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Reinstatement in Arbitration: The Grievors' Perspective

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Résumé de l'article

La voix du plaignant est à peu près absente de la littérature sur l'arbitrage. Nous rapportons ici les résultats d'une étude exploratoire portant surtout sur les expériences post-réintégration d'un groupe de plaignants albertains. Nous avons complété des vérifications de validité et de fiabilité par des entrevues avec des représentants syndicaux, des administrateurs et des arbitres. Nous avons choisi au hasard, pour fin d'analyse, un échantillon de douze cas impliquant quinze employés dans des auditions tenues à Calgary. De ces quinze employés, cinq n'ont pu être rejoints, trois ont refusé de répondre et sept ont répondu à une entrevue téléphonique semistructurée d'une durée d'environ une heure. Nous avons alors exploré leurs perceptions au sujet de leur arbitrage et de leur réintégration. Nous avons également examiné les facteurs qui accroissaient la probabilité d'une réintégration réussie. En plus, nous avons mené des entrevues téléphoniques avec dix professionnels de relations du travail tant syndicaux que patronaux et trois arbitres. Cette consultation avait pour objectif d'obtenir leur point de vue sur la fréquence des réintégrations et sur leurs perceptions eu égard aux employés réintégrés.

Afin de cerner le contexte pour mener les entrevues des plaignants, nous avons recensé un total de 485 cas d'arbitrages fédéraux et provinciaux survenus en Alberta entre janvier 1995 et décembre 1998. Sur les 138 causes de congédiement entendues durant cette période, les arbitres ont réintégré 48 individus. Il semble qu'il se dégage trois résultats distincts de la composante quantitative de la présente recherche. D'abord, notons le faible taux de réintégration par rapport au total des congédiements étudiés. Ce taux de 37,7 % représente une baisse sérieuse par rapport au taux de 53,8 % observé par la recherche albertaine entre 1982 et 1984. En second lieu, nous observons une baisse dramatique de griefs référés à l'arbitrage durant la dernière décennie, i.e. de 168 en 1990 à 80 en 1998. Cette réduction de moitié ne peut pas être attribuée entièrement à la baisse de la densité syndicale en Alberta de 26 à 22 % pour la même période. Même si le nombre de cas de congédiement a baissé en termes absolus, il est demeuré relativement stable lorsque exprimé en pourcentage du total de griefs déposés, à l'exception de pointes inhabituelles en 1997 et en 1998. Le taux moyen de cas annuels de congédiement est de 27,1 % et varie de 22,6 % en 1992 *h 31 % en* 1998. Le fait que la proportion de griefs de congédiement fut très haute en 1997 et 1998 suggère que le congédiement constitue toujours un sujet très chaud en milieu syndiqué.

La portion qualitative de la présente recherche a généré des résultats tout aussi intéressants. D'abord, les employés ignorent le caractère public de ce processus privé de justice industrielle. Il ne leur fut aucunement plaisant de savoir que le processus d'arbitrage entraîne la divulgation de leur histoire personnelle et d'emploi. Il en est résulté que notre contact initial avec les employés a constamment révélé un niveau significatif de non-confiance. Ensuite, la procédure pré-arbitrale de griefs est perçue comme un processus injuste qu'un employé a caractérisé de biaisé, l'employeur recevant beaucoup plus de déférence. On voyait alors comme une nécessité d'avoir l'occasion de voir un tiers impartial examiner les faits.

Peut-être le plus surprenant des résultats de notre étude tient du fait que malgré qu'ils aient eu gain de cause, très peu de personnes interviewées considéraient que leur syndicat leur a apporté suffisamment de support tant pendant les audiences que lors de la réintégration. En fait, les plaignants ont été très critiques des syndicats qui les défendaient et, en même temps, conservaient une perception relativement bienveillante envers leurs employeurs.

Cette perception du faible support syndical est confirmée par le fait que très peu d'assistance est offerte au plaignant suite à sa réintégration à son milieu de travail. Même si cela ne fait pas l'unanimité, plusieurs croient que tant l'employeur que le syndicat aurait pu être plus proactif.

Finalement, il y a clairement certaines caractéristiques chez les employés qui contribuent à une réintégration réussie. Une attitude positive envers son lieu de travail est plus déterminante pour une réintégration réussie que remords et acceptation de la culpabilité. Un comportement coopératif et une perception positive de sa propre conduite peuvent être importants pour aider les employés à bâtir ou à réparer les relations difficiles avec les collègues de travail.

Reinstatement in Arbitration

The Grievors' Perspective

KELLY WILLIAMS
DAPHNE GOTTLIEB TARAS

Virtually absent in the arbitration literature is the voice of the grievor. We examine post-reinstatement experiences primarily from the perspectives of a group of seven Alberta grievors. We first review the declining frequency of Alberta arbitrations, the extent to which dismissal cases form a proportion of the arbitral caseload, and the relatively low rate of reinstatement. Findings are: (1) grievors are unaware of the public availability of arbitration awards; (2) reinstated grievors are critical of the union that successfully defended them; (3) they have a more benign view of management;(4) very little reinstatement assistance is offered; and (5) grievors' positive attitudes to their worksites are more determinative of successful reinstatement than remorse and acceptance of culpability.

Conventional wisdom in industrial relations has held that reinstatement, as a remedy for unjust dismissal, is an expedient and successful approach available predominantly to workers under a collective agreement. By contrast, nonunion workers who are dismissed under existing common law doctrines must go to court to argue only for monetary payment in lieu of an adequate notice period. Except in the most extraordinary of circumstances, reinstatement is not an option (McFetridge 1988; Arthurs, Brown and Langille 1998). The right to consideration for reinstatement is a major victory for the union movement, and it proffers strong support for the conviction that workers have rights to their jobs unless there is demonstrable just cause for their dismissal. However, there may be considerable slippage between the *right to be reinstated*, and the *exercise of that right* at

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the workplace (Ponak 1991: 32). This article explores the reinstatement remedy as it is perceived by grievors whose unions have successfully reversed dismissal decisions.

Numerous studies have examined grievance initiation, settlement behaviours, and the relationship between industrial relations concerns (such as union-management climate, bargaining, and productivity) and grievance rates. Comprehensive reviews of the literature can be found in Lewin (1999), Bemmels and Foley (1996), and Klass (1989). Comparatively few studies have investigated the incidence of reinstatement and subsequent viability of employment relationships. Compiling the results of research performed in the 1970s through 1980s, Ponak (1991: 32) examined 14 published studies on discharge arbitration outcomes, and found a remarkable similarity of results: that "across countries, provinces, time periods, different economic and political circumstances, and substantially different levels of unionism," arbitrators reinstated discharged employees in over 50 per cent of the cases heard. The reinstatement rates ranged from a high of 86.5 per cent in British Columbia from 1974 to 1977 (Eeckhout 1981) to a low of 50.3 percent in Quebec from 1976 to 1981 (Brody 1987). In four out of five instances in which dismissed grievors were reinstated, some disciplinary consequence (e.g., letter of warning, suspension) was substituted for the dismissal (Ponak 1991: 33).

Data on post-reinstatement success typically is gathered as an adjunct to a comprehensive reinstatement survey. Employers are asked, in addition to standard demographic detail, three main questions: (1) whether the grievor returned to work; (2) whether the grievor was subsequently discharged for cause, and (3) whether the grievor's post-reinstatement performance was considered satisfactory (Ponak 1991). Where sample size is sufficient, researchers have performed regression analyses to examine the outcomes systematically. In over 80% of the cases studied, reinstated employees chose to return to work (see Table 1). Alberta was a notable exception, where only 63% return after reinstatement. Equally important, most of the returning employees received satisfactory performance ratings, and few were subsequently discharged (between 7% and 22%). However, it could well be the case that arbitrators are less likely to reinstate grievors with serious performance problems (McDermott and Newhams 1971).

Canadian data also suggest that reinstatement tends to be most successful with senior employees in relatively large organizational settings. Employees considered good performers prior to discharge continue to be good performers upon reinstatement. In his benchmark Canadian study, George Adams (1978) concluded that contrary to commonly held beliefs, the reinstated grievor is not a "marked man," likely to be targeted by the employer for subsequent discharge, or made so miserable upon reinstatement that

he voluntarily quits. Adams suggested that most employees do want their jobs back, and, for the most part, corrective discipline works. In cases in which the employee has engaged in culpable behaviour, perhaps the shock of being discharged may, in itself, prompt improvement in the employee's performance. It appears that the majority of individuals guilty of significant workplace misdeeds can, given another opportunity, go on to be productive members of the organization (Ponak 1991). While this finding gives comfort to advocates of the reinstatement remedy, it does not provide evidence on the following important questions: (1) is there a difference between the performance of grievors and non-grievors? And (2) is there a difference in the pre-grievance performance and post-reinstatement performance of grievors?

TABLE 1

Follow-Up of Reinstated Grievors in the Unionized Setting

Jurisdiction	*Date of Study*	*Number of Cases Analyzed*	*Proportion Returning to Work (%)**	*Proportion Subsequently Discharged (%)**	*Proportion with Satisfactory Post-Reinstatement Performance*
Ontario[a]	1978	161	83.2	13.3	51.0
Alberta[b]	1987	35	62.9	n.a.	60.0
Quebec[c]	1987	257	n.a.	10.8	79.7
Ontario[d]	1991	240	87.5	17.1	70.0
Canada[e]	1998	342	81.0	8.0	80.7
U.S.A.[f]	1957	123	91.2	12.2	65.0
U.S.A.[g]	1969	19	94.7	22.2	n.a.
U.S.A.[h]	1971	53	90.5	7.7	66.7
U.S.A.[i]	1978	35	65.7	39.1	33.0
U.S.A.[j]	1981	73	86.3	7.9	n.a.

[a]Adams (1978), [b]Ponak (1987), [c]Brody (1987), [d]Barnacle (1991), [e]Wagar (1998), [f]Ross (1957), [g]Jones (1969), [h]McDermott and Newhams (1971), [i]Gold, Dennis and Graham (1978), [j]Malinowski (1981).

* Proportions across three categories do not equal 100 per cent.

Source: Ponak (1991: 37), with three additional studies inserted.

There is growing evidence that grievors may face repercussions for exercising their rights. Trudeau (1998) documents several forms of unjust treatment perceived by reinstated employees in the non-unionized setting. The unjust treatment varied in duration and intensity, but included tactics such as unilateral modifications to working conditions or job content, excessive supervision, general harassment, discrimination, and isolation from co-workers. Klass (1989) and Klass and DeNisi (1989) found that supervisors' performance ratings of employees who are involved in filing

any type of grievance (particularly when winning grievances against the supervisors) are significantly lower than those of other employees. Lewin and Peterson (1998) confirmed this finding in a major quantitative study of four large workplaces, adding that even though there were no significant differences in performance appraisals between grievors and nongrievors in the years prior to the filing of a grievance, both grievors and grievors' *supervisors* faced serious deteriorations in performance appraisals by their managers and exhibited higher exit rates from the organization. This study also found that grievors who were completely exonerated were significantly more likely to leave their employers in the year following the settlement than grievors who lost their cases. Although this work reflects the broader subject of grievance outcomes, versus reinstatement outcomes, it brings both the approach and the conclusions of the earlier reinstatement research into question.

They cite two possible explanations for their findings. First, the position they favour, is that genuine reprisal may occur. Evidence for the reprisal explanation is Malinowski's (1981: 42–3) finding that immediate supervisors tend to be more dissatisfied with grievors' post-reinstatement performance even than more distant personnel managers. Further, employers deeply resent reinstatement orders. Of 71 cases in which employers answered a question evaluating the arbitrators' reinstatement decisions, 54 employers (83.1 per cent) were slightly to strongly dissatisfied with the awards, and 40 (56 per cent) were very dissatisfied. Second, management may be "shocked" by the grievance into paying greater attention to performance issues at the worksite, and particularly at the location in which grievances originate (Olson-Buchanan 1996). The performance appraisal system may become more accurate.

We believe that a third possibility also exists: that the very process of grieving may lead to emotional upheavals that make the work feel more toxic to the combatants. According to a senior human resource practitioner in Alberta, "I have seen good performers become bad performers: Even if they win the case, they say 'I can't believe management did that to me, and *I was right all along*!'" Their attitude towards work may change as a result of exercising their right to justice. Klass and DeNisi argue against this third explanation in their study of performance deterioration (1989: 714) but we believe further investigation is necessary before rejecting it.

Thus, there is a need for continued research to untangle the complexities of the reinstatement experience. Many conclusions are now dated, and have not taken into account contemporary factors such as escalating employee transience (Betcherman and Chaykowski 1996), progressive human resource management practices, and increasingly lengthy waits for union arbitration (Ponak and Olson 1992; Ponak et al. 1996). And, in spite of

the initial optimism regarding the rehabilitation potential of discharged employees, the most recent studies demonstrated significant deterioration in the post-reinstatement work relationships.

Furthermore, research specific to the post-reinstatement employee experience is rare. Of the fourteen reinstatement studies in the unionized environment described in Ponak (1991), only four of the American studies and three Canadian studies included follow-up data on the reinstated grievors. More recent studies (Lewin and Peterson 1998; Lewin 1999) have attempted to close this gap in the literature. However, in the majority of these studies the data typically reflect only employer opinions and perceptions of effectiveness, or an examination of performance appraisals and post-reinstatement performance measures. Noteworthy exceptions include Wagar's (1998) research using evidence from union officials on reinstatement effectiveness, and Trudeau's (1991) examination of employee perceptions of reinstatement success in the non-unionized workplace. A comprehensive, qualitative examination of the perceptions of all parties involved (employee, supervisor, and union representative) has not previously been completed.

Absent from almost all work in the arbitration literature is the voice of the grievor in the unionized setting (with the exceptions of Gordon and Bowlby 1988, Varman and Bhatnager 1999, and studies of perceptions of procedural versus distributive justice outcomes, i.e. the extensive body of research generated by Greenberg, e.g., 1983, 1987, 1990). In particular, the felt experiences of the grievor have never been considered in previous research on reinstatement. Perhaps this is due to the inaccessibility of the grievor as research subject, the stresses on both researcher and subject associated with interviewing grievors who are emotionally vulnerable or heavily invested in their cases, or the heavy reliance on quantitative methods which bypass the grievor altogether. Yet the subjective interpretation of grievors may yield considerable insights about the factors that determine the success or failure of the reinstatement remedy.

This article reports the findings of an exploratory study of post-reinstatement experiences primarily from the perspectives of a group of Alberta grievors, with validity and reliability checks through interviews with their union representatives and management. The research tasks were to (1) gain an understanding of the perceptions of the grievors about their experiences with arbitrations and subsequent reinstatement; and (2) to determine the factors that increase the likelihood of successful reinstatement.

The following section describes the design of the research project. To provide a context for the study of reinstated grievors we then present a section on frequency of arbitrations, the extent to which dismissal cases

form a proportion of the arbitral caseload, and the rate of reinstatement. The article then reports on the perceptions of grievors. A final section discusses conclusions drawn from the research.

RESEARCH DESIGN AND PROCEDURES

Preliminary information for the study was gathered through a review of both provincial and federal labour arbitration cases arising within Alberta between January 1995 and December 1998. A total of 485 cases were reviewed. Of the 138 discharge cases heard during the four-year period, arbitrators reinstated on 48 occasions, representing less than 35% reinstatement. (More will be written on this finding in a later section.) A convenience sample of twelve cases, from the Calgary-based arbitration hearings, was then randomly selected for detailed analysis. We felt that the 1995 to 1998 period was most appropriate for our study since there was a sufficient lag from the time of reinstatement to allow grievors an opportunity to experience a re-entry to the workplace. At the same time, their recollections of the grievance and arbitration process would remain fresh.

The affected employees were first contacted for in-depth interviews and to gain authorization to interview union representatives and employers. In all but one instance, the employees requested that the researcher not contact any employer representative. In all cases, the employee agreed to allow us to interview the union official responsible for processing the grievance through to arbitration. However, only one union representative agreed to discuss a specific case, although many were willing to discuss general issues. Where the researcher was unable to contact the employee, or the employee declined participation in the study, the response was documented and a replacement case drawn from the sample population. A total of twelve reinstatement cases involving fifteen employees were investigated. Five of the fifteen employees could not be traced, three refused interviews, and seven interviews were completed. Table 2 offers a portrait of the seven grievors whose experiences inform this article.

Telephone and/or personal discussions were conducted in accordance with an interview protocol (available from the authors upon request). The interviews lasted an average of one hour each, and the respondents were assured of confidentiality.

Of the seven employees interviewed for the project, five continue to work for their original employer. In addition, one other employee confirmed continued employment but refused further discussion. In two other cases, the reinstated grievors did not actually return to the worksite: one case was lost on subsequent appeal, while the other employee negotiated a settlement in lieu of reinstatement. Employees who were reinstated were

TABLE 2

Profile of Grievors

Case	*Issue*	*Gender*	*Continued Employment*	*Position*	*Discharge Date*	*Decision Date*	*Suspension*	*Same Department*	*Seniority*
A	Absent without leave	M	Yes	Service/ Maintenance	March 1997	June 1998	2 months	Yes	21 months
B	Alcohol on the job	M	Yes	Assembly line worker	July 1997	June 1998	11 months	Yes	15 years
C	Theft	M	No	General clerk clerk	March 1995	February 1997	3 days	N/A	13 years
D	Physical altercation	F	Yes	Customer service rep	May 1997	April 1998	6 months	No	2 years
E	Sabotage	M	Yes	Warehouse assembler	September 1996	September 1997	1 year	No	16 years
F	Insubordination	M	No	Cleaner	September 1995	March 1997	None	N/A	3 months
G	Absent without leave	F	Yes	Nurse's aide	December 1996	October 1997	5 days	Yes	10 years

usually returned to their original departments. In two cases, divisional restructuring occurred prior to the reinstatement, and the employee was assigned similar duties at a new site. The restructuring cases were also the only cases where the employees no longer had regular contact with their original supervisor.

In addition to the discussions with reinstated employees, telephone interviews were conducted with 10 labour relations professionals representing union or management, and three labour arbitrators. The objective of these consultations was to solicit opinions regarding reinstatement frequency, as well as to gain insight into the perceptions of both union and management on reinstated employees.

The qualitative nature of this research project, by definition, imposes limits upon its generalizability, and care must be taken when reaching conclusions based upon a small sample size. However, a 47 per cent response rate from Calgary grievors, and the opportunity for achieving some convergent validity through interviews with labour relations professionals, strengthen our confidence in the results. The employee response rate is significantly higher than the 22 per cent achieved by Adams in his 1978 study. Further, the opportunity for in-depth interviews with grievors and others adds nuances to the previous quantitative research findings.

RESULTS

Reinstatement Rates

To provide a context for this study, we investigated the number of arbitrations, the number of dismissal cases, and the reinstatement rate in the Alberta jurisdiction since 1990. The results are reported in Table 3.

TABLE 3

Arbitration Cases in Alberta, 1990–1998

Year	*Number of Cases Analyzed*	*Dismissal Cases*	*(%)*	*Number Reinstated*	*(%)*
1990	168	44	26%	19	43.2%
1991	187	52	28%	15	28.8%
1992	195	44	23%	16	36.4%
1993	172	41	24%	21	51.2%
1994	153	44	29%	18	40.9%
1995	143	33	23%	10	30.3%
1996	149	39	26%	14	35.9%
1997	113	36	32%	11	30.6%
1998	80	30	38%	13	43.3%
Total	1360	363	27%	137	37.7%

There appear to be three distinct findings from the quantitative research component of this study. First is the low reinstatement rate as a percentage of total dismissals. The 37.7 per cent average is a startling drop relative to Alberta research between 1982 and 1984, which had revealed a reinstatement rate of 53.8 per cent. The second finding is the dramatic decrease in filed arbitration cases over the past decade, from 168 cases in 1990 to 80 cases in 1998. This halving of the number of cases heard cannot be attributed entirely to the decrease in Alberta union density, from 26 per cent to approximately 22 per cent, over the same period of time. Finally, the number of dismissal cases, although dropping in absolute terms, have remained relatively stable as a percentage of total cases filed, with the exceptions of 1997 and 1998, which are unusually high. The mean percentage of dismissal cases per year is 27.1 per cent, ranging from a low of 22.6 per cent in 1992 to a high of 37 per cent in 1998. The fact that the proportion of dismissal cases in 1997 and 1998 is very high (in spite of the declining number of arbitration cases overall), suggests that dismissal is still a very hotly contested issue in the unionized setting.

Why is the reinstatement rate so low? Four possible explanations for the difference were offered by the union and management representatives and arbitrators interviewed for this study. First, it is likely there is more widespread use of progressive discipline, and less capriciousness in management decision-making. According to a prominent management-side lawyer, in the past there were more management mistakes made regarding dismissal, and less thorough investigations. His recollection is that management lost many cases through flawed firings, poor documentation, and insufficient evidence. By contrast, "Now when employers decide to fire someone, they really mean it." As another management representative explained, the more experienced the company becomes, the less likely it is to risk undergoing an expensive arbitration procedure when there is a strong possibility the arbitrator will reinstate.

This greater level of sophistication, on the part of both the employer and the union, seems the most plausible interpretation for the decline in the reinstatement rate. In addition, it is consistent with the second and third findings of our quantitative research. With the development of more cooperative approaches to union-management relations, including alternative dispute resolution techniques, training in mutual gains bargaining and relationship-by-objectives, the parties are more likely to share information and come to mutually agreeable settlements without recourse to arbitration.

A second possibility, suggested by the representatives interviewed, was the upsurge in the use of cash settlements in lieu of arbitration outcomes. According to both union and management sources, scheduling an arbitration

hearing is increasingly being used as bargaining leverage to initiate the real process of achieving a cash settlement that will make the case, as well as the hapless grievor, "go away". From the grievors' perspective, often the arbitration is the fall-back position, or best alternative to a negotiated settlement. Even though the arbitration costs are not borne by the grievor, but rather by the union and the employer, there is no certainty of reinstatement, whereas a cash settlement is tangible, immediate, and puts the matter to rest.

Further, managers are increasingly willing to consider paying the grievor in order to avoid any possibility of a return to work. As explained by a management-side attorney, "we *never* will allow reinstatement," particularly for large clients with deep pockets. A settlement will be offered either before or during arbitration, and companies are even willing to barter cash after the arbitrator orders reinstatement. Companies determined not to reinstate under any circumstances can pay a very high price after the hearing: "I recall situations in which a reinstatement order cost the company three times more than had the company settled before the hearing." A union representative put this same point slightly differently: "I counsel my employees that the best time to get money is now [before the hearing]. I say to them, do you *really* want to go back to that place?" Arbitrations are expensive, and for this union the average cost is approaching $20,000. It is rational for the union to persuade employees to accept a cash settlement, except in situations in which the employee has a substantial chance of winning or successful reinstatement is likely to be achieved or the issue in the case is important for the union. Thus, not only are fewer cases going to arbitration because management offers cash and the union is more inclined to counsel the grievor to accept it, but the cases which management allows to go forward often are those in which management believes it has an "iron-clad" case.

This second explanation might account for all of the findings, but requires additional research to confirm the number of cases in which cash settlements affected the arbitration rates and outcomes over the time period of our study.

A third avenue of analysis offered that strained union/management relationships also might play a role in the declining reinstatement rate. With tense worksite relations, and as some unions attempt to increase pressure on employers, they may begin taking as many cases through to arbitration as possible to "clog the system" (Dastmalchian and Ng 1990: 320; Knight 1987), regardless of the merits of the cases. Many hearings are cancelled at the last minute, and arbitrators complain that depending upon the client mix that they service, between 40 and 75 percent of scheduled cases cancel. The remaining cases may be settled in the hallways during the hearings,

except for those cases in which management refuses to pay or otherwise settle because the case against the grievor is strong. Although this scenario explains the decline in reinstatement rates, it is not consistent with the absolute decline in arbitration cases, and thus appears to be a weaker argument.

Finally, a number of union representatives interviewed suggested that the low reinstatement rate is a reflection of the general conservatism of Alberta, and the possible pro-business sentiments of the small group of arbitrators who hear the vast majority of Alberta cases. This explanation does little to address other findings of the research, nevertheless, it is possible that there are psychographic differences among arbitrators based on region.

Grievors' Perceptions of the Reinstatement Experience

Public Filing of Arbitration Awards

In the course of contacting grievors to obtain their consent to be interviewed we discovered an unanticipated difficulty in the research design, which became an important finding from the field research. Grievors were stunned that labour arbitration cases were public documents. Not only were they shocked that arbitration cases are available at law libraries and through the Labour Board, but they were totally unaware that cases (inclusive of the grievors' names and circumstances) are published in *Labour Arbitration Cases*, *CLV*s and *Lancaster* services. The notion that this form of private industrial justice results in the widespread availability of their personal and employment histories was an unpleasant revelation. As a result, initial contact with the employees consistently revealed a significant level of mistrust of the researchers. A typical response was "That's personal and nobody else's business." Without exception, concern regarding the researchers' affiliations and information sources was expressed. In one instance a mortified employee immediately terminated further discussions. Several interviewees required repeated assurance that there was no connection between the researchers and the employer. Once the nature and purpose of the research was understood, most individuals were willing to begin discussions, although they frequently cautioned they would not answer questions they felt were overly invasive. As the interviews progressed, the employees became less cautious, and question refusals were rare.

A representative of the United Food and Commercial Workers Union stated that although their representatives discuss the arbitration process and outcomes, including the fact the award will become a public record, he was not surprised at the employees' reactions. The document filing information is presented at a time when the grievors are preoccupied with

the merits of their particular cases. Further, if employees *do* comprehend the implications of "public record" at the time the term is explained, they generally expect that their cases will be lost among hundreds of others filed on some "dusty shelf" at the law library.

At a different union, the tacit practice is to use the threat of future public disclosure of the case in order to dissuade grievors with less meritorious cases from going forward to arbitration. The grievor is advised that a consequence of an arbitration hearing is that all the details of the grievor's work performance and activities will become a matter of public record. This factor will not be stressed in the situation of grievors with stronger and more meritorious cases.

Other union representatives admit that they do not counsel any grievors about the public availability of arbitration awards, and immediately acknowledge that "Oops, I'll add that to my check-list!" These respondents also appreciate the grievors' chagrin at being approached by researchers.

The Grievance and Arbitration Processes

The pre-arbitration grievance procedure is perceived as an unfair process. One employee characterized the early meetings as very "lopsided," with the manager clearly being afforded greater deference. The opportunity to have the facts of the case reviewed by an impartial third party was regarded as a necessity.

Overall, the grievors were satisfied with the arbitration procedure itself. They felt the arbitrators were impartial, and that they were offered an opportunity to "tell their side of the story." When asked what aspects of the procedure the employees considered most positive, a frequent comment was that the arbitrator made the right decision. This suggests that opinions regarding the arbitration proceedings may reflect the outcome more than actual procedural fairness. This finding is not unexpected. Greenberg (1983) found that grievors exhibited a clear "egocentric bias" preferring dispute resolution processes with favourable outcomes (Greenberg 1987; Thibaut and Walker 1975). One employee felt the procedure was unfair, and in this situation, although the employee was returned to the job, the reinstatement was accompanied by a significant suspension and commensurate loss of seniority. We would not be surprised to find that grievors whose dismissals were upheld would be far less sanguine about the arbitration procedure.

Not unexpectedly, the negative comments surrounding the arbitration hearing unfailingly included the length of time from the discharge until the hearing and award (which in Alberta averages 11.5 months for all grievances and 9.5 months for dismissal matters: Ponak and Olson 1992).

In the majority of these particular cases, the employees also contended that the employer was untruthful during their testimony. The employees reported being surprised by the testimony, and by the employers' willingness to "alter events" to better support their position. One employee pointed out that supervisors who did not directly witness the dismissal incident were required to testify about matters affecting the dismissal decision, but the version they presented seemed to have been influenced by pre-arbitration preparations for discussing the case. The employee did not feel the supervisors were intentionally misleading, but did feel the outcome of the hearing may have been affected by the testimony.

Grievors Do Not Become More Loyal to their Unions

Reinstated employee perceptions of union support throughout the hearing and subsequent reinstatement provided perhaps the most surprising finding of this study. In spite of winning their cases, few of the interviewees characterized their union as providing sufficient support. The employee most satisfied with his representation had been a senior executive with the union just prior to his dismissal. Another employee stated the union had very low visibility prior to his particular case, but had subsequently made greater efforts to establish a presence at the worksite, and to increase employee awareness.

Other comments were much less positive. The unions were perceived as unsupportive both during the arbitration stage and after reinstatement. Communication problems and a lack of interest and follow-up were cited on numerous occasions. One grievor, after a number of unsuccessful attempts to prompt union activity finally approached the Alberta government to make inquiries about launching a formal complaint with the Alberta Labour Relations Board, and the union was eventually forced to pursue the case. In another instance the employee stated he was told he had to "do his own investigation." Another questionable situation arose when the union chose to represent two employees with clearly conflicting interests at the same hearing, and provided only one legal representative. In addition, the employees reported ongoing difficulty with backpay issues that the union had failed to pursue. Repeated phone calls had been necessary to prompt union attention.

Union representatives acknowledge that they are well aware of the unflattering views expressed by their members. According to one union representative, workers feel entitled to union representation by virtue of the union dues they have paid over the years. They are not grateful for a service that they feel is owed to them, but are harsh in judging any deficiencies in support. Because grievors believe the union is obligated to proffer total unswerving advocacy of member interests, grievors might even

be harsher towards their union counsel than they would be to any nonunion lawyers acting on their behalf.

Further, unions are not likely to receive accolades from their members at the worksite for the reinstatement of culpable grievors, or any workers who have poor attitudes or substandard performance. Some co-workers will have testified against the reinstated grievors, a situation that may cause considerable discomfort. According to some literature, peers may be more conservative in the interpretation and application of policies than managers, and may be harsher judges of co-worker infractions than even arbitrators (Miller 1978; McCabe 1988). Taking on the industrial justice role in dismissal cases is not necessarily a wise public relations strategy for unions. In many situations it is an obligation rather than a pleasure. While there is evidence that workers strongly support the unions' role in taking on grievances as part of the provision of industrial justice (Godard 1997), the delivery of such service is more appealing in the abstract than in actual practice.

Grievors Perceive Improved Employer Relations

Several of the employees interviewed for this study characterized employer relationships as very poor prior to the dismissal incident. In each of these cases, the employee felt that conditions at the worksite *on the whole* were poor. They were adamant that they were not the only "victims" of the ongoing "poor management practices," and often cited numerous dismissals and grievances that also had occurred. Favouritism, unreasonable workload, unclear job definitions and managerial mistrust were specifically cited as major contributing factors to the poor working conditions and low morale. Interestingly, in most of these cases, either significant restructuring occurred while the employees were off work, or the particular "offending" managers were dismissed.

Once the employees had been reinstated, they generally rated their relationships with immediate supervisors and senior management as good or very good. Where the employees were no longer working in the same department, they often continued to have periodic contact with previous supervisors. One employee suggested that the reinstatement process could have been significantly facilitated by an opportunity to meet with both the new and previous supervisors to "clear the air and pave the way" for resuming the relationship.

Another employee suggested he had been targeted for harassment by management. This was the same individual who had significant union involvement prior to the dismissal. The employee's advice to others facing reinstatement was to "keep quiet and do your job." Since returning to work, the employee has declined a shop steward nomination. The "marked man"

theory, refuted by George Adams (1978), clearly surfaces on occasion but, by and large, the grievors in this study were not conscious of this phenomenon.

Labour relations professionals consulted in this study admitted that where management is particularly disappointed by the reinstatement award, it is not uncommon to see increased pressure on the employee that eventually results in a second dismissal, which is rarely grieved. "Not only do we not help with the grievor's reinstatement," confessed a senior human resource manager for a large grocery chain, "but we're pissed as hell to get him back." This company does not take any action to ease the reinstatement process. Recall that in many such situations, the grievor is paid a cash settlement by management in exchange for the permanent termination of employment.

Another manager suggested that cultural differences and long-standing union involvement can have a significant impact on reinstatement success. Where hiring from within is entrenched in corporate policy, managers have frequently come through the union ranks themselves, and accept reinstatement as a normal business practice. In fact, these managers often dismiss employees for more serious infractions, such as drug or alcohol abuse, with full knowledge the employee will be reinstated once a rehabilitation program has been completed. In these situations, the company frequently will reinstate the employee prior to any union action—the dismissal is effectively used to impose lengthy suspensions that would be unavailable through normal progressive discipline. If the case does go to arbitration, reinstatement is generally expected, and the real arguments may be regarding compensation or working conditions.

Grievors are Nervous about Coworker Relations, but Relieved Once Reinstated

The reinstated employees interviewed appeared to have difficulty evaluating their coworker relationships prior to the dismissal. Only one answered the question clearly and affirmatively. The remainder of the interviewees sought explanations for less than satisfactory situations. Several said there were too many people in their area to simply state the relationships overall as either negative or positive. Others said the worksite conditions were so poor that it was difficult to evaluate objectively. High stress levels and poor morale were thought to have contributed to interoffice disputes. In one example, when the grievor (prior to dismissal) volunteered to work extra hours to help lighten the load, the response from coworkers was distinctly unappreciative.

Since their reinstatements all the employees interviewed characterized their peer relationships as very good. Two of these employees remained in frequent contact with their original coworkers. We asked grievors to describe an event or incident that symbolized a successful reinstatement. Employees invariably provided accounts of coworker acceptance as critical incidents. Employees expressed nervousness about their return, but were not concerned about managerial reaction. Rather, their apprehension was related to how their peers would respond. Most were concerned with the workplace "grapevine" and what their coworkers had been told about their individual circumstances. Once rumors about settlement size and the cause of dismissal were clarified, the reinstated employees found the worksite much more comfortable.

Reinstatement Assistance Processes Lacking

None of the employees were offered any type of reinstatement assistance. This is not surprising given the complaints of poor union support following the arbitration hearing, and managements' responses to losing their cases, which seemed to range from indifferent to highly embittered. Although not all the grievors felt it was required, several clearly stated both management and the union could have been more proactive. In one case the employee was asked to undergo a retraining period; another required medical reassessment. In both situations, the employees did not consider the action an "assistance process" but rather an unnecessary delay in returning them to their full duties.

Union representatives presented a somewhat different picture, stating that they made very specific efforts to monitor the progress of reinstatements, and observe working conditions for the employee. Discussions were held with managers to help pave the way for a successful reentry. "The union sees itself as a service organization, and each employee deserves the best defense possible, regardless of what they have done." Their perception is that in any reinstatement, the employee and the union both see the outcome as a victory.

Overall Reinstatement Experience

In the ideal reinstatement experience, it may be thought that a culpable grievor would be contrite and, recognizing the behaviour was inappropriate, is thankful to have the job back; management accepts the arbitrator's award and makes every effort to salvage the employment relationship; and the union, successful in the hearing, continues to support the employee through the awkward return to work. Unfortunately, it appears this combination may be rare.

Only one of the employees interviewed for this study expressed remorse for the dismissal incident. The remaining grievors, none of whom were fully exonerated, continued to deny responsibility for their actions. The term "humiliating" was repeated on numerous occasions, as employees were asked to describe the overall experience. One possible explanation for this lack of remorse on the part of grievors is that "winning a grievance is likely to restore an individual's self-esteem, that is, the desire for repute or respect from other people" (Gordon and Bowlby 1988: 121).

The grievors were thankful to have their jobs back, but were often unhappy that any suspension had been imposed, possibly accounting for at least some of their frustration with union representation. Employers did little to support the reinstated employees, and if anything, appeared to make it clear that employees would be left on their own to manage any coworker transition issues. The perceived onus clearly is on the grievor or the union, but not on management. Unions, whose primary purpose is to ensure the rights of the employees are protected, often underperform, failing to provide sufficient support throughout the process. As one union representative noted about the difficult role of unions in general, the union is a politically motivated organization that might have to subordinate the rights of one for the good of the whole. It is not always possible for a union to provide the degree of service required by a single (often traumatized) employee when union officials are preoccupied with dozens of other, sometimes more pressing, matters.

DISCUSSION AND ANALYSIS

The objective of the reinstatement remedy is to salvage the employment relationship. Where employees are returned to work and there is less than adequate support from the employer and the union, the financially and emotionally costly arbitration process can be undermined. Thematic analyses of these research findings indicate a number of factors that contribute to the efficacy of the reinstatement process.

Clearly there is a gap between the level of support unions claim to offer their membership, and the level that actually exists. Much of the dissatisfaction reported in this study was related to post reinstatement performance: employees continued to struggle with outstanding backpay issues, and managerial indifference strained the new working relationship. An opportunity exists for unions to revise their role as employee advocates. The changing employment environment and increased workforce transience indicate that in order to remain effective, unions must develop wider and more influential support networks. The fact that most of these reinstated employees had little contact with the union prior to dismissal and little understanding of the grievance and arbitration processes, indicates

a need for a more proactive employee education function. In addition, ongoing membership education will counteract some of the effects of workforce transience, increasing the likelihood that reinstated employees will be accepted by coworkers on their return. One employee suggested that unions should consider activities that parallel those of an often distant human resource department.

Is there any explanation or precedent for the antipathy expressed towards unions, particularly in contrast to the benign view of management? Fryxell and Gordon (1989: 864) found that "procedures used in the administration of grievance procedures, more than the outcome realized, influenced workers' satisfaction with their union. On the other hand, workers' broad belief that their workplace was just was highly predictive of their satisfaction with management." Clearly, the complex and rather mystical procedures involved in processing a grievance through to arbitration had frustrated many of the grievors, and this frustration was displaced onto the union. By contrast, management having been undamaged by aggravations with the arbitration process tended to emerge relatively unscathed, particularly when grievors were relieved at the easy re-entry into the worksite after the arbitration award.

Increased frequency of communication is also an important factor in successful reinstatement. Grievors who more fully understood the significance of each phase of the arbitration and reinstatement processes were also those whose work life "returned to normal" most quickly. Post re-entry meetings with management and the grievor provide an opportunity to decrease reinstatement anxiety and clarify new roles. The employee who was most satisfied with the support from the union, and subsequently enjoyed a successful reinstatement in spite of perceptions of being targeted by management, was also the employee who was most involved in union activity. Overall increased union visibility in the workplace as a support organization, rather than acting strictly as the contract enforcer, would have a positive effect on perceptions of reinstatement success.

Corporate culture is also a factor in successful reinstatement. Companies that have long-standing and relatively positive relationships with their unions are more likely to provide a more stable re-entry environment. Supervisors and coworkers accept the reinstatement remedy as a normal course of business, decreasing the stigma faced by employees returning to less cooperative environments. Where this situation does not exist, and the organization is large enough to accommodate transfers, new departments for the reinstated employees offer another solution. Although this study reflected corporate reorganization as a positive influence, new departments would have the similar "clean start" effect. Fears of retribution and the company "grapevine" are decreased in a new environment.

Ensuring backpay issues are cleared up in a timely manner also has a positive influence on the returning employee's morale and loyalty to both

the company and union. In addition, employers can decrease the likelihood of further expense related to the reinstatement by managing the standard job issues that contribute to a positive work environment. Clear job descriptions, giving employees the tools they need to perform their duties and early recognition of worksite morale issues may prevent a series of dismissals/disciplinary actions.

Finally, there are clearly certain employee attributes that contribute to successful reinstatement. Interestingly, accepting responsibility for the dismissal incident does not appear to be necessary for employees to successfully return to the workplace. Rather, a positive perception of their own behavior may be important in allowing the employees to forge or repair critical coworker relationships. At the same time, cooperative behavior is also important. As Malinowski put it (1981: 43), "Those who are willing to work and who have a positive attitude toward the job and the company will probably continue working and will progress normally. Those who become or continue to be arrogant, and those who are uncooperative, may find their reinstatement short-lived." Employees were clearly subdued by the process, advising others in similar situations to "work hard, don't say anything" and remain "calm and polite" throughout. Those who were proactive in their own defense, and cooperated fully with the union were also most satisfied with their reinstatement. They had become involved at the beginning of the case, developed a rapport with union representatives but, most importantly felt they had helped to build a strong case.

Every reinstatement case reflects unique circumstances, and no single factor presented in this research can be attributed with ensuring a fair process of dispute resolution followed by successful reinstatement. However, a few findings from this exploratory study merit restatement here. First, employees are unaware of the public nature of a purportedly private process of industrial justice. Second, reinstated grievors are quite critical of the union that defended them and successfully set aside dismissal decisions. Third, by contrast to the strong feelings about the inadequacy of the union, reinstated grievors have a benign view of management. Fourth, very little reinstatement assistance is offered. Finally, remorse and acceptance of culpability do not seem to affect the success of reinstatement; rather, a positive attitude to the worksite appears a more likely determinant of success.

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RÉSUMÉ

La réintégration en arbitrage : le point de vue du plaignant

La voix du plaignant est à peu près absente de la littérature sur l'arbitrage. Nous rapportons ici les résultats d'une étude exploratoire portant surtout sur les expériences post-réintégration d'un groupe de plaignants albertains. Nous avons complété des vérifications de validité et de fiabilité par des entrevues avec des représentants syndicaux, des administrateurs et des arbitres. Nous avons choisi au hasard, pour fin d'analyse, un échantillon de douze cas impliquant quinze employés dans des auditions tenues à Calgary. De ces quinze employés, cinq n'ont pu être rejoints, trois ont refusé de répondre et sept ont répondu à une entrevue téléphonique semi-structurée d'une durée d'environ une heure. Nous avons alors exploré leurs perceptions au sujet de leur arbitrage et de leur réintégration. Nous avons également examiné les facteurs qui accroissaient la probabilité d'une réintégration réussie. En plus, nous avons mené des entrevues téléphoniques avec dix professionnels de relations du travail tant syndicaux que patronaux et trois arbitres. Cette consultation avait pour objectif d'obtenir leur point de vue sur la fréquence des réintégrations et sur leurs perceptions eu égard aux employés réintégrés.

Afin de cerner le contexte pour mener les entrevues des plaignants, nous avons recensé un total de 485 cas d'arbitrages fédéraux et provinciaux survenus en Alberta entre janvier 1995 et décembre 1998. Sur les 138 causes de congédiement entendues durant cette période, les arbitres ont réintégré 48 individus. Il semble qu'il se dégage trois résultats distincts de la composante quantitative de la présente recherche. D'abord, notons le faible taux de réintégration par rapport au total des congédiements

étudiés. Ce taux de 37,7 % représente une baisse sérieuse par rapport au taux de 53,8 % observé par la recherche albertaine entre 1982 et 1984. En second lieu, nous observons une baisse dramatique de griefs référés à l'arbitrage durant la dernière décennie, i.e. de 168 en 1990 à 80 en 1998. Cette réduction de moitié ne peut pas être attribuée entièrement à la baisse de la densité syndicale en Alberta de 26 à 22 % pour la même période. Même si le nombre de cas de congédiement a baissé en termes absolus, il est demeuré relativement stable lorsque exprimé en pourcentage du total de griefs déposés, à l'exception de pointes inhabituelles en 1997 et en 1998. Le taux moyen de cas annuels de congédiement est de 27,1 % et varie de 22,6 % en 1992 à 37 % en 1998. Le fait que la proportion de griefs de congédiement fut très haute en 1997 et 1998 suggère que le congédiement constitue toujours un sujet très chaud en milieu syndiqué.

La portion qualitative de la présente recherche a généré des résultats tout aussi intéressants. D'abord, les employés ignorent le caractère public de ce processus privé de justice industrielle. Il ne leur fut aucunement plaisant de savoir que le processus d'arbitrage entraîne la divulgation de leur histoire personnelle et d'emploi. Il en est résulté que notre contact initial avec les employés a constamment révélé un niveau significatif de non-confiance. Ensuite, la procédure pré-arbitrale de griefs est perçue comme un processus injuste qu'un employé a caractérisé de biaisé, l'employeur recevant beaucoup plus de déférence. On voyait alors comme une nécessité d'avoir l'occasion de voir un tiers impartial examiner les faits.

Peut-être le plus surprenant des résultats de notre étude tient du fait que malgré qu'ils aient eu gain de cause, très peu de personnes interviewées considéraient que leur syndicat leur a apporté suffisamment de support tant pendant les audiences que lors de la réintégration. En fait, les plaignants ont été très critiques des syndicats qui les défendaient et, en même temps, conservaient une perception relativement bienveillante envers leurs employeurs. Cette perception du faible support syndical est confirmée par le fait que très peu d'assistance est offerte au plaignant suite à sa réintégration à son milieu de travail. Même si cela ne fait pas l'unanimité, plusieurs croient que tant l'employeur que le syndicat aurait pu être plus proactif.

Finalement, il y a clairement certaines caractéristiques chez les employés qui contribuent à une réintégration réussie. Une attitude positive envers son lieu de travail est plus déterminante pour une réintégration réussie que remords et acceptation de la culpabilité. Un comportement coopératif et une perception positive de sa propre conduite peuvent être importants pour aider les employés à bâtir ou à réparer les relations difficiles avec les collègues de travail.