*	*Total*
Culpable	8 (66 %)	0	4 (33 %)	12 (100 %)
Nonculpable	5 (38 %)	8 (62 %)	0	13 (100 %)
TOTAL	13 (52 %)	8 (32 %)	4 (16 %)	25 (100 %)

* There is also some minimal overlap in cases reported here with those contained in Tables 1 and 2.

The Employer was successful in having the discharge upheld in eight of the 12 reported cases of culpable behavior. The other four were partial successes. Of the 13 nonculpable cases, the Union was successful in 61.5 % of them (8 cases). Because of the small size of the sample, the data in Table 3 were not subjected to statistical analysis.

DATA: ADJUDICATION UNDER THE CANADA LABOUR CODE - PART III

Under Part III of the Canada Labour Code, nonunion employees working in those industries which are covered by the federal jurisdiction (e.g., banks, post office, airlines, national railways) have a degree of legislated job security. Section 240 of the Federal Code (formerly Section 61.5) provides that nonunion nonmanagement employees with at least 12 months seniority who are dismissed for non-economic reasons may have access to an adjudication process. In the absence of just cause, an adjudicator may impose a variety of remedies. The primary difference between an adjudication and a traditional arbitration under the labour codes is the discretionary nature of the remedy. The federal adjudication rules expressly allow the adjudicator to find that the employer does not have just cause for dismissal but nevertheless to award damages in lieu of reinstatement.

Between 1982 and 1989, there were a total of eighty-four (84) adjudications in the Federal sector which dealt solely with incompetence or nonperformance. The results are contained in Table 4, and were found

to differ significantly as a function of culpability ($c^2 = 21.95$, df=4, $p < .01$). The first column refers to outright Employer success (i.e. discharge upheld); the second column is complete employee success (damages and reinstatement). The third column refers to cases where there was reinstatement but no damages which is similar to the "partial" results in the arbitration tables above. Columns 4 and 5 contain those cases which reflect the exercise of the remedial discretion of the adjudicator. Column 4 covers those cases in which only damages were sought by the employee. Column 5 contains those cases where reinstatement was sought by the employee but only damages were awarded by the adjudicator.

TABLE 4

Canada Labour Code - Section 240
1982 - 1989
Culpable/Nonculpable Work Performance Cases

	(1) ER Success	*(2) EE Success*	*(3) Partial*	*(4) Only Damages Sought Awarded*	*(5) Rein-statement Sought Damages Award*	*Total*
Culpable	23 (40 %)	4 (7 %)	3 (5 %)	17 (30 %)	10 (18 %)	57 (100 %)
Nonculpable	1 (4 %)	8 (30 %)	0	16 (59 %)	2 (7 %)	27 (100 %)
TOTAL	24 (29 %)	12 (14 %)	3 (4 %)	33 (39 %)	12 (14 %)	84 (100 %)

In this sample, culpable cases account for 68 % of the total number. Again, the Employer's complete success rate is much higher in culpable cases (40 % - 23 out of 57) than it is in nonculpable cases (4 % - 1 out of 27). Employees were completely successful only 7 % (4 out of 57) of the time in culpable cases but were successful 30 % (8 out of 27) in nonculpable cases. However, employees who sought only damages and were successful (column 4) account for a further 30 % in culpable cases (17 out of 57) and 60 % (16 out of 57) in nonculpable cases.

Finally, the authority of the adjudicator to award damages (columns 4 and 5) was used in 45 out of the 84 cases (54 %). Clearly, this adjudicative discretion is a significant factor in incompetence and nonperformance cases. Further, in cases where reinstatement was sought by the employee, federal adjudicators have not used the discretion to award damages in lieu of reinstatement in cases of incompetence but *have* used it in cases of culpable non-performance. As an aside, there may be support here for the proposition that the usual arbitral option of reinstatement, suspension or denial may be inadequate for the non-culpable grievor. In any event, this data demonstrates the markedly different treatment afforded to the two categories.

DATA SUMMARY

A number of preliminary observations can be drawn from an analysis of the above data. First, the results of the L.A.C. sample (although not statistically significant because of the size of the sample), appear to be generally consistent with those from British Columbia and Alberta where all cases were analyzed. Second, when one combines nonperformance and incompetence cases, the Employer is successful in slightly over half the cases (range of 53 % to 63 % in the samples). There are also partial successes in roughly one-sixth of the total (range of 16 % to 19 % in the samples). Third, the incidence of complete employer success in culpable cases is far higher (61-71 %) than it is in nonculpable cases (25-38 %).

These statistics become even more skewed when one includes the "partial" success rates in culpable cases. This occurs where management establishes that some form of discipline was called for but the imposed penalty was reduced by the arbitrator. The partial success rates were 26 % in British Columbia, 20 % in Alberta and 20 % in the L.A.C. sample. Therefore, the Employer has been either completely or partially successful in culpable cases 87 % of the time in British Columbia, 91 % of the time in Alberta and in 100 % of the cases in the L.A.C. sample. The corollary is that Unions are completely successful in winning these grievances against discipline only 13 %, 9 % and 0 % of the time in the B.C., Alberta and the L.A.C. samples respectively.

There are fewer "partial successes" in nonculpable cases because of the nature of the problem. In these cases, the employer will either succeed or fail except in those rare cases where an arbitrator may impose a different remedy such as a demotion. As a result, the nonculpable data are particularly striking when viewed from the perspective of the Trade-Unions. Total success rates for the Unions in nonculpable cases were 62 % (B.C.), 63 % (Alberta) and 62 % (L.A.C. sample). This is far higher than it was in culpable cases.

The analysis of the data related to adjudications indicates that the same phenomena exist within that scheme as well.

POLICY IMPLICATIONS

There are a number of implications from the above findings. First, in our view, the distinction between culpable and nonculpable behaviour is fundamental; unfortunately, the difference has been far from clear in the jurisprudence. The B.C. Labour Relations Board in *Canadian Liquid Air* set out the reasons for the distinction:

Having reviewed the "common threat" running through employee disciplinary conduct and the basis upon which employers may respond to this type of conduct, it is obvious that the direction of arbitrators found in *Wm. Scott, supra,* cannot logically and properly be applied to the action of an employee and the reaction of an employer to conduct which can truly be termed "nonculpable"...

Where employee conduct has been assessed as "nonculpable" or not blameworthy, different considerations apply when examining the reactions of an employer. It is difficult to apply the concept of fault to an employee who, through some physical or mental impairment, or simply through genuine inability or lack of competence, fails to attend the work place, or, once he or she is there, inadequately performs the work which is expected of him or her.[24]

It is also generally accepted that it is within the jurisdiction of arbitration boards to deal with both types of issues although this point has been the subject of some debate elsewhere, particularly in Alberta.[25] Second, there is also an on-going debate as to the propriety of combining the two grounds. In our view, cases will be fundamentally of one type or the other. In discipline cases, arbitrators can consider the employee's entire work history (including nonculpable problems) in dealing with the appropriateness of the penalty. Conversely, when subjectively considering a nonculpable case, the employee's disciplinary record will be a consideration. However, it is essential to keep the notions distinct and the blending of nonculpable inability and culpable nonperformance is likely to lead to more confusion than is necessary or desirable.

Therefore, management must be prepared to distinguish between the two situations and to handle them differently. In this regard, the status of employee evaluations must be clear. If the evaluation is disciplinary, it is grievable; if it is nondisciplinary then it is not.[26] However, if the employer

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24 [1982] 1 Can L.R.B.R. 355, at pp. 361-62.

25 *Her Majesty the Queen in Right of Alberta* v. *AUPE (Sim Grievance),* the Court of Queen's Bench of Alberta (Dea, J.) 1987; *dissenting* opinion of B.M.W. Paulin, Q.C. in *Re Canron Ltd.* v. *International Assoc. of Bridge etc. Workers, Shopmen's, Local 743,* (1973) 2 L.A.C. 282, at 283-284 (dealing with s. 37(2) of the Labour Relations Act, R.S.O. 1970, c. 232), and *Great Canadian Oil Sands Ltd.* v. *McMurray Independent Oil Workers (Scheer grievance),* [1979] 1 W.L.A.C. 271 (Summary).

26 *Lake Cowichan* v. *District Credit Union & Office & Technical Employees Union, Local 15,* (1985) 15 L.A.C. (3d) 248, (Bluman); *Workers' Compensation Board of British Columbia* v. *Workers' Compensation Board Employees Union,* (1983) 7 L.A.C. (3d) 92, (Ladner); *County of Norfolk* v. *London & District Bldg. Service Workers' Union, Local 220,* (1972) 1 L.A.C. (2d) 108 (Palmer), *Pacific Press Ltd.* v. *Vancouver-New Westminster Newspaper Guild,* (1986) 23 L.A.C. (3d) 251 (McColl); *Notre Dame Integrated School Board* v. *Newfoundland Teachers' Assoc.,* (1979) 22 L.A.C. (2d) 286, 288 (Harris); *City of Toronto* v. *Canadian Union of Public Employees, Local 79,* (1985) 16 L.A.C. (3d) 384 (M.G. Picher); *Mount Sinai Hospital* v. *Nurses Assoc. Mount Sinai Hospital,* (1976) 13 L.A.C. (2d) 103 (Brandt); *Kimberly-Clark of Canada Ltd.* v. *International Chemical Workers, Local 813,* (1972) 1 L.A.C. (2d) 44, (Lysyk); *Denison Mines Ltd.* v. *United Steelworkers,* (1961) 12

ultimately combines aspects of nonperformance and inability then there is a legitimate concern on the part of unions and employees that the nongrievable evaluations might effectively become a form of time-delayed, unattackable discipline.

Third, it is apparent from an analysis of the data that management is far more successful in culpable cases of nonperformance than it is in nonculpable incompetence cases. Even where management has correctly identified a problem as being one of a nonculpable nature, they have far less experience dealing with the issue. Unlike culpable cases where the general principles of progressive discipline have been applied for many years in other areas (e.g. insubordination), it is only in recent times that management has been forced to address nonculpable incompetence. Often, management may not even be aware of the tests set out in *Edith Cavell Hospital* and *National Harbours Board, supra*, let alone have incorporated the tests into its performance evaluation policies and practices. Specifically, the employer is sometimes unable to prove that an employee is actually incapable of doing the job rather than it being a case of carelessness or malfeasance. This is particularly true in cases of long-term employees where the nature of the job has not changed over time.

Fourth, regardless of whether one is dealing with culpable or non-culpable behaviour, management's human resources policies will come under close scrutiny. There are many occasions where inadequate supervision and training has been afforded to the employee. Clear standards of work performance are often not in existence. Even when they are, the cases indicate that employers have often failed properly to communicate those standards to the employee and then warn the individual that his/her job security is in imminent danger if the problems persist. Finally, human resource management practices are often inadequate both in the area of adjudicating job content and in the area of specifying required levels of performance.

Therefore, there are important implications particularly in two areas: job analysis and performance appraisal. First, in order to be able to determine whether non-performance is culpable or non-culpable and then to deal with it, it is necessary to delineate precisely both the activities which comprise a job, and the knowledge, skills, abilities, and other characteristics necessary for adequate job performance. Job analysis is the process of collecting, analyzing and documenting such job information and there are a range of formal job analysis procedures with a

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L.A.C. 364, 371 (Adams); *Calgary General Hospital* v. *Canadian Union of Public Employees, Local 8*, (1986) 23 L.A.C. (3d) 25 (Beatty).

variety of specific purposes.[27] Delineating job content and comparing a job with similar or related jobs can readily assist in determining whether non-performance is the result of an inability to do the job as opposed to carelessness or malfeasance.

Performance appraisal is the second human resource function which can be helpful in determining culpability. Performance appraisal is the process of assessing individual job performance in terms of a criterion of absolute or relative effectiveness (e.g., quality, quantity, or timeliness). A valid and defensible performance appraisal system should have the following characteristics: it should be based on job requirements as determined by job analysis; it should focus on behavioural aspects of the job and on specific dimensions of performance rather than on overall evaluations; if subjective ratings are employed, it is preferable that multiple raters be used, and raters must be sufficiently familiar with the employee's performance; the appraisal system should provide feedback to the employee in a timely manner in order to both correct inappropriate behaviour and to reduce uncertainty for the employee. It is also important that the nature of the performance appraisal system be communicated to the employee, and that cases of extreme performance ratings be clearly documented.[28]

Finally, there is an issue concerning the deference to be given by arbitrators to management opinions expressed in employee evaluations when they are used in non-culpable cases. There is an abundance of jurisprudence in which arbitrators have shown deference to management's opinion regarding the content of evaluations which are being used to justify promotion decisions.[29] When this approach has been adopted, it is often justified at least partly on the basis that promotion is an internal matter dealing with the day-to-day operations of the employer. However, it is debatable whether arbitrators should logically extend this deference to cases where these nondisciplinary

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27 For further information regarding job analysis, the reader is referred to: W. F. Cascio, *Applied Psychology in Personnel Management (Third Edition).* Prentice Hall, N.J.: Englewood Cliffs, 1988, 183-211; F.M. Lopez,G.A. Kesselman, and F.E. Lopez,1981, "An Empirical Test of a Trait-oriented Job Analysis Technique". *Personnel Psychology,* 34, 479-502; S.A. Fine, and W.W. Wiley, 1971. *An Introduction to Functional Job Analysis, Methods for Manpower Analysis.* Monograph No. 4, W.E. Upjohn Institute: Kalamazoo, MI, 1971; Employment and Immigration Canada, 1985. *Guide to the Canadian Classification and Dictionary of Occupations (Fifth Edition).* Minister of Supply and Services Canada.

28 Bernardin, H.J., and R.W. Beatty. 1984. *Performance Appraisal: Assessing Human Behaviour at Work.* Kent: Boston, MA.

29 See discussions in: *Maple Ridge,* (1979) 23 L.A.C. (2d) 86 (Hickling); *Carling Breweries Ltd.,* (1968) 19 L.A.C. 110 (Christie).

evaluations are subsequently used to justify discharge for nonculpable incompetence.[30]

In our opinion, the distinction between culpable work performance and nonculpable incompetence must be maintained and clearly understood by management, unions and arbitrators. The distinction is necessary to the achivement of consistency and fairness in dealing with problems of nonculpable incompetence and inadequate work performance in the workplace. Indeed, problems have arisen over the definition of terms, the nature of warnings and even the remedial actions of arbitrators in this area. However, despite the fact that the grounds are closely associated (as is the case with absenteeism), we submit that the distinction between nonculpable incompetence and culpable nonperformance is valid and must continue to be recognized in practice.

Les manquements volontaires versus les manquements involontaires

La jurisprudence arbitrale fait une distinction entre les manquements volontaires, ou intentionnels, et les manquements involontaires, ou hors du contrôle de l'individu. Tandis que le premier type est soumis à la règle de la gradation des sanctions, le second suit de plus en plus un courant jurisprudentielle voulant que des étapes additionnelles soient entreprises pour justifier un congédiement. Celles-ci comprennent la communication à l'employé des normes de rendement, la mise en place de moyens pour aider ce dernier à augmenter son rendement et la connaissance par celui-ci qu'un manquement prolongé pourrait conduire à la rupture de son lien d'emploi. Cette étude analyse les sentences portant sur ces deux sortes de manquement et rendues par des arbitres et des juges en vertu du *Code canadien du travail*

Les décisions arbitrales analysées ont été déposées entre 1984 et 1989. L'échantillon est constitué de causes entendues en Colombie-Britanique (n=72: 46 volontaires et 26 involontaires), en Alberta (n=42: 34 volontaires, 8 involontaires) et de sentences prononcées à l'échelle du pays rapportées dans *Labor Arbitration Cases* (n=25: 12 volontaires, 13 involontaires). De plus des décisions renversant des congédiements ont également été échantillonnées (n=84: 57 volontaires, 27 involontaires).

Pour toutes les juridictions canadiennes, les employeurs, dans un nombre significatif, ont moins de succès à obtenir le maintien d'un congédiement pour manquements involontaires que volontaires. Par juridiction, le geste de l'employeur a été supporté par le tribunal dans les proportions suivantes: Colombie Britanique 61 % volontaires, 38 % involontaires; Alberta 71 % volontaires, 25 % involontaires; Labour Arbitation Cases, 66 % volontaires,

30 For a fuller discussion relating to the appropriateness of giving deference, the reader is referred to the paper by John Rogers and Laura Parkinson, "Promotions: The Correctness Test", CLE-Labour Arbitration-1989, June, 1989.

38 % involontaires: décisions en vertu du Code Canadien du Travail 57 % volontaires, 38 % involontaires (de plus, des indemnités tenant lieu de réintégration ont été accordées dans 30 % des manquements volontaires contre 59 % pour les manquements involontaires). D'ailleurs, le congédiement a été plus souvent substitué par une sanction moins sévère dans les cas de manquements volontaires.

Les résultats démontrent clairement qu'il faudra que les employeurs saisissent la différence entre les manquements volontaires et involontaires. Les employeurs devront considérer davantage les descriptions d'emploi et les normes de rendement de même que leur processus d'évaluation du rendement. Tel que soulevé dans l'article, ces éléments sont importants surtout dans les cas de manquements involontaires: et malgré le débat en cours sur le degré d'acceptation, il est évident que toutes les parties ont la responsabilité et un intérêt à préserver la distinction entre les manquements volontaires et involontaires dans les situations où le rendement de l'employé est insatisfaisant.