NOTE TO USERS

WORKPLACE JUSTICE: AN EXAMINATION OF EMPLOYEE DISMISSAL IN THE VIEWS OF THE COURTS AND HUMAN RESOURCE PRACTITIONERS

By

James Douglas Grant

A Dissertation Submitted to
Saint Mary's University, Halifax, Nova Scotia
In Partial Fulfillment of the Requirements for
The Degree of Doctor of Philosophy (Management)

December, 2008, Halifax, Nova Scotia

Approved:	Terry H. Wagar, PhD Supervisor
Approved:	Steven McShane, PhD Examiner
Approved:	Bruce Anderson, PhD Reader
Approved:	Eldon Wiebe, PhD Reader
Approved:	Larry Haiven, PhD Reader
Date:	December 12, 2008

Your file Votre référence
ISBN: 978-0-494-50628-8
Our file Notre référence
ISBN: 978-0-494-50628-8

Dedication

To Dad.

Your sense of justice and determination has shaped me irrevocably.

Abstract

WORKPLACE JUSTICE: AN EXAMINATION OF EMPLOYEE DISMISSAL IN THE VIEWS OF THE COURTS AND HUMAN RESOURCE PRACTITIONERS

By: James Douglas Grant

My objective in this research is to better understand the nature of employment relationships by examining violations of expectations and obligations by the employee and employer as evidenced by the dismissal of allegedly poorly performing employees. While the centerpiece of this work, the common law of wrongful dismissal, is a unique Canadian phenomenon, its relevance to theory and practice is enhanced by framing the study of the employment relationship within the broader discourse of justice and fairness.

I begin by reviewing the theory and process of the law of wrongful dismissal in Canada. I then provide an overview of the literature with respect to the intersection of the psychological contract, organizational justice, and employee dismissal, as well as a review of the empirical study of employee dismissal. In addition, I embed the views of the Supreme Court of Canada with respect to the nature of the employment relationship, and the inequality of bargaining power and employee vulnerability in an analysis of divergent views of workplace justice.

In the first of three studies, I content analyse Canadian wrongful dismissal cases selected because they deal with an employer alleging employee incompetence or poor performance. The data from the analysis is quantitatively examined to establish the determinants of case outcome (was the dismissed employee successful) and reasonable notice period that is awarded. I found that an employee victory is associated with several factors related to the performance management of an employee, to the unequal bargaining relationship in non-union employment contracts, to an employee's vulnerability, and to the *Wallace v. United Grain Growers* (1997) decision. However, only two of these factors are related to the length of reasonable notice period.

In the second study, I surveyed human resource (HR) practitioners with an instrument constructed from items identified in the content analysis of the court cases in order to examine the determinants of perceived just cause and notice provided in workplace dismissals. I found that a much smaller set of determinants were associated with perceived just cause and reasonable notice period than were found in my examination of wrongful dismissal cases.

In my final study, HR practitioners responded to a simulated dismisssal based on the *Wallace* (1997) court case, a recent influential decision that has not been examined empirically to date. I found that there were significant differences in HR practitioners' perception of the legal basis of the employment contract compared to their psychological contract.

Finally, I contrasted the courts' views with the perceptions and experience of HR practitioners. I found that the treatment of dismissed employees in the workplace understates the relevant factors considered important in both the law and in several views of

workplace justice. Furthermore, I concluded that if HR practitioners are to achieve a better balance of employee and employer interests, management and organization scholars must be more prepared to examine a broad range of employee, employer, and social outcomes within a legal, justice, and organizational framework.

I also argued that the Court's views in *Wallace* (1997), as well as the structure of the lower courts' decisions, are consistent with both an instrumental conceptualization of justice and a power and dependence model of employment relationships. I concluded that a more inclusive depiction of justice in the workplace must incorporate both the instrumental needs of the employee and employer as well as the inequality of power and dependence that is innate to the employment relationship, and is the context in which management decisions are made.

December 12, 2008

ACKNOWLEDGEMENTS

I would like to acknowledge some of the people who have influenced and supported me along this journey. First, my dissertation owes its existence to the mentoring and friendship of Dr. Terry Wagar. Terry, thank you for all those skating sessions at the rink. We'll always be the best student-professor team on the ice. You have always been so generous with your time, advice, support, and data. I hope that I can be half so supportive to my students and colleagues in the years to come.

Second, I would like to thank my cohort mates, Peggy, Ellen, Amy, and Margaret. I owe my survival in the doctoral program to you. Your friendship, kindness, and generosity have been and always will be valued. My hope is that we always will be close colleagues and closer friends.

Next, I would like to acknowledge the faculty of the doctoral program in management at Saint Mary's University. I believe that it is fair to say that as doctoral students and candidates we were blessed with an opportunity to become who we were meant to be. We owe the quality of that experience to the faculty including Dr. Albert Mills, Dr. Jean Helms Mills, Dr. Kevin Kelloway, Dr. Hari Das, Dr. David Wicks, and Dr, Terry Wagar. I also want to acknowledge some of the others who rounded out our experience including Dr. Cathy Driscoll, Dr. John Chamard, Dr. Judy Haiven, and Sandra Fougere.

To my friends and colleagues in the Saint Mary's University PhD Program, Scott, Gabie, Terry, Kelly, Shelagh, Trish, Tony, Brad, Doreen, Donna, Arlene, Jason, Connie, Wendy, Bally, Jane, Angela Bissonnette and Angela Hope, Janet, Kakha, Salvador, and more, I'll see you at the pub. Cheers and thank you for your wisdom and inspiration. You are an exceptional group with so much to contribute and I am privileged to know you.

I want to thank my dissertation committee, Dr. Larry Haiven, Dr. Elden Wiebe, and Dr. Bruce Anderson, and external examiner, Dr. Steven McShane. My work benefitted greatly from your encouragement, hard work, and constructive feedback. I have learned much from each of you, particularly Dr. McShane who introduced me to wrongful dismissal law many years ago.

Finally, to my family, Mom, Allison, and Peter, thank you for all the love and support through the years.

TABLE OF CONTENTS

LIST OF TABLES

WORKPLACE JUSTICE: AN EXAMINATION OF EMPLOYEE DISMISSAL IN THE VIEWS OF THE COURTS AND HUMAN RESOURCE PRACTITIONERS[1]

Chapter 1 – Introduction

My motivation for this study is a disillusionment with what work has become for so many, lacking in meaning and opportunity for real contribution to society, in work-places which are increasingly characterized by insecurity and little commitment to the employee. At least Canada's wrongful dismissal law provides a potent remedy for some wrongfully terminated non-union employees, as well as a venue for the elaboration of employee rights and protection. Moreover, the case law is also a unique and rich data source for the study of the process of management of the employment relationship and of employee performance.

Despite the relatively generous protection in Canada, workers frequently find their interests (and their rights) swept aside when employers unilaterally exercise management prerogative. How does this occur? To begin, many employees are likely to be unaware of the full extent of their rights under the law. The most visible and accessible remedies that are provided by labour legislation offer minimal protection only. The courts, which offer the most liberal remedies, are relatively inaccessible to the largely unsophisticated and unrepresented non-union worker.

Employers and human resource (HR) practitioners may also be unaware of the full extent of worker rights or lack knowledge of the implications of these rights for the

---

[1] I gratefully acknowledge the financial support of the Social Sciences and Humanities Research Council through the Doctoral Fellowship Program.

development and maintenance of policy and practice. Many employers offer only the minimal employee protection required by the labour legislation. This may occur because they are either unaware of the greater protection promised by employment law or they believe that they can offer the minimum standards because workers are unlikely to challenge the employer's decisions.

HR practitioners typically acquire much of their knowledge of workplace rights from the legal community which itself is not likely to appreciate the implications of wrongful dismissal law for organizational and workplace practices. The legal profession tends to be narrowly focused on the legal context and what is important given the precedents in the practice of law. Moreover, the practitioners of the law may not have an appreciation of the structure of courts' decisions given a preoccupation with the unique circumstances of each case. As a consequence, HR practitioners seek to reduce uncertainty and to ensure a minimal level of equity and fairness is achieved in the generation of workplace policies and practices. The result is simplified decision rules that are applied equally across all employees regardless of the particular circumstances.

This study demonstrates that the law has specific implications and recommendations for workplace practice and policy with respect to performance management, for the employee-employer relationship, for the assurance of fairness and justice in these relations, and for the development and practice of the HR profession.

Purpose of the Study

The primary objective of my research is to better understand the nature of the employment relationship by examining incidents of the violation of expectations and

obligations by both the employee and the employer as evidenced by the dismissal of allegedly poorly performing employees. While the centerpiece of this work, the common law of wrongful dismissal, is unique to Canada its relevance to the theory and practice of unjust dismissal will be increased by framing the study within the broader discourse of justice and fairness in the workplace, and the psychological contract (Rousseau, 1995). In addition, these findings will be contrasted with the perceptions and experience of human resource (HR) practitioners through an examination of a simulated employee dismissal as well as actual workplace dismissals.

Lam and Devine (2001) use a similar methodology to identify and compare the severance compensation determinants identified by the courts in wrongful dismissal cases with the judgement of HRM practitioners in simulated dismissals. However, my investigation of employee dismissal is comprised of three studies. In the first study, I perform a content analysis of Canadian wrongful dismissal cases selected because they deal with an employer allegation of employee incompetence or poor performance. The data from the content analysis will be quantitatively examined to establish the determinants of both case outcome (whether the dismissed employee was successful) and the reasonable notice period awarded in cases where the employee won. Case outcome and reasonable notice period have only once been the focus of analysis in previous studies of wrongful dismissal cases (Nierobisz, 2002).

In Study 2, a survey of HR practitioners, which is largely constructed from items identified in the content analysis of the legal cases, is used to contrast the determinants of perceived just cause and notice provided in workplace dismissals with the determinants of a dismissed employee's victory and the reasonable notice awarded in wrongful

dismissal cases. This study may be the first time that actual workplace dismissals have been studied from the perspective of the HR practitioner. In addition, while several studies have examined dismissal rates at the organizational level (Shaw, Delery, Jenkins, & Gupta, 1998), no other studies have examined the determinants of workplace dismissal at the individual level of analysis.

Finally, in my third study respondents are asked to respond to a simulated dismisssal, which is based on the *Wallace v. United Grain Growers* (1997) decision of the Supreme Court of Canada, a recent influential decision that has not been examined empirically to date. This study has practical significance in that it provides an insight into how HR practitioners would deliberate and advise other managers on the dismissal of an employee and how these decisions differ from the legal requirements. In addition to its practical significance for HR management, this study also has implications for the formation of psychological contracts and the perception of justice and fairness in the workplace.

This study will provide the HR practitioner with much needed guidance with respect to principles of performance management which are consistent with legal requirements as well as a better understanding of employee rights. For example, HR practitioners in Canada may complain that their job is made especially complex by the overlapping contract and statute law governing the employment relationship. You would think that this complaint would make the individual employment contract a central issue to researchers as more than 70 percent of workers in Canada ("Unionization," 2007) are covered by individual employment contracts. In the U.S., almost 88 percent of the workforce is individually employed (Smerd, 2008). However, despite the attention given

to collective bargaining, grievance resolution and labour law, individual contracts remain the most common form of contract and, yet, the least studied (Troy, 2004). As a result, HR practitioners typically rely on legal analyses and opinions in reports on the leading cases, the implications of which they may incorporate into HR practice to a greater or lesser extent.

In contrast to the collective bargaining of unionized employees, most non-union employees are typically hired under an individual contract for an indefinite term. The contract is often an evolving agreement with many subtle components and few if any terms in writing. Consequently, the courts are required to imply contract terms from what should have reasonably been contemplated by both parties at the outset of the relationship, from actions or words of either party throughout the contract, from corporate, industry, or professional practice, and even from the relative treatment and behaviour of other employees, among other considerations. Therefore, the reports of wrongful dismissal cases are fertile ground for the examination of HR practices in the context of a process view of the employment relationship.

Furthermore, because non-union employment contracts typically consist of oral and other terms inferred from workplace practices, or implied from the law and the intention of the parties, as well as written terms, they are somewhat unavailable for examination. As a result, contract terms rarely get clarified because, "culturally, we don't want to appear pushy, brash or aggressive, and asking questions about pay, promotion or workplace problems makes people think they are coming across as too demanding" (O'Reilly, 2003). It is the unique nature of the non-union employment contract that our perception and understanding of the contract may only become concrete at the time of

dismissal when, or if, an employee challenges an employer's interpretation. Furthermore, while the employment relationship has been explored through the psychological contract – what management expects from workers and vice versa (Robinson, Kraatz, & Rousseau, 1994; Rousseau, 1995) – a full understanding of a legal contract and the expectations and obligations with respect to the employment relationship, may only come when the relationship has already been terminated.

One of the challenges for the study of employee dismissal has been that, aside from the arbitral and court case reports, little evidence of a dismissal remains in the workplace once the employee is dismissed, a situation reflected in the virtual absence of studies of those who have been dismissed. Hence, what we know about the non-union employment contract and employee dismissal has often been borrowed from the labour arbitration literature in which the public records of arbitrations are analysed or from the small number of studies of the courts' reports.

Some studies have employed simulated non-union dismissals to understand the dismissal phenomenon as it relates to the terminated individual (Miller & Hoppe, 1994), to those left behind (Blancero, 1995), to the organization (Klaas, Brown, & Heneman III, 1998), and to HR managers (Lam & Devine, 2001). Studies of employee dismissal have identified a wide range of determinants that influence the decisions of the courts, arbitrators and HR practitioners. They include the sex of the employee (Bemmels, 1991b; Knight & Latreille, 2001), the type of HR practices used (Barrett & Kernan, 1987; Feild & Holley, 1982; McShane & Redekop, 1990), the type of just cause used as an employer defense, the characteristics of the decision maker (Bemmels, 1991a; Simpson & Martoc-

chio, 1997) and the dismissed employee (Bemmels, 1988a), and perceptions of fairness and justice (Blancero, 1995; Dunford & Devine, 1998; Olson-Buchanan, 1996).

My study will have value for the assessment of HR management and employment practices. Its results will have implications for the duty and behaviour of employees owed to their employer and for the employer's obligation in terms of the provision of workplace conditions, as well as the support and development necessary for successful employee performance. The study will have relevance not only to management practice and scholarship but also to the legal community. For labour and labour law scholars, my study explores the courts' views and expression of employee rights and protection.

Termination will also be of interest to management researchers because an assessment of whether the dismissal is fair and legal must incorporate an evaluation of the whole employment relationship. In addition, dismissal is the final, and perhaps most unpleasant, duty that a manager can do to an employee, and, some might argue, it may be experienced as if it is a violent act (Wright & Barling, 1998). However, it has rarely been the subject of study. Moreover, perception of the fairness and legality of employee dismissal is the culmination of the whole of the employment relationship and it is shaped by both unarticulated and explicit agreements as well as by obligations implied by law. Therefore, an examination of dismissal in the courts and in the workplace will provide needed insight into the construction of both the legal and the psychological contract, ensuring that this study is of interest to both legal and management scholars.

In examining terminations, I am concerned not only with the nature of the act itself, because of its implications for both the employee and employer, but also with the relationship leading to the final act since it has numerous implications for HR manage-

ment. For instance, a termination, and how that termination is handled, affects not only the terminated employee but also those left behind as they also uniquely experience the termination (see, for example, Wright & Barling, 1998). Moreover, the common law protection from wrongful dismissal that is enjoyed by Canadian employees has implications for the employment relationship from as early as the first contact between the employee and employer as well as for HR practices such as recruiting and selection, compensation, performance appraisal, communication, discipline, feedback, training, and so on.

Furthermore, challenges to management authority are increasingly in the form of legal action (Grossman, 1984). Wrongful dismissal lawsuits are becoming more costly in both the United States (Dunford & Devine, 1998; Kornblau, 1987) and in Canada (see for example *Wallace v. United Grain Growers Ltd. 1997* and *Day v. Walmart Canada Inc. 2000*) where it was once called, "one of Canada's primary growth industries" (Grosman, 1984). Moreover, the dismissal of a long service, high status employee may affect firm productivity, reputation, and employee morale in addition to the direct costs associated with dismissal.

Contribution to the Literature and Human Resource Practice

My study makes several important contributions. Few studies of the dismissal case law exist and what exists is more than likely out of date. For example, the *Wallace* (1997) decision has not been incorporated into any study of dismissal. Other than the study by Lam and Devine (2001) there is little experimental work involving wrongful dismissal law. Likewise, studies of actual workplace dismissals are almost non-existent.

My study will examine both case outcome and reasonable notice. While studies of reasonable notice provide insight into a unique phenomena, an examination of the determinants of case outcome will provide rich insight into employee performance management. However, case outcome and reasonable notice have rarely been investigated in a single study like I am doing here. My study makes an important contribution to the study of wrongful dismissal and the employment relationship by incorporating a justice and fairness framework. Finally, this study also contrasts the findings of an analysis of wrongful dismissal cases with an examination of workplace dismissals as well as HR practitioners' perceptions in a simulated dismissal.

Summary

In Chapter 2, I begin with an overview of the theory and process of Canadian wrongful dismissal law. The wrongful dismissal law that emerges from the case law is the methodically developed expression of the courts' views on employment law in Canada. With my examination of the law, I will clarify the structure of employee rights with respect to performance management in the context of several views on the nature of workplace justice.

In Chapter 3, I review the literature with respect to the intersection of the psychological contract (Rousseau, 1995), organizational justice, and employee dismissal, as well as the conceptual basis of organizational justice (Colquitt, 2001; Lind & Tyler, 1988) and power and dependence in employee relations (Thibaut & Kelley, 1959). Past examinations of employment law largely fail to incorporate the larger organizational context of employment relationships, in particular there is a relative absence of organization theory.

Such an examination will strengthen the contribution of the study to the theory and practice of employee relations and HR management. Typically, HR practitioners receive their knowledge of employment law from its legal examination which is unlikely to include the broader management and organization discourse. In addition, the broader context will increase my study's appeal to management and organization scholars as it will embed the application of Canadian employment law in extant theory.

In Chapter 4, I discuss previous empirical studies of Canadian wrongful dismissal cases as well as other studies of employee dismissal from both the arbitral (union) and non-union perspective. This review draws attention to the gaps in the management and organization literature, in particular the limited application of theory which my study begins to address. It also highlights the virtual absence of HR practitioners, who are central to the management of the employee-employer relationship, as well as the missing voice of the dismissed employee.

In Chapters 5, 6, and 7, I present the three empirical studies of my research beginning with an examination of wrongful dismissal cases which involve dismissal for poor performance. The studies are presented in this way because this is the sequence in which they were undertaken in order to bring the divergent views together. Study 1 establishes the structure of the application of the law with respect to performance management and the employment relationship. Study 2 examines the application of the factors that emerge from Study 1 in actual workplace dismissals. Study 3 investigates the perceptions of HR practitioners in a simulated dismissal that considers factors which are central to both the legal and performance management perspective.

In Chapter 8, I discuss the findings of the three studies, contrast the results and draw implications for managers, and finish by discussing my study's implications for workplace justice. The discussion of each study's findings is delayed in order to link the findings of each in order to fulfill my primary research objective, to better understand the nature of the employment relationship in a legal, justice, and workplace framework.

Chapter 2 – The Legal Framework of Non-Union Employment Relationships in Canada

My focus in this study is the non-union worker and the individual non-union contract of employment. I adopt this focus because, in contrast to the study of labour, the study of employment contracts and dismissal is greatly under-represented in the management and organization literature despite the large proportion of non-union workers in the developed countries.

I begin the chapter with an overview of the context of the Canadian common law of wrongful dismissal. Protection of the non-union Canadian worker from dismissal is considered by way of an overview of the legislative and common law framework of the wrongful dismissal law. The non-union worker and the individual contract of employment are also compared to the experience of the union worker in terms of the nature of the employment relationship. In addition, the development of the Canadian wrongful dismissal law is briefly contrasted with that of the United Kingdom and the United States.

The heart of the chapter is an overview of the theory and process of the law of wrongful dismissal beginning with a discussion of how the terms of an employment contract develop, an employers' serious duty to demonstrate just and sufficient cause for dismissal, and how employee incompetence or poor performance may represent cause for dismissal. The remedies (particularly reasonable notice of termination) available to the employee when wrongfully dismissed as well as the employee's duty to mitigate the loss incurred as a result of the dismissal are also discussed. I give particular attention to these topics because in each case the court must decide whether the employer has shown that

just cause for dismissal exists and the length of reasonable notice of dismissal that is warranted, if any. Because these are the two key findings in all wrongful dismissal cases, they are also the primary criteria in my examination of the weight given to certain management practices by the courts, employers, and HR practitioners in my empirical studies.

Finally, the beliefs of the Supreme Court of Canada with respect to the employment relationship are investigated. In particular, I consider the innate inequality of bargaining power and employee vulnerability in the employment relationship (*Wallace v. United Grain Growers*, 1997) as well as the necessity for the employer to respond in proportion to the severity of employee misconduct (*McKinley v. BC Tel*, 2002). These views also become the basis for a discussion of the nature of justice in the employment relationship in Chapter 3.

Introduction to the Canadian Common Law of Wrongful Dismissal

The Supreme Court of Canada has clearly affirmed the view that there is an imbalance intrinsic in the typical non-union employment relationship with power and control residing with the employer, and that employees are frequently vulnerable and in need of protection when terminated (*Wallace*, 1997). In recognizing an inequality of bargaining power, the courts have required employers to present strong and cogent evidence when dismissing for cause . In addition, the Supreme Court of Canada has required employers to discipline in proportion to the severity of the employee misconduct (*McKinley*, 2001). Nevertheless, for a terminated non-union employee recourse is limited

to labour tribunals, which enforce only minimal standards[2], and to the courts, which are an expensive, stressful, public, and time-consuming alternative for many workers, and often an unrealistic substitute.

The measures available to HR managers in the discipline and dismissal of employees can vary considerably with the jurisdiction in which the workplace is located. In Canada for instance, terminated non-union employees are protected by statute law including human rights and labour legislation, different acts for each province and for federally-regulated industries, and also by the common law of wrongful dismissal. Statute law provides specific protection from discriminatory employer behaviour, as is the case for human rights legislation, and minimal standards of employment are provided by the various provincial and federal labour codes. Nevertheless, in spite of this labrynth of law, it is the courts' interpretation of the common law of wrongful dismissal that is generally considered the last word on the rights and wrongs of the individual employment contract in Canada (Levitt, 2004). Under the law of wrongful dismissal, the employer may terminate any employee at any time as long as reasonable notice of the termination is provided (or severance pay in lieu of notice) unless there is just and sufficient cause for the dismissal, which nullifies the need for a notice period.

Wrongful dismissal law is dynamic and responsive in that it frequently looks to the recent decisions of arbitrators and judges, statutory law, and generally prevailing mores in developing new law. It also has direct relevance to the workplace and HR practices. For example, two recent decisions of the Supreme Court of Canada have signifi-

---

[2] An important exception to the minimal standards enforced by labour tribunals in Canada can be found in the federal, Nova Scotia, and Quebec labour legislation where non-union workers may get their job back through the adjudication process.

cantly changed the legal landscape for employers by extending the notice to which an employee was otherwise entitled because the employer was "misleading and unduly insensitive" (*Wallace*, 1997), which has led to the awarding of '*Wallace* damages' in numerous subsequent wrongful dismissal court decisions. See for example, *Day v. Wal-mart* (2000), and *McKinley v. BC Tel.* (2001), a Supreme Court of Canada decision which gave tacit approval for the use of progressive discipline.

Two recent cases heard by the Ontario Superior Court of Justice may represent an even more damning verdict of the current organizational management of employment relationships. In *Zorn-Smith v. Bank of Montreal Financial Group* (2003), the terminated employee was awarded 16 months notice and an additional $33,760 for intentional infliction of mental distress and special damages, because the bank "took advantage ... in total disregard to the toll its demands were making on her health and the health of her family" (para. 168).

In *Keays v. Honda Canada Inc.* (2005), the trial court awarded 9 months *Wallace* damages and $500,000 in punitive damages because the employer had committed acts of discrimination, harassment and misconduct, the largest amount of punitive damages ever in an employee dismissal case in Canada. However, the Supreme Court of Canada recently overturned the punitive damages and the extended reasonable notice award that had been given in Keays v. Honda (2005) at trial. The implications of *Honda Canada Inc. v. Keays* (2008) for workplace management practices, if any, may be unclear at this time. However, at least one commentator has asserted that the Court's decision may give creative legal counsel the opportunity to obtain *Wallace* and aggravated damages based

on the manner of dismissal, effectively sanctioning the continued availability of *Wallace* damages (Levitt, 2008).

Other court decisions assess virtually every aspect of the employment relationship including recruitment, performance appraisal, compensation (McShane & Redekop, 1990), training and development, disciplinary and appeal systems, incompetence (Wagar & Grant, 1993), and misconduct (Grant & Wagar, 1995). Consequently, Canada's wrongful dismissal law not only provides protection for the employee but is a unique and rich data source for the study of the employment relationship as well. For instance, evidence in a wrongful dismissal lawsuit can be used to ascertain the implied conditions that went into making the employment contract real and enforceable. The case reports of lawsuits brought by wrongfully terminated employees frequently provide detailed evaluations of management practice, explanations of the principles of employment law, and the court's assessment of prevailing expectations of society at the time, all readily accessible to the management researcher.

Legislative and Common Law Framework in Canada

The relationship between workers and employers in Canada is governed by a complex web of employment law. Generally, employment law refers to the body of law created through the specialized application of employment contracts under the umbrella of the common law (except in Quebec, where civil law governs the relationship) and statute law, created by government legislation. Employment law developed out of the old English 'master and servant' relationship which governed employment contracts where an employer, or master, had individual contracts with each employee, or servant. Despite

the development of collective bargaining, individual contracts are the most common form of employment relationship.

Statute law is legislation at the federal, provincial, and territorial levels that governs both unionized and non-unionized workers. Employers cannot contract out of an employment standard specified by statute. For instance, human rights and labour standards legislation set out standards that invalidate an employment contract that is not consistent with the legislation (Sproat, 2002). In addition, wrongful dismissal law does not apply to employees whose rights are defined by statute or a collective agreement. Nevertheless, labour standards statutes throughout Canada usually do not preclude an employee's recourse to superior common-law rights with the exception of some Quebec employees (Mole & Stendon, 2004). Further, where statute law does not specifically address the matter in question, common law principles apply. Statute law may be superceded by common law due to the uncertainty of the wording or the intention of the statutes, the inability of a statute to anticipate all situations, or because the statute is recognized to stipulate minimal standards of performance only (Levitt, 2004).

Canadian employment statute law has had a distinctive development primarily because of its diverse origins in at least eleven jurisdictions. Most of the responsibility for employment fell to the provinces because of the division of powers in the British North America Act. Because of the limited jurisdiction of the federal government over certain areas of employment (transportation, communications, financial institutions, and crown corporations) federal employment legislation affects approximately one in ten workers. In such a decentralized system, innovation in Canada's employment law has been driven by diverse interests and implemented independently in each of the various jurisdictions.

Experience with the new developments in law can be evaluated by other jurisdictions, which then have the opportunity to adopt what they feel is appropriate.

Despite the large number of jurisdictions a great deal of uniformity exists. All workers are covered by either federal or provincial statute law and by the common law with few, if any, substantive differences between jurisdictions. The employee's rights are protected by statutes ensuring minimum standards of employment, human rights and equality.

Union and Non-union Workers' Contracts

The non-union contract, while sharing many of the same principles and provisions of collective agreements, sharply contrasts with the collective agreement. For the union-ized worker, a collective agreement covers nearly all contract bargaining, leaving little for the individual to bargain. Furthermore, unions help workers achieve bargaining power that they could not have individually, and win improvements in working condi-tions for themselves and, indirectly, for all workers. Nonetheless, while improvements in the terms of employment are achieved by virtue of being a member of a bargaining unit, the employee forfeits some individual freedom for collective strength. For the employee, the collective agreement becomes the basis of day-to-day activities, grievances, and longer-term negotiations and, in maintaining union membership, the employee may pro-vide indirect support for issues which may not reflect personal beliefs or are contrary to their wishes.

To the frustration of some employees, the courts defer to the agreement between contracting parties (an employer and a union, or an employer and an individual) entered

into without duress or an imbalance of bargaining power. "In order for the contract to have contractual force, there must be a concluded unambiguous agreement, consideration and a contractual intention..." (Levitt, 2004; p. 3-6.1). In addition, the union is recognized as the legal bargaining agent for employees. The courts will reach common law interpretations only in the absence of clear provisions in the collective agreement or other statutory provisions.

In contrast to the collective bargaining of unionized employees, non-union employees are typically hired under an individual contract for an indefinite term. Moreover, the contract is typically an evolving agreement with unique rights and obligations and few, if any, terms in writing. Consequently, the courts are required to imply contract terms from what should have reasonably been contemplated by both parties at the outset of the relationship, from actions or words of either party throughout the contract, from corporate, industry, or professional practice, and even from the relevant treatment and behaviour of other employees, among other considerations. For instance, the courts may imply terms that are required to complete an employment contract. An example of such a term is the implicit recognition in employment law of the employer's duty to provide reasonable notice of termination or salary and benefits in lieu of notice in the event the dismissal is not justified by cause. Hence, the reports of wrongful dismissal cases are fertile ground for the examination of HR management practices.

Canadian, American, and British Employment Law Contrasted

The Canadian experience with respect to employee dismissal differs from both the United States where the 'at-will' doctrine[3] continues to dominate employment law and from the United Kingdom where workplace wrongs are addressed primarily under a statute-based adjudication process. Unlike the employment-at-will doctrine of the United States (Dannin, 2007), an employee in Canada is generally entitled to reasonable notice of termination or severance in lieu of notice unless the employer has just cause for dismissal. Even though the employment-at-will doctrine in the United States has been eroded by federal and state laws prohibiting discrimination (Kesselring & Pittman, 1993), by unjust-dismissal legislation (Abraham, 1998; Dannin, 2007), and by the emergence of common law exceptions in tort and contract law (Dannin, 2007; Dunford & Devine, 1998), most states allow maximum employer discretion in employee dismissals and the courts presume employment-at-will to be in effect unless it is specifically nullified by statutory law, personal contract or a collective bargaining agreement (Dunford & Devine, 1998).

The number of American employees not covered by 'just cause' protection against dismissal (which is generally contained in collective bargaining agreements for instance), has been estimated at 60 million of whom some 2 million are dismissed each year (Kornblau, 1987; Stieber, 1985). Furthermore, Stieber (1985) estimated that 7.5% of the two million discharged at-will employees would have won reinstatement under a collective bargaining agreement requiring terminations be for just cause if they had en-

---

[3] The employment-at-will doctrine says, "... unless an employee has bargained for an express contractual limitation, his employer can terminate the employment 'for good cause, for no cause or even for cause morally wrong'" (Payne v. Western &A.R.R., 81 Tenn. 507 (1884), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915) as cited in Kornblau 1987).

joyed such protection. This disparity, along with the general decline in union membership in the United States since the mid-1960s (Taras & Ponak, 2001), has been the basis for calls for additional job security protection (Kornblau, 1987).

Employment-at-will is now rare in Canada, since only senior government administrators are employed 'at the pleasure of the crown' as specified by statute and hence subject to employment-at-will unless they have negotiated severance packages in their contracts. In addition, some employees may be employed at-will in industries where it is custom, such as some commissioned sales people, and some agents and independent contractors (Mole & Stendon, 2004). Canadian dismissal experience may also differ from American practices with respect to the extent that in Canada wrongful dismissal lawsuits represent a broader range of occupational levels than in the United States where typical wrongful discharge plaintiffs are dismissed executives and managers rather than hourly and low-level salaried workers (Kornblau, 1987).

British workers, although entitled to notice under the common law, have found the British common law remedy to wrongful dismissal inadequate and have, instead, come to rely on statutory protection and employment tribunals (Knight & Latreille, 2001) which tend to offer better and quicker justice. While labour standards have also been legislated in Canada, they are considered minimum standards only. In contrast to the American and British experience, some dismissed Canadians have found the common law courts to be quite sympathetic to employees terminated without just cause.

Canadian Common Law of Wrongful Dismissal

Under the common law of wrongful dismissal, non-union employees in Canada are generally entitled to reasonable notice of termination or severance in lieu of notice unless the employer has just and sufficient cause for dismissal. Although there are several other issues to be considered, wrongful dismissal cases centre on two key determinations: (1) was the employee terminated for just and sufficient cause? (2) if not terminated for cause, to what length of notice of termination should he or she have been entitled?

Terms of the Employment Contract

The common law courts' interpretation of the non-union employment contract typically comes from an analysis of a combination of both oral and written terms, the practice of the parties, and terms implied by both the law and the intention of the parties. Each non-union employee is deemed by common law to have an individual contract with his or her employer, typically hired for an indefinite term. The contract is a dynamic, evolving agreement with sometimes subtle rights and obligations, and few if any terms in writing.[4] Therefore, the courts are required to interpret the terms of the contract from what would have reasonably been contemplated by both parties at the outset of the relationship, in subsequent discussions, or implied by the actions or words of either party throughout the contract, corporate, industry or professional practice, even the relative treatment and behaviour of other employees, among other considerations.

Oral Terms. Most employment contracts, especially those of more junior employees, consist of "oral agreements comprised of promises" made relative to job duties, salary, or

---

[4] Wagar and Jourdain (1992) reported that written contracts of employment were present in only 6% of the 177 Canadian wrongful dismissal court cases examined.

the term of employment, including the possible provision for termination (Levitt, 1992; p. 57). The court must piece together the rights and obligations of employee and employer when there is no written contract or if the written contract is not comprehensive, which is frequently the case. Not only does the court consider terms agreed to orally by the parties but also statements made by the employer which have been used to the disadvantage of the employee (Sproat, 2002).

Written Terms. Generally, written conditions which have been brought to the employee's attention before acceptance of a job offer are to be considered part of the employment contract. A common practice of having the potential employee sign materials that have been brought to her or his attention and acknowledged can be effective in making such information part of the employment contract. Written information in the form of letters of offer, published rules, brochures, administrative documents, personnel manuals, and annual letters can also provide the employer with protection against wrongful dismissal particularly if the employee accepts without protest and the documents also contain provisions favourable to the employee. However, if a document provided to the employee after he or she has accepted employment contains nothing of value to the employee or only new obligations it may have no legal effect (Levitt, 2004).

Practice. Many terms of employment, such as hours, job duties, and reporting relationships, which have never been discussed nor found in written form, will be implied from the parties' actual practice (Levitt, 2004) or from the terms and conditions enjoyed by others in analogous positions.

Terms Implied by Law. Terms, such as the requirement to provide notice of termination and the employee's duty of faithfulness and confidentiality, are implied by the courts

in all employment relationships (Levitt, 2004). Nevertheless, the terms are implied, not from "rigid principles" but from an assessment of the "entire history of the employer-employee relationship as it evolved" (p. 3-16).

Terms Implied by the Intention of the Parties. While the courts are reluctant to imply a term into a contract, they may in cases where the real intentions of the contracting parties can be determined. However, "the evidence of the conduct of both parties must strongly support" the term in "that it was so obvious that it 'went without saying'" and an implied term is much less likely if there is a written contract (Levitt, 2004; p. 3-18). A term is more likely to be implied from intentions at the time of hiring, or when the employee has experienced a material job change, when the discussion of such intentions is made more explicit. In addition, the courts will consider industry custom and practice in order to ascertain the usual understandings and traditions in the particular type of business. In the balance, however, the parties' behaviour is the definitive test of what was their intention.

Cause for Dismissal and Employer Onus

While an employer may dismiss any non-union employee at any time provided the employee receives sufficient notice of the termination, or severance in lieu, the employee who has breached a fundamental term of the employment relationship is the exception and may be dismissed without notice. Nevertheless, demonstrating that the employer had legal cause to terminate an employee is frequently quite challenging. To begin, an employee (the plaintiff) who feels they have been wrongfully dismissed may bring a civil action against the employer and is required to establish a prima facie case

only, that a) s/he was employed and b) s/he was dismissed (expressly or constructively). Once a prima facie case is established, the onus shifts to the employer (the defendant) to justify the dismissal. Harris (1990) summarizes the defendant's duties in this regard:

> "It is a firm principle of common law that the onus rests upon the employer to prove the existence of just cause, an onus that must be demonstrated beyond the balance of probabilities... In asserting just cause, the employer must show more than mere dissatisfaction with the plaintiff's performance. Real misconduct or incompetence must be demonstrated" (p.3-101).

Just and Sufficient Cause

In order to succeed at court, the employer must establish, on the balance of probabilities, just and sufficient cause for the employee's dismissal, the breach of an implied term which is serious enough to constitute a "fundamental repudiation" of the employment contract (Levitt, 2004; p. 6-11). If the courts find that there is just cause for dismissing the employee having considered the seriousness of the offence, the employer is not obligated to provide notice, or severance in lieu of notice. Where the employer believes they have just cause they may also consider a constructive dismissal such as the demotion or suspension of the employee (Levitt, 2004). If there is no cause or cause is insufficient to justify dismissal or constructive dismissal, the employee is entitled to notice of termination or equivalent compensation. Since discharge in a contract of personal service is likely to poison the employment relationship, severance in lieu of notice is the only settlement considered under common law and it represents the severance policy used almost exclusively by employers.

As workplace and other social norms and mores change, so too does what might be considered cause. What was considered cause in the past may no longer be and, like-

wise, what constitutes cause at any point in time can never be fully catalogued as human behaviour is limitless. Nevertheless, legal scholars and others have attempted to enumerate the many just cause defenses argued at court. McShane and Redekop (1990) offered an early categorization of employer defenses for dismissal for just cause which had three broad classes including misconduct, unfaithful service and gross incompetence. A fourth series of defenses that may be considered in this schema is the defense based on the contractual rights of the employer such as those based on the employee's status or the relationship with the employer. Such defenses may be used to justify terminating a probationary employee or an employee under an agency contract for instance. In addition, an employer may also seek to limit common law obligations by having an employee agree to a settlement and a release from further liability.

Finally, a fifth series of defenses includes dismissal for business reasons such as lack of work, reorganization of the workplace, or reassignment. All of the defenses in the fourth and fifth categories generally meet with mixed success, however, as the courts are generally hesitant to allow the dismissal of an otherwise satisfactory employee for reasons unrelated to the employee's performance or for terms agreed to by the employee at the time of dismissal when the employee is most vulnerable. The employer has great difficulty escaping the duty of fairness and reasonable treatment of the employee. A more detailed enumeration of causes which can lead to dismissal can be found in Grosman (1984), Harris (1990), Levitt (2004), Mole and Stendon (2004), or Sproat (2002).

The test for just cause has been delineated by Schroeder J.A. in a dissenting opinion of the Supreme Court of Canada in *R. v. Arthurs: Exparte Port Arthur Shipbuilding Co.* (1967), a definition relied on most frequently in recent decisions:

> "If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee" (p. 55).

Justice Schroeder made explicit that an additional test, that the employee breach must be one of substance, is also appropriate. In addition, he does not seem to rule out prejudicial conduct outside of the place of work as a possible cause for dismissal. The employee has a strict duty to provide faithful service, since to do otherwise would create doubt as to his or her trustworthiness to carry out the business of the company in a manner consistent with the company's interest.

Nevertheless, employees have protection from arbitrary dismissal or dismissal for acts which do not have a substantial impact on the employer's business. First, what is considered sufficient cause must vary with the circumstances:

> "The causes which are sufficient to justify dismissal must vary with the nature of the employment and the circumstances of each case. Dismissal is an extreme measure, and not to be resorted to for trifling reasons. The fault must be something which a reasonable man could not be expected to overlook..." (*McIntyre v. Hockin*, 1889; p. 501).

Second, employment is further secured by an employer's duty to an employee:

> "... the employee is taken to some extent for better or worse. There must be as I understand the cases, more than mere dissatisfaction..." (*Carveth v. Railway Asbestos Packing Co.*, 1913; p. 874).

A three-part test for what is justifiable cause is set out in this more recent case:

> "The particular act justifying dismissal without notice must depend on the act itself, upon the duties of the workman and upon the nature of the possible consequences of the act" (*Zeigler v. Victoria (City)*, 1972; p. 76).

In summary, employee dismissals must be evaluated in context giving regard not only to the kind of misconduct but also to all the circumstances around the act, the status

and responsibilities of the employee and employer, and, perhaps most importantly, to the seriousness of the consequences of the act or the incompetent performance. No matter how dissatisfied with the employee or how sincere its intentions, if the employer does not demonstrate objective and material injury to business operations, it is less likely to demonstrate to the courts' satisfaction that it has cause. The courts may examine some of the following circumstances in determining whether cause existed: Was the cause relied on at the time of termination? Did the company suffer damages? Did the employer claim that the employee misconduct or incompetence was more serious than could be established at trial? The answers to these questions may alter the courts' perception of the employer's credibility.

Constructive Dismissal

Constructive dismissal is a termination under the law of wrongful dismissal which must also meet the requirement for reasonable notice in the absence of just cause. It is referred to as a 'constructive dismissal' because the employer has not formally dismissed the employee. A constructive dismissal may be any fundamental breach or substantial change of a major term or essential condition of the employment contract. The concept does not extend to minor or incidental terms of the contract. In finding that a constructive dismissal has occurred, the court must determine the terms of the employment contract, whether there has been a breach of one or more of those terms, and whether it amounts to a fundamental breach. Levitt (2004) suggests that there is no obligation on the employer to change the essential terms of the contract to accommodate an employee's

health needs. In addition, the employee's dissatisfaction with the new terms does not necessarily constitute a constructive dismissal.

Employee Incompetence or Poor Performance as Cause for Dismissal

As noted earlier, my focus in this study is dismissal for incompetence or poor performance rather than wilful or other forms of misconduct. In these cases, there is a greater likelihood that the courts examine the employer's effort to manage the employee's performance. The general principle underlying incompetence as just cause for dismissal is an implied warranty that the employee is reasonably competent for the work for which she is employed. If the employee proves to be incompetent, the employer is not required to continue the employment relationship for an indefinite term. However, proving that the employee performed poorly in a manner that justifies dismissal is a somewhat complex task. The employer must have demonstrated much more than that the employee was "unsatisfactory, careless or indifferent" (Levitt, 2004; p. 6-75).

In addition to establishing the shortcomings of the employee, the employer must also clearly demonstrate the faithful discharge of its duty to the employee. Levitt (2004) draws on the case law to demonstrate the employer's obligations with respect to performance standards including the following: the employer must set performance standards which are reasonable and realistic, consistently enforced, do not conflict with other performance standards, and which represent the employee's substantive tasks; the employer's expectations and standards must also have been clearly communicated to the employee who should have received feedback, instruction, supervision, training and other support as required to learn and perform the tasks; and, the employer must be able to es-

tablish that the employee's performance fell below an objective standard and that he or she was incapable of meeting the standard for that job or for other positions.

The employer must also have provided warnings of deficiencies or performance levels that if not met would lead to termination. Generally, employee incompetence or poor performance must be "grossly deficient" for termination to result if there has not been a series of warnings (Levitt, 2004; p. 6-79). Once again, Levitt (2004) reviews the case law in order to illustrate the employer's obligations with respect to the provision of warnings including: it must be much more severe if termination is abrupt rather than after a series of warnings and it must take into account the circumstances; warnings of poor performance must be clearly understood and specifically communicated to the employee; simple criticism or urging the employee to improve will not suffice; the warnings could take the form of the employee being told of the consequences of poor performance, that the employee's performance is not meeting standards and that dismissal may result, or that the employee's job is in jeopardy; it should be obvious to the employee that termination is likely if poor performance persists; and, the employer should ensure that the employee is told what is required to improve and provided a timeline and opportunity to improve.

Furthermore, the employer must give weight to the deficiencies in proportion to their importance to the substantive tasks, and to the employee's past good performance, age, tenure, and improving performance (see Appendix A: Factors Mitigating Against Incompetence for a fuller description of factors that employers have been required to establish in order to show cause). The courts will downplay the seriousness of the poor performance if the employee displayed no intent to repudiate the employment contract,

did not benefit from his behaviour, or if the poor performance was not serious in the context of the employee's duties and overall relationship with the employer. Moreover, if there was no real loss, risk, or jeopardy to the employer caused by the poor performance, it may not be considered serious (Levitt, 2004).

The difficulty of proving incompetence was clearly illustrated in a case heard in the Nova Scotia Supreme Court (*Rogers v. Canadian Acceptance Corporation Ltd.,* 1982) in which a sales agent with substantial experience and success in various positions with the same company was discharged on the basis of declining sales figures. The employee had been transferred to a new territory and asked to service a market niche for which he had not any previous responsibility. In finding for the employee, the trial judge stated:

> "Although warnings were issued, I do not think this sufficient merely to show that a loss was incurred. To establish the existence of just cause for summary dismissal, it must be shown that there was a causal connection between the loss and actual incompetence on the part of the employee. Quite clearly the burden of proof is on the employer... In the present case they do not think that burden has been discharged by the defendant any evidence as to factors contributing to the loss is not clearly indicate the extent of the plaintiff's responsibility" (p. 548).

The court concluded that the warnings issued by the employer, which drew Rogers' attention to comparisons of actual versus budgeted sales for instance, provided no indication of the nature of the incompetence, only what was already obvious. Furthermore, the employer ignored Rogers' improving sales performance and had been arbitrary, short-sighted, and insensitive in dealing with the legitimate requests of a long time, dedicated employee. The employer had asked him to fill a vacancy for which he was unaccustomed after passing him over for an available position which he had requested. The employer

had failed to consider the circumstances surrounding the apparent incompetence of an employee who, to the objective observer, was anything but. Rogers' setback was clearly temporary and rectifiable with a small effort on the employer's part.

A more recent case, *Day v. Wal-Mart* (2000), also illustrates the difficulty of proving poor performance justifying dismissal without notice. Day, the manager of a Wal-Mart store, was fired after 17 years of service for altering employee payroll records in order to eliminate the payment of staff overtime. He had taken this action on the strength of a recent, strongly-worded memo from the regional vice-president that overtime would not be tolerated and that a 'zero budget' had been allocated. In the usual course of managing Wal-Mart stores some editing of time records was necessary to correct errors even though his employer had a strong policy against editing the records. The jury found that in editing the records, Day was acting on his belief that he was enforcing the company's specific policy relating to overtime. In addition, he had received no personal benefit from his actions and freely admitted that he had made the changes. Moreover, in suggesting to Day that the situation was serious but that he would investigate and likely recommend against termination, the district manager had been less than candid in not acknowledging that the decision had been his all along. The Nova Scotia Court of Appeal affirmed the lower court's decision that Day should be awarded 17 months notice and an additional 12 months *Wallace* damages.

Factors Assessed in Incompetence or Poor Performance

The factors examined by the courts in considering incompetence have been enumerated and summarized by several authorities (Harris, 1990; Levitt, 2004; Mole &

Stendon, 2004; Sproat, 2002). While Levitt (2004) lists thirty-seven items that have been required in order for employers to prove just cause for dismissal based on incompetence, my review will be limited to a brief discussion of the major factors considered by the courts in incompetence cases.

Because mere dissatisfaction with an employee's performance is not sufficient to justify dismissal for cause, an employer must demonstrate serious incompetence, a real inability to carry out the duties for which he or she was hired. Evidence of incompetence might include substandard work performance that persists even after appropriate and reasonable support and time have been provided, and the employee has been given specific instructions on how and what to improve with appropriate warnings issued. As well as providing adequate training for new and current employees, employers should clearly communicate expectations and standards constituting acceptable performance, and that failure to reach these standards will constitute cause. The communication of standards might be accomplished by one or more approaches. In addition to statements in job descriptions, standards may be discussed in interviews, performance evaluation assessments, or when providing an employee with a warning of the consequences of substandard performance. It is essential that the message is received and understood by the employee.

Proving incompetence depends on measuring performance against expectations. Hence evidence of a formal performance appraisal system may lend credibility to an employer's defense. It is essential that the standards of performance are reasonable, applied equally, and are non-discriminatory. For instance, the employer will be judged to have condoned the deficient performance if other employees with similar job duties are also

performing below standard but are not recognized by the employer as poor performers. Condonation is a possibility where there are circumstances which might cause the employee to receive mixed messages about her or his performance, or where the performance problems are overlooked (Mole & Stendon, 2004). Where the employee's performance is substandard, the employee must be warned that his or her job is in jeopardy if performance remains below standard. Warnings should not be merely general statements indicating that performance is unsatisfactory or urging the employee to improve performance. Rather, the warnings must convey standards delineating effective performance and must outline specific action the employee should take. Furthermore, the employee must be given a reasonable period of time to improve performance or, if new to the job, she or he must be given a reasonable opportunity to learn the job and perform accordingly.

The seriousness of employee incompetence may also be mitigated by the existence of circumstances beyond the employee's control. Poor performance must be clearly related to the actions of the employee; that is, the employee's shortcomings should be the actual cause of business losses, declining sales, low morale, or other poor performance. The existence of factors that contribute to temporary poor performance, and which may be outside the control of the employee, tend to deflect responsibility. For instance, the employee's poor performance must not have been partly due to the actions of the company such as failing to provide the necessary support or failing to act to remedy the problem. In addition, incompetence must be shown to be related to a task that is serious in its consequences for the employer in light of the organization's policy and obligations to the employee, such as poor performance that endangers the safety of others.

In *Reilley v. Steelcase Canada Limited* (1979), the court held that in certain circumstances, an employee should be allowed a formal hearing prior to the drastic step of dismissal, in order to satisfy procedural fairness and/or to ensure that the full facts of the situation are known. There is considerable agreement that a single incident of incompetence should rarely be grounds for dismissal, particularly where the incident is an isolated occurrence in what may otherwise be an unblemished record. However, as was held in *Ross v. Willards Chocolates Limited* (1927), it may be sufficient to rely on a single incident where the employee's conduct shows a general laxity and disregard for instructions and may merge with previous offenses to constitute just cause for dismissal. Similarly, where an employee's performance has been of generally high quality, a single incident of poor performance, or a deficiency that is not central to the job or that falls outside the capabilities for which the employee was hired, is typically not sufficient to justify dismissal. The courts will look for and consider mitigating factors or alternative explanations that help account for the alleged incompetence.

Furthermore, in labour arbitration poor performance or incompetence falls into two categories, a non-culpable behaviour for which the employee cannot be faulted or a culpable behaviour which is the intentional failure to perform one's duties. In cases of non-culpable incompetence, discipline is not considered appropriate or required (Knight, McPhillips & Shetzer, 1992).

'Near Cause' and Employee Incompetence

The courts have referred to the shortening of the period that would be considered reasonable notice where there was cause for dismissal but it was not sufficient to justify

the employee's dismissal as 'near cause' or the 'third option' because it is an intermediate solution between full notice and no notice. In these cases, the employer may argue that, even though the employee's actions were not sufficient to justify dismissal, it should be considered a factor which reduces the notice period thereby justifying the provision of "moderated damages" or lesser severance to the employee upon termination (Mole & Stendon, 2004; p. 289).

However, there has been considerable disagreement within the courts over the application of near cause. In some jurisdictions, the courts have ruled that dismissal is seldom a clear cut issue and greater latitude is required to arrive at a reasonable settlement. In these cases, the courts chose to reduce notice as a result of questionable conduct rather than deny notice altogether. A more objective approach to near cause, which had won some endorsement, was to reduce damages awarded to the employee only when it was demonstrated that the employer had suffered a loss as a result of the employee's actions. However, the Supreme Court of Canada rejected near cause which should entirely remove the argument from consideration (*Dowling v. Halifax (City)*, 1998 in Mole & Stendon, 2004). As a result of this decision, the courts should simply determine whether there is cause for dismissal or not. When cause is not sufficient to justify dismissal, such as for incompetence or poor performance, the employee should have the full entitlement to reasonable notice. Nevertheless, in addition to influencing the outcome of a case, it may be possible that the employee's performance is a factor that will continue to affect the length of the period of reasonable notice. For instance, Lam & Devine (2001) found that HR managers not only expressed the view that poor performance should reduce notice peri-

ods but that it also caused the HR managers to reduce notice periods in an experimental setting.

Probationary Employees

Employers of probationary employees are mistaken in their belief that their obligations to the employee are extremely limited or nonexistent. In earlier decisions, probationary employees could be terminated without notice and without reason. But, an analysis of more recent jurisprudence suggests that the probationary period is intended only to assess whether an employee can do the job (Levitt, 2004). Probationary employees, while they may be discharged for a wider variety of cause, or for lesser cause, must not be dismissed arbitrarily:

> "... in order to terminate a probationary employee, the company must affirmatively prove that the probationer was 'unsatisfactory' in the sense that he does not meet the standards which the company sets for its regular employees. In making this decision, management may not set standards which are 'unreasonable'. Nor may management assess whether the employee will be 'satisfactory' in a manner which is arbitrary, discriminatory, or in bad faith" (Re *British Columbia telephone Co.*, 1977).

The additional scope afforded employers in terminating probationary employees is described in *Kirby v. Motor Coach Industries Ltd.* (1981):

> ... The majority of arbitrators has expressed the view that an employer is entitled to discharge a probationary employee on such grounds as on suitability which might not support the termination of the seniority rated employee and which has embraced such considerations as the character incompatibility of the probationary employee as well as his ability to meet the present and future production standards demanded by the employer... (p. 397).

Nevertheless, the broader scope afforded employers in the termination of probationary employees does not diminish the need for an objective assessment.

Tests enumerated in the courts' decisions which must be satisfied in order to justify a probationary employee's termination have included (Levitt, 2004):

- The employee assessment must not be "arbitrary, discriminatory, or in bad faith," and against the standards for regular employment, criteria of which are "fair, reasonable, known to the employee," and done in a "reasonable fashion" (p. 1-49, 1-50);
- The employee must be given a "fair opportunity to demonstrate the ability to perform the job," and an "opportunity to respond to management's concerns" (p. 1-50);
- Since the court will only assess whether the employer's decision was fair and reasonable (see the previous two points) and not "the correctness" of the decision, "the employer may consider the employee's character ... compatibility with the workplace and the other employees, and the ability to meet not only present but future production standards" (p. 1-50, 1-51); and
- If no cause for dismissal exists, the probationary employee "must receive notice of termination," although possibly less notice than if the employee was not probationary (p. 1-51).

However, the common law for probationary employment is "new and developing rapidly" and so "arbitral jurisprudence dealing with unionized employees is still relied on to some extent" (Levitt, 2004, p. 1-52). Finally, an employee can be placed on probation

as a form of discipline if the effect is to provide a warning but not if it is a unilateral change in the terms of employment (Levitt, 2004).

Canadian Legislation and Wrongful Dismissal Remedies

Since 1978, reinstatement provisions similar to those provided for employees under collective agreements have been extended to non-unionized, non-managerial employees who have been employed by a firm covered by the *Canada Labour Code.* Under section 240 (1) of the Code:

> "... any person (a) who has completed twelve consecutive months of continuous employment by an employer, and (b) who is not a member of a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust."

A managerial employee is defined as an "administrator having power of independent action, autonomy, and discretion" (Levitt, 2004; p. 2-13).

The inspector will investigate and mediate a settlement if possible. If unsuccessful, the complaint goes to adjudication and, if the person is found to have been unjustly dismissed, according to section 61.5(9) the adjudicator may require the employer to:

1. Pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
2. Reinstate the person in his employ; and
3. Do any other thing... to remedy or counteract any consequence of the dismissal.

Nevertheless, it has been suggested that adjudicators with the power to reinstate may tend to award damages rather than reinstate the wrongfully dismissed employee as a result of

the adjudicator's perception that reinstatement would create a bias against the employee following reinstatement (Levitt, 2004).

In addition, legislation similar to the federal *Canada Labour Code* has been enacted in both Nova Scotia and Quebec. Under these provisions, eligible dismissed employees have the option of either bringing an action before the courts or laying a complaint under the terms of the code. Although actions may be commenced simultaneously, once a final decision has been reached by the court or the adjudicator, there is no further recourse to the other remedy. If the employee proceeds with an action under the code and subsequently also proceeds with an action before the courts, the court will be bound by the adjudicator's finding as to whether just cause exists. If the adjudicator orders reinstatement, however, the action for wrongful dismissal will be rejected; since the contract has been reinstated, there is no longer a breach of the employment contract.

Although there is significant variation between the remedies available under statute and common law, adjudicators may rely on the jurisprudence of both labour arbitration and common law wrongful dismissal. For instance, concepts such as 'progressive discipline' and 'culminating incident' have developed similar meanings in each area of law.

The various provincial employment standards codes provide only minimum standards to protect employees in workplaces regulated by these codes. For instance, the notice of termination provisions are only the minimum notice periods that an employer is required to offer when terminating employment without just cause. The notice can be no less than that specified in the relevant code. In addition, the common law courts, when specifying the notice to which the employee is entitled, frequently exceed the minimum

standards to a considerable extent. For instance, employees who have been hired but then fired before they had even commenced working have been awarded as much as six month's severance pay (Levitt, 2004).

However, under employment standards legislation, the amount of notice provided is limited to that set out in the Act. Nevertheless, an employee's action permitted by employment standards legislation can be "an effective and cost-free remedy to certain employees" (Levitt, 1992; p. 38). The remedy provided by employment standards legislation is all the more relevant given the disadvantages of going to court that may be experienced by dismissed employees. In going to court, the employee bears the risk associated with the costs of legal action for both themselves and the employer if unsuccessful. Consequently, the wrongful dismissal cases that are eventually resolved by the court cannot be said to represent the particular employee legal actions with greatest merit as much as the cases that are likely to represent the resources available to the employee to pursue the action.

Reinstatement Remedy at Common Law

Common law decisions are distinguished from labour arbitration decisions and non-union arbitral decisions in Nova Scotia, Quebec and the federal jurisdiction in that the courts do not use reinstatement as a remedy. The courts hold that the implied conditions and goodwill at the outset of the employment relationship are irreparably damaged as a result of the dismissal and are reluctant to order specific performance of contracts of service against an employee. In contrast, under a collective bargaining regime, reinstatement has long been held to be a successful remedy to unjust dismissal. The argu-

ment against reinstatement, which is normally based on the personal nature of the employment contract, is diminished by the collective nature of the union contract. In large, industrial enterprises, most employment is of an impersonal nature. It has also been seen as a victory for the union movement in establishing that workers have rights to their jobs in the absence of just cause (Williams & Taras, 2000). The provision of this remedy should increase interest in the analysis of reinstatement in non-union as well as in labour arbitration research.

However, the reinstatement remedy may be undermined by the reinstated workers experience after re-entering the workplace. Williams and Taras (2000) interviewed union workers who had been returned to work after a reinstatement order, and Trudeau (1991) and Eden (1994) investigated non-union workers' experiences after being reinstated by an adjudicator. Williams and Taras (2000) concluded that there was a gap in the support that unions claim to offer and the support that actually exists for reinstated workers. Moreover, Trudeau (1991) reported that reinstated non-union workers stated that they had been treated unfairly by their employers after their return and that a reinstated employee is most likely to leave work within a few months of reinstatement. In addition, Eden (1994) asserted that the result of non-union worker reinstatement negatively contrasted with the experience in union settings.

Given the subsequent impact on discharge rates reported by Bamberger and Donahue (1999), further study of reinstatement should be undertaken before it is more broadly adopted in the adjudication of cases brought by dismissed non-union employees under labour statute. Furthermore, Bemmels and Foley (1996) recommend that future research of arbitration decisions include explanations for gender differences in reinstate-

ment rates, analyses of why reinstatement is frequently unsuccessful, and a study of the circumstances under which reinstatement is the best solution, or whether it is an opportunity for retaliation against the reinstated employee.

Reasonable Notice of Termination

Once it has been determined that the dismissed employee has been terminated without just cause, the court must decide the length of notice which is reasonable in the circumstances and consistent with common law principles. The practical purpose of reasonable notice is to provide the employee with a reasonable period of time to locate a position of similar stature requiring the skill or ability comparable to the position from which they were dismissed or to locate a position for which the employee is qualified or suitable, subject to additional factors such as length of service, labour market conditions, industry custom, age of the employee, and circumstances surrounding the hiring (Levitt, 2004).

In some decisions, the courts have concluded that the proper notice is what would have been contemplated by the parties at the time of hiring. It would follow then that the economic or business circumstances at the time of termination could not be foreseen and, therefore, should not be considered. In these cases, the parties are reasonably sophisticated in terms of negotiating contracts and considered to be relatively equal in bargaining power. However, in many cases the courts seem to have assumed that the appropriate test is what the parties would have agreed to at the time of hiring given knowledge of the circumstances at the time of termination.

The leading case in this area, the decision of Mr. Justice McClure in *Bardal v. Globe and Mail Limited* (1960), outlines the basic factors to be considered:

> "There can be no catalog laid down as to what is reasonable in particular classes of cases. The reasonableness of the notice must be decided with reference to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant" (p. 145).

While Levitt (2004) listed more than one hundred factors that the courts have considered and which have formed the basis of its judgments, he examined two dozen which he claimed had been given weight by the courts, or were of interest and potentially important in the future (p. 8-21 to 8-65). They included: the employee's specialization and status, age and length of service, the availability of similar employment, custom and nature of the industry, circumstances surrounding hiring, and the manner of dismissal. However, his analysis is a subjective assessment of decision criteria based solely on a descriptive survey of wrongful dismissal cases.

The courts have stressed that employers cannot take "refuge in the application of a blanket formula" since the "individuality" of each employment contract must be considered and "fairness requires a balancing of the applicable factors" (*Kothlow v. Westcoast Savings Credit Union*, 1987; p. 10-11). If such a view prevailed in either the courts or in HR management practice, it might tend to limit our ability to model notice decisions because each would be of such unique character that few consistent patterns would be found – a view that seems to be held by some legal scholars (Grosman, 1984). However, because several studies of reasonable notice criteria have found that a relatively small number of factors explain most of the variance in notice periods awarded, a fairly uni-

form practice does seem to have existed in the courts. At common law, the notice period awarded by the courts has frequently far exceeded labour code provisions, on occasion reaching two years (*Wallace,* 1997) or more (*Day v. Wal-Mart*, 2001).

Reasonable Notice and the Employee's Duty to Mitigate Losses

The defendant (the employer) may present evidence to demonstrate that the employee, once terminated, did not act diligently to mitigate loss of income. This principle is summarized in *Gardner v. Rockwell International of Canada* (1975):

> "... It was the duty of the plaintiff to attempt to secure other employment and make all reasonable efforts to secure such a position as one could reasonably expect him to take under all the circumstances" (p. 513).

Once again, the onus is on the defendant to not only prove a plaintiff's failure to mitigate but also to show that had steps been taken to mitigate, alternative employment would likely have been found. Moreover, the Supreme Court of Canada (*Evans v. Teamsters Local Union No. 31*, 2008) recently ruled that the dismissed employee had failed to mitigate his loss of income by unreasonably refusing the employer's offer to serve out the balance of a 24-month notice period. The Court asserted that the employment relationship had not been seriously damaged and Evans could have continued working under the same terms.

Nature of the Employment Relationship: The View of the Supreme Court of Canada

"... *Wallace* has become one of the most significant employment law decisions."

Levitt (2004, p. 8-53)

Inequality of Bargaining Power

In describing the impact of *Wallace* (1997) on the development of employment law, Levitt (2004) stated that "Not only must the law not sanction the deliberate and callous disregard by the powerful of the weaker person's rights, the law must do what it can to ensure, by whatever means are at its disposal, that the legal rights of a citizen are protected from the tyranny of another" (p. 8-53). In reaching its decision in *Wallace* (1997), the Supreme Court of Canada espoused the view that the innate nature of the employment relationship is that the employee and employer are in an unequal bargaining relationship and that the employee is in a vulnerable position. "Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure" (Swinton, 1980; p. 363). Moreover, "This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship." (*Wallace*, 1997; para. 92). This opinion was later re-affirmed by the Court in *McKinley* (2001).

The Court cautioned that the employment contract must be viewed as something unique compared to a commercial contract, and that the employment contract is a special relationship and that employers have greater bargaining power. The Court quoted with approval Swinton (1980) who argued that unlike a commercial contract where an ex-

change is made between to traders, "the terms of the employment contract... particularly with respect to tenure... rarely result from an exercise of free bargaining power..." (p. 363). Moreover, the employment relationship typically requires an "act of submission" in its inception and a "condition of subordination" by an "isolated employee" in its operation (Davies & Freedland, 1983 in Wallace, 1997; para. 92). Furthermore, the Court claimed that work is a central feature of an employee's life, helping to define our identity, self-worth, and well-being. Any change of status will have ramifications for the employee, particularly if the change is involuntary, such as where the conditions of employment are changed by the employer unilaterally and without consultation with the employee, or after sufficient notice of the change.

The Court also stated that the employee is *most* vulnerable when terminated, and that the Court must act to minimize the damage to the employee when he or she is most vulnerable and encourage proper conduct including good faith and fair dealing in the manner of dismissal. The question arises, will the courts consider the employees' vulnerability in other aspects of the employment relationship, such as when the employee suffers health problems, has his or her employment relationship altered in some fundamental way such as that experienced in a new role or with a new supervisor, or as a result of relocation?

It should also be noted that the Court confirmed the employer's right to terminate and the ability to decide the composition of the workforce, which they explained would be contrary to accepted theories on the employment relationship. Wallace had argued that his employer had promised employment until retirement and that United Grain Growers must have good faith reasons to terminate him. The Court rejected the notion of

a guarantee of employment in the absence of a specific agreement and asserted that such a radical shift of the established principles of employment law would be better left to legislators. Such a guarantee would amount to job property rights, a right the court was not prepared to grant to non-union employees. Interestingly however, several jurisdictions (federal, Quebec, and Nova Scotia) that have established reinstatement rights for some non-union employees could be said to have implicitly recognized these rights (Swinton, 1980).

Wallace v. United Grain Growers Ltd. (1997) and Reasonable Notice Awards

In the following section, I describe the implications for reasonable notice periods that flow from the *Wallace* (1997) decision. In its landmark decision, the Supreme Court of Canada found that, even though there was insufficient evidence for Wallace to bring a separate action with respect to damages for mental distress, the trial judge had the discretion to extend the notice to which Wallace was entitled because "employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal" (*Wallace*, 1997; para. 95). Even though Wallace had been the top salesperson for each of the 13 years he had been employed by the defendant, he was summarily discharged without explanation and subsequently suffered emotional difficulties forcing him to seek psychiatric help. The employer's bad faith conduct and unfair dealing led to an intangible injury to Wallace in the manner of "humiliation, embarrassment, [and] damage to [his] sense of self-worth and self-esteem" (para. 103), which, the court held, should be compensated even if the injury hadn't led to the employee's inability to find new employment. If it had, the court may have awarded considerably more. The Court restored the trial judge's

award of 24 months notice, which the lower appeal court had reduced to 15, in part because Wallace had been induced to leave previous secure employment but in particular because the employer had been "untruthful, misleading and unduly insensitive" (para. 98). During the course of dismissal, employers should be, "candid, reasonable, honest and forthright" (para. 135).

Until the *Wallace* (1997) decision, the purpose of reasonable notice awards was to recognize the period of time in which the dismissed employee might have acquired comparable employment to that from which she or he was terminated. However, *Wallace* has been explicitly relied on in subsequent dismissal cases to extend the notice to which the successful plaintiff would otherwise have been entitled in recognition of tangible as well as intangible damages, which may not have a direct relationship to the employee's ability to locate new employment. For instance, in *Day v. Wal-Mart Canada Inc.* (2000) the Nova Scotia Court of Appeal agreed with the lower court and affirmed 17 months notice in addition to 12 months '*Wallace* damages.' Furthermore, it may be possible that the *Wallace* decision has also had an implicit affect on reasonable notice awards in general by extending the average length of notice awarded by the courts in cases in which *Wallace* has not been explicitly cited, an effect which has been referred to as the '*Wallace* Bump' in some HR management literature (Bhalloo, 2006).

Recently, the Ontario Court of Appeal (*Gismondi v. Toronto (City)*, 2003; p. 1B-5) summarized some of the kinds of bad faith employer conduct that fit the definition in *Wallace* (1997). Furthermore, the Ontario Court of Appeal allowed the trial judge's opinion that bad faith conduct could include the employer's conduct both before and after termination, as well as in its aftermath but only as it relates to the manner of dismissal.

The court also further stipulated, after a review of decisions following *Wallace*, that the conduct must be "something akin to intent, malice, or blatant disregard for the employee" (In *4th Annual Employment Law Forum*, 2003, p. 1B-6). Some examples of bad faith employer conduct are presented in Table 2-1.

Table 2-1: Examples of Bad faith Employer Conduct

False allegation	• That the termination was because of inability to perform the job; • That termination was for cause; • Persisting in the allegation of cause up to the time of trial; • Spreading word through the industry that the employee was terminated for dishonest conduct or having done 'something reprehensible';
Unreasonable Behaviour	• Refusal to provide letter of reference after termination;
Insensitivity	• Although the employee's position was eliminated, he was led to believe he would be transferred to a new job and only told of termination after selling his home; • Firing an employee immediately upon return from disability leave (because he or she was suffering from major depression);

Wallace damages may be said to represent a fundamentally new direction for wrongful dismissal law. In *Wallace* (1997), the Supreme Court of Canada made a distinction between 'tangible' and 'intangible' injuries, in that tangible injuries – those that lead to a loss because of the dismissed employee's difficulty locating alternative employment – are not the only losses which may be compensated in the reasonable notice award. Intangible awards – "humiliation, embarrassment, damage to one's sense of self-worth and self-esteem" – may also be compensated (para. 103). While the dissenting opinion in *Wallace* agreed with this view, it took a more conservative position which

maintained that such damages should be considered outside of the reasonable notice criteria such that the integrity of the principle of reasonable notice might be maintained. They argued that the addition of factors unsupported by "policy reasons" would lead to "confusion" (para. 117) about factors to consider based on the intent of reasonable notice – the time reasonably required to find alternative employment such that the employee would be placed in a similar position had the contract been performed – and would not "aid certainty and predictability in the law" (para. 119).

However, the majority view of the Court seems to be that employee rights must be protected in spite of how it might impair the 'efficiency' and easy interpretation of the law, in an attempt to lessen the '"economic and personal" (para. 95) damage inflicted on the employee. In addition, the court must act to create limits on the employer's ability to act unilaterally without regard to employees' "welfare" (para. 88). The majority argued that a strict application of reasonable notice had already been breached by other courts in the application of additional factors that had not been anticipated by the court in *Bardal* (1960). One such example which was offered by the Court is whether the employer had induced the dismissed employee to leave secure employment, so-called 'wrongful hiring.' They argued that many courts had already compensated wrongfully dismissed employees for the "reliance and expectation" (para. 83) that had been encouraged by promises of security, advancement, responsibility, and compensation by the new employer.

While *Wallace* damages have been more tightly defined in the recent *Honda Canada, Inc. v. Keays* (2008) decision of the Supreme Court of Canada, they may not be more difficult to achieve as has been suggested (Levitt, 2008). Levitt (2008) asserts that the Court's view is that *Wallace* damages should only be applicable in rare cases where

the understanding at the time of hiring is that the employee's dismissal could lead to hardship. In addition, the Court drew a distinction between *Wallace* damages, which are 'compensatory' and limited to damages actually suffered such as extraordinary mental distress, and punitive damages, which should be restricted to malicious and outrageous acts only (*Honda*, 2008). The Court warned of the issue of 'double-compensation where *Wallace* and punitive damages may be awarded without a basis for each. However, rather than limiting the possibility of additional damages, Levitt (2008) argues that this decision may have created an opportunity for creative counsel to obtain *Wallace* and aggravated damages.

Progressive Discipline and *McKinley v. BC Tel* (2001)

Prior to *McKinley v. BC Tel* (2001), any employee dishonesty may have been considered a 'revelation of character' and incompatible with the employment relationship (Jewitt v. Prism Resources Ltd., 1980), and even a single act of dishonesty could prove to be grounds for summary dismissal. In addition, the courts had been reluctant to clearly establish the test for employee misconduct. However, in *McKinley* (2001) the Supreme Court of Canada found that the trial judge's two-part test should lead to a more balanced outcome. The test enunciated was "(1) whether the evidence established the employee's deceitful conduct on a balance of probabilities, and (2) if so, whether the nature and degree of the dishonesty warranted dismissal" (McKinley, 2001; para. 65). Moreover, the Court also proposed the "principle of proportionality" in which the employer must balance the severity of misconduct or incompetence and the discipline imposed (*McKinley*, 2001; para. 66). The Court suggested that this balance must be placed in the context of

the central role of work in society and to the individual's sense of identity, worth, and well-being.

McKinley (2001) is expected to have consequences for HR management in that it promotes the use of progressive discipline[5] and encourages employers to consider lesser forms of discipline in the case that the misconduct was not sufficient for cause. In addition, employers should consider the nature and circumstances of the misconduct, the employee's tenure, previous record and nature of employment, and whether it is a single, isolated incident. A single act of misconduct should rarely warrant dismissal in that the misconduct must violate the essential conditions of the employment contract or breach an employer's faith in the employee. This test, which takes into consideration the context of the misconduct, may not be applied as rigorously where the behaviour is more serious such as fraud, misappropriation, or theft (*4th Annual Employment Law Forum*, 2003).

Nevertheless, a study of adjudications under the Canada Labour Code (Eden, 1992) has questioned the perpetuation of the application of progressive discipline in the arbitral jurisprudence given the relative lack of empirical support for its efficacy either as a corrective action or as a form of punishment. Eden argued that, while its use may have been appropriate at one time, the application of progressive discipline may institutionalize a conservative, traditional method of handling employee problems instead of encouraging alternative practices which may be more effective, especially considering an increasingly sophisticated and educated workforce. A later study of adjudicator decisions of unjust dismissal complaints in the federal jurisdiction (Eden, 1993) found adjudicators

---

[5] Progressive discipline imposes progressively more severe penalties to correct conduct without terminating employment and might include the following steps: verbal warning, written warning, suspension and final warning, and discharge.

had also adopted the progressive discipline approach of arbitrators in the unionized sector.

Summary

This chapter provided an overview of protection of the Canadian worker by way of an examination of the legislative and common law framework into which the law of wrongful dismissal is situated. The non-union worker and the individual contract of employment, the focus of this study, were also compared to the union worker in terms of the nature of the employment relationship. In addition, the Canadian experience was contrasted with that of the United Kingdom and the United States. In sum, I situated the law of wrongful dismissal in terms of its relationship to legislated labour standards and its unique development relative to the law in other common law countries including the United States and United Kingdom. I also contrasted the individual employment contract of the non-union worker with the collective agreement of the union worker.

I have also summarized the key issues of the law of wrongful dismissal. Many of the concepts are carried forward to my empirical studies, in particular just cause for dismissal and reasonable notice of termination. These concepts are the primary criteria by which I examine the weight given to certain management practices, such as progressive discipline, performance standards and warnings, concepts which I also discussed in this chapter in anticipation of their use in my empirical studies to come.

In Chapter 3, I turn to an overview of the management and organizational literature with respect to the intersection of organizational justice with the psychological contract and employee dismissal. There are two reasons for incorporating a discussion of particular concepts of organizational justice in my study. I situate my study of dismissal

in the courts and in the workplace in a broader theoretical context which has been missing in many studies of dismissal in the courts, as well as in adjudication and arbitration processes (see Chapter 4 for a review of that literature). In addition, because justice may be said to be the methods by which we *justify* decisions, some concepts in organizational justice are useful in explanations of the courts' decisions. It also creates a broader context in which to contrast the dismissal decisions of the courts with those of employers and HR practitioners.

Chapter 3 – Organizational Justice and the Psychological Contract

Recently, Kochan (2004) claimed that HR management professionals must "redefine their role and professional identity" to better meet a "crisis of trust and loss of legitimacy" among their stakeholders since the profession's effort to develop a strategic role had failed to reach its potential. He stated that this role redefinition should lead HR professionals "to advocate and support a better balance between employer and employee interests at work" (Kochan, 2004, p. 132). Hence, in my study the investigation of HR practitioners' experience with the management, discipline, and dismissal of poorly-performing employees and of the courts' view of management and organizational processes also incorporates a more extensive review of workplace justice and fairness in order to better incorporate employee interests. I argue that the role of balancing interests that Kochan wants for HR practitioners may best be understood by examining a broad range of employee, employer, and social outcomes within a legal, justice, and organizational framework.

My investigation of the management and organization literature with regard to the intersection of the psychological contract, organizational justice, and employee dismissal widens the context in which the employment relationship can be understood. The chapter begins with an introduction to the notion of a psychological contract in the employment relationship and its relationship to organizational justice. I introduce the psychological contract in order to demonstrate that employees, HR practitioners, and other managers will have subjective understandings of the nature of the employment relationship. It is

inevitable that HR practitioners' beliefs about workplace expectations and obligations will diverge from those of the courts as a result of gaps in HR practitioners' knowledge.

In turn, the use of organizational justice in the employee dismissal literature is reviewed followed by a more extensive examination of competing views in the organizational justice literature. My analysis demonstrates that an understanding of the employment relationship which represents a better balance of employee and employer interests must also incorporate a better balance of views of workplace justice and fairness.

The Psychological Contract and Organizational Justice

HR practitioners may be guided as much by their perceptions and beliefs of what is fair to both the employee and employer as they are by employment law. How they conceive of justice and the nature of the obligation in the employment relationship, what Rousseau (1995) has called the psychological contract, may be as determinant of an HR practitioner's response to employee incompetence or misconduct as any other factor. Rousseau (1995) defined the psychological contract as an individual's beliefs or perceptions about the terms and conditions of a reciprocal exchange agreement. She explained that each party believes that both parties have made promises and have accepted the same terms without necessarily sharing a common understanding of all the contract terms; they only believe that they share the same interpretation of the contract.

Frequently and particularly for the employee, it is only on the occasion of discipline or dismissal, for instance when a terminated employee sues for wrongful dismissal, that their beliefs about both the legal and psychological contract are tested. In addition, while HR practitioners may or may not employ rigorous management practices and perform-

ance standards incorporated to the best of their ability, they are inevitably influenced by their perceptions and beliefs with respect to the employee-employer relationship and fulfillment of the employment contract. HR practitioners have expectations about the obligations of both the employee and employer and their view of right and wrong goes beyond legal understanding and fills gaps in their knowledge of the law.

Conflict in the employment relationship may be inevitable. According to Rousseau (1995), psychological contract violation, including the violation of employment contracts, is "commonplace", leads to "adverse reactions by the injured party", but "need not be fatal to the relationship" and may be experienced by both the employee and the employer (p. 111). Whereas, contract violation erodes trust, adherence to practices which are consistent with procedural justice enhances a sense of fairness both for those directly involved as well as employees who may be indirectly involved or not involved at all. Moreover, practices of procedural justice may increase the strength and quality of the employment relationship by assisting the parties to carry on in spite of the violation and to repair their relationship. Through these practices, employers and practitioners send important messages about the value they place on the individual and on the employment relationship. Rousseau (1995) warns that these practices are especially important where substandard performance is the issue and where subjective understanding of standards and one's own level of performance is likely.

For employees, it seems that most of them experience some form of violation of an employment commitment. Though many violations are remedied and the contract remains essentially fulfilled, psychological contract violations may have serious consequences for employee attitudes and performance in a number of areas including organiza-

tional citizenship, turnover intentions, and productivity (Robinson et al., 1994). Moreover, news of breaches may spread to other employees and discourage them. There are implications for HR practitioners and for HR practice as well. Although HR practitioners may believe their decisions are guided by legal advice and generally accepted HR policy, their decisions with respect to employee discipline and dismissal may be influenced as much by their perceptions of the character of the employee, and the context of the incident or deficiency, as they are by the law and organizational policy. Rousseau (1995) claims that the psychological contract, as well as its promises and commitments, are shaped by both personal beliefs and social processes. Therefore, since most employees experience conflict between their own understanding of workplace expectations and obligations and that of their employer, it is crucial to understand the content of both the legal and the psychological contract. In doing so, we might better understand the relevance of these constructs to the employment relationship and to workplace performance.

The moment when discipline or dismissal becomes a consideration for an allegedly poorly performing employee, the employee may be marked as damaged in some way by the employer. The anomalous employee, who does not meet the employer's expectations of performance, is somehow contrary to a notion of unity and harmony, and, subsequently, may be treated differently than *normal* employees. An example of the discriminatory treatment of employees who represent a 'problem' for management can be seen in Lam and Devine's (2001) finding that HR managers provided shorter notice periods and, therefore, smaller severance awards, to employees who were performing poorly in a simulated termination but not poorly enough to represent sufficient cause for dismissal. Moreover, the HR managers expressed a desire to punish intransigent employees, even

though the Supreme Court of Canada has rejected the so-called 'near cause' argument that had been used to justify a lesser notice period for employees terminated without sufficient cause (Mole & Stendon, 2004).

Rousseau (1995) claimed that some believe that employment contracts lock employees and employers into obligations that circumstances may make obsolete. However, legal contracts more typically change over time in the indefinite-term employment contract. In Canada for instance, because the courts explore the dynamic nature of the employment contract, and of the promises made and broken, the changing terms of the legal contract may be found to parallel the psychological contract in some respects and diverge from the psychological contract in other respects, in an evolving and interpretive arrangement. Therefore, a study of HR practitioners' experience, behaviour, or attitudes toward employee discipline and dismissal, or the related outcomes, should consider both the legal and the psychological context.

The few studies concerned with employee dismissal may be criticized for a failure to apply social science theory because without a theoretical context we are less able to appreciate the wider context in which these phenomena can be understood. Similar criticism has been levelled at the grievance procedure research as well (Bemmels & Foley, 1996). Even so, some progress has been made. For instance, Dunford and Devine (1998) proposed a preliminary model which incorporated organizational justice, including procedural and distributive justice that addressed the decision by a discharged employee to bring a lawsuit against an employer. Other studies which have examined employee dismissal have also used organizational justice (Blancero, 1995; Olson-Buchanan & Boswell, 2002; Rousseau, 1995). However, it is difficult not to conclude that the application

of theory – particularly of organizational justice – in non-union dismissal research remains deficient since such a small number of empirical studies have reported findings with a theoretical grounding and the only model of organizational justice that has been advanced remains largely untested.

Organizational Justice and Dismissal

A number of studies have investigated the role of organizational justice in employee dismissal. Dunford and Devine (1998) presented a preliminary model of the decision process of a discharged employee deciding to sue an employer and the factors likely to influence an outcome favourable to either the employee or the employer. The two key concepts at the heart of the model driving employee behaviour were the employee's perceptions of distributive and procedural justice. They noted that organizational justice had been a widely accepted framework for understanding behavioural phenomena including the perceived negativity of job loss, job satisfaction, organizational commitment of survivors, coping strategies, and employee organizational retaliatory behaviours (ORBs).

In an experimental simulation of the characteristics of a non-union grievance system (NUGS) in an employee discharge, Blancero (1995) found that the presence of elements of procedural (employee input and the composition of the grievance panel) and interactional (communication of an explanation) justice had larger effects on non-union, non-management workers' perceptions of overall fairness than a favourable outcome. Furthermore, unfavourable outcomes reached by fair processes generated higher perceptions of distributive justice than favourable outcomes reached by unfair processes. Consistent with Blancero's (1995) findings, Olson-Buchanan (1996) concluded that proce-

dural justice played an important role in participants' perceptions. Participants who had experienced 'punishment' effects after filing a grievance were more willing to continue working for the organization if they had access to a grievance system. She also found, consistent with motivation theory, that participants who had a basis for a dispute had lower objective job performance scores and were less willing to continue working for the organization. Finally, a study of arbitrators' decisions in simulated absenteeism discharge cases (Simpson & Martocchio, 1997) found that arbitrators are less likely to modify managements' discharge decisions if management had met all the due process considerations before discharging.

Conceptualizations of Organizational Justice

In this section, I investigate the notion that individuals judge the fairness of decisions made with respect to the relationship they have with their employer based on the manner in which they experience the full employment relationship, not just the content and process of reaching a particular decision. Individuals develop a generalized perception of fairness about decisions but fairness itself may be conceptualized as having a number of different aspects or dimensions which have a unique contribution to make to overall fairness perceptions and to other outcomes such as employee turnover or their willingness to take legal action after termination. In addition, HR practitioners may be considered consultants who, with the line and more senior practitioners, are responsible for the long-term management of employment relationships. They also play an important mediating influence in how employees perceive the fairness of decisions made which directly or indirectly affect their relationship with the employer. The organizational justice

literature provides a rich framework for explaining perceptions – and for improving outcomes – of the employment relationship for the employee, the employer, and the organization and, more specifically, for improving the outcome of disciplinary and dismissal decisions.

Organizational justice has its origins in social exchange theory which was premised on two central assumptions about behaviour: that relationships are exchange processes in which contributions of material things, of ideas, of emotions, and of behaviour (Thibaut & Kelley, 1959) lead to the expectation of certain outcomes, and that individuals assess the fairness of such exchanges using information obtained through social interactions (Mowday, 1991). That is, we evaluate a relationship on the basis of benefits exchanged within that relationship. Social exchange theories of behaviour view individuals as motivated by self-interest in interactions with others and believe that they judge relationships on the basis of costs and benefits in predominantly market transactions. However, Thibaut and Kelley (1959) assert that status or resource differences between employees and employers ensured the continuity of the employment relationship by causing an imbalance and placing the employee in debt. Given this view of individual employee behaviour, one would expect that employees also judge and react to employer decisions based on what they perceive that they gain or lose in those decisions but that alternative courses of action are also limited by their perceptions of indebtedness or reliance on the resources of the employer. That is, market-based transactions between employees and employers are limited by the context of the unequal dependence of the employee on the employer.

Pushing this idea further, Thibaut and Kelley (1959) developed a theory of inter-dependence in interpersonal relations in which power is derived from the dependence of one party on the other for the quality of his or her outcomes. Furthermore, they assert that an employer's perceived power[6] also derives from evidence that an employee's actions results in little variation in the employer's overall success or failure. Moreover, the more powerful employer's behaviours are largely derived from internal needs rather than external needs. For instance, they posit several possible advantages to being the more powerful party in an employment relationship. First, being the more powerful party "tends to relieve [the employer] of the necessity of paying close attention to his [employee's] actions and of being careful in his own actions" (Thibaut and Kelly, 1959; p. 125). In addition, the inequality of power also permits the employer "to determine the course and pace of the interaction and to insist upon receiving the better of the outcomes potentially available to him in the relationship" (Thibaut and Kelly, 1959; p. 125). Nevertheless, they also claim that power tends to be used up with continued use in that the employer loses the ability to "make further demands or to induce further behaviour changes" in the employee (p. 125). They maintain that, "power can be maintained at its maximum only if it is used considerately and sparingly" (Thibaut and Kelly, 1959; p. 119).

An extension of social exchange theory, social justice theory, posits that exchanges are perceived as fair when individuals sense that their rewards or outcomes are comparable with their contributions (Adams, 1965; Homans, 1961). Leventhal (1976)

---

[6] I assume for the purpose of narrative that the more powerful party in Thibaut and Kelley's (1959) dyadic relationship is the employer which is consistent with the views of the Supreme Court of Canada in *Wallace* (1997).

described this relationship between outcome and contribution as the equity rule. Equity theory led back to the notion of distributive justice, so-called because it specified fairness perceptions of the allocation or distribution of outcomes (Greenberg, 1990) – costs and rewards – proportionately within the group and consistent with a set of implicit norms such as equity (the proportionality of contributions and outcomes), equality of outcomes, or according to need (Colquitt, 2001). Another type of distributive justice theory is that which focuses on feelings of relative deprivation, such as when an individual's outcomes fall short of expectations (Tyler & Lind, 1992).

At least two extreme views of social justice have been articulated over the last several decades. The egalitarian *maximum equal liberty* of Rawls (1971) asserts that justice requires that economic benefits be distributed in a way that makes the least well-off as well-off as possible. Rawls' view was that political theory had become too utilitarian, too unconcerned with individual rights, and that justice required that the less fortunate should not be left behind. An alternative perspective requires the protection of individual rights to resources and claims that social justice implies an authority, likely the state, to distribute goods and opportunities as it sees fit. They see the social justice view as being incompatible with individual liberty and individuals' right to use what is ours as we choose. The distance between these positions affords room for disagreement over the extent of basic rights and about how to judge whether a particular instance of differential treatment is justified. Conflicts arise over what social goals to value such as equality on the one hand and freedom of action on the other. For instance, the implicit norms of some views of distributive justice may be based on equality of outcomes or need rather than the equity rule, which is the implied view of the dominant interests in management

and organization studies. In the development of organizational justice, conflict over *what* to value may have fuelled a focus on the process of fairness rather than the content.

Research on procedural justice – the perceived fairness of the processes that lead to decision outcomes – is supported by the claim that individuals would tolerate some injustice in the allocation of outcomes, or distributive justice, if the procedures employed to determine those outcomes were perceived to be fair. The conceptualization of procedural justice owes much to Thibaut and Walker's (1975) observation of court room proceedings where the perceived fairness of the verdict itself and the process that led to the verdict were frequently seen to be two independent phenomena. They contended that since the courts and comparable "agencies" were the principal formal instrument for the large-scale solution to social problems, the procedures of the courts had potential for creating "justice or injustice" in other settings (Thibaut & Walker, 1975; p. 1). They proposed to distribute process control to the "disputants" in conflict and relatively little to the decision maker in an "optimal distribution of control" to "self-interested litigants" (p. 2). With a focus on process rather than content or outcome, they described procedural justice as the individual's ability to influence decision outcomes through both process control – the ability to voice one's views – and decision control – the ability to influence the outcome itself (in Colquitt, 2001). They hoped that their contribution would lead to the accessibility of procedures for the resolution of conflict that best facilitate the goal of achieving peaceful and suitable termination of disputes (Thibaut & Walker, 1975).

Leventhal et al. (Leventhal, 1980; Leventhal, Karuza, & Fry, 1980) extended the concept of procedural control with the addition of six new factors in the study of allocation preferences in non-legal settings (Colquitt, 2001). They believed that to assess pro-

cedural justice one compared the process one experienced to generalizable procedural rules which included consistency (across persons and times), bias suppression (decision maker neutrality), accuracy of information (procedure based on accurate information), correctibility (appeal procedures exist), ethicality (standards of ethicality and morality upheld), and representation (Colquitt, 2001). The sixth factor involves the *representation* of all subgroups and individuals affected by a decision process and that they are heard from. However, Lind and Tyler (1988) argued that the concept of representation could be subsumed by Thibaut and Walker's (1975) process and decision control, which left five unique aspects to contribute to the conceptualization of procedural justice.

Until the introduction of interactional justice (Bies & Moag, 1986) – the interpersonal treatment people receive as a result of procedures – the two-factor conceptualization of organizational justice, including procedural and distributive justice, had been well established and consistently supported by research (see for example: Greenberg, 1993; Sweeney & McFarlin, 1993). In interactional justice, perceived fairness increases when an individual is treated with respect and sensitivity, and decision makers explain the grounds for decisions clearly (Colquitt, 2001). Bies and Moag (1986) found four factors for interactional justice (justification, truthfulness, respect, and propriety) in a study of expectations of interpersonal treatment during recruitment.

In the midst of mixed results and considerable disagreement over the underlying structure of organizational justice, Greenberg (1993) proposed a four-factor structure which he derived from crossing the two justice types (distributive and procedural) with the structural and social determinants of justice. Nevertheless, until Colquitt's (2001) investigation of the theoretical dimensionality of organizational justice, the four-factor

conceptualization remained largely untested and, as Colquitt argued, little progress had been made to that point in constructing a standardized instrument. He claimed that, although there had been some clarity with respect to the 2-factor organizational justice model in the literature which included procedural and distributive justice and that some researchers had treated interactional justice as a third type of justice, it was unclear whether organizational justice was best depicted by two, three, or perhaps more factors.

In an effort to settle this question, Colquitt (2001) generated twenty items "by strictly following the seminal works in the organizational justice [literature] along with more recent examinations of these constructs" (p. 388). In two separate studies, one in the context of a university classroom setting and the other in the context of employees in an automotive parts manufacturing company, he found support for a four-factor structure of the organizational justice measure, with distributive, procedural, interpersonal, and informational justice as distinct dimensions. In his four-factor structure, two underlying constructs, interpersonal and informational justice, emerged as distinct dimensions of interactional justice. Interpersonal justice contained notions of respect and propriety. Informational justice included truthfulness and several aspects of justification in communicating the decision. In naming these constructs, Colquitt borrowed from Greenberg's (1993) taxonomy in which the socially determined aspects of procedural and distributive justice were conceptualized as two of Greenberg's four justice factors.

In Colquitt's (2001) study, distributive justice referred to the perception of decision outcomes derived from the fairness of resource allocation with respect to equity. Most distributive justice research has focused on the "equity rule" which Leventhal (1976 in Colquitt, 2001) described as "a single normative rule which dictates that rewards and

resources be distributed in accordance with recipients' contributions"(p. 389). While conceding that other allocation rules, such as equality or need, may be appropriate in different contexts, Colquitt (2001) adopted items based on the equity rule to "maximize generalizability" to the much greater number of studies in the existing literature which had incorporated an equity perspective of distributive justice (p. 389). Whether HR practitioners and other employees actually employ the equity rule or have some other implicit allocation preferences does not appear to have been considered. The decision to incorporate the equity rule only seems to have been based on its instrumental value rather than on some other norm or value set. Reframing distributive justice from an equality or need perspective may yield a significantly different insight into the character of the employment relationship and contribute to our understanding of this important phenomenon. Furthermore, in assembling the items from his review of the literature, Colquitt (2001) discarded the relational justice criteria that Lind and Tyler (Lind, 1995; Lind & Tyler, 1988; Tyler, 1989; Tyler & Lind, 1992) had contributed to the conceptualization of procedural justice. In neglecting to incorporate Lind and Tyler's notion of relational justice, Colquitt (2001) explained that neutrality, benevolence (Lind, 1995), and standing or status recognition overlapped considerably with procedural justice criteria that had been identified by Leventhal and his colleagues (Leventhal, 1980; Leventhal et al., 1980) and Thibaut and Walker (1975), as well as by the dignity and respect aspects of interactional justice. Moreover, Colquitt (2001) noted that trust (Tyler, 1989) was a well-developed construct with its own literature and best considered a correlate of procedural justice.

Yet, in examining the work of Lind and Tyler (1988), one might conclude that they had conceptualized a distinctive variety of organizational justice which was rela-

tional rather than individualistic in nature. In their investigation of procedural justice, Tyler and Lind had drawn a distinction between relational and instrumental justice. In the group-value, or relational model of procedural justice, individuals receive signals about how, or if, they are valued by authority figures and by the collective or group to which they belong. It is a process of perceived relations within the group rather than of balancing the interests of individuals. They argued that group value is a key determinant of an individual's perception of authority legitimacy and willingness to comply with the rules and decisions of the collective or of the authority figure. The rationale is that groups provide a source of self-validation in that they can impart information about the appropriateness of attitudes and values to the member. They are also a source of emotional support and other resources, and provide a sense of belonging. Group members also pick up information about their standing or status within the group by the way their effort, ideas, and presence are received by the other members of the group, especially authority figures.

Tyler and Lind (1992) contrasted the relational notion of justice with the self-interest, or instrumental model in which procedural justice is valued because it provides for a level playing field on which all interests may be fairly represented. They argued that in the instrumental model, as conceived by Thibaut and Walker (1975) for instance, that "disputants are primarily concerned with the problem" that brought them to a third party for resolution and that "judgments of the fairness ... are based on instrumental concerns in the sense that [they] view procedures as means to the end of improving their own outcomes or their relationship with the [other disputant]" (Tyler and Lind, 1992; p.138). Also problematic, Thibaut and Walker (1975) "do not devote much time to disputants' concerns about their long-term relationship" and that implied in their conceptualization is

the assumption that "disputants view their experience with the judge and the court system as a one-shot encounter" (p.138). While Colquitt (2001) argued that the relational model complemented the theory underpinning both Thibaut and Walker's, and Leventhal's concepts, he concluded that the dimensions of procedural justice that Lind and Tyler had contributed were better represented in other already-established dimensions.

Colquitt and his colleagues (Zapata-Phelan, Colquitt, Scott & Livingston, 2009) claim that the research in organizational justice, which is "focused on the experience of fairness in ... task-focused environments, has increased dramatically over the past decade" because "perceptions of fair treatment have been linked to a number of beneficial employee behaviors" (p. 93). Based on the nature of the research on which Colquitt (2001) constructed his four-factor model of organizational justice (studies in which the individual was the subject of allocation decisions), I suggest that Colquitt's (2001) conceptualization is instrumental in nature in that it focuses on individual procedures and outcomes. His conceptualization reflects a bias in favour of the decision processes, the outcomes it leads to, and the manner in which those processes and decisions are communicated to the employee disputant. Moreover, the context for the studies of organizational justice on which Colquitt (2001) relied, were typically a decision process with the potential to be judged unfair, such as pay raises, performance appraisals, hiring decisions, discipline, and so on.

By contrast, Lind and Tyler (1988) may have conceptualized an entirely distinct notion of organizational justice, one that may have its own unique relationship to judgments of fairness, and to procedural, distributive, and interactional justice, as well as to other outcomes typically of concern to researchers, such as turnover, and others perhaps

not so typical, such as employee outcomes following discipline or dismissal. While Colquitt (2001) had synthesized a large and somewhat chaotic literature relative to instrumental justice, the fundamentally distinctive notion of relational justice is, as yet, largely unexplored. As Lind and Tyler (1988) suggested, if relational justice is an appropriate conceptualization of organizational justice, we must be concerned with which model accounts for the variation in fairness judgments and to which model we should give more weight.

A Closer Examination of Relational Justice

Colquitt's (2001) four-factor conceptualization synthesized over 25 years of effort in the development of organizational justice theory and may well have standardized the measurement of perceptions of workplace fairness for another generation to come. Nevertheless, his operationalization of organizational justice may represent an incomplete conceptualization as Lind and Tyler's (1988) work suggests. Lind and Tyler (1988) argued that a distinction must be drawn between relational or group-value, and instrumental or self-interest, notions of procedural justice. Their analysis of these concepts suggests that Colquitt's (2001) four-factor structure may be measuring perceived fairness based on an instrumental notion of justice only, in that fairness judgements are based on the instrumental concerns of possessing appropriate means to achieve a valued end or outcome in allocation decisions. On the other hand, the notion of relational justice that Tyler and Lind (1988) offered seems to have been overlooked as a conceptual basis in the operationalization of a standardized notion of organizational justice. Perceived fairness may be explained by relational justice and notions of an individual's value to the group and to

authority figures as well as by the instrumental conceptualization of procedural, distributive, and interactional justice that has emerged as a benchmark operationalization of organizational justice.

The challenge to relational justice may not be so much in its conceptualization, which they argue is distinct from an instrumental notion of justice, as much as in the dimensions specified by Tyler and Lind (1992). Tyler and Lind (1992) seem to have been unsuccessful in several respects in defining a set of unique criteria with which to distinguish relational justice. First, Colquitt (2001) easily incorporated the neutrality criterion (Tyler, 1989; Lind, 1995) in the notion of procedural justice. In addition, taken together procedural and interactional justice are the essence of the 'level playing field' of instrumental justice. Furthermore, a *neutral* relationship with an employee (one in which the employee receives similar treatment to a non-employee) hardly seems like the basis for building commitment. For example, in an organization with high perceived relational justice the employment relationship is not neutral but one that actually favours the employee, especially when his or her need is great. Inherent in this attitude is the belief that the incumbent employee is of far greater value than an employee who has yet to be hired and hence the incumbent should be given what some might consider an extraordinary opportunity to correct deficiencies.

Two, standing (Tyler, 1989) or status recognition (Lind, 1995) – the extent to which interpersonal treatment has communicated standing or value to the group or authority figure – overlaps considerably with aspects of interactional justice. While being disrespectful to an employee may communicate that the individual has a lesser value to the group, the relationship of disrespectful treatment to perceived fairness is not unique to

relational justice in that it is central to the conceptualization of instrumental justice as well. Moreover, an individual may be shown respect without being perceived as having any group value.

Three, trust (Tyler, 1989) is a construct with its own literature and may be a correlate of procedural justice (Colquitt, 2001). What seems more likely is that trust mediates the relationship between perceived group value and both organizational and individual outcomes. That is, when individuals perceive that they are valued by the organization or authority figures they are more likely to display trust in decision making authorities and, therefore, they are more likely to comply with the decisions "without worrying too much about exploitation or rejection" (Lind, 1995; p. 86).

Finally, when Lind (1995) updated the criteria he may have inadvertently created some confusion in changing trust (Tyler, 1989) to benevolence. However, in doing so, he also gave tacit approval to Thibaut and Kelley's (1959) notion of the imbalance in reciprocal relationships brought about by status or resource differences. In the case of employers, showing benevolence toward employees may be thought of as acknowledgment of an underlying imbalance inherent in the employment relationship. Lind (1995) defined benevolence as the "impression of real consideration for the individual" (p.87). Employees find evidence that they are accepted members of their organizations – evidence of their status or standing within the organization – to the extent that they perceive they are given real consideration. Perceived group value has significance for the employer in that individuals begin making judgments early in the employment relationship, well before a procedure or decision might lead to conflict, and it is these fairness judgments which serve as a heuristic that guides the decision to accept or reject an organiza-

tional decision or policy (Lind, 1995). Benevolence and relational justice are, therefore, something other than instrumental, more than simply utilitarian. Moreover, the concept suggests that the party who is benevolent possesses greater power in the relationship and that consideration for the other party beyond the basic contractual requirements is characteristic of benevolent behaviour. Thus, Lind's (1995) notion of benevolence assumes an on-going power imbalance in the employment relationship, a view which has much in common with Thibaut and Kelley's (1959) view of power and dependence, whereas instrumental justice assumes the achievement of a level playing field.

Conceptually, relational justice may act on perceived fairness by assuring employees who have been disciplined or dismissed that they are not being rejected personally, that they are still valued by the group and those in authority, and that, under different circumstances they might still be welcomed back into the organization. In an organization with high perceived relational justice, outcomes should improve for both the employee and the employer. For the employer, the probability of wrongful dismissal lawsuits brought by terminated employees and other retaliatory behaviours (Skarlicki & Folger, 1997) might be lowered and surviving employees might have a greater commitment to the organization. On the other hand, terminated employees might experience better outcomes psychologically and, therefore recover more quickly from the disruption of their employment.

Organizational Justice in the Broader Context

The focus of the previous review was both the generally accepted four-factor model of organizational justice as well as a unique conceptualization of fairness based on

a relational notion of organizational justice (Lind, 1995; Lind & Tyler, 1988; Tyler, 1989; Tyler & Lind, 1992). While the four-factor model – a conceptualization of organizational justice that is based on an instrumental notion of organizational justice (Tyler and Lind, 1992) – has received much of the research and practitioner attention recently, relational justice has been overlooked in studies of organizational justice (see Colquit, 2001 for example) in that relational justice suggests the need to appreciate both the on-going nature of the relationship as well as the inherent power differences. By contrast, the instrumental conceptualization of organization represented by procedural and interactional justice (Colquitt, 2001) is associated with one-time decision processes and a 'level playing field'.

Lind and Tyler (1988) had conceptualized the group-value or relational model of procedural justice as the signals that individuals receive about how, or if, they are valued by authority figures and by the collective or group to which they belong and they operationalized the model through notions of neutrality, benevolence, trust, and standing or status recognition. However, in this review, I suggested that only the benevolence dimension is unique to relational justice and that it assumes an inequality of power in the employment relationship.

In addition, the conceptualization of distributive justice incorporated by Colquitt (2001) employed only a limited notion based on the "equity rule" (Leventhal, 1976), overlooking other possible allocation rules such as equality or need. Colquitt seems to have preferred the equity rule only because "most research" (primarily concerned with maximizing productivity) had focused on equity. However, reframing distributive justice from an equality, need, or other perspective might yield a significantly different under-

standing of the employment relationship and the HR practitioner's role in that relationship.

This analysis suggests that the extent to which employees accept the legitimacy of authority and perceive that decisions related to their employment relationship are fair will be influenced by the nature of employment throughout the relationship and not only as a result of the procedures and outcomes of a single experience with managerial decision making. For instance, the remediation of each employee's unique needs can be considered a source of relational justice in that it can promote an employee's sense of belonging and value to the organization, and provide the consideration needed for the employee to adapt to and to appreciate the organization's demands in both the short and long terms. In addition, Lind's (1995) benevolence concept hints at an inequality of power in the employment relationship. Such an inequality can be found in Thibaut and Kelley's (1959) theory of power and dependence in interdependent relationships and in the views of the Supreme Court of Canada (*Wallace*, 1997) which will be discussed in the next section.

Organizational Justice in the Law and Decisions of the Supreme Court of Canada

In addition to examining the relevant conceptualizations of justice and fairness in the previous discussion, I have reviewed the use of organizational justice in the dismissal literature. In the following discussion, I turn to an examination of the extent to which the decisions of the Supreme Court of Canada reproduce conceptualizations of justice and fairness in order to fulfill my primary research objective, to better understand the nature of the employment relationship and dismissal in a *legal*, *justice*, and workplace framework.

Workplace Justice and the Nature of the Employment Relationship

Legal analyses of the *Wallace* (1997) decision typically focus on the additional months of notice awarded as a result of the intangible injuries caused by the manner of the employee's dismissal, what have come to be called '*Wallace* damages' (see, for example, Levitt, 2004). Nevertheless, in the *Wallace* (1997) decision the Supreme Court of Canada also expresses a relatively comprehensive view on the nature of the employment relationship and of the vulnerable position of the worker. In the judgment, Justice Iacobucci outlines an approach to the nature of the typical employment relationship that emphasizes the vulnerability of the employee as a result of the importance of work and the power imbalance that exists between the employee and employer. In the following section, I will link the views expressed by the Court to a discussion of justice in the workplace, particularly power and dependence (Thibaut & Kelly, 1959), relational justice (Lind & Tyler, 1988) and the four-factor model (Colquitt, 2001).

I begin with a reading of the decision limited to *Wallace* damages only, which reveals a view of dismissal practices that is conceptually most consistent with the interactional (interpersonal and informational) justice of Colquitt's four-factor model. Then, I move the discussion to the broader themes of power and vulnerability as expressed in *Wallace* (1997) and augment these views with a social psychological model of power and dependence (Thibaut and Kelley, 1959) and the conceptual basis of relational justice (Lind & Tyler, 1988). Insights generated by conceptualizations of justice can assist in an examination of the structure of wrongful dismissal decisions and in generating a deeper appreciation of the Supreme Court of Canada's views on the nature of the employment relationship.

Wallace Damages and the Four-Factor Model of Organizational Justice

In Colquitt's (2001) four-factor structure, two underlying constructs, interpersonal and informational justice, emerge as distinct dimensions of interactional justice. Interpersonal justice consists of treating the employee with respect and propriety. Informational justice includes being truthful and providing a thorough, reasonable, and timely explanation, as well as being considerate of the employee's needs. Each of these dimensions of interactional justice may be identified in *Wallace* (1997) and in subsequent court decisions.

In *Wallace* (1997), the Court asserted that reasonable notice may be extended if employers fail to meet their "obligation of good faith and fair dealing in the manner of dismissal" (*Wallace*, 1997; para. 95). Wallace was discharged without explanation even though the employer maintained that it had cause to terminate him right up to the trial, leaving others to speculate on what he had done that could justify such harsh treatment. In finding for Wallace, the Court asserted that employers should not be "untruthful, misleading or unduly insensitive" (*Wallace*, 1997; para 98) and that during the course of dismissal employers should be, "candid, reasonable, honest and forthright" (para 135).

Wallace damages may be said to represent a fundamentally new direction for wrongful dismissal law. In *Wallace* (1997), the Court made a distinction between 'tangible' and 'intangible' injuries, in that tangible injuries – those that lead to a loss because of the dismissed employee's difficulty locating alternative employment – are not the only losses which may be compensated in the reasonable notice award. Intangible damages – "humiliation, embarrassment, damage to one's sense of self-worth and self-esteem" – may also be compensated if they arise from the manner of dismissal (para. 103). There-

fore, *Wallace* damages recognize the injustice that results from the bad faith actions of the employer in addition to the economic loss suffered by the terminated employee.

The Ontario Court of Appeal (Gismondi v. Toronto (City), 2003) summarized some of the kinds of bad faith conduct that have subsequently arisen in the case law and fit the definition in *Wallace* (1997). These acts of bad faith in the manner of dismissal might be characterized as misrepresentation (such as false allegations), misleading (such as leading the employee to believe that his or her job is secure), insensitive (such as terminating an employee on return to work after suffering major depression), malicious (such as persisting in a false allegation of cause), or unreasonable (such as refusing to provide a letter of reference).

In *Wallace* (1997), it is clear that the Court was concerned with the lack of respect and propriety of the employer, particularly in that it resulted in intangible damage. In addition, the employer misrepresented the reasons for the dismissal and misled Wallace's potential employers by not providing reasons for the dismissal but instead coloured his reputation through innuendo. The employer also misled Wallace with respect to the tenure he could expect as a consequence of the promises it made before he was hired. Furthermore, the employer was inconsiderate of Wallace's welfare and knew that it had caused him great distress but made a conscious "decision to 'play hardball' with Wallace and maintained unfounded allegations of cause until the day the trial began" (*Wallace*, 1997; para. 108). Therefore, I suggest that the basis of *Wallace* damages is consistent with Colquitt's (2001) interpersonal and informational dimensions of interactional justice, which is an instrumental conceptualization of organizational justice.

Nevertheless, where the Supreme Court of Canada is concerned, Colquitt's (2001) four-factor model may not be sufficient to fully account for the dynamics of the employment relationship. In order to better appreciate the implications of the *Wallace* (1997) decision, I first return to Tyler and Lind's (1992) critique of the instrumental model of organizational justice which reveals a relatively limited view of the nature of the employment relationship. My purpose is to demonstrate that two (or more) conceptualizations of justice correspond to the views expressed in *Wallace* (1997), and that together they offer a more complete and inclusive view of justice in the workplace.

Tyler and Lind (1992) argued that the instrumental, or self-interest, model of organizational justice in which procedural justice is valued because it provides a level playing field on which all interests may be fairly represented. They also argued that in the instrumental model "disputants are primarily concerned with the problem" and that "judgments of the fairness ... are based on instrumental concerns in the sense that they view procedures as means to an end of improving their own outcomes" (Tyler and Lind, 1992; p. 138). Colquitt's (2001) four-factor model is also concerned with the solution to a 'one-shot' problem and with the representation of interests with respect to that problem.

Likewise, I suggest that *Wallace* damages also relate to instrumental justice. In addition to the consistency between the Court's views and Colquitt's (2001) interpersonal and informational justice, *Wallace* damages are concerned with the manner of dismissal, a 'one-shot encounter' and a problem for the employer to resolve – how to dismiss the employee fairly while meeting legal requirements. The Court's interest in awarding *Wallace* damages is to protect the employee's rights and improve his or her outcomes by limiting the employer's ability to act unilaterally and without regard for the employee's wel-

fare, while ensuring the employer's right to determine the composition of its workforce. These are instrumental outcomes in that they are related to a single decision process and protecting the interests of the parties.

Wallace (1997) and the Power and Dependence Model of Interpersonal Relations

A more careful reading of *Wallace* (1997) reveals a set of views about the nature of the employment relationship which is much more consistent with Thibaut and Kelley's (1959) power and dependence model of interpersonal relations. In their theory of interdependence in interpersonal relations, power is derived from the dependence of one party on the other for the quality of his or her outcomes. In employment, the quality of the less powerful employee's outcomes with respect to the relationship is dependent, to a greater or lesser extent, on the more powerful employer. That is, the employer's power is proportional to the extent that an employee is dependent on the employer for his or her outcomes. As a consequence, employees may be advised to reduce their dependence by developing alternatives to the particular employer or to employment itself. However, as the Supreme Court of Canada makes clear (*Wallace*, 1997), the typical employee is dependent on employment for a sense of self-worth, self-esteem, and contribution that work provides as well as possessing inferior bargaining power in employment relationships generally, but particularly with respect to tenure. Moreover, Justice Iacobucci specifically links the importance of work to the individual employee's vulnerability, a position that ensures the employee's dependence (Langille and Macklem, 2007).

Thibaut and Kelley (1959) assert that an employer's perceived power also derives from evidence that there is little variation in the employer's outcomes as a result of the

actions of an employee. Furthermore, the more powerful employer's behaviours are largely derived from internal needs rather than external needs. For instance, employers with the greater resources and power required in order to experience fewer consequences as a result of an individual employee's poor performance or even dismissal would be more likely to adopt progressive HR practices because of the need to attract, retain, and motivate a productive workforce, rather than adopting the practices in order to satisfy the needs, or protect the rights, of an individual employee. However, where the employer and employee are more equal in terms of power (they are more interdependent for the quality of their outcomes), the employer may be more inclined to bargain from an awareness and sensitivity to external (employee) needs. For example, the employer may be far more willing to guarantee tenure where there is a greater degree of dependence on the employee's knowledge, skills, or abilities. Nevertheless, the employee who possesses an equal bargaining relationship with the employer is not typical given the level of knowledge and sophistication required by the employee in order to negotiate a balanced ongoing relationship.

However, Thibaut and Kelley (1959) also claim that the less powerful party's ability to "make further demands or to induce further behaviour changes" in the more dependent party (p. 125) tends to be used up with continued use and that, "power can be maintained at its maximum only if it is used considerately and sparingly" (p. 119). Nonetheless, despite the temptation to infer an internal limit to the employer's ability to act unilaterally, I suggest that the employer could terminate 'at will' any employee who no longer meets expectations if not for the limits that the courts' place on the employer's ability to act unilaterally. Without the employer's willingness to comply with the law,

the typical employee is excessively vulnerable and the employer will continue to possess unequal and overwhelming power. Moreover, it is only because employers may neglect employee rights that a system of minimum worker rights exists in Canada as well as a court that is willing to limit employer's ability to act arbitrarily and without consideration for the employee's welfare.

In *Wallace* (1997), the Supreme Court of Canada adopts an approach to protecting worker rights that has at its heart a view of the employment relationship that is consistent with Thibaut and Kelley's (1959) power and depedendence model of interpersonal relations. The Court advocates the view that the essential nature of the employment relationship is that the employee and employer are in an unequal bargaining relationship and that the employee is in a vulnerable position. This view is in striking contrast to that assumed by Colquitt's (2001) four-factor model of organizational justice which implies that adhering to a set of principles of process and interaction can ensure that employers 'level the playing field' relative to the employee. That is, power differences become inconsequential as a result of a fair decision process and the fundamental nature of the relationship is not examined. However, in *Wallace* (1997) the Court firmly establishes that the employment relationship in Canada is innately unequal.

The Court further distinguishes the employment contract by contrasting it to the commercial or private contract (Langille and Macklem, 2007). In stressing the importance of the careful construction of laws that promote fairness and protect the rights of employees, Justice Iacobucci for the Court asserts that the employment relationship typically requires an "act of submission" in its inception and a "condition of subordination" by an "isolated employee or worker" in its operation (Davies & Freedland, 1983 in *Wal-*

lace, 1997; para. 92). The employment contract is unlike a commercial contract in that it does not result from an exercise of free bargaining power and that, "the rights and obligations [of the employee and employer] arise not from the will of the parties but from the employment relationship itself" (Langille and Macklem, 2007; p. 348). That is, a commercial (or private) contract typically emphasizes the will of the parties as the relationship is assumed to be structured by commitments freely made. In contrast, if an employment contract is allowed to arise only from the will of the parties, it typically produces a power imbalance. Therefore, an employment relationship involves a very special kind of contract that must be constructed in such a way that it promotes fairness despite its innate inequality. Such a contract must recognize that, "the parties possess certain unique rights and owe each other unique obligations that cannot necessarily be traced to their agreement," or to the 'will' of the parties (Langille and Macklem, 2007; p. 347).

In his reasons in both *Wallace* (1997) and *McKinley* (2001), as well as other decisions of the Supreme Court of Canada (see, for example *Rizzo & Rizzo Shoes Ltd.*, 1998), Justice Iacobucci demonstrates his, "willingness to calibrate rules to specific contexts to promote fairness in the face of inequality" (Langille and Macklem, 2007; p. 349). In his reasons, the Court asserts that employee rights must be protected in spite of how it might impair the 'efficiency' and easy interpretation of the law, in an attempt to lessen both the economic as well as the personal damage inflicted on the employee and that the Court must act to create limits on the employer's ability to act unilaterally without consideration of the employee's welfare.

In *McKinley* (2001), Justice Iaccobucci asserts that work is a central feature of an employees' life, helping to define our identity, self-worth, and well-being, as well as pro-

viding a means of financial support and an opportunity for the employee to contribute to society, especially given the importance that our society attaches to employment. In *Machtinger* (1992), he argues that because of the importance of work and the power imbalance that exists in the employment relationship, employees are particularly vulnerable and, therefore, care must be exercised in crafting the law in order to protect employees and to "provide incentives for employers to comply with minimum employment standards" (Langille and Macklem, 2007; p. 351). In that decision, Justice Iacobucci argues that longer notice periods "will have a deterrent effect on employers contemplating the exercise of superior bargaining power in ways that undermine legal protections provided to employees..." (Langille and Macklem, 2007; p. 348).

For example, in *Wallace* (1997) he crafts a rationale and a penalty for *Wallace* damages that result from the employer's bad faith dealing in the manner of dismissal. He also argues that any change of employment status will have ramifications for the employee, particularly if the change is involuntary, such as where the conditions of employment are changed by the employer unilaterally. In *McKinley* (2001), Justice Iacobucci proposes the 'principle of proportionality,' a requirement that the employer balance the severity of misconduct or incompetence and the discipline imposed. Once again, he suggests that this balance must be placed in the context of the central role and value of work in society and to the individual's sense of identity, worth, and well-being.

Summary

This chapter presented an examination of the management and organization literature with respect to the intersection of the psychological contract, organizational justice

and employee dismissal. My purpose in this chapter was to widen the context in which the employer-employee relationship can be understood. The chapter began with an introduction to the notion of a psychological contract in the employment relationship and its relationship to organizational justice. I found that employees, HR practitioners, and other managers are likely to have subjective understanding of the nature of the employment relationship and that their beliefs about workplace expectations and obligations will diverge from the courts' views as a result of and in order to fill gaps in their knowledge of the law.

I then turned to the use of organizational justice in the employee dismissal literature followed by a more extensive examination of the organizational justice literature. I completed my consideration of justice and fairness in the organizational context by examining the views of the Supreme Court of Canada about the nature of the employment relationship and the inequality of bargaining power as expressed in its decisions. I found that creating a better balance of employer and employee interests in the employment relationship requires the incorporation of a more diverse range of views of workplace justice and fairness.

My empirical studies of employee dismissal (Chapter 5, 6, and 7) will include an investigation of justice from the perspective of the HR practitioner and the courts (a third-party) providing the rationale for my consideration of justice and the law. The investigation of these alternative perspectives is anticipated to yield some common ground with respect to the employment contract while also revealing a divergent understanding of workplace justice.

My investigation of justice in the management and organization literature revealed relatively little use of organizational justice as well as remarkably diverse conceptualizations of justice in the workplace, which are largely absent from previous studies of employee dismissal. Hence, in the next chapter I examine the current state of knowledge and the relative lack of work in the study of non-union dismissal and the employer-employee relationship in order to take my investigation one step further.

Chapter 4 – The Empirical Study of Dismissal

In this chapter, I examine the current state of knowledge and the relative lack of work in the empirical study of non-union dismissal and the employer-employee relationship. My review will highlight the relative absence of management and organization theory generally in the literature. In addition, I include a discussion of the arbitral literature where appropriate in order to illustrate issues which remain relatively unrepresented in the non-union dismissal literature.

I review the key issues investigated in the dismissal literature including HR management practices, employment contract remedies, the determinants of case and arbitration outcomes, and topics in managerial and employee psychology. Finally, I summarize gaps in the dismissal literature including: a very small number of studies of the dismissal of the non-union employee, the lack of a complete theory of non-union dismissal, a relative absence of guidance from management and organization scholars for HR practitioners, and few studies that examine managerial psychology and behaviour.

Empirical Studies of Wrongful Dismissal Cases

Most studies of Canadian common law wrongful dismissal cases have focused on the factors used to determine the length of notice or severance, to which the employee was entitled once it has been determined that the employer did not have sufficient cause to dismiss an employee. Surprisingly, until the first empirical study of reasonable notice (McShane, 1983) it was considered impractical to construct a guide or predictive model of the length of notice to which the terminated employee was entitled (Grosman, 1984).

Nevertheless, McShane (1983) found that the employee's length of service, salary and job status, the labour market conditions, and year of the decision were statistically significant predictors of the notice awarded in a study of 199 wrongful dismissal cases for the period 1960 to 1982. A later study (McShane & McPhillips, 1987) of more than 100 British Columbia court cases found two additional predictors (did the employee incur a cost in taking employment with the employer and the employee's age) in addition to the five identified above. Furthermore, the OLS regression model accounted for 69 percent of the variance in reasonable notice awards and was highly generalizable in a test with Canada-wide data.

Several other studies also examined notice in common law wrongful dismissal. They include an evaluation of trends in wrongful dismissal cases (Sooklal, 1987) and replications of McShane and McPhillips (1987) work (Lam & Devine, 2001; Wagar & Jourdain, 1992). In a study of 177 Canadian cases, Wagar and Jourdain (1992) also found that occupational status, years of service, unfavourable labour market conditions and the year of the decision were correlated with predictors of notice period. However, they also found that the notice period increased when employers had 500 or more employees and when the cases were heard in British Columbia or Ontario. In an examination of Alberta wrongful dismissal cases, Lam and Devine (2001) compared the severance compensation determinants identified in the cases with severances provided by HR managers. Like McShane and McPhillips (1987), they also found that age, salary and length of service were significant predictors but found only modest support for unfavourable labour market conditions and occupational level. However, their full model accounted for 84.5 percent of the variance in notice.

In the second part of their study, Lam & Devine (2001) surveyed HR managers about hypothetical scenarios in a non-union setting in which the respondents were asked to decide the length of notice for a terminated employee. They found support for HR managers' use of age, length of service, occupational level, salary and labour market conditions as predictors of length of notice. But, respondents provided longer notice periods when the termination was due to corporate restructuring rather than to performance-related reasons and when the terminated employee was female. Notice periods were shorter when the company was in poor financial condition. A comparison of the notice periods provided revealed that, overall, HR managers provided shorter notice periods than the courts. However, the HR managers provided longer notice periods than the courts for lower status employees and shorter notice periods than the courts for higher status employees. Thus, notice periods provided by HR managers were clustered in a smaller range than those provided by of the courts.

It should be noted that in the studies of reasonable notice discussed above, the primary criterion for selection of the cases to study was that the courts had found in favour of the plaintiff (the dismissed employee) and had awarded notice. That is, these studies included many court cases in which cause for dismissal was not argued. Interestingly, an unpublished study (Wagar & Grant, 1992) which focused solely on cases in which just cause for dismissal was argued by the employer found evidence that an employee dismissed for alleged incompetence resulted in a notice award that was almost two months shorter than cases where the employer had argued for some other basis for dismissal.

Wagar and Grant (1992) also found that the larger the number of factors that the courts observed which mitigated the seriousness of the employee's alleged deficiency the longer the notice period awarded. For instance, the courts recognized the employer's obligation to provide the employee with the tools, training, direction and opportunity to fulfill their obligations and were prepared to penalize the employer by increasing the length of notice awarded for not fulfilling that obligation.

Determinants of Reasonable Notice

In the most recent study of reasonable notice, Lam and Devine (2001) replicated and added to the previous studies of wrongful dismissal case law. In their study, they contrasted the determinants of reasonable notice in the courts – an area previously examined in several studies (McShane 1983; McShane and McPhillips 1987; Sooklal 1987; Wagar and Jourdain 1992) – with the factors considered by HR managers when making severance decisions. They found that HR managers considered economic and social justice factors in addition to the factors that were found to be significant in court decisions. Their study took an innovative approach to examine the application of employment law in the workplace and to ground HR practice in a theoretical framework as well as a legal framework. Not only did they argue that there had been a limited number of factors considered in the relatively small number of previous studies, but also that there had been inconsistencies in the significance of some of the factors' significance. Furthermore, they claimed to have identified shifting trends, despite failing to specify what the trends may be.

In previous studies of reasonable notice (McShane, 1983; McShane & McPhillips, 1987; Wagar & Jourdain, 1992; Lam & Devine, 2001), occupational status, length of service, limited re-employment prospects, and salary are the most frequently cited predictors of length of notice to reach significance. Two possible explanations for the relationship between occupational status and notice have been offered. The first is thought to rest on the vagaries of the labour market; employees with greater status in the workplace such as executives will have fewer opportunities of a similar status, responsibility, and specialization available, making it more difficult for them to find comparable work (Lam & Devine, 2001). The second explanation has been that the courts believe that employees in higher status positions have made greater contributions to the organization than other workers (McShane & McPhillips, 1987) and have also carried greater responsibility.

Perhaps the mostly frequently cited factor in reasonable notice awards in the court record is the length of service of the employee. Longer service may be construed as an indication of the contribution to the organization or that the longer an employee has served a particular employer the longer the period it will take to find comparable employment elsewhere (McShane & McPhillips, 1987). In addition, because the essential rationale underlying notice is to provide reasonable time in which to find comparable employment evidence of a limited labour market should lengthen the notice period. Although considered in past studies, salary has not been examined in the present study because the courts have referenced the plaintiff's earnings in a little over half of the cases only.

Age (McShane & McPhillips, 1987; Lam & Devine, 2001), industry (Lam & Devine, 2001), having been hired away or induced to leave previous employment, the year

of the decision (McShane & McPhillips, 1987; Wagar & Jourdain, 1992), employer size, provincial jurisdiction, the existence of a written employment contract, and whether the employee mitigated the loss of employment (Wagar & Jourdain, 1992) have also been found to have been significant or moderately significant predictors of notice. Only Lam & Devine (2001) have previously considered the employee's performance and it was not found to be a significant predictor.

Wrongful Dismissal and Case Outcome

The examination of the outcomes of wrongful dismissal case (whether the employee or employer is successful) should also be particularly relevant for the examination of HR practices in that the courts seem especially concerned with both the employee's work history and the employer's workplace practices. Analysis of these decisions might help to identify the practices that do not infringe on an employee's common law rights. For instance, in an analysis of cases in which the employer argued that incompetence was the just cause for termination Wagar and Grant (1993) found that the provision of a hearing before termination and a blemished employee disciplinary record increased the probability of a successful employer defence whereas previous satisfactory performance appraisals decreased the probability of employer success. In a study of misconduct cases (Grant and Wagar 1995), they also found that a satisfactory performance appraisal and the absence of a disciplinary record increased the likelihood of a successful employee action and that employer condonation of similar past behaviour, either the employee's or another employee's behaviour, also led to increased employee success.

Turning briefly to unionized workplaces, labour arbitrators have distinguished between culpable and non-culpable incompetence (Knight, McPhillips, & Shetzer, 1992) and have prescribed different employer responses for each. In their analysis of arbitration awards, Knight, McPhillips & Shetzer (1992) found a difference between culpable and non-culpable incompetence in that employers were more likely to be successful in cases of employee termination. They argued that the distinction must be maintained and clearly understood by management, unions and arbitrators and that the distinction is necessary for the achievement of consistency and fairness in dealing with problems of non-culpable incompetence in the workplace.

Wagar and Grant (1996) also examined gender differences in non-union common law dismissal cases. The results were consistent with the general findings in the arbitral literature that found that women who sued their former employers were significantly more likely to win their cases than were men. Furthermore, they found no evidence that discrimination on the basis of gender had diminished over time. A more detailed discussion of the related sex differences literature is undertaken later in this chapter.

Additional Empirical Non-Union and Arbitral Research

The focus of the following review is limited to the dismissal of employees hired under an individual, or non-union, contract of employment. Generally, there has been a more intense focus on union arbitral grievance procedure research by researchers (see Bemmels and Foley, 1996 for a dated but comprehensive review). My review will cite grievance or union-focused research only to the extent that it may help to inform the relatively limited non-union dismissal research. This section is organized around the broad

research topics in the literature including HR practices, managerial and employee psychology, employment dismissal remedies, and other determinants of case and arbitration outcome. In addition, my review includes a discussion of research themes in the employee dismissal literature which are organized around the union and non-union environment (Table 4-1), the level of analysis (Table 4-2), and research methodology employed (Table 4-3).

Studies which focus on non-union employee dismissal are not abundant but use varied methodological approaches including the content analysis of jurisprudence (Lam & Devine, 2001), experimental simulation of employee dismissal (Blancero, 1995), surveys at the individual (Klaas & Dell'omo, 1997) and organizational levels (Shaw et al., 1998), and conceptual or theoretical studies (Dunford & Devine, 1998). Paradoxically, there are more than 1,500 studies of turnover focused primarily on individual-level predictors of turnover. While the researchers in these studies acknowledge the distinction nearly all of the studies of turnover collapse "voluntary" (quits) and "involuntary" (dismissal) turnover into a single category (Shaw et al., 1998). Otherwise, involuntary turnover or dismissal is usually not studied at all. Furthermore, while collective bargaining and labour arbitration have been subject to extensive study, the individual employment contract remains the most common form of employment relationship and, yet, the least studied by labour or management theorists (Troy, 2004). The picture of the non-union employee dismissal literature is a limited body of research with borrowed conceptual underpinnings and mixed research approaches that make identifying themes and drawing meaningful conclusions difficult.

Table 4-1
Topics of Dismissal Papers by Union and Non-Union Staus

Union	Non-Union
1. **Human Resource Management** **Employee Incompetence** (Knight, McPhillips, & Shetzer, 1992) **Work History** (Simpson & Martocchio, 1997), (Bemmels, 1988b), (Klaas, 1989)	**Performance Appraisal** (Barrett & Kernan, 1987), (Feild & Holley, 1982) **Progressive Discipline** (Eden, 1992, 1993) **Employee Misconduct, Incompetence** (Grant & Wagar, 1995), (Wagar & Grant, 1993) **Organization-level HRM Practices** (Klaas, Brown, & Heneman III, 1998), (Shaw, Delery, Jr, & Gupta, 1998) **Compensation** (McShane & Redekop, 1990) **Outplacement** (Phelps & Mason, 1991) **HRM Role Under Unfair Dismissal Provisions** (Dickens, 1987)
2. **Managerial & Employee Psychology** **Attribution Theory** (Bemmels, 1991a) **Managerial Decision Making** (Klaas, 1989)	**Organizational Justice** (Dunford & Devine, 1998), (Blancero, 1995), (Olson-Buchanan, 1996) **Managerial Distancing** (Folger & Skarlicki, 1998) **Willingness to Take Legal Action** (Grant & Wagar, 1992) **Predictors of Termination** (Inwald, 1988) **Managerial Decision Making** (Klaas & Dell'omo, 1997), (Klaas & Wheeler, 1990) **Psychological Stress** (Miller & Hoppe, 1994) **Voice** (Olson-Buchanan, 1996) **Progressive Withdrawal** (Rosse, 1988) **Psychological Contracts** (Robinson, Kraatz, & Rousseau, 1994), (Rousseau, 1995), (Rousseau & Anton, 1991) **High-Commitment Management Style** (Knight & Latreille, 2000)
3. **Employment Contract Remedy** **Reinstatement** (Bamberger & Donahue, 1999), (Ponak, 1991), (Trudeau, 1991), (Williams & Taras, 2000), (Rodgers, Helburn, & Hunter, 1986) **Grievance Procedure** (Bemmels & Foley, 1996) **Grievance Initiation** (Bemmels, 1994), (Klaas, 1989)	**Reinstatement** (Eden, 1994), (Dickens, Hart, Jones, & Weekes, 1984) **Reasonable Notice** (Lam & Devine, 2001), (McShane & McPhillips, 1987) (McShane, 1983), (Sooklal, 1987), (Wagar & Jourdain, 1992) **Non-Union Grievance & Appeal Systems** (Blancero, 1995), (Klaas & Feldman, 1994) **Initiating Legal Action** (Grant & Wagar, 1992), (Dunford & Devine, 1998)
4. **Other Determinants of Arbitration Outcome** **Gender** (Bemmels, 1988a, 1988b, 1988c, 1990b, 1991b), (Bigoness & DuBose, 1985), (Dalton & Todor, 1985), (Mesch, 1995), (Scott & Shadoan, 1989) **Arbitrators and Lawyers, etc.** (Bemmels, 1990a), (Block & Stieber, 1987), (Nelson & Curry, 1981), (Rodgers & Helburn, 1984), (Thornicroft, 1994), (Wagar, 1994), (Thornton & Zirkel, 1990), (Zirkel & Breslin, 1995), (Oswald, 1991)	**Other Determinants of Case Outcome** **Gender** (Knight & Latreille, 2001), (Wagar & Grant, 1996) **Just Cause** (Wagar & Grant, 1992)

Table 4-2
Topics of Dismissal Papers by Level of Analysis

Individual	Managerial	Organizational
1. **Human Resource Management** **Performance Appraisal** (Barrett & Kernan, 1987), (Feild & Holley, 1982) **Progressive Discipline** (Eden, 1992, 1993) **Employee Misconduct** (Grant & Wagar, 1995) **Compensation** (McShane & Redekop, 1990) **Employee Incompetence** (Knight, McPhillips, & Shetzer, 1992), (Wagar & Grant, 1993) **Outplacement** (Phelps & Mason, 1991) **Work History** (Simpson & Martocchio, 1997), (Bemmels, 1988b),	**HRM Role Under Unfair Dismissal Provisions** (Dickens, 1987) **Work History** (Klaas, 1989)	**Organizational-level HRM Practices** (Klaas, Brown, & Heneman III, 1998), (Shaw, Delery, Jr, & Gupta, 1998)
2. **Managerial & Employee Psychology** **Attribution Theory** (Bemmels, 1991a) **Organizational Justice** (Dunford & Devine, 1998), (Blancero, 1995) **Willingness to Take Legal Action** (Grant & Wagar, 1992) **Predictors of Termination** (Inwald, 1988) **Psychological Stress** (Miller & Hoppe, 1994) **Voice** (Olson-Buchanan, 1996) **Progressive Withdrawal** (Rosse, 1988) **Implied Terms & Psychological Contracts** (Robinson, Kraatz, & Rousseau, 1994), (Rousseau, 1995), (Rousseau & Anton, 1991)	**Attribution Theory** (Klaas, 1989) **Managerial Decision Making** (Klaas, 1989), (Klaas & Dell'omo, 1997), (Klaas & Wheeler, 1990) **Managerial Distancing** (Folger & Skarlicki, 1998)	**High-Commitment Management Style** (Knight & Latreille, 2000)
3. **Employment Contract Remedy** **Reinstatement** (Bamberger & Donahue, 1999), (Ponak, 1991), (Trudeau, 1991), (Williams & Taras, 2000), (Rodgers, Helburn, & Hunter, 1986), (Eden, 1994) **Grievance and Legal Action Initiation** (Bemmels, 1994), (Klaas, 1989), (Grant & Wagar, 1992) **Union and Non-Union Grievance Procedure** (Bemmels & Foley, 1996), (Blancero, 1995) **Reasonable Notice** (Lam & Devine, 2001), (McShane & McPhillips, 1987), (McShane, 1983), (Sooklal, 1987), (Wagar & Jourdain, 1992)	**Non-Union Grievance & Appeal Systems** (Klaas & Feldman, 1994) **Reasonable Notice** (Lam & Devine, 2001)	
4. **Other Determinants of Arbitration and Case Outcome** **Gender** (Bemmels, 1988a, 1988b, 1988c, 1990b, 1991b), (Bigoness & DuBose, 1985), (Dalton & Todor, 1985), (Mesch, 1995), (Scott & Shadoan, 1989), (Knight & Latreille, 2001), (Wagar & Grant, 1996) **Arbitrators and Lawyers, etc.** (Bemmels, 1990a), (Block & Stieber, 1987), (Nelson & Curry, 1981), (Rodgers & Helburn, 1984), (Thornicroft, 1994), (Thornton & Zirkel, 1990), (Zirkel & Breslin, 1995), (Wagar, 1994), (Oswald, 1991) **Just Cause** (Wagar & Grant, 1992)		

Table 4-3
Themes of Dismissal Papers by Research Design

Content Analysis	Experimental	Survey	Conceptual/Theoretical
1. **Human Resource Management** **Performance Appraisal** (Barrett & Kernan, 1987), (Feild & Holley, 1982) **Progressive Discipline** (Eden, 1992, 1993) **Employee Misconduct** (Grant & Wagar, 1995) **Compensation** (McShane & Redekop, 1990) **Employee Incompetence** (Knight, McPhillips, & Shetzer, 1992), (Wagar & Grant, 1993) **Work History** (Bemmels, 1988b)	**Work History** (Simpson & Martocchio, 1997)	**Work History** (Klaas, 1989) **Organizational-level HRM Practices** (Klaas, Brown, & Heneman III, 1998), (Shaw, Delery, Jr, & Gupta, 1998) **Outplacement** (Phelps & Mason, 1991) **HRM Role Under Unfair Statutory Dismissal Provisions** (Dickens, 1987)	
2. **Managerial & Employee Psychology**	**Attribution Theory** (Bemmels, 1991a) **Managerial Decision Making** (Klaas & Wheeler, 1990), (Klaas & Feldman, 1994) **Managerial Distancing** (Folger & Skarlicki, 1998) **Willingness to Take Legal Action** (Grant & Wagar, 1992) **Voice** (Olson-Buchanan, 1996) **Organizational Justice** (Blancero, 1995) **Psychological Contracts** (Rousseau & Anton, 1991)	**Managerial Decision Making** (Klaas, 1989), (Klaas & Dell'omo, 1997) **Psychological Stress & Attribution** (Miller & Hoppe, 1994) **Predictors of Termination** (Inwald, 1988) **Progressive Withdrawal** (Rosse, 1988) **High-Commitment Management Style** (Knight & Latreille, 2000) **Psychological Contracts** (Robinson, Kraatz, & Rousseau, 1994)	**Organizational Justice** (Dunford & Devine, 1998) **Psychological Contracts** (Rousseau, 1995)
3. **Employment Contract Remedy** **Reasonable Notice** (Lam & Devine, 2001), (McShane & McPhillips, 1987), (McShane, 1983), (Sooklal, 1987), (Wagar & Jourdain, 1992), (Wagar & Grant, 1992)	**Reasonable Notice** (Lam & Devine, 2001) **Non-Union Grievance & Appeal Systems** (Blancero, 1995), (Klaas & Feldman, 1994) **Initiating Legal Action** (Grant & Wagar, 1992)	**Reinstatement** (Bamberger & Donahue, 1999), (Eden, 1994), (Trudeau, 1991), (Rodgers, Helburn, & Hunter, 1986), (Williams & Taras, 2000), (Dickens, Hart, Jones, & Weekes, 1984) **Grievance Initiation** (Bemmels, 1994)	**Reinstatement** (Ponak, 1991) **Grievance Procedure** (Bemmels & Foley, 1996) **Lawsuit Initiation** (Dunford & Devine, 1998) **Grievance Initiation** (Klaas, 1989)
4. **Other Determinants of Arbitration / Case Outcome** **Gender** (Bemmels, 1988a, 1988b, 1988c, 1990b, 1991b), (Dalton & Todor, 1985), (Mesch, 1995), (Scott & Shadoan, 1989), (Knight & Latreille, 2001), (Wagar & Grant, 1996) **Arbitrators and Lawyers, etc.** (Bemmels, 1990a), (Block & Stieber, 1987), (Rodgers & Helburn, 1984), (Thornicroft, 1994), (Zirkel & Breslin, 1995), (Wagar, 1994) **Just Cause** (Wagar & Grant, 1992)	**Gender** (Bigoness & DuBose, 1985), (Bemmels, 1991a), (Grant & Wagar, 1992) **Arbitrators and Lawyers, etc.** (Nelson & Curry, 1981), (Thornton & Zirkel, 1990), (Oswald, 1991)		

Human Resource Management Practices

Studies of non-union dismissal with implications for HR practices may be categorized into two types. The first includes those concerned with functional HR practices such as performance appraisal (Barrett & Kernan, 1987; Feild & Holley, 1982), employee compensation (McShane & Redekop, 1990), the role of the HR manager (Dickens, 1987), and organization-level assessments of HR practices (Klaas et al., 1998; Shaw et al., 1998). The second includes those studies which examine the factors related to employee discipline where the employee has apparently come into conflict with the employer's expectations of performance. These factors include work history (Simpson & Martocchio, 1997), progressive discipline (Eden, 1992, 1993), employee incompetence (Wagar & Grant, 1993), and misconduct (Grant & Wagar, 1995).

The dismissal literature has produced little of consequence or assistance to the HR manager or to the employer (see Table 4-2) since so little research has examined the HR manager's role (Dickens) or the organization's HR practices (Klaas et al., 1998; Shaw et al., 1998). In addition, there is a remarkable gap in the experimental and conceptual or theoretical investigation of HR practices in dismissal (see Table 4-3). Also, there seems to be surprisingly little use made of labour arbitration reports or other methods to investigate HR practices in the union environment (see Table 4-1). Most of the research has been done by organizational scholars who have analysed the content of dismissals in various forms of legal proceedings or conducted surveys at the individual, managerial, and organizational level.

Organization-Level HR Practices. Shaw and his colleagues (1998) claimed that the study of the determinants of turnover at the organizational level was essentially nonexis-

tent and that nearly all organizational studies collapse voluntary and involuntary turnover together or ignore involuntary turnover. In response, their examination of the effects of HR management practices in trucking companies on 'quit' and discharge rates found that, while both rates were influenced by HR practices, the determinants of each were different. Quit rates increased with electronic monitoring and time on the road and decreased with better pay and benefits. However, discharge rates increased with the ratio of drivers hired and the number of applications and, surprisingly, with increased training. In that same year, Klaas and his colleagues (1998) analysed the results of a survey of almost 1,600 Australian workplaces and found that dismissal rates are affected by organizational restrictions on the use of discipline, compensation levels, labour market factors, human capital, worker control, use of incentive pay, work force size and industry classification.

In a somewhat different approach, Saridakis, Sen-Gupta, Edwards and Storey (2008) used a survey of Employment Tribunal applications in the UK to examine individual employment rights and the effect of firm size and the use of standards of procedural fairness. They found that smaller firms were more likely to experience more claims than large firms, to be subject to different kinds of claims, and to lose at a Tribunal. They also found that firms that have procedures and follow them are more likely to win than firms that do not. The study recognized that many small firms may face a policy dilemma in maintaining the benefits of informality while also ensuring that proper standards of procedural fairness are followed.

Compensation. McShane (1990) demonstrated that the reports of common law wrongful dismissal cases offered a rich critique of compensation practices including issues with pay communication (that is, ambiguity, indecision or failing to fulfill a promise), pay

structure (for instance, red-circling), pay form (changing the form of compensation), and pay level (reducing, withdrawing, or withholding any significant part of an employee's pay). The cases examined by McShane involved 'constructive dismissal' where the employee sued the employer for unilaterally altering a fundamental condition of the employment relationship. This is an area of law of fundamental importance to both the employee and employer particularly since employers claim that they must be able to respond rapidly to changes in the environment.

Performance Appraisal. In the 1980s, two studies investigated the verdicts in employment discrimination cases brought under Title VII of the American Civil Rights Act. Feild and Holley (1982) found that four out of ten performance appraisal system characteristics were correlated with the court's decisions; the characteristics were a behavioural rather than trait-based appraisal system, the use of job analysis and trained evaluators, and a review of the results with the employee. In a later study, Barrett and Kernan (1987) rejected extremely technical approaches to performance appraisal arguing instead that the courts were more concerned that standards were applied consistently and that the "organization have a review process that mitigates the chances of individual supervisory bias" (p.500). They went on to recommend that organizations undertake performance counselling, job analysis, written definitive standards, uniform application of standards through supervisor training, formal appeal mechanisms, and documented performance appraisal ratings.

Employee Work History. At least four work history factors have been hypothesized to influence arbitral decision making: the grievor's seniority, job performance, absence history and prior disciplinary record. Klaas (1989b), in outlining a theoretical framework

for the study of grievance initiation, suggested that senior employees were likely to receive more lenient treatment and less severe penalties than junior employees. In addition, he used attribution theory to hypothesize that above-average performers would be more likely to have the cause of deviant behaviour attributed to factors outside their control and that an employee's previous disciplinary history should influence arbitrators judgements about the employee.

In a study of 1,812 discharge cases, Bemmels (1988b) found that the grievor's disciplinary record affected whether the grievance was sustained, whether full or partial reinstatement was awarded, and the length of suspension. In an examination of arbitrators' decisions in a simulated absenteeism discharge case, Simpson and Martocchio (1997) found that a prior record of problems with absenteeism and other disciplinary problems decreased the likelihood that the arbitrator would modify the discharge decision while above average performance increased the likelihood. However, seniority was not significant in this study.

Studies of common law dismissal cases in Canada have also found that an unblemished disciplinary record significantly increased the probability of a successful action brought against the employer when the employee had been terminated for misconduct (Grant and Wagar 1995) and that satisfactory performance evaluation and past discipline both influenced case outcome in the hypothesized direction (Wagar and Grant 1993).

Progressive Discipline. Eden (1992), in a study of adjudication under the Canada Labour Code, questioned the continued application of progressive discipline in the arbitral jurisprudence given the relative lack of empirical support for its efficacy either as a cor-

rective action or as a form of punishment. Eden argued that, while its use may have been appropriate at one time, the application of progressive discipline may institutionalize a conservative, traditional method of handling employee problems instead of encouraging alternative practices which may be more effective, especially considering an increasingly sophisticated and educated workforce. A later study of adjudicator decisions of unjust dismissal complaints in the federal jurisdiction (Eden, 1993) found adjudicators had adopted the progressive discipline approach of arbitrators in the unionized sector. In addition, the Supreme Court of Canada has recently endorsed the use of progressive discipline as a more proportionate response to many employee performance issues (*McKinley*, 2001).

Employment Contract Remedies

Legal remedies for unfair employee dismissal such as reinstatement and reasonable notice of termination (or severance in lieu of notice) have been well represented in both the union and non-union dismissal literature (Table 4-1), and studies have been conducted using a variety of research designs (Table 4-3). Nonetheless, this research has been focused almost exclusively on the individual employee. There has been very little examination of the manager in the studies of the remedy of dismissal (Klaas & Feldman, 1994 and Lam & Devine are notable exceptions) and likewise little study of remedy at the organization level (Table 4-2). A study of the consequences for HR managers in organizational downsizing (Wright & Barling, 1998) is not included here because its focus is the dismissal of large numbers simultaneously in organizational downsizing. Yet, the

study has clear implications for HR managers and the need to balance the interests of the employee, the community, and the organization (Kochan, 2004).

Grievance and Appeal Procedures. In a review of grievance procedure research in the arbitration literature, Bemmels and Foley (1996) identified studies that examined individual-level determinants of grievance filers versus non-filers, and grievance filing rates across organizational units. They found studies in which grievors' job satisfaction, demographic characteristics, exit-voice behaviours, and attributes of reactance, attribution, and expectancy theory, were related to grievance filing. For studies of small work group- and organization-level grievance rates, they grouped factors affecting grievance rates into five categories: environmental (e.g., labour market conditions), management (e.g., labour relations policies and supervisor behaviour), employee grievance precursors (e.g., percentage of work group that was female), union (policy and shop stewards' characteristics), and union-management relations.

However, few studies have examined non-union grievance and appeal systems in the dismissal literature. Examples of such studies include work by Blancero (1995), and Klaas and Feldman (1994). Blancero (1995) used a simulated appeal of a dismissal decision to study NUGS. She found that NUGS procedural elements (employee input, communication, and grievance panel composition) had a greater impact on employee perceptions of overall fairness than the appeal's outcome. In a study of disciplinary procedures, Klaas and Feldman (1994) examined the effect of disciplinary appeal procedural guidelines which are common to arbitral and judicial systems but less common in NUGS, on managers' evaluation of disciplinary appeals. Where the managers were allowed to evaluate the reasonableness of a rule regarding the standard of proof required and work

history information was available in a simulated disciplinary appeal, they were more likely to grant the appeal.

Non-union employee grievance and the initiation of legal action have also received very little attention. Olson-Buchanan (1996) found that approximately 50 percent of the employees who had both a basis for dispute (each had an equivalent basis on which to file a grievance) and access to a grievance system, did file a grievance. In addition, Olson-Buchanan also found that grievance filers had significantly lower objective job performance both after the grievance was filed and after the outcome of the grievance had been learned. She concluded that the extent to which managers punish grievance filers may have been overstated in previous research by field researchers who relied on subjective performance ratings since both objective and subjective performance ratings among grievance filers were consistent. Therefore, her study did not support organizational punishment theory in which it is posited that managers tend to punish grievance filers.

Nevertheless, evidence seems to indicate that women are less likely to pursue remedies to wrongful dismissal than men. Bemmels (1994) found decreased grievance rates in work groups with a higher proportion of women in his study of grievance initiation. Likewise, Grant and Wagar (1992) found that men were more willing to pursue legal action in two simulated dismissal cases, one of which involved alleged incompetence and the other misconduct. In addition, the willingness of subjects to pursue legal action was influenced by the occupation of the dismissed employee as well as characteristics of the misconduct. The subjects were less likely to favour legal action when the employee was supervisor of cashiers (a predominantly female occupation) instead of produce man-

ager (male occupation) and when the alleged misconduct involved drug or alcohol abuse as opposed to absenteeism.

Reinstatement. Reinstatement in the union setting has been concerned with the proportion of employees winning reinstatement who actually returned to work, their future retention and disciplinary rates, and how employers and unions assess the impact of reinstatement on labour-management relations (Bemmels & Foley, 1996). Interestingly, women had been reinstated more frequently than men and many of the employees ordered reinstated were not anxious to return to work as the reinstatement experience had not necessarily been a positive experience (Bemmels & Foley, 1996).

It may be, however, that the reinstatement remedy is losing its appeal. Williams and Taras (2000) claimed that the reinstatement rate had fallen to 37.7 percent in federal and provincial discharge arbitration cases in Alberta for the period 1995 to 1998 compared to 53.8 per cent over the period 1982 to 1984. Nevertheless, Ponak (1991), in his examination of 14 studies on discharge arbitration outcomes, reported that arbitrators consistently reinstated discharged employees in over 50 per cent of the cases heard. In most cases some disciplinary action, such as a letter of warning or a suspension, was substituted for the dismissal.

In addition, in the non-union sector reinstated workers may also tend to experience difficulty on their return to work. A study of discharged employees reinstated under a Quebec statute that provides for reinstatement found that two-thirds of survey respondents who returned to work reported being treated unfairly by their employers after returning to work and were likely to leave work within a few months of reinstatement (Trudeau, 1991). Although not directly addressing the issue of discharge, in a study of

grievances collected from the personnel files of a public-sector organization, Klaas (1989b) found that managers are influenced by the grievor's work history even when that history is not relevant to evaluating the merits of the grievance.

Finally, a study of last chance agreements (LCA) – contracts governing the non-arbitral reinstatement of discharged employees which stipulate that violation will result in dismissal – found evidence of a positive relationship between the number of LCAs signed in one year and discharge rates in subsequent years (Bamberger & Donahue, 1999).

Determinants of Case or Arbitration Outcome

In effect, all of the studies of dismissal, in which the determinants of case outcome are the primary focus, have been conducted at the individual level of analysis (Table 4-2), and most of these have been conducted in the union environment (Table 4-1) using content analysis of case and arbitral reports (Table 4-3). A relatively small number of studies have used an experimental research design or have been applied to the non-union employment relationship. Apparently, survey methodologies and conceptual or theoretical studies have not been employed nor has a managerial or organizational-level analysis been conducted. Remarkably, there also is little evidence of the study of American case law in the organization literature (for examples, see Feild and Holley (1982) and Barrett and Kernan (1987).

In Canadian wrongful dismissal cases, two outcomes (or decisions of the courts) have been the basis of analysis: whether the employee has been terminated for cause and, if not, what the appropriate notice period should have been. Studies which have employed both of these dependent variables are rare with the exception of Nierobisz's

(2002) study of how the economy influences court decisions in wrongful dismissal cases. Nevertheless, these studies more frequently employ one dependent variable or the other. On the other hand, labour arbitrators have additional remedies available including full or partial reinstatement and suspensions in place of dismissal. As a result, these studies generally have several dependent variables including whether the grievance was sustained, whether full or partial reinstatement was ordered, the length of the suspension if any, and the award if the employee's grievance was sustained but reinstatement was not ordered.

The studies of dismissal arbitration have usually been focused on one or more themes but generally they centre around the sex of the complainant (for example, Bemmels, 1988a) and the characteristics of the arbitrator (for example, Bemmels, 1990a) and how these factors influence the outcome of the arbitration. However, in addition to examining the influence of plaintiff sex on case outcome (Wagar & Grant, 1996), studies of wrongful dismissal cases have also considered the just cause allegations made by the employer, including misconduct (Grant & Wagar, 1995) and incompetence (Wagar & Grant, 1993).

Sex Differences. Sex differences are one of the most extensively studied phenomena in the dismissal literature. To date, sex has been examined in the content analysis of arbitral jurisprudence (Bemmels, 1988a, 1988b, 1988c, 1990b, 1991b; Dalton & Todor, 1985; Mesch, 1995; Rodgers & Helburn, 1984; Scott & Shadoan, 1989; Zirkel & Breslin, 1995), and of British industrial tribunal hearings (Knight & Latreille, 2001), as well as in experimental treatments of arbitration cases (Bemmels, 1991a; Bigoness & DuBose, 1985). In addition, Wagar and Grant (1996) examined sex differences in non-union

common law dismissal cases. Their results were consistent with the general findings in the arbitral literature in that women who sued their former employers were significantly more likely to win their cases than were men. Furthermore, they found no evidence that discrimination on the basis of sex had diminished over time.

From a conceptual perspective, Bemmels (1988ac) advanced two theories from the criminology literature, both based on stereotypical assumptions of female behaviour. The chivalry/paternalism thesis supports a finding of more lenient treatment. Chivalrous behaviour connotes a paternalism that insinuates the superior / subordinate relationship in which women are seen to be child-like, helpless and in need of protection. Alternatively, the evil woman thesis holds that women who commit offences violate assumptions of expected behaviour. It suggests that women are penalized for both their offence and their deviant behaviour. Bemmels (1988c) also pointed out that reasons other than arbitrator bias may explain the differential treatment. Potential explanations include the possibility that the female grievors had stronger cases, that unions may have differential policies when deciding to settle rather than pursue a grievance to arbitration, or that male grievors may be more persistent to have their grievance proceed to arbitration.

Sex in the arbitral dismissal literature. Two experimental simulation studies provided mixed results with respect to sex differences in labour arbitration outcomes. Bigoness and DuBose (1985) found no difference between female and male 'arbitrators' in a study in which students were asked to render decisions when presented with the transcript of a simulated dismissal case. However, the female arbitrators did regard the offence (an employee caught drinking on the job) as less serious. Nevertheless, it has been observed that using undergraduate students as arbitrators is unrealistic (Bemmels 1988a) and inap-

propriate (Oswald, 1991). In a study of students' and arbitrators' decisions in hypothetical discharge cases, Oswald found significant differences between the two groups which led her to question the validity of using students as subjects in research on arbitral decisions. However, Bemmels (1991) examined the decisions of 230 male arbitrators in a hypothetical discharge grievance case and found that female grievors were more likely to receive full (rather than partial) reinstatement and shorter suspensions than male grievors.

Nevertheless, the studies in which content analysis of labour discharge arbitrations was used to analyse sex differences are quite uniform in their conclusions. Women tend to receive more lenient treatment than do men, or there is no difference at all. They have their grievances sustained, and receive full rather than partial reinstatement and shorter suspensions, more frequently. For instance, in an early examination of sex differences in 361 grievance arbitration decisions, Dalton and Todor (1985) found that women received more than 50% more favourable outcomes than men. They interpreted these findings to represent results consistent with the criminal justice research, which had found evidence of preferential treatment of women in the criminal court proceedings, rather than the research showing less favourable treatment in the workplace. However, a few years later Scott and Shadoan (1989) concluded that the arbitration process is free of sex bias in an analysis of 169 arbitration decisions.

In three separate studies, Bemmels examined the effect of grievor's sex in labour arbitration cases in Alberta (Bemmels, 1988a), British Columbia (Bemmels, 1988c), and the United States (Bemmels, 1988b). There was evidence that female grievors received more lenient treatment than male grievors, although some variability existed among the studies. In a study of 104 discharge arbitration cases in Alberta from 1981 to 1983,

Bemmels (1988a) found that women had their grievances sustained more often than men and received full rather than partial reinstatement more frequently when the grievance was sustained. Furthermore, when suspension was substituted for discharge, women received shorter suspensions, on average, than male grievors.

In a subsequent study of 633 discipline cases in British Columbia from 1977 to 1982, Bemmels (1988b) found no significant sex difference regarding the likelihood of grievances being sustained or in the length of suspension imposed on grievors. However, women were more likely to receive full reinstatement when their grievances were sustained. Finally, Bemmels (1988c) analysed the effect on case outcome of the sex of both grievor and arbitrator in 1,812 discharge cases in the United Sates from 1976 to 1986. He found that female grievors were more likely to have their grievances sustained and to receive full reinstatement. Surprisingly, female grievors were found to receive longer suspensions before July 1, 1981; however, there were no significant differences after that date. In addition, there were no significant differences between male and female grievors when the arbitrator was female.

In an analysis of 557 suspension cases several years later, Bemmels (1991) again found that male arbitrators favoured female grievors and that female arbitrators did not treat male and female grievors differently. The male arbitrators were 74% more likely to sustain the grievances of female grievors than male grievors. Nevertheless, two later studies found no support for more lenient treatment of female grievors (Mesch, 1995; Zirkel & Breslin, 1995). In fact, Mesch concluded that women appeared to be treated more harshly rather than more leniently, and the data indicated that women tended to lose more cases and received fewer compromise decisions.

Finally, a study of British industrial tribunal hearings (Knight and Latreille 2001) also found that predominantly male tribunal panels were more likely to sustain cases brought by female applicants. Interestingly, this study also showed a sex difference with respect to the amount of award received in the case of a successful application. Though women tended to receive smaller awards, this difference disappeared as other variables, such as occupation level entered the regression equation.

The results for the studies of reasonable notice awarded in wrongful dismissal cases (Lam & Devine, 2001; McShane, 1983; McShane & McPhillips, 1987; Sooklal, 1987; Wagar & Jourdain, 1992), have been consistent with those of Knight and Latreille (2001). No evidence has been found that plaintiff sex affected the length of notice; that is, female plaintiffs did not seem to receive significantly different notice periods than male plaintiffs even though occupation level, salary and tenure usually are directly related to notice. Two possible explanations would account for sex differences if any had been found; that the judges or arbitrators were biased, or, that women tend to occupy lower occupational levels or are already disadvantaged in some other way.

While it seems apparent that some sex bias does exist in both the union and non-union dismissal proceedings, little if any effort has gone to answer the question, why? Several research questions should be explored in future efforts. To what extent does the support network available to men and women affect the decision to pursue court action? Do sex differences persist over time? Are women more risk averse and less willing to pursue a wrongful dismissal action? For instance, an experimental study of 146 business students with full-time work experience (Grant & Wagar, 1992) found that men were more likely than women to favour court action in the event of dismissal. While grievance

rates have been the subject of a number of studies (see Bemmels, 1994), little research has examined terminated non-union employees' propensity to sue.

Arbitrator Attributes. Both labour and management have been known to prefer arbitrators with particular attributes (Nelson & Curry, 1981) and to investigate an arbitrator's background and reported decisions before agreeing on a selection (Bemmels, 1990a) implying a relationship between arbitrators characteristics and their decisions. Nevertheless, analysis of both simulated and reported arbitration cases has found little evidence of significant relationships between arbitrator attributes and their decisions (Bemmels, 1990a; Thornicroft, 1994; Thornton & Zirkel, 1990) except for age and experience (Bemmels, 1991a; Nelson & Curry, 1981), and educational attainment (Simpson & Martocchio, 1997). Furthermore, while Thornton and Zirkel (1990) found a large variance in arbitrators' awards, none of it was explained by age, sex, education or experience. However, one analysis of arbitration awards (Block & Stieber, 1987) did find that the awards of several of the arbitrators studied were consistently more favourable to one party than the other.

A more recent study (Klaas, Mahoney, & Wheeler, 2006) used a policy-capturing approach to compare how decisions about termination cases are made by employment arbitrators, labour arbitrators, and jurors. They found that labour arbitrators were the most likely to rule in favour of the employee, followed by jurors. Employment arbitrators judging statutory claims in a workplace in which termination must be 'for-cause' were also more likely to rule for the employee than were employment arbitrators judging statutory claims where the employer adheres to an employment-at-will policy. However,

both groups of employment arbitrators were less likely to favour the employee than labour arbitrators and jurors.

Overall, they found that decision makers were influenced most by strength of evidence against the employee, followed by evidence of discrimination, employee work history, and procedural compliance by the employer. The least weight was given to supervisor provocation and stress-inducing personal circumstances. They also found partial support for the hypothesis that employment arbitrators (under both for-cause and employment-at-will conditions) would give less weight to mitigating factors including the weight given to the employer's failure to compliance with its own procedures, evidence of employer discrimination, a strong employee work history, and that there had been stress-inducing personal circumstances involved. For instance, only jurors were significantly more likely to favour employees when the termination involved stress-inducing personal circumstances. In addition, where there had been evidence of a strong performance history, labour arbitrators and jurors were more likely to favour the employee.

Managerial and Employee Psychology

A relatively large number of studies have focused on employee psychology in dismissal using conceptual or theoretical notions such as attribution theory (Bemmels, 1991a), organizational justice and appeal systems (Blancero, 1995), psychological stress (Miller & Hoppe, 1994), voice (Olson-Buchanan, 1996), willingness to take legal action (Grant & Wagar, 1992), progressive withdrawal (Rosse, 1988), psychological instruments (Inwald, 1988) and the psychological contract (Rousseau, 1995). A smaller number of studies have examined managerial decision making (Klaas & Dell'omo, 1997), managerial distancing from the dismissed employee (Folger & Skarlicki, 1998), and

high-commitment management style (Knight & Latreille, 2001). It seems that the content analysis of case, arbitration, and legal reports have not been used to examine employee or managerial psychology although experimental and survey research designs are relatively well represented, and conceptual / theoretical studies have been undertaken (Dunford & Devine, 1998; Rousseau, 1995). In addition, only a small number of studies have been carried out in the union environment (Bemmels, 1991a. Klaas, 1989b).

Managerial Decision Making, Distancing, and Commitment Style. A handful of studies have examined manager response in simulated non-union dismissal scenarios. Two of the studies were concerned with disciplinary appeals and determinants of managerial decisions regarding those appeals. The first study of line managers' willingness to attempt dismissal (Klaas & Dell'omo, 1997) found that informal norms (for instance, compensating for deficiencies), restrictive disciplinary procedures (for instance, requiring multiple approvals for dismissal) and whether the appeal was made to a neutral decision maker, specifically, a peer review board or an arbitrator, reduced the managers' willingness to attempt a dismissal particularly where there was uncertainty about the strength of the just cause argument. However, the line managers were positively influenced to dismiss when the appeal was only to an HR manager authorized only to mediate but not to overturn a decision. The second study of 142 MBA students with some supervisory experience found that decision makers were more likely to give affirmative responses to disciplinary appeals if the appeal procedure allowed them to evaluate the reasonableness of the disci-

plinary rule[7], if it specified a stringent standard of proof for dismissal, and if it restricted work history information (Klaas & Feldman, 1994).

Two additional studies analysed manager response to attributes related to the manager or to the situation. For instance, in a study of line and personnel managers, Klaas and Wheeler (1990) found that the institutional / legal context (that the disciplinary system would operate in accordance with the 'rule of law') had the largest impact of the six factors manipulated on personnel managers' decisions. In contrast, line managers were most influenced by the hierarchical context (the desire that employees remain subordinate to managerial authority). Furthermore, they found substantial variation in the application of decision rules in disciplinary decisions. They argued that, "while personnel managers may be more likely to follow norms regarding the consistent application of discipline, line managers may be more concerned about immediate needs within their work unit" (Klaas & Wheeler, 1990; p. 190). In a more recent study, Folger and Skarlicki (1998) found evidence of a 'distancing' effect – the length of time scheduled for a dismissal meeting – when the managers' mismanagement (rather than external causes) led to the need for the layoff.

A British study (Knight & Latreille, 2001) found that workplace practices that reflected a high-commitment management style had limited impact on the rates of disciplinary sanctions and dismissal, as well as the incidence of unfair dismissal complaints to the employment tribunals. Furthermore, formal discipline and dismissal procedures had no influence on whether unfair dismissal claims are brought at the workplace.

---

[7] Some organizations explicitly prohibit appeal decision makers from evaluating the reasonableness of the rule.

A final study (Elangovan, 1998) tested a prescriptive model of intervention strategy selection in an exploration of successful managerial third-party dispute intervention (the settlement was consistent with organizational objectives, the resolution was timely, and disputants were committed to the resolution). Results of the study supported a contingency approach to dispute intervention in that, contrary to the trend to a non-contingency approach favouring mediational styles, different intervention strategies are successful under different conditions. Moreover, most of the strategies employed by managers in the study were described as means (consistent with mediation or conciliation), full (sometimes referred to as the inquisitorial or autocratic intervention), or partial (a group problem solving approach) control strategies rather than ends or low control strategies, a result which differed slightly from prior research.

Attribution Theory. In an examination of male arbitrators' decisions in a hypothetical discharge grievance case, Bemmels (1991a) found that their responses supported the central proposition of attribution theory that a decision maker's response to an individual's action largely depended on the decision maker's attributions of causality or responsibility for the action. In addition, Klaas (1989b) used attribution theory to hypothesize that above average performers were more likely to have the cause of deviant behaviour attributed to factors outside of their control and that an employee's previous disciplinary history should influence arbitrators' judgments about the employee.

Employee Turnover. Two studies were found to be relevant to employee turnover in the form of dismissal. First, Inwald (1988) used pre-employment psychological testing to predict which public safety officers would be terminated within five years. Inwald found that equations based on tests (Minnesota Multiphasic Personality Inventory and Inwald

Personality Inventory) alone were more successful than clinicians ratings. However, all equations resulted in a significant number of false predictions. Next, Miller and Hoppe (1994) studied the psychological reactivity of terminated and laid-off working-class men. They suggest that future research should give attention to the role of job loss attributions as they seem to have implications for psychological outcomes.

Gaps in the Non-Union Dismissal Literature

Despite the substantial turnover and labour arbitration literature, there have been a relatively limited number of studies on dismissal of the non-union employee. Many gaps exist which provide opportunity for future research. In addition, some parallels can be drawn with gaps identified in the labour literature. For instance, in their review of grievance procedure research, Bemmels and Foley (1996) reported that, "a complete theory of the grievance process with testable hypotheses had not been developed" (p. 361) and that efforts to create a theoretical framework (for example, Klaas, 1989a) had been the basis of little hypothesis testing. They had concluded that the descriptive 'systems models' that had been widely used had been important for understanding the broader context within which the system operates. However, the weakness of the systems models developed was that linkages among components and variables were left unspecified. Nevertheless, they found the increasing use of social science theories applied to specific aspects of the grievance procedure to be a promising development and that this approach would lead to solidly grounded research and testable hypotheses. Klaas' (1989b) theoretical framework, for instance, depicts the employee's role in deciding to file a grievance and is grounded in expectancy theory, as well as procedural and distributive justice theory.

Experience in the study of non-union dismissal has not been significantly different from that in the grievance procedure research. For instance, the limited body of literature that uses content analysis of jurisprudence, the most frequently employed method in the study of non-union dismissal, typically utilizes a simple input-output framework and borrows many of the concepts and variables under study from the labour arbitration literature. In addition, conceptual or theoretical papers are either non-existent or inadequate in most areas of the non-union dismissal literature. Nevertheless, researchers have increasingly relied on an assortment of concepts and theories at use in the organizational sciences such as attribution theory (Bemmels, 1991a; Klaas, 1989b), behaviour modification (Eden, 1992), exit-voice (Olson-Buchanan, 1996), organizational justice (Blancero, 1995; Dunford & Devine, 1998), and expectancy theory (Klaas & Dell'omo, 1997).

Nonetheless, it is difficult not to conclude that the use of management and organization theory in non-union dismissal research remains inadequate since a relatively small number of empirical studies have reported findings with a theoretical grounding. In addition, among the relatively small number of experimental and survey-based studies, researchers have utilized virtually as many different dependent variables as there are studies. A summary of some of these dependent variables and themes are contained in the Table 4-1.

Finally, the non-union dismissal literature is heavily slanted to studies at the individual level of analysis with very few studies focused on the managerial or organizational level. While these studies have made important contributions for the most part, they do little to provide us with an image of, or insight into, management or the organization. A more specific discussion of gaps in the non-union dismissal literature follows.

Table 4-4: Summary of Dependent Variables in Experimental and Survey-Based Studies of Dismissal

Employee Perspective	• employees' terminations (Rosse, 1988) • willingness to continue working and job performance (Olson-Buchanan, 1996) • perceptions of fairness among employees left behind (Blancero, 1995)
Managerial Perspective	• manager's willingness to attempt dismissal (Klaas & Dell'omo, 1997) • time scheduled for discharge meetings (Folger & Skarlicki, 1998) • application of progressive discipline (Klaas & Wheeler, 1990) • responses to employee appeals (Klaas & Feldman, 1994)
Organizational Perspective	• organization-level discharge rates (Shaw et al., 1998) • the number and use of dismissals (Klaas et al., 1998)

Limited Examination of HR Practices in Dismissal

HR practitioners have received little practical guidance from management researchers on the implications of dismissal for the employment relationship or for HR practice. The relatively few studies in the non-union dismissal literature are largely based on the analysis of court reports. Aside from the limited study of HR practices at the organizational level (Klaas et al., 1998; Shaw et al., 1998), employee work history (Simpson & Martocchio, 1997), and outplacement (Phelps and Mason, 1991), field, experimental and conceptual / theoretical research in HR practices seems virtually non-existent. In addition, surprisingly little research has focused on HR themes in the union environment.

Moreover, the reverse of this condition seems to be the case for studies of managerial and employee psychology. Among the studies of the content analysis of dismissal

and labour arbitration cases, few, if any, have examined topics related to the psychology or behaviour of managers and employees, or have attempted to align legal analysis with management and organization theory (a possible exception is the work of Rousseau, 1995). Although there has been some consideration of the psychological contract in the employment relationship (Robinson et al., 1994; Rousseau, 1995), few studies have considered the implications of the terms of the employment contract implied by the courts (Dunford & Devine, 1998; Parks & Schmedemann, 1994; Rousseau & Anton, 1991) for the practice of HR management. Even then, only American examples with little theoretical foundation exist.

Summary

This chapter presented an overview of the management and organizational literature with respect to the empirical study of Canadian wrongful dismissal cases as well as other studies of employee dismissal from both the arbitral and non-union perspective. The chapter began with a review of the empirical studies of Canadian wrongful dismissal cases. It continued with a discussion of the union and non-union employee dismissal literature, which includes studies relevant to HR practices, employment contract remedies, the determinants of case and arbitration outcomes, as well as managerial and employee psychology.

The study of dismissal of non-union employees has been shown to be a diverse but inadequately studied field with rich opportunity for a clearer understanding of the nature of the individual employment relationship. For instance, in this chapter I identified gaps in the dismissal literature including: a very small number of studies of the dismissal

of the non-union employee, the lack of a complete theory of non-union dismissal, a relative absence of guidance from management and organization scholars for HR practitioners, and few studies that examine managerial psychology and behaviour. Such research seems needed given that more than two out of every three employees in many Western countries are engaged under such contracts. Furthermore, this research has more promise beyond a simple consideration of the legal terms of the employment contract. The dismissal record is frequently representative of the whole of the employment relationship and must, therefore, have implications for management practice, as well as social policy and employee rights.

Future research of non-union dismissal of the individual employee should focus on the underutilized reports of Canadian wrongful dismissal cases, the application of management and organization theory and management practice in dismissal, and the development of a conceptual or theoretical grounding for the study of the non-union employment relationship.

In Study 1 (Chapter 5), I examine the determinants of both case outcome – who wins and who loses – and the reasonable notice awards of the courts in their published decisions by way of a quantitative content analysis of Canadian wrongful dismissal law court cases. In Study 2 (Chapter 6), I will go on to compare my findings in Study 1 with an investigation of workplace dismissals using data collected from HR practitioners. In contrasting the responses of HR managers with an analysis of wrongful dismissal cases, Lam and Devine (2001) found that HR managers considered both economic and social justice factors in addition to the factors that had been found to be significant in court decisions. As such, the present research borrows, at least in part, from their innovative ap-

proach to the examination of the application of employment law in the workplace and seeks to ground HR management practice in a theoretical framework.

Chapter 5 – The Courts' Perspective of Employee Performance Management: An Empirical Investigation of Wrongful Dismissal Case Outcome and Reasonable Notice Awards

Study 1

I undertake a quantitative content analysis of Canadian wrongful dismissal law cases. The study examines the determinants of both case outcome – who wins and who loses – and the reasonable notice awards of the courts in their published decisions. Data collection, research method, variables under examination, and hypotheses are described. This study makes an important contribution to the study of wrongful dismissal and employment law in that it both replicates and goes beyond the previous studies of wrongful dismissal case law to contrast the determinants of reasonable notice with the determinants of case outcome using the same sample of case reports. Only one previous study has considered both reasonable notice and case outcome concurrently (Nierobisz, 2002).

My study's findings have implications for HR management and employment practices. Moreover, the study will have relevance not only to management practice but also to the labour law community and to other management researchers. Its results have lessons for the duty and behaviour of employees owed to their employer, and for the employer's obligation in terms of workplace conditions, support and development of the employee.

Background

In this study, the determinants of case outcome (whether the employee or the employer won) and reasonable notice awards in Canadian wrongful dismissal case will be explored. The study incorporates the effect of the Supreme Court of Canada decision in *Wallace v. United Grain Growers* (1997) as well as HR practices related to performance management. In addition, it considers the possible implications of subsequent decisions of Canada's highest court (*Dowling v. Halifax (City)*, 1998, and *McKinley v. BC Tel*, 2001). Determinants of case outcome and reasonable notice awards will be explored in terms of employee performance, voluntary and involuntary workplace change, disciplinary history, and the employers' failure to make effective use of progressive discipline, warnings, aspects of organizational justice, and performance standards. The study also attempts to resolve whether the '*Wallace* Bump' (Bhalloo, 2006) has had an effect on notice periods in general.

Case reports of wrongful dismissal decisions have been examined empirically in several previous studies. For instance, the determinants of reasonable notice awards have been analysed in several earlier studies (Lam & Devine, 2001; McShane, 1983; McShane & McPhillips, 1987; Sooklal, 1987; Wagar & Jourdain, 1992). In addition, a variety of factors that influence case outcome have also been explored (Grant & Wagar, 1995; Wagar & Grant, 1993, 1996). The present study extends the literature on wrongful dismissal by attempting to replicate the major findings of some of these studies in a particular sample of the case law (cases in which incompetence or poor performance have been alleged) and by extending the analysis to an investigation of specific human resource management practices which have not been studied previously. These practices

relate particularly to the management of employee performance. In addition, factors related to the inequality of bargaining power and employee vulnerability (*Wallace*, 1997), near cause (*Dowling*, 1998), and progressive discipline (*McKinley,* 2001) will be examined.

Previous studies of wrongful dismissal have examined court cases selected because they addressed employee incompetence (Wagar & Grant, 1993) and misconduct (Grant & Wagar, 1995). However, studies of reasonable notice have failed to distinguish between cases in which employee performance was an alleged issue and those in which other forms of misconduct, such as theft and dishonesty, have been alleged (McShane, 1983; McShane & McPhillips, 1987; Wagar & Jourdain, 1992). In addition, such studies also neglected to differentiate between cases in which cause for termination was argued and those in which only the proper period of notice was decided.

The cases selected for my study include those in which an allegation of incompetence or other poor performance has been alleged as cause for dismissal. In these cases, the courts examine many issues related to the management of employee performance, issues which are an on-going and normal part of the employment relationship and an important and recurrent concern of both the employee and employer. By contrast, employee misconduct such as insubordination or theft may tend to be considered anomalies in the typical day-to-day employment relationship.

Because an employee's poor performance has been linked to reasonable notice periods in the case law through 'near cause' (a concept that was recently rejected by the Supreme Court of Canada in *Dowling*, 1998), it is anticipated that other factors related to employee performance not explicit in the courts' arguments might also affect reasonable

notice periods. Furthermore, unlike previous studies in which only case outcome or reasonable notice have been investigated, this study will investigate both case outcome and reasonable notice awards.

Previous empirical studies of wrongful dismissal cases have not considered the impact of the Supreme Court of Canada's decision in *Wallace v. United Grain Growers* (1997) either on the length of reasonable notice awards or on the proportion of cases won by the employer or the employee. In their decision, the Court affirmed the view that there is power imbalance intrinsic in typical non-union employment relationships with power and control residing with the employer, and that employees are frequently vulnerable and in need of protection, particlularly when they are terminated. It is important to note that the Court decided that the trial judge had the discretion to extend the notice to which Wallace was entitled because "employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95), a concept that has come to be known as '*Wallace* damages.'

Hypotheses

Change of the Employee's Status

In reaching their decision in *Wallace* (1997), the Supreme Court of Canada expresses the view that, "The essence of the employment relationship is that the employee and employer are in an unequal bargaining relationship and that the employee is in a vulnerable position... This power imbalance is not limited to the employment contract itself, but informs virtually all facets of the employment relationship" (*Wallace*, 1997; para 92). The Court asserted that work is a central feature of an employee's life, helping to

define our identity, self-worth, and well-being. The Court also asserts that any change of status will have ramifications because the employee is vulnerable, particularly if the change is involuntary, such as where the conditions of employment are changed by the employer unilaterally and without consultation with the employee. Moreover, the Court stated that it will act to create limits on the employer's ability to act unilaterally without consideration of the employee's welfare.

I do not expect a change of status in the employment relationship prior to dismissal, voluntary or involuntary, to have an effect on the dismissed employee's ability to find comparable employment. However, additional damages in the form of a longer notice period may be awarded by the courts because an employee had been induced to leave previously secure employment or because of *Wallace* damages. Nevertheless, change of an employee's workplace status is not associated with the employee having been induced to leave previous secure employment. Nor is change directly associated with dismissed employees' vulnerability induced by the manner of dismissal. Hence, an employee's change of employment status is not expected to increase or decrease the reasonable notice period. This leads to the following hypotheses:

H1a: A voluntary change of an employee's status in the employment relationship will increase the likelihood of a plaintiff's victory.

H1b: A voluntary change of an employee's status will have no effect on the length of reasonable notice awards.

H2a: An involuntary change of an employee's working conditions (such as employee illness or the employer's unilateral imposition of new conditions of employment) will increase the likelihood of a plaintiff's victory.

H2b: An involuntary change of an employee's working conditions will have no effect on the length of reasonable notice awards.

The Employee's Past Performance

The quality of the terminated employee's past performance was examined by both McShane (1983) and Wagar and Grant (1993). While the 'quality of the employee' was not found to be a significant predictor of reasonable notice (McShane, 1983), the coefficient was in the expected direction. In addition, both a satisfactory performance appraisal and an employee's acquisition of new employment prior to the court hearing were found to be significant predictors of a plaintiff's victory (Wagar & Grant, 1993). Both factors were thought to be evidence of the employee's competence. Hence, there is evidence in the empirical literature that past satisfactory performance will be positively related to the likelihood of a plaintiff's victory and to longer reasonable notice periods.

A history of satisfactory performance may help to create reliance and expectation in the employee, as well as in the courts, of future good faith behaviour on the part of the employer. Employees may come to rely on an expectation that their past satisfactory performance will help them to attain a level of consideration from the employer greater than they might otherwise have received without a history of satisfactory performance. This higher level of consideration would be offered in recognition of an employee's contribu-

tion and value to the organization, and can be traced to a sense of what is fair based on an appreciation of equitable treatment based on employee contribution.

The remediation of an employee's short-term performance issues may also be a source of relational justice in that it can promote a sense of belonging and value to the organization. Such consideration would lead to the increased likelihood that an employee could adapt to and appreciate the organization's demands in the short and long terms. The courts see such adaptation and consideration by both the employee and employer as part of the on-going nature of an indefinite term contract. I suggest that the courts will provide an incentive for the employer to respect the covenant of good faith by increasing the likelihood that it will decide for the employee and by lengthening the period of notice awarded. Therefore, I hypothesize that:

H3a: A terminated employee's past satisfactory performance will increase the likelihood of a plaintiff's victory.

H3b: A terminated employee's past satisfactory performance will be positively related to the length of reasonable notice awards.

The Employee's Disciplinary History

Wagar and Grant (1993) found that where the employee had a history of past discipline, there was a greater likelihood of the employer's success in demonstrating that it had just and sufficient cause for termination. In *Wallace* (1997), the Supreme Court of Canada stated that it will create and enforce boundaries on the employer's ability to act unilaterally, especially given the employee's particularly vulnerable position in the employment relationship. The Court suggested that a balance must be created in recognition

of an employer's right to determine the composition of its workforce and in the context of the central role of work in society and to the employee's sense of identity, self-worth, and well-being. In *McKinley* (2001), the Court proposed the 'principle of proportionality' in which the employer must balance the severity of misconduct or incompetence with the discipline imposed. Given that dismissal is the ultimate disciplinary measure available to the employer, it should only be taken once other measures such as progressive discipline have been exhausted or when there has been especially grievous incompetence or misconduct. Moreover, progressive discipline may be linked to information justice in that it communicates an employer's displeasure with an employee's performance.

Previous discipline may also be evidence of past performance problems and related to 'near cause' for dismissal, which has been used in the past to shorten notice periods awarded in the courts. While the near cause argument was rejected by the Supreme Court of Canada (Mole & Stendon, 2004), the courts may allow retribution to infringe on the calculus of reasonable notice, explicitly or otherwise, and in the process favour shorter notice periods for plaintiffs who should receive some form of discipline rather than dismissal. Where the courts have noted that discipline would have been preferable to dismissal and the employer has failed to employ progressive discipline, the courts will award a shorter notice period rather than find that the employee had been terminated for cause. As a result, I hypothesize that:

H4a: An employer's failure to employ progressive discipline will increase the likelihood of a plaintiff's victory.

H4b: An employer's failure to employ progressive discipline will be negatively related to the length of reasonable notice award.

Fair Employment Practices

As I explained in Chapter 3, procedural justice suggests that where an employee has the opportunity to have his or her views heard there is a greater likelihood that the decision will be seen as fair. In addition, where the employer has a procedure for the investigation and appeal of a dismissal or disciplinary decision there is a greater opportunity for sober second thought which may lead to a more balanced outcome to what might otherwise be considered a more arbitrary and unfair decision. The employer is likely to be more certain that the decision to dismiss was the right one. Support for such a view is seen in a previous study of wrongful dismissal cases where Wagar and Grant (1993) found that when an employer had provided a hearing related to the decision to dismiss, the likelihood of an employer victory was significantly greater.

However, the employer's failure to employ workplace practices consistent with the principles of procedural justice is not expected to have an effect on the dismissed employee's ability to find comparable employment. Nor is it expected to be related to the employee having been induced to leave previous secure employment or to an employee's vulnerability that results from the manner of dismissal. Consequently, I hypothesize that:

H5a: An employer's failure to fair workplace practices related to the principles of organizational justice will increase the likelihood of a plaintiff's victory.

H5b: An employer's failure to employ practices related to principles of organizational justice will have no effect on the length of reasonable notice awards.

Effective Use of Performance Warnings

The value of an employer's effective use of performance warnings in an employment relationship can be appreciated through the lens of relational justice (Lind & Tyler, 1988), power and dependence (Thibaut & Kelley, 1959), and the views of the Supreme Court of Canada (*Wallace*, 1997). In relational justice, the employer is an important source of self-validation and sense of value to the organization for the employee. The employer, particularly authority figures, can provide information about the appropriateness of attitudes and efforts in the organizational context. The employer is also a source of support and resources plus a sense of belonging that are important to the development and maintenance of an on-going employment relationship. The benevolence dimension of relational justice (Lind, 1995) implies that fairness is derived from evidence that an employee perceives that she or he is given real consideration in a relationship characterized by an on-going power imbalance. Relational justice has much in common with the power and dependence model of interpersonal relationships (Thibaut and Kelley, 1959) and the views of the Supreme Court of Canada in *Wallace* (1997).

The power and dependence model implies that employees are dependent on the employer for the quality of their outcomes. For instance, a typical employee depends on the resources and benevolence of the employer for continuing employment. In that respect, the employer can more fully appreciate what it requires from the employee in order to ensure the success of the organization. Hence, the success of the employment relationship places a heavy onus on the employer to share its performance expectations with an employee and to provide feedback and support to the employee in order to match effort and ability to the needs of the organization. Moreover, the Supreme Court of Canada

(*Wallace*, 1997) asserts that inequality in the employment relationship derives in part from an employer's virtual monopoly of information relevant to an employee's ability to achieve a more favourable position in the relationship. Consequently, both the effective use of performance standards and of performance warnings can be seen as a vital component of performance management and necessary to demonstrate an employer's faithful discharge of its duty to an employee.

Finally, as noted in Chapter 2, according to wrongful dismissal law the employer must provide warnings of deficiencies that if not met, would lead to termination. Otherwise, employee incompetence or poor performance must be "grossly deficient" for termination to result if there has not been a series of warnings (Levitt, 2004; p. 6-79). Wagar and Grant (1993) included an examination of an employer warning that the employee's performance was unsatisfactory. Although the factor was not found to be positively correlated to employer success, the result was in the direction expected.

An employer's failure to use effective performance warnings is not expected to have an effect on the dismissed employee's ability to find comparable employment. Nor is it expected to be related to the employee having been induced to leave previous secure employment or to the manner of dismissal. Accordingly, I hypothesize that:

H6a: An employer's failure to use effective performance warnings with respect to the employee's performance will increase the likelihood of a plaintiff's victory.

H6b: An employer's failure to use effective performance warnings will have no effect on the length of reasonable notice awards.

Effective Use of Performance Standards

As noted in the previous section, the effective use of performance standards is necessary in order for an employer to demonstrate the faithful discharge of its duty to the employee. Wagar and Grant (1993) examined cases in which the employer had made an allegation that the employee's incompetence constituted just cause for termination. Although considered important components of a performance management system and the communication and support of performance standards, neither the presence of a performance appraisal system nor the failure to provide adequate training was significantly related to plaintiff success. However, the signs on the coefficients were in the expected direction.

An employer's failure to use performance standards effectively is not expected to have an effect on the dismissed employee's ability to find comparable employment. Nor is it expected to be related to the employee having been induced to leave previous secure employment or to the manner of dismissal. Consequently, I hypothesize that:

H7a: An employer's failure to effectively use performance standards will increase the likelihood of a plaintiff's victory.

H7b: An employer's failure to effectively use performance standards will have no effect on the length of reasonable notice awards.

Effect of the *Wallace* (1997) Decision on Damages

In *Wallace* (1997), the Supreme Court of Canada altered the legal landscape for employers and HR practitioners by extending the notice to which an employee was otherwise entitled because the employer was "misleading or unduly insensitive" (para. 98).

This decision led to the awarding of '*Wallace* damages' in numerous subsequent wrongful dismissal court decisions (for example, *Day v. Wal-mart*, 2000). Where *Wallace* damages are awarded, the notice is extended beyond that which the successful plaintiff would otherwise have been entitled in recognition of tangible as well as *intangible* damages. Hence, the *Wallace* (1997) decision may have an effect on reasonable notice awards by lengthening the notice period beyond what normally would be expected where there has been an intangible injury caused by the manner of the dismissal.

The *Wallace* (1997) decision will also likely have had an implicit effect on reasonable notice awards overall by lengthening the average notice period awarded by the courts in cases that have been decided since *Wallace*. Moreover, in the *Wallace* decision, the Court made explicit its view that the employment relationship is characterized by an inequality of bargaining power and the vulnerability of the employee. In Thibaut and Kelley's (1959) theory of power and dependence an employer's power is derived from the employee's dependence on the employer for the quality of her or his outcomes. In *Wallace* (1997), the Court asserted that typical employees are made all the more vulnerable by their dependence on employment for a sense of self-worth, self-esteem, and contribution. In addition, an employer's power also derives from evidence that there is little variation in an employer's outcomes as a result of the actions of an employee. As a consequence, the courts may see a requirement for their decisions to increase the variation in an employer's outcomes when they terminate an employee. If such a view held it would cause the lower courts to consider a terminated employee more sympathetically. As a result dismissed employees' will have a greater likelihood of victory in addition to longer notice periods overall in cases decided after *Wallace* (1997). Hence, I hypothesize that:

H8a: Wrongful dismissal cases decided before *Wallace* (1997) will lessen the likelihood of a plaintiff's victory.

H8a: In wrongful dismissal cases decided before *Wallace* (1997), reasonable notice periods will be shorter than reasonable notice periods after the *Wallace* (1997) decision.

H9a: An employee's vulnerability that results from the manner of dismissal will increase the likelihood of a plaintiff's victory.

H9b: An employee's vulnerability that results from the manner of dismissal will be positively related to the length of reasonable notice awards.

Factors Which Mitigate the Seriousness of the Incompetence

As I have argued previously, employers must respond proportionality in a manner that balances the severity of an employee's incompetence with the discipline imposed. As a consequence, employers should give weight to the employee's deficiencies in proportion to their importance to the substantive tasks. The courts will downplay the seriousness of the poor performance if the employee displayed no intent to repudiate the employment contract, did not benefit from her or his behaviour, or if the poor performance was not serious in the context of the employee's duties and overall relationship with the employer. Moreover, if there was no real loss, risk, or jeopardy to the employer caused by the poor performance, it will not be considered a serious deficiency.

Wagar and Grant (1993) found that where other circumstances mitigated the seriousness of an employee's incompetence there was an increased chance of a plaintiff victory. The employee's relatively vulnerable position in the employment relationship com-

bined with the employer's ability to act unilaterally and arbitrarily unless checked by the legal system will lead the courts to favour the employee in cases where the employer is seen to act disproportionately to the employee's poor performance. Nevertheless, the employee's ability to obtain comparable employment after dismissal is unlikely to be directly affected by the employer's poor performance management. Consequently, I hypothesize that:

H10a: An employer's failure to weigh the incompetence or poor performance of an employee against the relatively inconsequential nature of the incompetence will increase the likelihood of a plaintiff's victory.

H10b: An employer's failure to weigh the incompetence or poor performance of an employee against the relatively inconsequential nature of the incompetence will have no effect on the length of reasonable notice awards.

Factors Found to be Significant Predictors of Reasonable Notice

Larger employers are likely to have greater resources available to successfully manage employment relationships and performance than smaller employers. For example, Wagar and Grant (1996) found that employers with 5,000 or fewer employees were less likely to be successful in wrongful dismissal cases than very large employers (more than 5,000 employees). However, where employees are found to have been wrongfully dismissed, larger employers are also more likely to have the resources to provide longer notice periods. For instance, Wagar and Jourdain (1992) found moderate support for longer notice periods in wrongful dismissal cases where employers had 500 or more employees.

In addition, the courts may consider the power imbalance between a large employer and an employee to be even greater than the imbalance between a small employer and an employee. Therefore, I hypothesize that:

H11a: Large employer size will decrease the likelihood of a plaintiff's victory.

H11b: Large employer size will increase the length of reasonable notice awards.

Employee tenure, occupational level, and limited job prospects (Lam and Devine, 2001; McShane and McPhillips, 1987; Wagar and Jourdain, 1992), as well as whether the employee had been hired away from, or induced to leave previously secure employment (McShane and McPhillips, 1987; Wagar and Jourdain, 1992) have been found to be significant predictors of reasonable notice periods. As a result, I hypothesize that:

H12a: An employee's tenure, occupational level, and limited job prospects, as well as whether an employee had been induced to leave secure employment will have no effect on the likelihood of a plaintiff's victory.

H12b: An employee's tenure, occupational level, and limited job prospects, as well as having been induced to leave previously secure employment will be positively related to the length of reasonable notice awards.

Table 5-1: Hypotheses for Case Outcome and Reasonable Notice

Hypotheses	Relation to Plaintiff Victory	Relation to Notice Period
H1a: A voluntary change of an employee's status in the employment relationship will increase the likelihood of a plaintiff's victory. H1b: A voluntary change of the employee's status will have no effect on the length of reasonable notice awards.	+	No Effect
H2a: An involuntary change of an employee's working conditions (such as employee illness or the employer's unilateral imposition of new conditions of employment) will increase the likelihood of a plaintiff's victory. H2b: An involuntary change of an employee's working conditions will have no effect on the length of reasonable notice awards.	+	No Effect
H3a: A terminated employee's past satisfactory performance will increase the likelihood of a plaintiff's victory. H3b: A terminated employee's past satisfactory performance will be positively related to the length of reasonable notice awards.	+	+
H4a: An employer's failure to use progressive discipline will increase the likelihood of a plaintiff's victory. H4b: An employer's failure to use progressive discipline will be negatively related to the length of reasonable notice awards.	+	-
H5a: An employer's failure to use workplace practices related to the principles of organizational justice will increase the likelihood of a plaintiff's victory. H5b: An employer's failure to use practices related to principles of organizational justice will have no effect on the length of reasonable notice awards.	+	No Effect
H6a: An employer's failure to use effective performance warnings with respect to the employee's performance will increase the likelihood of a plaintiff's victory. H6b: An employer's failure to use effective performance warnings will have no effect on the length of reasonable notice awards.	+	No Effect

Table 5-1: Hypotheses for Case Outcome and Reasonable Notice, continued ...

Hypotheses	Relation to Plaintiff Victory	Relation to Notice Period
H7a: An employer's failure to use effective performance standards will increase the likelihood of plaintiff victory. H7b: An employer's failure to use effective performance standards will have no effect on the length of reasonable notice awards.	+	No Effect
H8a: Wrongful dismissal cases decided before *Wallace* (1997) will decrease the likelihood of a plaintiff's victory. H8a: In wrongful dismissal cases decided before *Wallace* (1997), reasonable notice periods will be shorter than reasonable notice periods after the *Wallace* (1997) decision.	+	-
H9a: An employee's vulnerability that results from the manner of dismissal will increase the likelihood of a plaintiff's victory. H9b: An employee's vulnerability that results from the manner of dismissal will be positively related to the length of reasonable notice awards.	+	+
H10a: An employer's failure to weigh the incompetence or poor performance of an employee against the relatively inconsequential nature of the incompetence will increase the likelihood of a plaintiff's victory. H10b: An employer's failure to weigh the incompetence or poor performance of an employee against the relatively inconsequential nature of the incompetence will have no effect on the length of reasonable notice awards.	+	No Effect
H11a: Large employer size will decrease the likelihood of a plaintiff's victory. H11b: Large employer size will increase the length of reasonable notice awards.	+	+
H12a: An employee's tenure, occupational level, and limited job prospects, as well as whether an employee had been induced to leave secure employment will have no effect on the likelihood of a plaintiff's victory. H12b: An employee's tenure, occupational level, and limited job prospects, as well as having been induced to leave previously secure employment will be positively related to the length of reasonable notice awards.	No Effect	+

Method

The objective of this study is to explore the factors that influence the Canadian courts' decisions with respect to complaints of wrongful dismissal. Generally, the court must determine whether the employer had just and sufficient cause to terminate the employee. To be successful, an employer must demonstrate just and sufficient cause to terminate. Where the court has held that there was not just cause for dismissal, it must then determine the length of notice which would be considered reasonable under the circumstances. The primary factors examined include an employee's past performance, disciplinary history, and vulnerability as a result of the dismissal, voluntary (for example, a promotion) and involuntary changes of the employment relationship imposed by the employer, as well as an employer's failure to warn the employee where there was a performance deficiency, to follow principles of procedural and interactional justice in making the decision to terminate, and to effectively employ performance standards. In addition, I examined whether *Wallace* (1997) has had an effect on case outcome and reasonable notice periods in the period since the decision.

Quantitative Analysis of Case Content

This study involves a quantitative content analysis of wrongful dismissal decisions. Weber (1990) stated that "content analysis is a research method that uses a set of procedures to make valid inferences from text" (p. 9). It typically involves identifying and coding the occurrences of concepts as they appear in texts. A concept is a single idea, what Carley (1993) has termed an 'ideational kernel,' that may be represented in the text by a single word, a phrase, or a characteristic of the actors (in this case the judge,

employee, employer, etc.) or situation (such as the industry of the employer or the year of the decision). For example, a concept might be the sex of a plaintiff (the terminated employee) in a wrongful dismissal case, or it might be a more complex notion such as 'employer condonation' where the employer has been found to have condoned similar past behaviour in the plaintiff or some other comparison employee.

Decisions were carefully read and coded using qualitative-analysis software called *Atlas ti*. Categories were identified from a review of the legal and organizational literature on employee dismissal, labour arbitration, and other areas of the law. The coding and analytic capabilities of *Atlas ti* allowed for retrospective checks of code and coding reliability as the case content of the codes could be reviewed at any point during the analysis. In this way some code definitions were allowed to evolve so that the final code definition better reflected the data. While many of the categories are explicit and easily identifiable in the case reports, specific coding rules were developed for other more complex concepts. The reliability of the data collected was examined by having two additional coders read and analyse 7 cases assigned randomly from the full sample of 159 cases which had previously been coded by the researcher. The coders were given coding sheets (Appendix B) on which they recorded their observations. Overall, the coders achieved 86.7%% consistency with the researcher.

Several decision rules about how to treat certain case reports were made. For example, the unit of analysis is the 'case' which is considered to include both trial reports and any subsequent appeals of the original decision at trial. In cases where there were two or more plaintiffs (terminated employees) in a single written decision, each plaintiff

is recorded as a separate wrongful dismissal case as individual circumstances and notice awards, if any, are likely to be unique.

Analytical Strategy

The analysis of the quantitative case content has two distinct parts. First, the factors which affect case outcome – whether the plaintiff wins or loses his legal action – will be analysed using probit, an appropriate method for use with dichotomous dependent variables (Greene, 2000). The analysis will provide the probability of a favourable or unfavourable outcome for the plaintiff for each of the independent variables entered into the analysis. For example, if the court finds that the plaintiff had previously-documented poor performance, it might tend to reduce the probability that he or she would be successful in their legal action against the employer. Probit also provides the marginal effect of the previous poor performance on case outcome.

Second, if the court finds that the plaintiff was dismissed without just and sufficient cause, it must decide the length of the notice period to award. Ordinary least squares (OLS) regression has been used in a number of studies to analyse the factors relied on by the court to determine the length of notice, and hence the amount of damages, to be awarded (for example, Lam & Devine, 2001; McShane & McPhillips, 1987; Wagar & Jourdain, 1992). This type of analysis has become particularly relevant since the *Wallace* (1997) decision of the Supreme Court of Canada. Numerous decisions have relied on *Wallace* to lengthen the period to which the successful plaintiff was entitled (for example, Day, 2000). To date, no studies in the organizational literature have examined the effect of the *Wallace* decision on subsequent reasonable notice decisions. In addition, I

question whether the *Wallace* decision has had an effect on case outcome as a result of the explicit views about the inequality of bargaining power and the vulnerability of an employee which was expressed by the Supreme Court of Canada in that decision.

Data Collection

The data for this study were obtained by content analysing 159 Canadian wrongful dismissal court cases reported in the period 1990 to 2006. The cases were identified by means of a database search using Lexus-Nexus. The cases in this data base are both published and unpublished, and are acquired from a variety of law journals across the country, with the exception of Quebec where dismissal is governed by the civil code (see Appendix C for a list of the journals). In order to be included in the analysis the case must have involved an employer allegation that the employee was terminated for just cause, specifically for incompetence or poor performance. In each of these cases, the court would have first determined if there had been just cause for dismissal. If the court had determined that just cause did not exist, it would then have determined the award of notice found to be reasonable under the circumstances. As a result, the cases examined represent both those in which the plaintiff (former employee) was successful and reasonable notice was awarded (104 cases) and those in which the defendant (employer) had successfully shown that just cause did exist and, therefore, reasonable notice was not required. Cases which dealt solely with the issue of reasonable notice were excluded from the analysis.

In cases where incompetence or poor performance has been alleged to have risen to the level of just and sufficient cause for dismissal, employers frequently must provide

a higher level of evidence to the courts with respect to their obligations in the employment relationship than in cases where other allegations (such as in certain kinds of misconduct like theft and fraud) have been used to justify dismissal. The incompetence must be serious and willful, and there is a "heavy onus" on the employer to prove that especially where the job requires a high degree of skill or a specialized body of knowledge (Levitt, 2004, p. 6-75). Moreover, where incompetence has been alleged employers are less likely to be successful in persuading the courts that dismissal was for just cause than for other types of cause (Wagar and Grant, 1993). In these cases, the courts hold the employer to a high standard of proof with respect to the management of the employment relationship and will devote a significant portion of their written decision to an examination of the employers' management practices. When a case at the trial level was appealed, the case was coded based on the findings of the highest appeal court ruling.

Sample Selection Bias

Sample selection bias arises when an investigator does not obtain a random sample of a population of interest (Winship & Mare, 1992). The problem is that certain respondents are excluded from the analysis, leading to samples that are unrepresentative of the larger population. Strategies to lessen the impact of sample selection bias in social science research have been developed. Nevertheless, in research using judicial decisions, there are many sources of sample selection bias that are not always correctable. Various sources of selection bias may undermine the utility of this method.

One source of selection bias arises from the fact that legal disputes taken to court judgments do not represent a random sample of all disputes (Priest & Klein, 1984). Only

a small number of individual complaints ever become formal disputes and, likewise, only a small number of formal complaints reach the courts. Perhaps as few as five percent of disputes ever reach the courts (Priest & Klein, 1984). In addition, only a small number of cases lead to a court decision because many are settled before or during the proceedings (Priest & Klein, 1984). Consequently, the reports of wrongful dismissal cases do not represent the population of wrongful dismissals brought to court. Nor do they represent the population of wrongful dismissals in the workplace.

Because cases sampled from the published court reports, or even the unpublished reports, neither represent all wrongful dismissals nor even all the wrongful dismissal litigation, an examination of the case reports can only illuminate the values, principles and processes that are employed by the courts. These faults should not be generalized beyond that context. Nevertheless, the importance of this study is to identify and better understand the courts' views as represented in the determinants of case outcome and reasonable notice in order to contrast the treatment of dismissal by the courts with workplace practices and with the attitudes of HR practitioners.

Dependent Variables

Two dependent variables were examined in this study. The first was case outcome, which was dichotomously coded. The cases (n = 159) were coded on the basis of whether the employer had been successful (that is, the court found that the employer had just and sufficient cause to dismiss the employee without notice) or the employee had been successful (that is, the court found that the employer did not have cause for dis-

missal). A victory for the terminated employee (plaintiff) was coded '1' and a win for the employer (defendant) was coded '0.'

The second dependent variable was a continuous variable representing the number of months notice that the courts had decided was reasonable under the circumstances after having decided that the plaintiff employee had been wrongfully dismissed (n = 104). That is, in the cases selected the employer had failed to demonstrate that there was cause sufficient for termination. Generally, the courts do not calculate months of notice in cases in which the employer has successfully demonstrated that it has just and sufficient cause for dismissal as there would be no legal requirement to provide notice of termination.

Independent Variables

Before describing the independent variables, an explanation of how the primary independent variables were constructed is required. It was necessary to treat the primary independent variables differently for the probit analysis of the determinants of case outcome from the OLS regression analysis of the determinants of reasonable notice. In the case of the reasonable notice analysis, the primary independent variables (voluntary and involuntary change, satisfactory past performance, the use of progressive discipline, the use of practices consistent with the principles of procedural justice, the effective use of performance warnings and of performance standards, and poor performance not serious) were constructed by adding the presence of each factor in the variable as a cumulative measure of the number of factors present in each case. For example, if an employee had experienced both an illness and a unilateral change of the employment relationship, in-

voluntary change was recorded as 2 for that case report, the presence of one or the other but not both was 1, and if the employee had experienced neither an illness nor a unilateral change, 0 was recorded. If a case received a higher score for satisfactory performance, that employee's performance would have had a greater number of factors present in the case which were indicative of satisfactory past performance, or that there were other explanations for the poor performance.

In the case of the probit analysis, it was necessary to code each variable as either 1 for the presence of at least one of the associated factors, or 0 in the case where none of the factors was present. This coding method was made necessary by the large number of empty cells created by the relative absence of many factors in the cases in which the employer had successfully demonstrated that it had just and sufficient cause to terminate. Two variables, poor performance not serious and vulnerability, were omitted from the probit analysis because these variables had predicted plaintiff success perfectly, which rendered their inclusion in the probit model meaningless.

The following independent variables were the primary focus of my analysis (see Table 5-2 for the specific factors identified in content analysis):

Voluntary Change. Defined as whether the employee had experienced a recent voluntary change of status in the employment relationship. The variable consists of three factors which include a change of employment status (such as a promotion), a new workplace relationship (such as a new boss), new duties or responsibilities, or relocation. For both the case outcome and reasonable notice analysis, the variable is dichotomously-coded, which indicates the presence of at least one of the factors in the case.

Involuntary Change. Defined as whether an involuntary change due to an employee's illness which affected job performance, or a unilateral change of the employment relationship imposed by the employer had occurred. For case outcome, involuntary cahnge was a dichotomously-coded variable which indicated the presence of at least one of the factors in the case. However, for reasonable notice, this variable is the sum of all factors present in the case. For instance, if the dismissed employee had experienced both an illness as well as a unilateral change imposed by the employer, the case is assigned 2 for this variable, 1 if only one or the other, and '0' if the employee had experienced neither.

Satisfactory Performance. Defined as whether there was evidence of the employee's past satisfactory performance. This variable includes the employee's long satisfactory service, the presence of other explanations for the poor performance, the poor performance was not in the employee's area of responsibility, the poor performance was not worse relative to other employees, previous exemplary service, a previous, satisfactory performance appraisal, or other recent positive feedback. For case outcome, this is a dichotomously-coded variable which indicates the presence of at least one factor in the case but for reasonable notice, this variable is the sum of all factors present.

No Progressive Discipline. Defined as whether the employer had failed to apply progressive discipline before resorting to dismissal. The variable includes the employer's failure to have applied progressive discipline, the employer's dismissal of the employee was a disproportionate response, or the employee had a previously unblemished disciplinary record. For case outcome, this is a dichotomously-coded variable which indicates the presence of at least one factor in the case but for reasonable notice, this variable is the sum of all factors present.

Procedural Justice. Defined as whether the employer had failed to apply principles of procedural justice before the termination. The variable includes the employer's failure to investigate thoroughly before termination, to provide an adequate explanation, to provide an unbiased hearing, and to allow an appeal of the decision. For case outcome, this is a dichotomously-coded variable which indicates the presence of at least one factor in the case but for reasonable notice, this variable is the sum of all factors present.

Employer Failed to Warn. Defined as whether the employer had failed to provide warnings to the employee before dismissal. This variable consists of five aspects of the effective use of employer warnings related to performance which include that the employee was not given a timeline or opportunity to improve after a warning, not told dismissal may result from failure to meet standards, not told his or her job is in jeopardy, not told performance is not meeting standards, and not told what is required to improve. For case outcome, this is a dichotomously-coded variable which indicates the presence of at least one factor in the case but for reasonable notice, this variable is the sum of all factors present.

Performance Standards. Defined as whether the employer had failed to effectively employ performance standards. The factors considered include whether the employer had communicated conflicting standards or expectations, had not established performance standards, had not demonstrated that the employee had failed to meet objective standards, had not enforced standards consistently, had not communicated standards adequately, had not provided feedback, instruction, supervision, support, or training necessary to accomplish the standards, had set unreasonable or unrealistic standards, or had imposed new higher standards. For case outcome, this is a dichotomously-coded variable which indi-

cates the presence of at least one factor in the case but for reasonable notice, this variable is the sum of all factors present.

Pre-Wallace Decision. Defined as whether the case was published prior to the publication of *Wallace* in October, 1997. It is unlikely that the judges in these cases would have been exposed to the opinions or new law expressed in *Wallace*. For both case outcome and reasonable notice, this is a dichotomously-coded variable.

The following variables (employee vulnerability and not serious) are not included in the probit (case outcome) analysis but are included in the OLS regression (reasonable notice) analysis:

Employee Vulnerability. Defined as whether the terminated employee was made vulnerable as a result of the manner of the dismissal. The employee's vulnerability consisted of either psychological distress or a damaged reputation in the relevant community. For both case outcome and reasonable notice, this is a dichotomously-coded variable which indicates the presence of at least one factor.

Not Serious. Defined as whether the employer had failed to consider that the poor performance was not so serious as to repudiate the employment contract. This occurred where the employee had shown no intent to not meet standards, to benefit from the failure to meet standards, or to repudiate the employment contract in any way. The variable also includes whether the employer had not suffered a loss, risk, or jeopardy, or had failed to establish the serious nature of the poor performance in the context of the employee's duties or overall employment relationship. For case outcome, this is a dichotomously-coded variable which indicates the presence of at least one factor in the case but for reasonable notice, this variable is the sum of all factors.

Table 5-2: Primary Independent Variables

Primary Independent Variable	Factors as Coded in Content Analysis
Voluntary Change	A recent change of employment status due to: • Promotion, • New relationships such as a new boss, • New duties, • Relocation.
Involuntary Change	An unexpected change due to: • Employees' Illness, • Unilateral change of the employment relationship imposed by employer
Satisfactory Performance	Evidence of the terminated employees satisfactory past performance including: • Long satisfactory service, • Other explanation for the poor performance, not in employees area of responsibility, or not poor performance relative to other employees, • Previous exemplary service, • Positive performance appraisal, • Other recent positive feedback.
No Progressive discipline	The court noted that the: • Employer had failed to employ progressive discipline, or had responded disproportionately with dismissal, • Employee had an unblemished disciplinary record.
Procedural Justice	The employer failed to: • Provide an adequate explanation for the dismissal, • Investigate the circumstances leading to dismissal fully, • Provide a hearing prior to dismissal, • Provide an appeal after the dismissal decision.
Employer Failed to Warn	The employer had failed to: • Provide a timeline and opportunity to improve, • Inform the employee that dismissal may result from failure to meet standards, • Inform the employee that job is in jeopardy, • Inform the employee that performance not meeting standards, • Inform the employee what is required to improve.

All of the items used to construct the variables above were dichotomously coded (presence of the factor = 1 and absence = 0).

Table 5-2: Primary Independent Variables, continued ...

Primary Independent Variable	Factors as Coded in Content Analysis
Performance Standards	The employer had failed in the implementation of standards by: • Communicating conflicting standards or expectations, • Not establishing performance standards, • Not demonstrating that employee had failed to meet objective standards, • Not enforcing standards consistently, • Not communicating standards adequately, • Not providing feedback, instruction, supervision, support, or training necessary to accomplish the standards, • Setting unreasonable or unrealistic standards, or by imposing new higher standards.
Pre-Wallace Decision	Cases that were published prior to the publication of *Wallace* in October, 1997.
Vulnerability *	The terminated employee was made vulnerable as a result of the dismissal. The vulnerability consisted of either: • Psychological distress, • Damaged reputation or integrity.
Not Serious *	The employer had failed to consider the lack of seriousness of the poor performance: • By not considering that the employee had no intent to not meet standards, to benefit from the failure to meet standards, or repudiate the employment contract, • Employer had not suffered loss, risk, or jeopardy, • Employer had not established the serious nature of the poor performance in the context of the employee's duties or overall employment relationship.

Note: * Not included in probit analysis of case outcome.

All of the items used to construct the variables above were dichotomously coded (presence of the factor = 1 and absence = 0).

Variables Found to be Predictors of Case Outcome or Reasonable Notice Period

Several variables which had been found to be significant predictors in previous studies of Canadian wrongful dismissal law are also examined in my study. These variables include the former employee's tenure in years with the employer, whether the employee faced a limited labour market, whether the employee had been induced away from previous secure employment, the employee's occupational status, whether the employer was large (500 or more employees), and whether the plaintiff (terminated employee) was female. A limited labour market, an inducement to leave secure employment, a large employer, and a female plaintiff were dichotomously coded (presence of the factor = 1 and absence = 0). The occupational status of the former employee was captured with a five-point hierarchical scale. A higher score indicated a higher status position. For example, executives were scored at 5, the highest status position, and clerical workers as 1, the lowest status position. In order to increase the reliability of the coding, three raters[8] first independently scored each job title or occupation on the 5-point scale. Coding differences were then negotiated in order to create a shared understanding of the jobs and their organizational status.

Control Variables

Control variables include the industry of the employer (manufacturing was dummy coded; non-manufacturing was the omitted category) and the province of Canada in which the decision was rendered (British Columbia and Ontario as Canada's largest

---

[8] All three raters were business professors and doctoral candidates, each possessing significant work experience. A similar method was used by both Wagar and Jourdain (1992) and McShane and McPhillips (1987).

provinces were coded as 1; all others, except Quebec,[9] were 0). British Columbia and Ontario are the two largest provinces (excluding Quebec) and are expected to be more progressive relative to the other western provinces. For instance, Wagar and Jourdain (1992) found that the combination of Ontario and British Columbia was a significant predictor of a longer reasonable notice period in a sample of Canadian cases.

Results

Descriptive statistics relating to the 159 Canadian wrongful dismissal cases used to examine the determinants of just cause are reported in Table 5-3 and are described below. Employee tenure was the only variable with missing data. Mean substitution was considered an appropriate method for replacement of the missing data because employee tenure was not one of the primary independent variables and because the missing data were found to have had an adverse affect on the quality of the analysis. As a result, deletion of cases because of missing data was not necessary.

Descriptive statistics for the smaller sample of 104 cases used in the examination of reasonable notice are reported in Table 5-5 and described with the results for reasonable notice. Mean substitution of the missing employee tenure data was not used for the examination of reasonable notice. Because tenure has been found to be one of the most consistent determinants of reasonable notice, I deemed it prudent to use a more conservative method of analysis. As a result, while pair-wise deletion was used for the descriptive analysis of the 104 reasonable notice cases, list-wise deletion was used for the OLS regression analysis, which results in 93 useable cases.

---

[9] In Quebec, civil law governs the relationship rather than common law. Therefore, Quebec cases were excluded from this study.

For the 159 cases, the plaintiff (dismissed employee) won 72% of the cases. Women were slightly under-represented in the sample with 31% of the plaintiffs being female. The average tenure for all plaintiffs was 8.33 years (SD = 7.49), while 16% of plaintiffs faced limited job prospects upon dismissal, and 4% had been induced to leave previous, secure employment. The low number of cases which involved employees induced to leave secure employment is a shortcoming of the sample and a limitation of the generalizability of the results. Just over half of the plaintiffs had been employed in some management capacity as an executive, business or general manager, sales manager, or generalist manager. The average occupational status for all plaintiffs was somewhat higher (M = 3.43; SD = 1.28) than the mid-point of the 5-point scale, which indicated that the sample was well-represented by plaintiffs at the management level or higher. In addition, thirty per cent of the employers were large businesses (500 or more employees), 21% were manufacturers, and just over half (52%) of the cases had been heard in either British Columbia (BC) or in Ontario.

Only eight of the ten variables of primary interest could be included in the probit analysis of case outcome. Employee vulnerability and the employer's failure to consider the lack of seriousness of the poor performance were dropped from the analysis as each predicted plaintiff success perfectly. That is, each time the court cited the employee's vulnerability that resulted from the manner of dismissal or the employer failed to consider the lack of seriousness of the poor performance, the case resulted in an employee victory. Therefore, hypotheses H9a and H10a are supported by this finding.

Among the remaining primary independent variables, each was dichotomously coded 1 for the presence of at least one of the factors related to the construct (see Primary

Independent Variables, Table 5-2) and 0 if none of the factors were present in a case. The courts noted that plaintiffs had experienced an involuntary change (illness / unilateral change) in 23% of the cases, had experienced a recent, voluntary change in their employment relationship (such as new duties, a new supervisor, or relocation) in 21% of cases, and that there had been evidence of satisfactory past performance in 50% of cases. The employer had failed to warn in 47% of cases, to use progressive discipline in 18% of cases, failed to effectively use performance standards in 40% of cases, and had failed to use practices consistent with procedural justice practices in 20% of cases. In addition, 41% of the cases had been published prior to the publication of the *Wallace* decision in October 1997.

Probit Results for Case Outcome

I tested my hypotheses related to the determinants of a plaintiff victory (the victory of the dismissed employee) using a hierarchical probit analysis of case outcome. Table 5-4 reports the results of three probit estimations of case outcome, the dichotomously-coded dependent variable. The first equation (Model 1, *pseudo* R^2 = .572; LR Chi^2 = 107.27) includes only the primary independent variables. The second equation (Model 2, *pseudo* R^2 = .624; LR Chi^2 = 117.00) includes both the primary independent variables as well as variables that have been found to be predictors in previous studies of reasonable notice awards. The third equation (Model 3, *pseudo* R^2 = .640; LR Chi^2 = 120.12) includes the variables of Model 2 as well as three control variables (manufacturer, provincial jurisdiction, and plaintiff's sex).

A voluntary change of the employee's status was not found to be significantly related to an employee's victory, thus Hypothesis H1a is not supported. However, an involuntary change, is associated with a greater likelihood of a plaintiff's victory, and is significant at the $p < .05$ level or better in all three equations. Involuntary change increased the likelihood that the employee would win by between 5.2% (Model 3) and 11.8% (Model 1) relative to cases in which their was no involuntary change. Consequently, Hypothesis H2a is supported.

Past satisfactory performance is associated with a greater likelihood of a plaintiff'svictory, and is significant at the $p < .05$ level or better in all three equations. Evidence that the employee had performed satisfactorily in the past increased the likelihood of a plaintiff's victory by 8.6% (Model 2) to 10.3% (Model 1) relative to cases in which no evidence of past satisfactory performance was presented. In short, the results support Hypothesis H3a.

While the employer's failure to use progressive discipline as an alternative to dismissal is significantly associated with plaintiff success ($p < .05$) in Model 3, it is only marginally significant in Models 1 and 2 ($p < .10$). The failure to use progressive discipline increases the likelihood of a plaintiff's success by 4.9% (Model 2) and 9.0% (Model 1), but by 5.9% in Model 3. Likewise, procedural justice is also moderately associated with a plaintiff's success as it is significant ($p < .05$) in Model 1 and 2 but is only marginally significant ($p < .10$) in Model 3, the full model. The employer's failure to use practices related to the principles of procedural justice increases the plaintiff's chance of success by 5.0% (Model 3) to 11.1% (Model 1). As a result, there is only modest support for Hypotheses H4a and H5a.

In all three estimations, if the employer failed to effectively use warnings there is a greater likelihood of plaintiff success ($p < .01$). Likewise, if the employer failed to effectively use performance standards there is a greater likelihood of a plaintiff victory ($p < .01$). Cases where employers failed to provide warnings to the terminated employee had a 15.5% (Model 3) to 23.7% (Model 1) higher chance of an employee victory when compared to employers who had provided warnings. Employers who failed to use performance standards effectively had an 18.8% (Model 2) to 23.7% (Model 1) greater likelihood of an employee's victory compared to employers who had used performance standards. Therefore, both Hypotheses H6a and H7a are supported.

Dismissal cases heard before *Wallace* are not significantly associated with case outcome in any of the equations, thus Hypothesis H8a is not supported by the results. However, employee vulnerability and the employer's failure to consider the lack of seriousness of the poor performance both predict plaintiff success perfectly. That is, every time the court cites the employee's vulnerability that resulted from the manner of dismissal or the lack of seriousness of the poor performance, the case results in an employee's victory. Consequently, I suggest that both hypothesis H9a and hypothesis H10a are supported.

Hypothesis H11a is also supported by the results. Larger employer size ($p < .05$) is significantly associated with lower likelihood of a plaintiff's victory in both Models 2 and 3. Plaintiffs who had been employed by large employers (500 or more employees) are 7.1% to (Model 2) and 9.9% (Model 3) less likely to successfully demonstrate that they were wrongfully dismissed when contrasted with plaintiffs who had been employed

with smaller employers (fewer than 500 employees). As a result, Hypothesis H11a is supported.

Interestingly, the plaintiffs' limited job prospects are associated with greater plaintiff success ($p < .05$) in both equations (Model 2 and 3). In cases where the court noted the terminated employee's limited prospects for re-employment in a comparable position, the plaintiff's chance of winning the lawsuit increased by between 5.3% (Model 3) and 5.7% (Model 2). However, as hypothesized, employee tenure, occupational status, and an inducement to leave previous secure employment, are not significantly associated with a plaintiff victory in any of the equations. Consequently, Hypothesis H12a is only partly supported by the results.

In addition, there is modest support for an association between a greater likelihood of a plaintiff's success ($p < .10$) and cases being heard in Ontario or British Columbia. Having a case heard in one of these jurisdictions increases a plaintiff's chance of success by 5.5%. However, the manufacturing sector and plaintiff sex are not significantly associated with case outcome in any of the estimations.

Table 5-3
Descriptive Statistics and Inter-correlations for Wrongful Dismissal Case Outcome

Variable	*M(%)*	*SD*	1	2	3	4	5	6	7	8
1. Employee / Plaintiff Win	(.72)	.45								
2. Voluntary Change	(.21)	.41	.21†							
3. Involuntary Change	(.23)	.42	.27†	.09						
4. Satisfactory Performance	(.18)	.39	.40†	.19*	.29†					
5. No Progressive Discipline	(.55)	.50	.26†	.00	.05	.23†				
6. Procedural Justice	(.20)	.40	.28†	.05	.02	.21†	.25†			
7. Employer Failed to Warn	(.47)	.50	.50†	.20*	-.04	.13	.17*	.15		
8. Performance Standards	(.41)	.49	.47†	.28†	.07	.17*	-.05	.11	.39†	
9. Pre-Wallace Decision	(.40)	.49	-.03	.05	-.03	.01	-.26†	-.16*	.03	-.07
10. Large Employer	(.30)	.46	-.09	.04	-.10	17*	.05	-.02	-.14	.01
11. Employee Tenure	8.33	7.49	-.02	-.01	.07	.08	.10	.14	-.15	-.05
12. Occupation Status	3.43	1.28	.03	.19*	.00	.05	.05	-.01	-.01	.03
13. Limited Job Prospects	(.16)	.37	.20*	.11	-.04	.13	.01	.12	.16*	.09
14. Induced to Leave	(.04)	.21	.06	.04	.03	.07	-.02	-.03	.04	.08
15. Industry (Manufacturer)	(.21)	.41	.05	.11	.04	.04	-.01	.08	.06	-.02
16. Ontario or BC	(.52)	.50	.13	.00	-.15	.08	-.10	.05	-.02	.01
17. Employee Sex (female)	(.31)	.46	-.01	-.01	.02	.03	-.03	.07	-.03	.07

Table 5-3 *continued ...*
Descriptive Statistics and Inter-correlations for Wrongful Dismissal Case Outcome

Variable	9	10	11	12	13	14	15	16
10. Large Employer	.05							
11. Employee Tenure	-.01	.19*						
12. Occupation Status	-.03	.05	-.01					
13. Limited Job Prospects	-.02	.01	.07	.13				
14. Induced to Leave	-.12	-.01	-.07	-.05	.07			
15. Industry (Manufacturer)	-.06	.20*	.09	.04	.06	.04		
16. Ontario or BC	-.04	-.06	-.01	.05	.09	.09	-.05	
17. Employee Sex (female)	-.03	-.07	-.06	-.10	-.11	-.01	-.15	.13

Note. $N = 159$.

Mean substitution was used for the 31 missing values of employee tenure.

Pair-wise deletion is used.

Two-tailed tests of significance. * $p < .05$. † $p < .01$.

Table 5-4
Hierarchical Probit Analysis of the Probability of an Employee Victory

Variable	Model 1	Model 2	Model 3
Voluntary Change	- 0.036 (.097)	- 0.028 (.070)	- 0.051 (.092)
Involuntary Change	0.118† (.053)	0.064** (.044)	0.052** (.042)
Satisfactory Performance	0.103** (.065)	0.086** (.058)	0.093† (.062)
No Progressive Discipline	0.090* (.051)	0.049* (.039)	0.059** (.043)
Procedural Justice	0.111** (.049)	0.059** (.040)	0.050* (.038)
Employer Failed to Warn	0.237† (.076)	0.169† (.078)	0.155† (.079)
Performance Standards	0.237† (.072)	0.188† (.072)	0.202† (.079)
Pre-Wallace Decision	0.056 (.048)	0.028 (.032)	0.026 (.031)
Large Employer (yes)		- 0.071** (.057)	- 0.099** (.072)
Employee Tenure		0.001 (.002)	0.002 (.002)
Occupation Status		0.000 (.011)	- 0.001 (.011)
Limited Job Prospects (yes)		0.057** (.037)	0.053** (.037)
Induced to Leave (yes)		- 0.056 (.123)	- 0.064 (.133)
Industry (Manufacturer)			0.023 (.029)
Ontario or BC (yes)			0.055* (.047)
Employee Sex (female)			0.077 (.029)
F(LR chi^2)	107.27†	117.00†	120.12†
Pseudo R^2	.572	.624	.640
N	159	159	159

Note: All equations estimated using probit analysis with marginal effects and corresponding standard errors reported.

All models were calculated using list-wise deletion.

One-tailed tests of significance with the exception of Employee Tenure, Occupational Status, Limited Job Prospects, and Induced to Leave.

* $p < .10$ ** $p < .05$. † $p < .01$.

Results for Reasonable Notice

Descriptive statistics relating to the 104 Canadian wrongful dismissal cases, in which there was a reasonable notice award, are reported in Table 5-5. The average notice period awarded by the courts in these cases was 8.42 months (SD = 6.20). Women were slightly under-represented in the sample with 32% of the plaintiffs being women. The average tenure for all plaintiffs was 8.33 years (SD = 8.78), while 23% of plaintiffs faced limited job prospects upon dismissal, and 5% had been induced to leave previous, secure employment. In addition, just over half of the plaintiffs had been employed in some management capacity as an executive, business or general manager, sales manager, or as a generalist manager. The average occupational status for all plaintiffs was somewhat higher (M = 3.44; SD = 1.31) than the mid-point of the 5-point scale. In addition, twenty-six per cent of the employers were coded as large businesses (500 or more employees) and 24% were in the manufacturing sector. Just over half (56%) of the cases were heard in either British Columbia (BC) or Ontario and 43% had been heard prior to the publication of the *Wallace* decision in October 1997.

All ten of the variables of primary interest in this study were included in the OLS regression analysis of reasonable notice. The mean of the sum of involuntary change was .37 (SD = .58), failure to use progressive discipline was .27 (SD = .54), satisfactory past performance was 1.15 (SD = 1.16), failure to use the practices consistent with procedural justice principles was .38 (SD = .74), failure to effectively use performance warnings was 1.12 (SD = 1.05), failure to effectively use performance standards was 1.05 (SD = 1.22), and failure to consider the lack of seriousness of the poor performance was .40 (SD = .70). In 20% of the cases, the court found that the wrongfully dis-

missed employee was left vulnerable as a result of termination. In 27% of the cases, the dismissed employees had experienced a recent, voluntary change in their employment.

I tested my hypotheses related to the determinants of reasonable notice awards using a hierarchical OLS regression analysis in the cases where the dismissed employee had won the wrongful dismissal claim. Table 5-6 reports the results of four estimations of reasonable notice. In the first equation (Model 1, $R^2 = .168$; $F = 2.12$, $p < .05$) notice was regressed on the primary independent variables except for employee vulnerability and not serious. In the second equation (Model 2, $R^2 = .260$; $F = 2.88$, $p < .01$), vulnerability and not serious were also entered in the equation. When vulnerability and not serious were included in Model 2, the change in R^2 (.092) was significant ($p < .01$). I entered the primary independent variables in two steps (Model 1 and 2) in order to be consistent with the first step of the probit analysis of case outcome (where it was necessary to exclude vulnerability and not serious because each variable had perfectly predicted a plaintiff victory). Model 2, which includes all the primary independent variables, accounts for more than a quarter (26%) of the variance in reasonable notice awards.

In the third equation (Model 3, $R^2 = .662$; $F = 10.06$, $p < .01$), the variables found to be significant predictors in previous studies of reasonable notice awards were entered. With the addition of these variables, there was a large increase in R^2 (.402), which was significant ($p < .01$). As a result, Model 3 accounted for 66.2% of the variance in reasonable notice. Finally, in the fourth equation (Model 4, $R^2 = .666$; $F = 8.20$, $p < .01$), the additional control variables were entered but added very little explanatory power to the overall equation as the change in R^2 was only .004.

Neither voluntary change, nor involuntary change, is significantly related to the reasonable notice award, thus supporting Hypotheses H1b and H2b. However, while past satisfactory performance is significant in the equations with only the primary independent variables entered (Models 1 and 2), it is not significant when the variables found to be significant predictors of notice in previous studies are included. In addition, the failure to use progressive discipline is also not significantly related to notice in any of the equations. Consequently, neither Hypotheses H3b nor H4b are supported by the results.

The employer's failure to use practices consistent with principles of procedural justice, to effectively use warnings, and to effectively use performance standards are not significantly related to the reasonable notice award. Therefore, the results support hypotheses H5b, H6b and H7b.

Among the primary independent variables, only the variable pre-*Wallace* decision is significantly related to reasonable notice awards ($p < .05$) in all four estimations. Pre-*Wallace* decisions had notice periods that were shorter by 1.66 (Model 3) to 2.34 months (Model 1) than decisions that were published after *Wallace* (1997), thus supporting Hypothesis H8b. It seems that some of the additional notice period that successful plaintiffs' received after the *Wallace* decision may be due to the additional award provided by the courts where the dismissed employee had experienced vulnerability as a result of the manner in which she or he was terminated (what has become known as *Wallace* damages). A plaintiff's vulnerability that is caused by the manner of dismissal is significant ($p < .01$) in each equations and adds between 2.85 (Model 3) and 4.36 months (Model 2) to the notice period relative to plaintiffs who had no claim that they had been left vulnerable because of the manner of dismissal. As a result, Hypothesis H9b is also supported.

The employer's failure to consider the seriousness of the poor performance is not significantly related to notice awards in any equation, thus Hypothesis H10b is not supported. However, large employer are a significant predictor ($p < .01$) of reasonable notice periods, adding almost four months (3.75 in Model 3 to 3.80 months in Model 4) to the notice period awarded. Consequently, hypothesis H11b is supported.

As expected, employee tenure ($p < .01$), occupational status ($p < .01$), and whether induced to leave previous, secure employment ($p < .05$) are found to be significant predictors of notice periods in both Models 3 and 4. Employee tenure adds approximately one-third of a month (.37 months) for every year with the employer and occupational status adds more than a month (1.34 to 1.36 months) for each level of the five-point occupational status. Therefore, notice periods for the highest-level employees (CEOs and senior executives) are as much as five to five and one-half months longer than for the lowest-level employees (for example, clerical employees). If the plaintiff had been induced to leave previous, secure employment, the notice period is almost four months longer (3.84 months) than those who had not received such an inducement. However, contrary to the hypothesized relationship, limited job prospects is not a significant predictor of the notice award. As a result, Hypothesis H12b is only partly supported by the results.

Table 5-5
Descriptive Statistics and Inter-correlations for Reasonable Notice Cases.

Variable	*M(%)*	*SD*	1	2	3	4	5	6	7	8
1. Reasonable Notice	8.42	6.20								
2. Voluntary Change	(.27)	.45	.04							
3. Involuntary Change	.37	.58	.06	.05						
4. Satisfactory Performance	1.15	1.16	.33†	.23†	.30†					
5. No Progressive Discipline	.27	.54	.09	.00	.06	.22†				
6. Procedural Justice	.38	.74	.15	.03	-.04	.31†	.20*			
7. Employer Failed to Warn	1.12	1.05	-.07	.05	-.04	.09	.14	.14		
8. Performance Standards	1.05	1.22	.02	.18*	.13	.28†	-.02	.07	.37†	
9. Vulnerability	(.20)	.40	-.19	.06	-.07	.08	.02	-.18*	-.08	-.01
10. Not Serious	.40	.70	.63†	.14	.13	.01	.12	.00	-.19*	-.03
11. Pre-Wallace Decision	(.43)	.50	-.19	.05	-.07	.01	-.26†	-.18*	-.08	-.12
12. Large Employer	(.26)	.44	.37†	.04	-.08	.24†	.03	-.02	-.22†	-.03
13. Employee Tenure	8.33	8.78	.63†	-.01	.13	.23†	.08	.11	-.19*	-.09
14. Occupation Status	3.44	1.31	.26†	.19*	.05	.15	.01	.00	-.02	.02
15. Limited Job Prospects	(.23)	.44	.25*	.11	-.04	.21†	.05	.14	.17*	.06
16. Induced to Leave	(.05)	.42	.10	.04	.00	.05	-.03	.04	.13	.10
17. Industry (Manufacturer)	(.24)	.22	.04	.11	-.01	-.01	-.01	.00	.13	.00
18. Ontario or BC	(.56)	.43	.01	.00	.17*	.11	-.07	.13	.01	.01
19. Employee Sex (female)	(.32)	.50	-.07	-.07	.06	.02	-.01	.07	-.02	.04

Table 5-5 *continued ...*
Descriptive Statistics and Inter-correlations for Reasonable Notice Cases.

Variable	**9**	**10**	**11**	**12**	**13**	**14**	**15**	**16**	**17**	**18**
10. Not Serious	.11									
11. Pre-Wallace Decision	-.07	-.13								
12. Large Employer	.02	.01	.05							
13. Employee Tenure	.08	.14	-.01	.21*						
14. Occupation Status	.02	.05	-.03	.05	-.01					
15. Limited Job Prospects	.32†	.09	-.02	.01	.08	.13				
16. Induced to Leave	.09	-.11	-.12	-.01	-.08	-.05	.07			
17. Industry (Manufacturer)	.15	-.20*	-.06	.20*	.09	.04	.06	.04		
18. Ontario or BC	.13	.08	-.04	-.06	-.02	.05	.09	.09	-.05	
19. Employee Sex (female)	.13	-.02	-.03	-.07	-.06	-.10	-.11	-.01	-.15	.13

Note. $n = 104$ with the exception of $n = 93$ for all correlations with Employee Tenure.

Pair-wise deletion is used.

Two-tailed tests of significance. * $p < .05$. † $p < .01$.

Table 5-6
Hierarchical OLS Regression on Reasonable Notice Awards

Variable	Model 1	Model 2	Model 3	Model 4
Voluntary Change	- 1.17 (1.43)	- 0.57 (1.38)	- 0.99 (1.00)	- 0.96 (1.02)
Involuntary Change	- 0.46 (1.12)	0.01 (1.09)	0.25 (0.81)	0.24 (0.82)
Satisfactory Performance	1.90† (0.57)	1.28 ** (0.58)	- 0.07 (0.44)	- 0.05 (0.45)
No Progressive Discipline	- 0.66 (1.17)	-0.95 (1.16)	- 0.69 (0.81)	- 0.74 (0.83)
Procedural Justice	0.46 (0.84)	0.94 (0.82)	0.85 (0.59)	0.87 (0.60)
Employer Failed to Warn	- 0.50 (0.58)	- 0.58 (0.59)	0.33 (0.44)	0.34 (0.50)
Performance Standards	- 0.29 (0.52)	- 0.35 (0.50)	0.07 (0.35)	- 0.04 (0.36)
Pre-Wallace Decision	- 2.34 **(1.34)	- 1.72 * (1.29)	- 1.66 ** (0.91)	- 1.75** (0.93)
Vulnerability		4.36 † (1.49)	2.85 † (1.08)	3.02† (1.12)
Not Serious		1.29 (0.88)	0.97 (0.63)	0.90 (0.66)
Large Employer (yes)			3.75† (1.05)	3.80† (1.09)
Employee Tenure			0.37† (0.05)	0.37† (0.05)
Occupation Status			1.36† (0.33)	1.34† (0.34)
Limited Job Prospects (yes)			0.67 (1.01)	0.63 (1.05)
Induced to Leave (yes)			3.84** (1.87)	3.84** (1.91)
Industry (Manufacturer)				- 0.64 (1.07)
Ontario or BC (yes)				- 0.55 (0.86)
Employee Sex (female)				- 0.27 (0.94)
Constant	8.25† (1.51)	7.16† (1.50)	-1.21 (1.56)	-0.62 (1.75)
F	2.12**	2.88†	10.06†	8.20†
Overall R^2	.168	.260	.662	.666
Change R^2		.092†	.402†	.004

Note: n= 104.

All models were calculated using list-wise deletion.

One-tailed tests of significance with the exception of Change of Status, Illness / Unilateral Change, Procedural Justice, Employer Failed to Warn, Performance Standards, and Not Serious.

* p <.10 ** p <.05. † p < .01.

Summary

In this chapter, I examined the determinants of both case outcome and reasonable notice awards in wrongful dismissal cases. Hypotheses of the relationships between the dependent variables (case outcome and reasonable notice) and the independent variables were posited. A summary of the findings is presented in Table 5-7.

The primary purpose of this study of incompetence or poor performance using common law case decisions is to explore the relationship between both case outcome and reasonable notice awards (the dependent variables) and several possible determinants of case outcome and notice which have not been considered in past empirical studies of wrongful dismissal law. The independent variables of primary interest are associated with the performance management of the individual employee, the unequal bargaining relationship in non-union employment contracts, and the notion of employee vulnerability as set out in the *Wallace* (1997) decision, as well as the *Wallace* decision itself.

Given the beliefs expressed by the Supreme Court of Canada in *Wallace* (1997), I hypothesized that factors, which are related to an employer's serious duty to an employee as well as an employee's vulnerable position in the employment relationship, would be associated with the greater likelihood of plaintiff (dismissed employee) success in wrongful dismissal cases. Moreover, I also expected that the *Wallace* decision in October 1997 would have the general effect of increasing the likelihood of plaintiff success in post-*Wallace* (1997) cases.

The hierarchical probit results of case outcome suggests that factors related to performance management, which include the effective use of performance standards, the effective use of performance warnings, and evidence of an employee's past satisfactory

performance are all significant predictors of a dismissed employee's success. In addition, the use of progressive discipline and workplace practices that are consistent with the principles of procedural justice also appear to be important HR practices with respect to case outcome. Moreover, employers should consider the weight to give to the seriousness of poor performance and the impact that involuntary workplace change as well as the manner of dismissal may have on the employee.

In the hierarchical OLS regression analysis of reasonable notice awards, I found that an employee's vulnerability brought about by the manner of dismissal as well as whether the case was decided before *Wallace* (1997) are important predictors of longer reasonable notice periods. Several determinants of reasonable notice from previous studies are also significant. Large employers, longer employee tenure, higher occupational status, and whether the dismissed employee had been induced to leave secure employment are significant predictors of longer reasonable notice periods. Surprisingly, the employee's limited job prospects are not related to the length of notice awards, a finding that is contrary to the accepted basic purpose of providing notice of termination.

In Chapter 6, a set of factors comparable to those considered in this chapter are examined relative to perceptions of just cause and notice received in workplace dismissals. The next study may be the first time that actual workplace dismissals have been studied from the perspective of the HR practitioner. In addition, while several studies have examined dismissal rates at the organizational level (Klaas, Brown et al, 1998; Shaw, Delery et al., 1998), no other studies have examined the determinants of workplace dismissal at the individual level.

Table 5-7: Summary of Study 1 Findings

Hypotheses	Variable	Relation to Plaintiff Victory	Relation to Notice Period
H1a: A voluntary change of an employee's status in the employment relationship will increase the likelihood of a plaintiff's victory. H1b: A voluntary change of the employee's status will have no effect on the length of reasonable notice awards.	Change of Status		
H2a: An involuntary change of an employee's working conditions (such as employee illness or the employer's unilateral imposition of new conditions of employment) will increase the likelihood of a plaintiff's victory. H2b: An involuntary change of an employee's working conditions will have no effect on the length of reasonable notice awards.	Illness/ Unilateral Change	+	
H3a: A terminated employee's past satisfactory performance will increase the likelihood of a plaintiff's victory. H3b: A terminated employee's past satisfactory performance will be positively related to the length of reasonable notice awards.	Satisfactory Performance	+	
H4a: An employer's failure to use progressive discipline will increase the likelihood of a plaintiff's victory. H4b: An employer's failure to use progressive discipline will be negatively related to the length of reasonable notice awards.	No Progressive Discipline	+	
H5a: An employer's failure to use workplace practices related to the principles of organizational justice will increase the likelihood of a plaintiff's victory. H5b: An employer's failure to use practices related to principles of organizational justice will have no effect on the length of reasonable notice awards.	Procedural Justice	+	
H6a: An employer's failure to effectively use warnings with respect to the employee's performance will increase the likelihood of a plaintiff's victory. H6b: An employer's failure to effectively use warnings will have no effect on the length of reasonable notice awards.	Employer Failed to Warn	+	
H7a: An employer's failure to effectively use performance standards will increase the likelihood of plaintiff victory. H7b: An employer's failure to effectively use performance standards will have no effect on the length of reasonable notice awards.	Performance Standards	+	
H8a: Wrongful dismissal cases decided before *Wallace* (1997) will decrease the likelihood of a plaintiff's victory. H8a: In wrongful dismissal cases decided before *Wallace* (1997), reasonable notice periods will be shorter than reasonable notice periods after the *Wallace* (1997) decision.	Pre-Wallace Decision		-
H9a: An employee's vulnerability that results from the manner of dismissal will increase the likelihood of a plaintiff's victory. H9b: An employee's vulnerability that results from the manner of dismissal will be positively related to the length of reasonable notice awards.	Vulnerability	+	+

Table 5-7: Summary of Study 1 Findings, continued ...

Hypotheses	Variable	Relation to Plaintiff Victory	Relation to Notice Period
H10a: An employer's failure to weigh the incompetence or poor performance of an employee against the relatively inconsequential nature of the misconduct will increase the likelihood of a plaintiff's victory. H10b: An employer's failure to weigh the incompetence or poor performance of an employee will have no effect on the length of reasonable notice awards.	Not Serious	+	
H11a: Large employer size will decrease the likelihood of a plaintiff's victory. H11b: Large employer size will increase the length of reasonable notice awards.	Large Employer	+	+
H12b: An employee's tenure, occupational level, and limited job prospects, as well as whether an employee had been induced to leave secure employment will have no effect on the likelihood of a plaintiff's victory. H12b: An employee's tenure, occupational level, and limited job prospects, as well as having been induced to leave previously secure employment will be positively related to the length of reasonable notice awards.	Employee Tenure Occupation Level Limited Prospects Induced to Leave Previous Secure Employment	+ +	+ + +

Chapter 6 – HR Practitioners' Experience with Dismissal in the Workplace: An Empirical Investigation of Dismissal, Just Cause, and Reasonable Notice

Study 2

In this study my purpose is to examine the determinants of perceived just cause and notice paid (if any) in employers' decisions to dismiss allegedly poorly performing non-union employees. Here dismissals are explored through the perceptions of human resource (HR) practitioners. HR practitioners are involved in dismissal decisions either by making actual decisions to dismiss an employee or by advising other managers in the decision process to dismiss an employee. As discussed in Chapter 2, employers have the legal right to terminate any non-union employee at any time as long as reasonable notice of termination or severance pay in lieu of notice is provided to the employee unless the employer has just and sufficient cause to dismiss the employee. HR practitioners may be more or less informed about the wrongful dismissal law and employee and employer rights flowing from the law. However, it is probable that HR practitioners will be guided as much by their perception of fairness and justice in the employment relationship, what Rousseau (1995) has referred to as the psychological contract, as they are by the law. Gaps between what the law necessitates and HR practice may be caused by gaps in HR practitioners' knowledge or because of other beliefs about right and wrong in the employer-employee relationship.

In the preceding chapter, the determinants of wrongful dismissal case outcome and reasonable notice awards were investigated but cases sampled from the published and unpublished reports do not represent all wrongful dismissals, nor even all wrongful dis-

missal litigation. An examination of the court case reports can only identify the values, principles and processes that are used by the courts. Obviously, it would be inappropriate to generalize these findings to the experience of employers and employees in workplace dismissals. In the present study, the sample of employee dismissals investigated is more representative of workplace dismissals and this will permit inferences with respect to HR practices.

In this study, I construct survey items developed out of the content analysis of the wrongful dismissal cases in the preceding study. This step ensures that the factors examined here are comparable to the factors explored in the analysis of the law. While studies have examined dismissal rates at the organizational level (Klaas, Brown et al, 1998; Shaw, Delery et al., 1998), no other studies have examined the determinants of workplace dismissal at the individual level. Hence, this study represents the first time that HR practitioners have been surveyed about their experience with individual workplace dismissals.

The first step in this study is an analysis of the factors that influence HR practitioners' perceptions of the employer's claim that there was just cause for an employee's dismissal. Second, the determinants of the notice actually given to the dismissed employee are investigated. This analysis will yield a basis for comparison of the practice of law with management practices and experience. The findings will have implications for HR management and other employment practices. For example, how are HR practitioners' decision models with respect to dismissal and reasonable notice periods different or the same as the courts' decisions? What is the relative importance of particular performance management and other practices in the decision to dismiss an employee in the work-

place compared to the courts. In addition to its practical contribution, this study may also expand our understanding of the formation of psychological contracts and the perception of justice and fairness in the workplace.

Hypotheses

Change of the Employee's Workplace Status

Consistent with the Supreme Court of Canada's position in Wallace (1997) and with the findings of my study of wrongful dismissal cases Chapter 5, I expect that recent changes in status, location, or other working conditions that alter the fundamental nature of the employee's relationship will have an influence on an employer's claims that just cause exists. In Wallace, the Court asserted that work is a central feature of an employee's life, helping to define identity, self-worth, and well-being, and that any change of status will have ramifications for the employee. Nowhere is this more evident as when the change is involuntary, such as where the conditions of employment are altered by the employee's illness.

However, a voluntary or involuntary change of status is not expected to have an effect on the dismissed employee's ability to find comparable employment. In fact, in Chapter 5, neither voluntary nor involuntary change was found to influence the length of reasonable notice stipulated by the courts when an employee was dismissed in Study 1. Such findings lead to the following hypotheses:

H1a: A recent change of the dismissed employee's status will be negatively related to perceived just cause.

H1b: A recent change of the dismissed employee's status will not be related to the notice period provided.

H2a: An employee's unexpected illness will be negatively related to perceived just cause.

H2b: An employee's unexpected illness will not be related to the notice period provided.

Satisfactory Past Performance

A history of satisfactory performance may create reliance and expectation in the employee of future good faith behaviour by the employer as a result of the contribution the employee has made. When terminated, the employee is likely to view such an outcome as a violation of the psychological contract. HR practitioners may also take the employee's contribution into consideration. Equity theory (Leventhal, 1976) suggests that HR practitioners will tend to view the dismissal of an employee as increasingly unfair to the extent that the satisfactory contribution of the employee increases. The inequity between contribution and outcome will tend to lead to increased notice periods and to decrease the perception that the employee was terminated for cause. HR practitioners will tend to want to compensate the employee for the broken promise.

In addition, the remediation of an employee's performance issues may also be a source of relational justice in that it can promote a sense of belonging and value to the organization. Such consideration would lead to the increased likelihood that an employee could adapt to and appreciate the organization's demands. As I confirmed in Study 1, the

courts see such adaptation and consideration by both the employee and employer as part of the on-going nature of an indefinite term contract.

Evidence of the differential treatment of employees who represent a 'problem' for management can be found in Lam and Devine's (2001) study of reasonable notice. They found that HR managers provided shorter notice periods to employees when there had not been sufficient cause to terminate without notice even though there had been performance-related reasons for the dismissal. In interviews, the HR managers expressed a desire to punish poorly performing employees even though there had not been a just cause for their dismissal. Therefore, it is possible that HR practitioners will favor the employee with satisfactory past performance and punish the poorly performing employee despite the Supreme Court of Canada's rejection of the *near cause* argument (Mole & Stendon, 2004). As a result, I hypothesize that:

H3a: A terminated employee's past satisfactory performance will be negatively related to perceived just cause.

H3b: A terminated employee's past satisfactory performance will be positively related to the notice period provided.

Disciplinary History

Consistent with my findings in the preceding study and with the views of the Supreme Court of Canada in *Wallace* (1997) and *McKinley* (2001), previous disciplinary history will influence perceived just cause. In *Wallace*, the Court stated that it will create and enforce boundaries on the employer's ability to act unilaterally, especially given the employee's particularly vulnerable position in the employment relationship. In

McKinley, the Court effectively sanctioned the use of progressive discipline as an intermediate step. In its decision the Court proposed the 'principle of proportionality' in which the employer must balance the severity of the misconduct or incompetence and the discipline imposed. The Court suggested that this balance must be placed in the context of the central role of work in society and its relation to the individual's sense of identity, worth, and well-being. In the courts dismissal is the ultimate disciplinary measure available to the employer and should only be taken once other measures are exhausted or when the misconduct is especially severe.

Because the court's views determined in Study 1 suggest that where employers have already made use of lesser forms of discipline, there is an increased likelihood that just cause will exist, HR practitioners are also likely to believe that just cause exists. Furthermore, dismissed employees with a disciplinary history are more likely to be seen by HR practitioners as having contributed to the dismissal thus to receive a shorter notice period as a result. Such a finding would also be similar to the attitude that Lam and Devine (2001) found in HR managers' perceptions. Therefore, I hypothesize that:

H4a: Past discipline for any reason will be positively related to perceived just cause.

H4b: Past discipline for any reason will be negatively related to notice period provided.

Non-Union Grievance System (NUGS)

In the previous study (Chapter 5), I found that where an employer failed to use workplace practices that were consistent with the principles of procedural justice, the plaintiff (the dismissed employee) had a greater likelihood of victory than in cases where the court had not identified such a failure. Likewise, where an employer instituted a non-

union grievance system (NUGS) the courts are more likely to decide the employer used fair practices (such as a willingness to adequately investigate an incident before moving to dismiss, to provide an unbiased hearing in which the employee would have an opportunity to respond to the allegations, and to provide a reasonable and frank explanation) when dismissing an employee than if no NUGS has been instituted. In addition, employers who have instituted such practices are more likely to be confident that the dismissal was for cause because they would have had a greater opportunity for sober second thought and a more thoughtful outcome.

However, the employer's failure to employ a NUGS is not expected to have an effect on the dismissed employee's ability to find comparable employment. Nor is it expected to shape the HR practitioner's perceptions of the employee. Moreover, the presence of workplace practices consistent with procedural justice was not found to influence reasonable notice in Study 1 (Chapter 5) where I analysed court cases. Consequently, I hypothesize that:

H5a: The employer's use of a non-union grievance system (NUGS) will be positively related to perceived just cause.

H5b: The employer's use of a non-union grievance system (NUGS) will not be related to the notice period provided.

The Effective Use of Performance Warnings and Performance Standards

As discussed in Chapter 5, the effective use of performance standards and warnings can be assessed through the conceptual basis of relational justice (Lind & Tyler, 1988), power and dependence (Thibaut & Kelley, 1959), and the views of the Supreme

Court of Canada (*Wallace*, 1997). For instance, the employer is a source of support and resources plus a sense of belonging, important to the development and maintenance of an on-going employment relationship. Fairness is derived from the provision of real consideration in a relationship characterized by an inequality of power and information. Typically, only the employer can fully appreciate what is required to ensure organizational success, thus it bears a heavy onus to share expectations, and to provide feedback and support in order to best match an employee's effort and abilities to the needs of the organization. The Supreme Court of Canada makes clear that the inequality of bargaining power derives in part from an employer's relative monopoly on information needed by an employee to achieve a more favourable position in the relationship.

Moreover, employers who effectively use performance standards and warnings where performance has fallen short of expectations are also likely to feel confident that they dismiss employees for cause. Employers should also feel confident if they have implemented fair practices such as a NUGS because it is likely that they would have investigated circumstances more thoroughly and have heard from the relevant parties before the decision to dismiss had been taken. This result should be consistent with my findings in the preceding study, in which the employer's failure to effectively use employee warnings and the failure to effectively use performance standards significantly increased the likelihood of a plaintiff's victory. The employers' use of warnings and performance standards should also lead to shorter notice periods as well, as employers' increased confidence will tend to lead to lower notice periods thought to be necessary under the circumstances. Thus, I hypothesize that:

H6a: The employer's effective use of employee performance warnings will be positively related to perceived just cause.

H6b: The employer's effective use of employee performance warnings will be negatively related to the notice period provided.

H7a: The employer's effective use of performance standards will be positively related to perceived just cause.

H7b: The employer's effective use of performance standards will be negatively related to the notice period provided.

Effect of the *Wallace* (1997) Decision

The *Wallace* (1997) decision has been the most influential recent wrongful dismissal case (Levitt, 2004). However, in my legal analysis in Chapter 5, the employee's vulnerability is a result of the manner of dismissal while in my workplace study in this chapter it is a result of the dismissal only. In other words, the courts awarded compensation in the form of *Wallace* damages only when the employer has caused an intangible injury as a result of the manner in which the termination was conducted, not as a result of the dismissal itself. Hence, an effect on perceived just cause or notice of termination in the workplace should not be expected.

Nevertheless, I propose that HR practitioners will tend to act in a way that they believe will reduce the animosity (and perhaps their own remorse) that could arise when they terminate employees in order to minimize the possibility of *Wallace* damages. It is probable that the *Wallace* decision will have an effect on lengthening notice periods gen-

erally, but particularly where an employee is vulnerable as a result of the dismissal. Such an outcome would be at least partly consistent with the findings of the previous study. However, the employee's vulnerability as a result of the manner of dismissal is not related to case outcome in that vulnerability is only considered by the court once it is determined that the employer has failed to establish just cause. Therefore, the employee's vulnerability is unlikely to influence whether an HR practitioner believes there is just cause in the workplace dismissals but will increase the notice period provided by the employer. Therefore, I hypothesize that:

H8a: The employer's consideration of the extent to which the employee would be made vulnerable by the dismissal will not be related to perceived just cause.

H8b: The employer's consideration of the extent to which the employee would be made vulnerable by the dismissal will be positively related to the notice period provided.

No Employee Intent

The employee's relatively vulnerable position in the employment relationship in light of the employer's ability to act unilaterally and arbitrarily is held in check by the legal system and the courts favouring the employee in cases where the employer is perceived to over-react to the employee's poor performance. Therefore, the employer may temper its position relative to the perception that just cause exists where the employee has shown no intent to perform poorly and take disciplinary action in proportion to the severity of the incompetence. I argue that the likelihood of perceived just cause should be lessened where the employee has no intention to perform poorly. Nevertheless, an em-

ployee's ability to locate comparable employment even though he or she did not to intend to perform poorly is unlikely to be affected. As a result, I hypothesize that:

H9a: The employee's intention to perform poorly will be positively related to perceived just cause.

H9b: The employee's intention to perform poorly will be not be related to the notice period provided.

Factors Found to be Determinants of Reasonable Notice in Other Studies

A number of factors including employee tenure, occupational status, having been induced to leave previous, secure employment, limited job prospects, and large employer size, have been found by management scholars to be at least moderately related to reasonable notice awards in studies of wrongful dismissal cases. I expect these factors will also tend to increase notice periods in the workplace. However, with the exception of employer size, these factors are not expected to be related to perceived just cause. While limited job prospects is positively related to a dismissed employee's victory in court in Study 1, Chapter 5 there is no conceptual basis on which to expect limited job prospects to influence workplace dismissal decisions. By contrast, large employers are expected to have the resources to both manage employee relations more effectively and to afford longer notice periods. In addition, large employers may carry a greater burden caused by an increased monopoly of bargaining power over employees relative to small firms. Therefore, employer size is expected to be positively related to perceived just cause and to notice period provided. Hence, I hypothesize that:

H10a: The size of the employer will be positively related to perceived just cause.

H10b: The size of the employer will be positively related to notice period provided.

H11a: The length of employee tenure, occupational status, having been induced to leave previous secure employment, and limited employee job prospects will not be related to perceived just cause.

H11b: Employee tenure, occupational status, having been induced to leave previous secure employment, and limited employee job prospects will be positively related to the notice period provided.

A summary of my hypotheses is provided in Table 6-1.

Table 6-1: Hypotheses for Perceived Just Cause and Notice Provided

Hypotheses	Just Cause	Notice Provided
H1a: A recent change of the dismissed employee's status will be negatively related to perceived just cause. H1b: A recent change of the dismissed employee's status will not be related to the notice period provided.	-	No Effect
H2a: The illness of the employee will be negatively related to perceived just cause. H2b: The illness of the employee will not be related to the notice period provided.	-	No Effect
H3a: The terminated employee's past satisfactory performance will be negatively related to perceived just cause. H3b: The terminated employee's past satisfactory performance will be positively related to the notice period provided.	-	+
H4a: Past discipline for any reason prior to the dismissal will be positively related to perceived just cause. H4b: Past discipline for any reason prior to the dismissal will be negatively related to the notice period provided.	+	-

Table 6-1: Hypotheses for Perceived Just Cause and Notice Provided, continued ...

Hypotheses	Just Cause	Notice Provided
H5a: The employer's use of a non-union grievance system (NUGS) will be positively related to perceived just cause. H5b: The employer's use of a non-union grievance system (NUGS) will not be related to the notice period provided.	+	No Effect
H6a: The employer's effective use of performance warnings will be positively related to perceived just cause. H6b: The employer's effective use of performance warnings will be negatively related to notice period provided.	+	-
H7a: The employer's effective use of performance standards will be positively related to perceived just cause. H7b: The employer's effective use of performance standards will be negatively related to notice period provided.	+	-
H8a: The employer's consideration of the extent to which the employee would be made vulnerable by the dismissal will not be related to perceived just cause. H8b: The employer's consideration of the extent to which the employee would be made vulnerable by the dismissal will be positively related to the notice period provided.	No Effect	+
H9a: The employee's lack of intention to perform poorly will be negatively related to perceived just cause. H9b: The employee's lack of intention to perform poorly will not be related to the notice period provided.	-	No Effect
H10: The size of the employer will be positively related to perceived just cause. H10b: The size of the employer will be positively related to notice period provided.	+	+
H11a: Employee tenure, occupational status, having been induced to leave previous, secure employment, and limited employee job prospects will not be related to perceived just cause. H11a: Employee tenure, occupational status, having been induced to leave previous, secure employment, and limited employee job prospects will be positively related to the notice period provided.	No Effect	+

Method

The data for this study were obtained using a Web-based survey of HR practitioners in Atlantic Canada. Members of three human resources professional associations, the Human Resource Association of Nova Scotia (HRANS), the Human Resources Association of New Brunswick (HRANB), and the Human Resources Professionals of Newfoundland and Labrador (HRPNL), were sent an email inviting them to participate in my survey (Appendix D). In total, the associations claim to have approximately 2,500 members. Approval and assistance to contact the associations' members was given by each association in the early summer of 2007. Data collection began in June 2007.

The invitation directed participants to access the survey via a Web-link to a secure server hosted by Saint Mary's University. The survey was programmed with a software package (*Perseus 7*) in order to facilitate the HR practitioner's on-line access, completion, and submission. A total of 208 usable surveys had been received on the secure server by the end of April 2008.

Participants completed a questionnaire on employee dismissal (Appendix E). They were asked to recall the most recent dismissal of a non-union employee for performance-related issues in which they had been involved with or had direct knowledge of their present or most recent employer.

The primary independent variables examined in this study were developed from the content analysis of the wrongful dismissal case reports of my first study in Chapter 5 as well as from an analysis of the legal literature (see Levitt, 2004) which I summarized in Chapter 2. The study variables and the items used to construct them are contained in Table 6-2, 6-3, 6-4, and 6-5. The primary independent variables included the dismissed

employees' past performance, disciplinary history, vulnerability as a result of the dismissal, change in employment status, the onset of illness, plus the employers' effective use of performance standards, the provision of warnings where performance was deficient, use of a non-union grievance system, and the employees' lack of intention to perform poorly.

Ethical Considerations

In the covering letter (Appendix F), general instructions, the gifts available by a draw for survey participants, and assurances about the voluntary and confidential nature of participating were presented. To this end care has been taken to ensure the confidentiality of the responses and the anonymity of the respondents. The completed surveys were hosted on a secure Web server at Saint Mary's University and access to the surveys was limited to the researcher and programmer only. Thus the results are presented only in aggregate form with no individual participants or responses identified.

I plan to make the results of the survey available to the participants by way of a report available through the researcher's Web site or by distributing the report directly to the associations for distribution to members. The direction of the Saint Mary's University Research Ethics Board was followed throughout the process.

Dependent Variables

The two dependent variables are whether the respondent perceived that the employer had just cause for dismissal and the notice (or severance) that had been provided to the dismissed employee. A summary of the dependent variables and the items used to

construct them are presented in Table 6-2. Perceived just cause is a measure of the extent to which the respondent (HR practitioner) perceived the employer to have had just cause for dismissing the employee. Perceived just cause consisted of three items ($\alpha = .88$) each of which were measured on a 6-point scale (1 = strongly disagree and 6 = strongly agree). Notice provided is a single item in which the respondent provided the dismissal notice that was provi.ded, if any, to the employee, as expressed in months.

Table 6-2: Dependent Variables

Dependent Variables	**Items used to construct Dependent Variables**
Perceived Just Cause $\alpha = .88$	1. In terminating the employee, the employer claimed to have had just and sufficient cause for the termination. 2. At the time of termination, I believed that the employer had just and sufficient cause to terminate the employee. 3. In hindsight, I now believe that the employer had just and sufficient cause to terminate the employee.
Notice Paid in Months	A single item in which the respondent entered the number of months of dismissal notice or severance that was paid, if any, to the dismissed employee.

Primary Independent Variables

The following independent variables were the primary focus of this analysis. Each of the items (described in Table 6-3) which make up the variables – change of status, satisfactory performance, employee was warned, performance standards, vulnerability considered, and absence of an employee intent – are measured on a 6-point scale (1 = strongly disagree and 6 = strongly agree). A summary of the primary independent variables is presented in Table 6-3.

Change of Status. The employee had experienced a recent change of status in the employment relationship prior to dismissal. The variable consists of three factors combined as a single measure ($\alpha = .70$).

Employee Illness. The employee had recently experienced a serious illness. Employee illness consists of a single dichotomously coded item.

Satisfactory Performance. There was evidence of the employee's past satisfactory performance. Satisfactory performance consists of seven items ($\alpha = .80$).

Discipline History. The employee had been disciplined prior to the dismissal. Discipline consists of a single dichotomously coded item.

Grievance System (NUGS). The HR practitioner claimed that the employer had a non-union grievance system (NUGS). The presence of a grievance system is captured with a single dichotomous item.

Employee Was Warned. The employee had been warned about a failure to meet performance standards, that there would be consequences, as well as whether he or she had been provided with an opportunity to correct deficiencies. The effective use of warnings is measured with six items ($\alpha = .96$).

Performance Standards. The employer had set and communicated effective performance standards and provided sufficient support in order for the employee to meet the standards. Performance standards consists of eight items ($\alpha = .93$).

Vulnerability Considered. The employer had considered whether the employee would be made vulnerable by the dismissal either by way of psychological distress or damaged reputation in the community. The variable consists of two items ($\alpha = .80$).

No Employee Intent (to perform poorly). The employee had not demonstrated an intention to perform poorly or to benefit from the failure to perform to standards. No employee intent consists of two items ($\alpha = .77$).

Table 6-3: Primary Independent Variables

Primary Independent Variables	Items used to construct the variable
Change of Status $\alpha = .70$	1. The employee had recently experienced a significant change of employment status. 2. The employee had recently experienced a significant relocation. 3. The employer had unilaterally changed the employee's conditions of employment.
Employee Illness (yes / no)	The employee had recently experienced a serious illness.
Satisfactory Performance $\alpha = .80$	1. The employee had performed long, satisfactory service. 2. The employee's past performance had been exemplary. 3. The employee had received recent positive feedback. 4. The employee had shown improved performance. 5. The employee's poor performance was temporary. 6. There was another explanation for the poor performance. 7. The employee's performance was NOT worse relative to others.
Progressive discipline (yes / no)	The dismissed employee was previously disciplined for any reason.
Grievance System (yes / no)	Your organization has adopted a non-union grievance procedure allowing non-union employees to challenge management decisions.
Employee was Warned $\alpha = .96$	1. The employee was warned that performance was not meeting standards. 2. The employee was warned about the consequences of poor performance. 3. The employee was warned that continued employment was in jeopardy. 4. The employee was given a reasonable opportunity to improve after a warning. 5. The employee was told what was required to improve. 6. The employee failed to improve performance after a warning.
Performance Standards $\alpha = .93$ (Item 2 was reverse coded.)	1. The employer had established performance standards. 2. The employer's performance standards/expectations were contradictory. 3. Performance standards were enforced consistently. 4. Performance standards were reasonable and realistic. 5. The employer communicated performance standards clearly. 6. The employee received sufficient performance feedback. 7. The employee received sufficient instruction and support. 8. The employee received sufficient training.

Table 6-3: Primary Independent Variables, continued ...

Primary Independent Variables	Items used to construct the variable
Vulnerability Considered $\alpha = .80$	1. The possibility of damage to the employee's mental health was considered in deciding whether to dismiss. 2. The possibility of damage to the employee's reputation in the community was considered in deciding whether to dismiss.
No Employee Intent $\alpha = .77$	1. The employee did not intentionally perform poorly. 2. The employee demonstrated no intent to benefit personally from any of her/his actions.

Variables Found to be Predictors of Reasonable Notice

Several variables which had been found to be significant predictors in previous studies of Canadian wrongful dismissal law are also included in the study. These include the dismissed employee's tenure (in years) with the employer, whether the employee faced a limited labour market after dismissal, whether the employee had been induced to leave a previous employer, the employee's occupational status[10], whether the terminated employee was female, and the employer's size (number of employees). A limited labour market, hired away, and female plaintiff are dichotomously coded (presence of the factor = 1 and absence = 0).

---

[10] The occupational status of the dismissed employee was captured with a five-point hierarchical scale identical to that used in Study 1. A higher score indicated a higher status position. For example, CEOs or executives were scored 5, the highest status position, and clerical workers, 1. The job titles or positions had been examined previously by three independent raters. All were business professors and doctoral candidates, each possessing significant work experience. A similar approach was used by both Wagar and Jourdain (1992) and McShane and McPhillips (1987).

Control Variables

Additional control variables included whether the employer was in the manufacturing sector, as well as the survey respondent's sex (female = 1 and male was the omitted category), occupational status (the same hierarchical code that was used above for the dismissed employees status), and experience in the dismissal of employees. Experience in the dismissal of employees was captured with two items (You have been the primary decision maker in a number of dismissals. You have played a role in making the decision to dismiss by providing recommendations or advice.). The items were measured on a six-point scale (1 = strongly disagree and 6 = strongly agree; $\alpha = .78$).

Results

My findings are presented in two parts. The results with respect to perceived just cause are provided in the first section. In the second section, the results related to the termination notice (or severance) paid to the dismissed employee are presented. The number of dismissals examined for the notice provided ($n = 145$) is smaller than for perceived just cause ($n = 208$) because employers are not required to pay any severance to employees who are dismissed for cause, although some may choose to do so as a gesture or to soften the blow of job loss. Termination notice was not provided in sixty-three of the dismissals in this study (30.3%). The results for perceived just cause are presented first followed by the results for reasonable notice. Descriptive statistics for perceived just cause are reported in Table 6-4 and are described below. Descriptive statistics for dismissal notice are reported in Table 6-8. Pair-wise deletion was employed for the descriptive analysis.

Results for Perceived Just Cause

The mean of perceived just cause was 4.57 (SD = 1.48). This score is a higher than the scale mean of 3.5, which indicates that respondents were more likely to agree than disagree that the employee had been dismissed for cause and that there is a slight bias toward just cause dismissals. Female dismissed employees were slightly under-represented in the sample as they comprised only 43% of the dismissal. The average tenure for all the dismissed employees was 4.58 years (SD = 5.79). Twenty-six percent of plaintiffs were reported to have faced limited job prospects upon dismissal, and 11% had been induced to leave a previous employer. Just over half of the plaintiffs had been employed in some management capacity as an executive, business or general manager, sales manager, or as a generalist manager. The average occupational status for all dismissed employees was slightly lower (M = 2.76; SD = 1.35) than three, the mid-point of the 5-point scale. In contrast, the average status of the plaintiffs in the analysis of wrongful dismissal cases was somewhat higher (M = 3.43) than the mid-point, an indication that the plaintiffs were of somewhat higher status overall when compared to the dismissed employees in this study of workplace dismissal. In these studies, the average number of employees for each employer was almost 6,000 and 18% of the employers were in the manufacturing sector.

Three-quarters of the survey respondents were women and occupational status was relatively high at 3.91, well above the mid-point of the 5-point scale. Nearly three-quarters of the respondents reported that they held managerial or professional positions and had significant experience in dismissing employees. The mean score of the role in dismissal scale (M = 4.11 SD = 1.43) is marginally higher than the mid-point of 3.5 on

the 6-point scale, an indication that respondents had been the primary decision makers in a number of dismissals and had provided recommendations or advice in dismissal decisions.

The survey respondents reported that 55% of the dismissed employees had been disciplined in the past for reasons not necessarily related to the dismissal and that 33% of the respondents claimed that the employers of the dismissed employees had a non-union grievance system (NUGS). The average score for employee illness (Mean = 1.92, S.D. = 1.14), change of status (Mean = 1.97, S.D. = 1.00), and satisfactory performance (Mean = 2.50, S.D. = .86) are all below the scale's mid-point This may indicate that illness and a change of employment status did not occur frequently among the dismissed employees and that the employee's past performance was more likely to be unsatisfactory. Overall, employers were perceived to have effectively employed warnings (Mean = 4.64, S.D. = 1.32) and performance standards (Mean = 4.55, S.D. = 1.08). However, respondents somewhat agree (Mean = 4.08, S.D. 1.36) that the dismissed employees had not performed poorly intentionally, nor had they intended to benefit from their actions. In addition, the HR practitioners slightly disagreed (Mean = 3.41, S.D. = 1.36) that the employer had considered the psychological distress or damaged reputation that would result from the employee's dismissal.

Determinants of Just Cause

The first step in the analysis was to investigate the determinants of just cause as perceived by the HR practitioners. That is, the purpose of this analysis was to determine which of the primary independent variables were correlated to the respondent's percep-

tion that the employer had just and sufficient cause to dismiss the employee. Tables 6-5, 6-6, 6-7 report the results of hierarchical OLS regression analysis of just cause. As a result of high co-linearity between failure to use effective employee warnings and failure to use effective performance standards (Pearson correlation = 0.77), an OLS regression analysis was performed with only one of the variables at a time in Tables 6-5 and 6-6. In Table 6-5, only the variable performance standards is used in the analysis. In Table 6-6, only employee warned is used. However, in Table 6-7, both performance standards and employee warned are used in the OLS regression estimations.

The primary independent variables alone (Model 1) explain 23.1% of the variance in Table 6-5 ($F(8, 186) = 7.00, p < .01$), 24.8% of the variance in Table 6-6 ($F(8, 186) = 7.65, p < .01$), and 25.9% of the variance in Table 6-7 ($F(9, 185) = 7.18, p < .01$). Model 2, which also includes the variables that have been found to be predictors in previous studies of wrongful dismissal cases, explains 24.8% of the variance in Table 6-5 ($F(14, 180) = 4.23, p < .01$), 26.3% in Table 6-6 ($F(14, 180) = 4.60, p < .01$), and 27.7% in Table 6-7 ($F(15, 179) = 4.56, p < .01$). Model 3, which includes the four additional control variables explains 25.4% of the variance in Table 6-5 (Model 3; $F(18, 176) = 3.33, p < .01$), 26.9% in Table 6-6 ($F(18, 176) = 3.60, p < .01$), and 28.4% in Table 6-7 ($F(19, 175) = 3.65, p < .01$). The ΔR^2 is not significant for any of the models.

A change in an employee's workplace status is not significantly related to perceived just cause, although the coefficient is in the expected direction. However, there is a moderately significant and positive relationship between employee illness and perceived just cause in Models 2 and 3. They are not in the expected direction.

Where there is a greater likelihood that respondents perceive that the employee had experienced a recent, serious illness, there is also greater likelihood of perceived just cause for the dismissal. Consequently, neither Hypothesis H1a nor Hypothesis H2a is supported by the results.

An employee's past satisfactory performance is not significantly related to perceived just cause in any of the equations, although the coefficients are in the expected direction. While the coefficients for disciplinary history are not significant, they are in the opposite direction to those hypothesized. That is, where the dismissed employee had a reported disciplinary history, the respondent HR practitioner was less likely to agree that there had been just cause for the dismissal. Therefore, Hypotheses H3a and H4a are not supported by the results.

In the equations where only the employers' failure to use effective performance standards appears (Table 6-5), the presence of a non-union grievance system (NUGS) is significant ($p < .05$). However, NUGS is only moderately significant ($p < .10$) where performance standards and employee warnings appear together (Table 6-7) and not significant where it appears with employee warned only. Therefore, Hypothesis H5a is only partly supported by the results.

The employers' failure to use effective employee warnings is a significant predictor ($p < .01$) of, and positively related to, the perceived just cause of HR practitioners in all equations where only employee warnings was included in the analysis (Table 6-4) as well as all equations where employee warnings appears together with the employers' failure to use effective performance standards. Similarly, the failure to use effective performance standards is a significant predictor and positively related to the perceived just

cause of HR practitioners both where it is used without employee warnings ($p < .01$) as well as where it is used with employee warnings ($p < .05$). That is, when the employer is perceived to be more likely to employ effective performance warnings, as well as where the employer is more likely to employ effective performance standards, the respondent is more likely to perceive that just cause for dismissal exists. Thus, Hypotheses H6a and H7a are supported by the results.

The extent to which the employee would be made vulnerable by the dismissal is not significantly related to perceived just cause. Thus, Hypothesis H8a is supported. However, the absence of employee intention to perform poorly, or to benefit from the poor performance, is significantly ($p < .05$) and negatively related to perceived just cause where it appears with the failure to use effective employee warnings only (Table 6-6). Where no employee intent appears with performance standards (Tables 6-5 and 6-7), it is only marginally significant ($p < .10$). Hence, Hypothesis H9a is only partly supported by the results.

Employer size (the number of employees) is not related to HR practitioners' perceived just cause. Consequently, Hypothesis H10a is not supported by the results. Likewise, other predictors of past studies of wrongful dismissal cases (employee tenure, occupational status, sex, limited job prospects, and induced to leave secure employment) are not related to perceived just cause as hypothesized. None of the variables found to be significant in previous studies of the law of wrongful dismissal in the management and organizational literature, nor the additional control variables, are found to be significant predictors of perceived just cause. As a result, Hypothesis H11a is supported.

Table 6-4
Descriptive Statistics and Inter-correlations for 208 Workplace Dismissals.

Variable	*M(%)*	*SD*	1	2	3	4	5	6	7	8
1. Perceived Just Cause	4.57	1.48								
2. Change of Status	1.97	1.00	.20†							
3. Employee Illness	1.92	1.14	-.08	.22†						
4. Satisfactory Performance	2.50	0.86	-.28†	.31†	.12					
5. Disciplinary History	(.55)	0.50	.19†	-.19†	-.14*	-.22†				
6. Grievance System	(.33)	0.47	.17*	-.11	-.12	-.11	.15*			
7. Employee Warned	4.64	1.32	.47†	-.27†	-.25†	-.48†	.45†	.27†		
8. Performance Standards	4.55	1.08	.44†	-.32†	-.19†	-.53†	.30†	.11	.77†	
9. Vulnerability Considered	3.41	1.36	.15*	-.10	.06	-.05	.01	.11	.30†	.25†
10. No Employee Intent	4.08	1.36	-.17*	.18*	.14*	.10	-.06	.00	-.09	-.14*
11. Employee Tenure	4.58	5.79	-.12	.00	.25†	.19†	-.09	-.12	-.15*	-.14*
12. Occupation Status	2.76	1.35	-.07	.16*	.03	.11	-.22†	-.07	-.09	-.24†
13. Employee Sex (female)	(.43)	0.50	-.10	.12	.13	.05	-.02	-.13	-.06	-.02
14. Number of Employees	5,984	18,023	.01	-.07	.14	.03	.13	.11	.09	.04
15. Limited Job Prospects	(.26)	0.44	-.05	.13	.03	.18*	-.05	-.12	-.23†	-.23†
16. Induced to Leave	(.11)	0.31	-.03	.18†	.13	.15*	-.18*	-.12	-.19†	-.24†
17. Industry – Manufacturer	(.18)	0.39	-.08	.05	.00	.09	-.15*	-.06	-.08	-.05
18. Resp. Sex (female)	(.75)	0.43	-.02	-.03	.05	.03	.18†	-.01	.01	.00
19. Resp. Occ. Status	3.91	0.68	.02	.03	.04	-.01	.03	.05	.14	.11
20. Resp. Role in Dismissal	4.11	1.43	.10	-.01	-.11	-.16*	.06	.05	.24†	.25†

Table 6-4 *continued ...*
Descriptive Statistics and Inter-correlations for 208 Workplace Dismissals.

Variable	9	10	11	12	13	14	15	16	17	18	19
10. No Employee Intent	-.04										
11. Employee Tenure	.14*	-.03									
12. Occupation Status	.24†	-.01	.22†								
13. Employee Sex (female)	.05	.08	-.02	-.06							
14. Number of Employees	-.11	.00	.11	-.08	-.10						
15. Limited Job Prospects	-.01	.09	-.05	.12	.01	-.06					
16. Induced to Leave	.10	-.01	-.03	.26†	.13	-.10	.17*				
17. Industry – Manufacturer	-.10	-.01	.15*	-.06	-.18†	-.08	-.11	-.05			
18. Resp. Sex (female)	-.06	-.02	-.06	-.06	.27†	.00	-.04	-.01	-.02		
19. Resp. Occ. Status	.19†	.02	-.05	.06	.02	.02	.06	.07	-.12	-.04	
20. Resp. Role in Dismissal	.27†	-.07	-.03	.02	-.21†	.06	-.10	.02	-.04	-.25†	.24†

Note. $n = 208$.

All correlations were calculated with pair-wise deletion.

Two-tailed tests of significance. * $p < .05$. † $p < .01$.

Table 6-5
Hierarchical OLS Regression on Perceived Just Cause (Performance Standards Included).

Variable	Model 1	Model 2	Model 3
Change of Status	- 0.09 (0.10)	- 0.11 (0.11)	- 0.10 (0.11)
Employee Illness	0.08 (0.09)	0.11 (0.10)	0.10 (0.10)
Satisfactory Performance	- 0.10 (0.13)	- 0.08 (0.14)	- 0.08 (0.14)
Disciplinary History	0.07 (0.21)	0.09 (0.21)	0.07 (0.22)
Grievance System (NUGS)	0.46** (0.21)	0.49** (0.21)	0.49** (0.22)
Performance Standards	0.50† (0.11)	0.55† (0.12)	0.58† (0.13)
Vulnerability Considered	0.03 (0.07)	0.01 (0.08)	0.03 (0.09)
No Employee Intent	- 0.10* (0.07)	- 0.10* (0.07)	- 0.10* (0.07)
Employee Tenure		- 0.02 (0.02)	- 0.02 (0.02)
Occupation Status		0.11 (0.08)	0.03 (0.09)
Employee Sex (female)		- 0.08 (0.20)	- 0.19 (0.22)
Number of Employees		0.00 (0.00)	0.00 (0.00)
Limited Job Prospects		0.21 (0.23)	0.19 (0.24)
Induced to Leave		0.30 (0.34)	0.34 (0.34)
Industry – Manufacturer			- 0.17 (0.26)
Resp. Sex (female)			- 0.05 (0.24)
Resp. Occ. Status			- 0.08 (0.15)
Resp. Role in Dismissal			- 0.07 (0.08)
Constant	2.70† (0.82)	2.38† (0.89)	2.88† (1.03)
F	7.00†	4.23†	3.33†
Overall R^2	.231	.248	.254
ΔR^2		.016	.006

Note: $n = 208$.

All models were calculated using list-wise deletion.

One-tailed test of significance with the exception of Constant, Vulnerability Considered, Employee Tenure, Occupational Status, Induced to Leave, Limited Job Prospects, Industry, Respondent Sex, Respondent Occupational Status, and Respondent Role in Dismissal.

* $p < .10$ ** $p < .05$. † $p < .01$.

Table 6-6
Hierarchical OLS Regression on Perceived Just Cause (Employee Warned Included).

Variable	Model 1	Model 2	Model 3
Change of Status	- 0.11 (0.10)	- 0.13 (0.10)	- 0.12 (0.11)
Employee Illness	0.12* (0.09)	0.15* (0.09)	0.15* (0.10)
Satisfactory Performance	- 0.11 (0.13)	- 0.10 (0.13)	- 0.10 (0.13)
Disciplinary History	- 0.13 (0.22)	- 0.15 (0.22)	- 0.18 (0.23)
Grievance System (NUGS)	0.26 (0.21)	0.28 (0.22)	0.27 (0.22)
Employee Warned	0.48† (0.10)	0.48† (0.10)	0.52† (0.10)
Vulnerability Considered	- 0.01 (0.08)	- 0.01 (0.08)	- 0.01 (0.09)
No Employee Intent	- 0.13** (0.07)	- 0.13** (0.07)	- 0.13** (0.07)
Employee Tenure		- 0.02 (0.02)	- 0.01 (0.02)
Occupation Status		- 0.03 (0.08)	- 0.04 (0.08)
Employee Sex (female)		- 0.11 (0.20)	- 0.16 (0.22)
Number of Employees		0.00 (0.00)	0.00 (0.00)
Limited Job Prospects		0.26 (0.23)	0.25 (0.24)
Induced to Leave		0.26 (0.33)	0.29 (0.34)
Industry – Manufacturer			- 0.19 (0.26)
Resp. Sex (female)			- 0.02 (0.24)
Resp. Occ. Status			- 0.10 (0.15)
Resp. Role in Dismissal			- 0.04 (0.08)
Constant	3.16† (0.70)	3.12†	3.65† (0.91)
F	7.65†	4.60†	3.60†
Overall R^2	.248	.263	.269
ΔR^2		.016	.006

Note: $n = 208$.

All models were calculated using list-wise deletion.

One-tailed test of significance with the exception of Constant, Vulnerability Considered, Employee Tenure, Occupational Status, Induced to Leave, Limited Job Prospects, Industry, Respondent Sex, Respondent Occupational Status, and Respondent Role in Dismissal.

* $p < .10$ ** $p < .05$. † $p < .01$.

Table 6-7
Hierarchical OLS Regression on Perceived Just Cause (Employee Warned and Performance Standards Included).

Variable	Model 1	Model 2	Model 3
Change of Status	- 0.10 (0.10)	- 0.12 (0.11)	- 0.11 (0.11)
Employee Illness	0.11 (0.09)	0.15* (0.10)	0.14* (0.10)
Satisfactory Performance	- 0.05 (0.13)	- 0.03 (0.14)	- 0.03 (0.13)
Disciplinary History	- 0.11 (0.21)	- 0.11 (0.22)	- 0.14 (0.23)
Grievance System (NUGS)	0.33* (0.21)	0.37* (0.22)	0.36* (0.22)
Employee Warned	0.34† (0.13)	0.35† (0.13)	0.36† (0.10)
Performance Standards	0.25** (0.15)	0.28** (0.16)	0.31** (.16)
Vulnerability Considered	- 0.02 (0.08)	- 0.03 (0.08)	- 0.01 (0.09)
No Employee Intent	- 0.13* (0.07)	- 0.12* (0.07)	- 0.12* (0.07)
Employee Tenure		- 0.01 (0.02)	- 0.01 (0.02)
Occupation Status		0.01 (0.08)	0.00 (0.09)
Employee Sex (female)		- 0.12 (0.20)	- 0.18 (0.22)
Number of Employees		0.00 (0.00)	0.00 (0.00)
Limited Job Prospects		0.28 (0.23)	0.26 (0.23)
Induced to Leave		0.31 (0.33)	0.35 (0.34)
Industry – Manufacturer			- 0.19 (0.26)
Resp. Sex (female)			- 0.03 (0.24)
Resp. Occ. Status			- 0.10 (0.15)
Resp. Role in Dismissal			- 0.06 (0.08)
Constant	2.47† (0.81)	2.22** (0.88)	2.78† (1.01)
F	7.18†	4.56†	3.65†
Overall R^2	.259	.277	.284
ΔR^2		.018	.007

Note: $n = 208$.

All models were calculated using list-wise deletion.

One-tailed test of significance with the exception of Constant, Vulnerability Considered, Employee Tenure, Occupational Status, Induced to Leave, Limited Job Prospects, Industry, Respondent Sex, Respondent Occupational Status, and Respondent Role in Dismissal.

* $p < .10$ ** $p < .05$. † $p < .01$.

Results for Dismissal Notice Provided

Descriptive statistics related to the 145 dismissals in which notice or severance was paid to the employee are reported in Table 6-8. I will only present a selection of the most important descriptive statistics because they have already been reported for perceived just cause in the immediately preceding sections of this chapter. The average notice period given or severance paid to the dismissed employee was 4.39 months (SD = 4.85). The average length of tenure for dismissed employees was 5.04 years (S.D. = 5.89), while 25% of dismissed employees faced limited job prospects upon dismissal, and 13% had been induced to leave a previous employer. In addition, just over half the dismissed employees had been employed in some management capacity as an executive, business or general manager, sales manager, or generalist manager. The average occupational status for all dismissed employees was just slightly lower (M = 2.97 and SD = 1.38) than the mid-point of the 5-point scale.

Almost three-quarters of the survey respondents (71%) were women and their occupational status is relatively high at 3.91. In contrast to the just cause examination, slightly fewer dismissed employees had been disciplined in the past (49%) and only 26% of employers had a non-union grievance system (NUGS). However, the average score for employee illness (M = 1.97 and SD = 1.08) and change of status (M = 2.04 and SD = 1.03) are slightly higher in cases where dismissal notice was received compared to the average score for all cases.

Respondents somewhat agree that the employers had effectively used warnings (Mean = 4.61 and S.D. = 1.23) and performance standards (M = 4.52 and SD = 1.06). However, relative to the just cause examination, respondents are somewhat more likely to

agree that the dismissed employee had not performed poorly intentionally (M = 4.18 and SD = 1.27). In addition, the respondents very slightly agree that the employer had considered the psychological distress or damaged reputation that would result from the employee's dismissal (M = 3.51 and SD = 1.36).

Determinants of Dismissal Notice Provided

The next step in the analysis is to investigate the determinants of the second dependent variable, the notice (or severance) provided to the employee as a result of the dismissal. The purpose of this analysis is to determine which variables contributed to the notice or severance measured in months provided by the employer. Table 6-9, 6-10, and 6-11 each report the results of three equations estimated with OLS regression analysis. Similar to my previous analysis, because of the co-linearity of employee warned and performance standards (Pearson correlation = 0.79), only performance standards is included in the analysis in Table 6-9, employee warned is the variable included in Table 6-10, and both variables are included in Table 6-11.

The primary independent variables alone (Model 1) explain 16.1% of the variance in Table 6-9 ($F(8, 136) = 3.04, p < .01$), 15.7% of the variance in Table 6-10 ($F(8, 136) = 2.95, p < .01$), and 16.1% of the variance in Table 6-11 ($F(8, 136) = 2.68, p < .01$). Model 2, which also includes the variables that have been found to be predictors in previous studies of wrongful dismissal cases, explains 38.2% of the variance in Table 6-9 ($F(14, 128) = 5.34, p < .01$), 38.1% in Table 6-10 ($F(14, 128) = 5.33, p < .01$), and 38.3% in Table 6-11 ($F(14, 128) = 4.97, p < .01$). Model 3, which includes the four additional control variables, explains 38.2% of the variance in Table 6-9 ($F(18, 124) = 4.02, p <$

.01), 38.2% in Table 6-10 ($F(14, 128) = 4.01, p < .01$), and 38.3% in Table 6-11 ($F(18, 124) = 3.79, p < .01$). The ΔR^2 for Model 2 is significant ($p < .01$) in Table 6-9, 6-10 and 6-11. However, the ΔR^2 for Model 3 is not significant in any of the models.

In the OLS regression analysis of termination notice provided, neither a change of the employee's status, nor employee illness is significantly related to notice provided in any of the models. Hence, both Hypotheses H1b and H2b are supported. However, the employee's past satisfactory performance, which was expected to be positively related to notice, is not significantly related to notice in any of the equations. Therefore, Hypothesis H3b is not supported. The employee's previous disciplinary history is the only primary independent variable that is significantly related to notice period in all models ($p < .05$). Because disciplinary history is negatively related to notice Hypothesis H4b is supported by the results.

The presence of a non-union grievance system (NUGS) is not significantly related to notice in any of the equations. Thus Hypothesis H5b is supported. Employee warned and performance standards were both expected to be negatively related to notice but neither is statistically significant. Thus, there is no support for either Hypothesis H6b or H7b.

While the employee's vulnerability was expected to be positively related to notice period, it was only significant in Model 1 ($p < .01$) where only the primary independent variables were entered (Tables 6-9, 6-10, and 6-11). Employee vulnerability is not significantly related to notice when the variables previously found to be significant predictors in studies of reasonable notice are entered in to the equation. Therefore, Hypothesis

H8b is not supported. However, the variable of no employee intent is not related to notice in any of the models, thus supporting Hypothesis H9b.

Employer size is not related to notice provided. Consequently, Hypothesis H10a is not supported. While the employee's limited job prospects and having been induced to leave secure employment are not related to notice, both the length of employee tenure and occupational status are positively and significantly related. Along with an employee's disciplinary history, tenure and occupational status are the only variables related to notice provided. Hence, Hypothesis H11b is partially supported.

Summary

The primary purpose of this study was to test whether the primary independent variables were related to the dependent variables, perceived just cause and the notice period provided, in addition to factors found to be significant in past studies of wrongful dismissal cases in the management and organizational literature. The primary independent variables are summarized in Table 6-3. A summary of the study's findings are contained in Table 6-12. The most surprising result of this examination is the relatively basic calculation for the determination of reasonable notice period that is used in the workplace. Likewise, the HR practitioners' perception of whether just cause existed relied greatly on a minimal number of factors that do not take into consideration of the employees' particular circumstances.

Table 6-8
Descriptive Statistics and Inter-correlations for 145 Decisions to Provide of Dismissal Notice.

Variable	*M(%)*	*SD*	1	2	3	4	5	6	7	8
1. Notice Paid	4.39	4.85								
2. Change of Status	2.04	1.03	.05							
3. Employee Illness	1.97	1.08	.21*	.09						
4. Satisfactory Performance	2.49	0.81	.18*	.36†	.10					
5. Disciplinary History	(.49)	0.50	-.27†	-.21*	-.14	-.31†				
6. Grievance System	(.26)	0.44	-.06	-.06	-.16	-.05	.11			
7. Employee Warned	4.61	1.23	-.16*	-.31†	-.18*	-.46†	.43†	.19*		
8. Performance Standards	4.52	1.06	-.17*	-.31†	-.04	-.50†	.34†	.02	.79†	
9. Vulnerability Considered	3.51	1.40	.26†	-.04	.18*	.02	-.02	.11	.23†	.16
10. No Employee Intent	4.18	1.27	.09	.08	.08	.07	-.13	.02	-.12	-.06
11. Employee Tenure	5.04	5.89	.48†	.01	.37†	.24†	-.06	-.07	.24†	-.13
12. Occupation Status	2.97	1.38	.38†	.18*	.04	.18*	-.18*	.08	.18*	-.26†
13. Employee Sex (female)	(.46)	0.50	.02	.09	.17*	.09	-.01	-.17	-.14	-.08
14. Number of Employees	6,274	19,302	-.05	-.12	.13	-.02	.15	.09	.15	.08
15. Limited Job Prospects	(.25)	0.43	.07	.17*	.03	.11	-.08	-.05	-.16	-.19*
16. Induced to Leave	(.13)	0.34	.05	.20*	.09	.21*	-.22†	-.05	-.22†	-.29†
17. Industry – Manufacturer	(.20)	0.40	.04	.07	.03	.07	-.21†	-.06	-.12	-.04
18. Resp. Sex (female)	(.71)	0.46	-.01	.00	.08	.13	.17*	-.07	-.03	-.06
19. Resp. Occ. Status	3.91	0.67	.03	.05	.00	-.02	-.09	.08	.19*	.18*
20. Resp. Role in Dismissal	4.12	1.44	-.01	.00	-.08	-.10	-.05	.10	.16	.17*

Table 6-8 *continued ...*
Descriptive Statistics and Inter-correlations for 145 Decisions to Provide of Dismissal Notice.

Variable	**9**	**10**	**11**	**12**	**13**	14	15	16	17	18	19
10. No Employee Intent	.03										
11. Employee Tenure	.21*	.05									
12. Occupation Status	.28†	-.06	.14								
13. Employee Sex (female)	.01	-.05	-.01	-.05							
14. Number of Employees	-.10	-.04	.10	-.08	-.11						
15. Limited Job Prospects	.07	.09	-.09	.15	.02	-.09					
16. Induced to Leave	.12	-.02	-.02	.26†	.22†	-.10	.20*				
17. Industry – Manufacturer	-.17*	.04	.15	-.13	-.18*	-.07	-.09	-.09			
18. Resp. Sex (female)	-.03	-.04	.00	.03	.31†	.00	-.02	-.02	-.02		
19. Resp. Occ. Status	.23†	.04	-.11	.09	.03	.01	.00	.05	-.12	-.09	
20. Resp. Role in Dismissal	.27†	.03	-.05	-.05	-.20*	.07	-.06	.02	-.04	-.33†	.23†

Note. $n = 145$.

All correlations were calculated with pair-wise deletion.

Two-tailed tests of significance. * $p < .05$. † $p < .01$.

Table 6-9
Hierarchical OLS Regression on Dismissal Notice Provided (Performance Standards Included).

Variable	Model 1	Model 2	Model 3
Change of Status	- 0.34 (0.42)	- 0.34 (0.41)	- 0.34 (0.38)
Employee Illness	0.40 (0.38)	- 0.07 (0.38)	- 0.07 (0.37)
Satisfactory Performance	0.30 (0.58)	- 0.08 (0.58)	- 0.07 (0.54)
Disciplinary History	- 1.68** (0.88)	- 1.88† (0.86)	- 1.85** (0.83)
Grievance System (NUGS)	- 0.48 (0.94)	- 0.40 (0.91)	- 0.40 (0.84)
Performance Standards	- 0.45 (0.60)	0.12 (0.45)	0.12 (0.44)
Vulnerability Considered	0.92† (0.30)	0.30 (0.29)	0.31 (0.32)
No Employee Intent	0.20 (0.31)	0.27 (0.28)	0.27 (0.28)
Employee Tenure		0.31† (0.07)	0.31† (0.07)
Occupation Status		1.15† (0.29)	1.15† (0.31)
Employee Sex (female)		0.22 (0.74)	0.26 (0.81)
Number of Employees		0.00 (0.00)	0.00 (0.00)
Limited Job Prospects		0.21 (0.85)	0.21 (0.87)
Induced to Leave		- 1.02 (1.16)	- 1.03 (1.19)
Industry – Manufacturer			0.06 (0.95)
Resp. Sex (female)			- 0.12 (0.88)
Resp. Occ. Status			0.02 (0.56)
Resp. Role in Dismissal			- 0.01 (0.28)
Constant	2.45 (3.32)	-1.31 (3.14)	-1.30 (3.69)
F	3.04†	5.34†	4.02†
Overall R^2	.161	.382	.382
ΔR^2		.221†	.000

Note: $n = 145$.

All models were calculated using list-wise deletion.

One-tailed test of significance with the exception of Constant, Change of Status, Employee Illness, NUGS, No Employee Intention, Industry, Respondent Sex, Respondent Occupational Status, and Respondent Role in Dismissal.

* $p < .10$ ** $p < .05$. † $p < .01$.

Regression equations were also estimated with the Number of Employees substituted by the natural log of the Number of Employees. The only substantive difference in the results was that the natural log of the Number of Employees was a significant predictor of notice period.

Table 6-10
Hierarchical OLS Regression on Dismissal Notice Provided (Employee Warned Included).

Variable	Model 1	Model 2	Model 3
Change of Status	- 0.34 (0.42)	- 0.34 (0.37)	- 0.35 (0.39)
Employee Illness	0.37 (0.38)	- 0.07 (0.36)	- 0.07 (0.37)
Satisfactory Performance	0.42 (0.56)	- 0.15 (0.51)	- 0.14 (0.53)
Disciplinary History	- 1.70** (0.88)	- 1.81** (0.79)	- 1.7** (0.85)
Grievance System (NUGS)	- 0.34 (0.92)	- 0.42 (0.82)	- 0.42 (0.84)
Employee Warned	- 0.26 (0.41)	- 0.04 (0.37)	- 0.04 (0.38)
Vulnerability Considered	0.92† (0.30)	0.34 (0.29)	0.33 (0.32)
No Employee Intent	0.20 (0.31)	0.26 (0.28)	0.26 (0.28)
Employee Tenure		0.31† (0.07)	0.31† (0.07)
Occupation Status		1.13† (0.28)	1.14† (0.30)
Employee Sex (female)		0.21 (0.74)	0.24 (0.81)
Number of Employees		0.00 (0.00)	0.00 (0.00)
Limited Job Prospects		0.18 (0.85)	0.18 (0.87)
Induced to Leave		- 1.08 (1.15)	- 1.09 (1.18)
Industry – Manufacturer			0.07 (0.95)
Resp. Sex (female)			- 0.12 (0.88)
Resp. Occ. Status			0.05 (0.56)
Resp. Role in Dismissal			- 0.01 (0.28)
Constant	1.42 (3.13)	- 0.46 (2.85)	- 0 .59 (3.52)
F	2.95†	5.33†	4.01†
Overall R^2	.157	.381	.382
ΔR^2		.225†	.001

Note: $n = 145$.

All models were calculated using list-wise deletion.

One-tailed test of significance with the exception of Constant, Change of Status, Employee Illness, NUGS, No Employee Intention, Industry, Respondent Sex, Respondent Occupational Status, and Respondent Role in Dismissal.

* $p < .10$ ** $p < .05$. † $p < .01$.

Regression equations were also estimated with the Number of Employees substituted by the natural log of the Number of Employees. The only substantive difference in the results was that the natural log of the Number of Employees was a significant predictor of notice period.

Table 6-11
Hierarchical OLS Regression on Dismissal Notice Provided (Employee Warned and Performance Standards Included).

Variable	Model 1	Model 2	Model 3
Change of Status	- 0.34 (0.42)	- 0.35 (0.38)	- 0.36 (0.39)
Employee Illness	0.41 (0.38)	- 0.10 (0.37)	- 0.10 (0.37)
Satisfactory Performance	0.31 (0.58)	- 0.09 (0.53)	- 0.08 (0.53)
Disciplinary History	- 1.71** (0.88)	- 1.80** (0.80)	- 1.77** (0.85)
Grievance System (NUGS)	- 0.50 (0.94)	- 0.32 (0.85)	- 0.32 (0.84)
Employee Warned	0.07 (0.60)	- 0.23 (0.53)	- 0.23 (0.38)
Performance Standards	- 0.50 (0.66)	0.31 (.61)	0.31 (0.63)
Vulnerability Considered	0.92† (0.30)	0.32 (0.29)	0.33 (0.32)
No Employee Intent	0.21 (0.31)	0.26 (0.28)	0.26 (0.29)
Employee Tenure		0.31† (0.07)	0.31† (0.07)
Occupation Status		1.17† (0.30)	1.17† (0.31)
Employee Sex (female)		0.21 (0.74)	0.23 (0.82)
Number of Employees		0.00 (0.00)	0.00 (0.00)
Limited Job Prospects		0.21 (0.86)	0.21 (0.88)
Induced to Leave		- 1.02 (1.12)	- 1.02 (1.19)
Industry – Manufacturer			0.05 (0.95)
Resp. Sex (female)			- 0.11 (0.88)
Resp. Occ. Status			0.03 (0.56)
Resp. Role in Dismissal			- 0.02 (0.28)
Constant	2.39 (3.38)	-1.15 (3.17)	- 1.16 (3.72)
F	2.68†	4.97†	3.79†
Overall R^2	.161	.383	.383
ΔR^2		.222†	.000

Note: $n = 145$.

All models were calculated using list-wise deletion.

One-tailed test of significance with the exception of Constant, Change of Status, Employee Illness, NUGS, No Employee Intention, Industry, Respondent Sex, Respondent Occupational Status, and Respondent Role in Dismissal.

* $p < .10$ ** $p < .05$. † $p < .01$.

Regression equations were also estimated with the Number of Employees substituted by the natural log of the Number of Employees. The only substantive difference in the results was that the natural log of the Number of Employees was a significant predictor of notice period.

The OLS regression analysis for perceived just cause suggests that the employer's effective use of performance standards and the effective use of performance warnings are the most important determinants of perceived just cause in the workplace. Nevertheless, other factors may also be significant depending on whether warnings or performance standards are included in the analysis. For instance, whether the employer considered the lack of employee intention to perform poorly is a significant determinant of perceived just cause where the employee was warned about poor performance. In addition, the presence of a non-union grievance system appears to be a determinant of perceived just cause where performance standards are effectively used concurrently. Furthermore, employers may also give weight to the unexpected illness of the employee where warnings have been provided. Surprisingly, no other independent variables are determinants of perceived just cause.

The OLS regression for the provision of notice indicates that among the primary independent variables only the employee's previous disciplinary history is a significant determinant of notice. Employees with a disciplinary history received 1.5 to 2 months less notice than employees who had not been previously disciplined. Given this result, it is not readily apparent whether employers consistently reduce notice periods because of past performance problems. Rather, the lower notice provided may be explained by the employer's choice to offer some notice even where they may have just and sufficient cause to dismiss instead of providing no notice at all, which the employer would be entitled to do under the law.

Overall, a very simple calculation with respect to reasonable notice seems to be used in the workplace. The employee's length of tenure and occupational status are the

only other significant determinants of reasonable notice. Employees received approximately one-third of a month for each year of tenure and just over one month for each additional level on the occupational status code. These coefficients are very close to those found in studies of wrongful dismissal cases, although the coefficients in this study represent a slightly lower, or more conservative, method for the calculation of reasonable notice as compared with the courts. This finding may help to explain why shorter notice periods are provided in the workplace, in contrast to those awarded by the courts. Moreover, employers do not seem to consider whether the employee had been induced from other secure employment or the organization's ability to pay, factors that have been considered important by the courts. A more detailed discussion of the findings is reserved for the final chapter where implications of the three studies taken together will also be considered.

One may deduce from the findings of this study that gaps exist between what the law necessitates and its application in actual workplace dismissals. These findings may also point to gaps in HR practitioners' knowledge of employee rights flowing from the law or their beliefs about responsibilities and obligations in the employee-employer relationship. In the next chapter, my final study examines HR practitioners' responses to a simulated dismissal of a non-union employee in order to determine if there are particular gaps in their beliefs which should be of concern.

Table 6-12: Summary of Study 2 Findings

Hypotheses	Variable	Perceived Just Cause	Notice Period
H1a: A recent change of the dismissed employee's status will be negatively related to perceived just cause. H1b: A recent change of the dismissed employee's status will not be related to the notice period provided.	Change of Status		
H2a: An employee illness will be negatively related to perceived just cause. H2b: An employee illness will not be related to the notice period provided.	Employee Illness	+	
H3a: The terminated employee's past satisfactory performance will be negatively related to perceived just cause. H3b: The terminated employee's past satisfactory performance will be positively related to the notice period provided.	Satisfactory Performance		
H4a: Past discipline for any reason prior to the dismissal will be positively related to perceived just cause. H4b: Past discipline for any reason prior to the dismissal will be negatively related to the notice period provided.	Disciplinary History		-
H5a: The employer's use of a non-union grievance system (NUGS) will be positively related to perceived just cause. H5b: The employer's use of a non-union grievance system (NUGS) will not be related to the notice period provided.	Grievance System	+	
H6a: The employer's effective use of performance warnings will be positively related to perceived just cause. H6b: The employer's effective use of performance warnings will be negatively related to notice period provided.	Employee Warned	+	
H7a: The employer's effective use of performance standards will be positively related to perceived just cause. H7b: The employer's effective use of performance standards will be negatively related to notice period provided.	Performance Standards	+	
H8a: The employer's consideration of the extent to which the employee would be made vulnerable by the dismissal will not be related to perceived just cause. H8b: The employer's consideration of the extent to which the employee would be made vulnerable by the dismissal will be positively related to the notice period provided.	Vulnerability Considered		
H9a: The employee's lack of intention to perform poorly will be negatively related to perceived just cause. H9b: The employee's lack of intention to perform poorly will not be related to the notice period provided.	No Employee Intent	-	
H10: The size of the employer will be positively related to perceived just cause. H10b: The size of the employer will be positively related to notice period provided.	Number of Employees		+
H11a: Employee tenure, occupational status, having been induced to leave previous, secure employment, and limited employee job prospects will not be related to perceived just cause. H11a: Employee tenure, occupational status, having been induced to leave previous, secure employment, and limited employee job prospects will be positively related to the notice period provided.	Employee Tenure Occupational Status Employee Sex Limited Job Prospects Induced to Leave		+ +

Chapter 7 – Human Resource Practitioners Perception of a Dismissal: An Experimental Investigation of Perceived Just Cause, Notice, and Fairness

Study 3

The purpose of my third study is to investigate some of the attitudes of human resource (HR) practitioners and the determinants of their decisions about whether just cause for dismissal exists, the reasonable notice of termination to offer, and the fairness of a simulated dismissal of a non-union employee. First, I undertake an examination of selected factors that might influence the HR practitioners' perceptions of just cause in the workplace in order to better appreciate the HR practitioner's response to workplace dismissal. Second, I investigate the determinants of HR practitioners' perceptions of the overall fairness of the simulated dismissal. Finally, I examine the determinants of the notice period that HR practitioners claim they would offer to the dismissed employee in the simulation.

HR practitioners are likely to be involved in dismissal decisions either by making actual decisions to dismiss an employee or by advising other managers regarding their decision. While HR practitioners may be well informed about wrongful dismissal law and employee and employer rights flowing from the law, HR practitioners are likely guided as much by their perceptions of fairness and justice in the employment relationship, what Rousseau (1995) calls the psychological contract, as they are by the law.

This study has practical significance in that it will provide an insight in to how HR practitioners would deliberate and advise other managers on the dismissal of an employee and how these decisions might differ from the legal requirements, particularly with respect

to the necessity for employers to warn employees that their jobs may be in jeppardy. In addition to its practical significance for HR management, this study may also have implications for the formation of psychological contracts and the beliefs of HR practitioners about just cause for dismissal, reasonable notice, and fairness in the workplace compared to these decisions in the courts.

Hypotheses

Decision-Maker and Employee Sex

The results of Wagar and Grant's (1996) examination of sex differences in wrongful dismissal court cases were consistent with the general findings in the arbitral literature. They found that female plaintiffs were significantly more likely to win their cases than men and that there was no evidence that the difference had diminished over the period of time represented by the cases studied. However, studies of reasonable notice have consistently failed to find a relationship between the plaintiffs' sex and notice awards (McShane, 1983; McShane & McPhillips, 1987; Wagar & Jourdain, 1992; Lam & Devine, 2001).

If we turn to the simulation of dismissal, studies provide mixed results with respect to sex differences in labour arbitration outcomes. Bigoness and DuBose (1985) found no differences between female and male 'arbitrators' in a study when students were asked to render decisions on arbitration issues when presented with a transcript of a simulated dismissal case. However, female arbitrators did regard the offence (an employee caught drinking on the job) as less serious. In the second study, Bemmels (1991), examined the decisions of 230 male arbitrators in a hypothetical discharge grievance case

and found that female grievors were more likely to receive full (rather than partial) reinstatement of their jobs and shorter suspensions than male grievors.

Hence, there is evidence in simulation studies and in the courts that sex differences do exist in both union and non-union dismissal decisions. However, in spite of the foregoing, the absence of sex differences in my examination of legal decisions in Chapter 5 (Study 1) and workplace decisions in Chapter 6 (Study 2) suggests that sex will not affect HR practitioners' attitudes or decisions. Consequently, I hypothesize that:

H1a: Neither the sex of a dismissed employee nor an HR practitioner's sex will be related to perceived just cause, perceived fairness, or notice provided.

Performance Warnings

As discussed in Study 1 (Chapter 5), an employer's use of performance warnings can be appreciated through the lens of relational justice (Lind & Tyler, 1988), power and dependence (Thibaut & Kelley, 1959), the views of the Supreme Court of Canada (*Wallace*, 1997), as well as informational justice (Colquitt, 2001). HR practitioners can provide information about the appropriateness of employee attitudes and efforts, a possible source of informational justice. In relational justice, the HR practitioner may be an important source of self-validation and sense of value for the employee. The HR practitioner may also be a source of support and resources plus a sense of belonging that are important to the development and maintenance of an on-going employment relationship. A sense of fairness is derived from evidence that an employee perceives that she or he is given real consideration.

The power and dependence model implies that employees are dependent on the employer for the quality of their outcomes. Hence, the success of the employment relationship places a heavy onus on the employer to share its performance expectations with an employee and to provide feedback and support to the employee in order to match effort and ability to the needs of the organization. Moreover, the Supreme Court of Canada (*Wallace*, 1997) asserts that inequality in the employment relationship derives in part from an employer's virtual monopoly of information relevant to an employee's ability to achieve a more favourable position in the relationship. Consequently, the use of performance warnings can be seen as a vital component of performance management and necessary to demonstrate an employer's faithful discharge of its duty to an employee.

Finally, as noted in Chapter 2, according to wrongful dismissal law the employer must provide warnings of deficiencies that if not met, would lead to termination. Warnings of poor performance must be clearly understood and specifically communicated to the employee. The warnings could take the form of the employee being told of the consequences of poor performance, that the employee's performance is not meeting standards and that dismissal may result, or that the employee's job is in jeopardy. It should be obvious to the employee that termination is likely if poor performance persists. The employer should ensure that the employee is told specifically what is required to improve performance and be provided with a timeline and opportunity to improve.

I argue that HR practitioners will be influenced by the use of warnings of poor performance, with decisions unfavourable to the employee more likely when the employee has received some form of warning. Therefore, I hypothesize that:

H2a: The likelihood of perceived just cause and perceived fairness of the dismissal will increase when an employee has received a warning that her or his performance could lead to dismissal.

H2b: The notice period provided will be decreased when an employee has received a warning that her or his performance could lead to dismissal.

An Employee's Past Performance

As I have discussed in Study 1 (Chapter 5), a history of satisfactory performance may help to create reliance and expectation of future good faith behaviour on the part of the employer. Employees may come to rely on an expectation that their past satisfactory performance will help them to attain a level of consideration from the employer greater than they might otherwise have received without a history of satisfactory performance. This higher level of consideration would be offered in recognition of an employee's contribution and value to the organization, and can be traced to a sense of what is fair based on an appreciation of equitable treatment based on past satisfactory employee performance.

The remediation of an employee's short-term performance issues may also be a source of relational justice in that it can promote a sense of belonging and value to the organization. Such consideration would lead to the increased likelihood that an employee could adapt to and appreciate the organization's demands. I argue that HR practitioners will be influenced by past performance, with decisions favourable to the employee more likely when the accused employee has a more positive work history. Therefore, I hypothesize that:

H3a: The likelihood of perceived just cause and perceived fairness of the dismissal will decrease when an employee has achieved a satisfactory performance record.

H3b: The notice period provided will increase when an employee has achieved a satisfactory performance record.

A summary of my hypotheses is provided in Table 7-1.

Table 7-1: Summary of Hypotheses

Hypotheses	Perceived Just cause	Perceived Fairness	Notice Period
H1a: Neither the sex of a dismissed employee nor an HR practitioner's sex will be related to perceived just cause, perceived fairness, or notice provided.	No Effect	No Effect	No Effect
H2a: The likelihood of perceived just cause and perceived fairness of the dismissal will increase when an employee has received a warning that her or his performance could lead to dismissal. H2b: The notice period provided will be decreased when an employee has received a warning that her or his performance could lead to dismissal.	+	+	-
H3a: The likelihood of perceived just cause and perceived fairness of the dismissal will decrease when an employee has achieved a satisfactory performance record. H3b: The notice period provided will increase when an employee has achieved a satisfactory performance record.	-	-	+

Method

Each participant in the simulation was presented with experimental materials in which they were asked to make a number of decisions relating to just cause for dismissal, reasonable notice period, and fairness about an employee dismissal. The dismissal por-

trayed deals with the poor performance of a long-term employee and is based on a real case, *Wallace v. United Grain Growers* (1997).

In the wrongful dismissal case upon which the scenario is based, the Supreme Court of Canada found that the trial judge had the discretion to extend the notice to which Wallace was entitled – damages that have come to be known as '*Wallace* damages' – because "employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal" (Wallace, 1997; para. 95). The employer's bad faith conduct and unfair dealing led to an injury to Wallace in the manner of humiliation, embarrassment, and damage to his sense of self-worth, which, the court held, should be compensated even if the injury hadn't led to the employee's inability to find new employment.

Wallace, who had been the top salesperson for each of the 13 years he had been employed by the defendant, was abruptly discharged without explanation and subsequently suffered emotional difficulties, forcing him to seek psychiatric help. In its judgment, the Court argued that Wallace had been induced to leave previous secure employment but in particular that the employer had been "untruthful, misleading and unduly insensitive." The Court asserted that during the course of dismissal, employers should be, "candid, reasonable, honest and forthright." Because of this treatment of Wallace the Court restored the trial judge's award of 24 months notice, which the lower appeal court had reduced to 15.

The names and some of the specific details in the vignette that would have alerted some survey respondents to the origin of the simulation were altered or removed from the material. The simulation includes the manipulation of two variables related to employee performance and employer warnings, as well as the sex of the dismissed employee.

These manipulations are presented in Table 7-2. In addition, there are debriefing notes for the experiment in Appendix H. In the scenario, the dismissed employee has been identified as Taylor and the manipulations include the sex of the employee portrayed (Jack or Jill), whether the dismissed employee had performed satisfactorily, and whether the employer provided a warning of the consequences of poor performance. Each participant received one of 8 possible variations of this scenario (2 x 2 x 2 interaction) and was asked to answer questions related to the dismissal. Study participants were not alerted to what, if any, material in the case had been altered relative to other participants. Following the description of the simulated dismissal, participants were asked to respond to a series of questions, which included two items related to whether there existed cause for dismissal, one question about the length of reasonable notice that the respondents would have provided, two questions (manipulation checks) to ensure that the respondents had noticed the manipulations related to the employer's warning and to the employee's performance, as well as four questions which provide a global measure of the fairness of the decision to dismiss.

Data Collection

The data for this study were obtained in the same way as in the previous study in Chapter 6. I used a Web-based survey of HR practitioners in Atlantic Canada. Members of three human resources professional associations, the Human Resource Association of Nova Scotia (HRANS), the Human Resources Association of New Brunswick (HRANB), and the Human Resources Professionals of Newfoundland and Labrador (HRPNL) were sent an email invitation to participate in my survey. Together the associations claim to

have approximately 2,500 members. Approval and assistance to contact the associations' members was forthcoming from each association in the early summer of 2007. Data collection began in June 2007 and continued until April 2008.

The invitation directed participants to access the survey (see Appendix G) via a Web-link to a secure server hosted by Saint Mary's University. The survey was programmed with a survey software package (*Perseus7*) in order to facilitate on-line access, completion, and submission. A total of 208 usable surveys had been received on the secure server by the end of April 2008.

Ethical Considerations

In the covering letter that introduced the survey, a description of general instructions, the gifts available by a draw for survey participants, as well as assurances about the voluntary and confidential nature of participation were presented. To this end, care has been taken to ensure confidentiality of the responses and the anonymity of respondents. The completed surveys were hosted on a secure Web server at Saint Mary's University and access to the surveys was limited to the researcher and programmer only. Results are only presented in aggregate form with no individual participants or responses identified.

Results of the experiment will be made available to the participants by way of notification that the report is available through the researcher's Web site or by distributing the report directly to the associations for distribution to members. The directions of the Saint Mary's University Research Ethics Board were followed throughout the process.

Dependent Variables

Three dependent variables examined in the study include whether the respondent perceived the employer to have just cause for dismissal, the length of notice, if any, that the respondent would have been inclined to provide to the dismissed employee, as well as the perceived overall fairness of the dismissal. Each of the items which make up the perceived just cause (2 items) and overall fairness (4 items) constructs were measured on a 6-point scale (1 = strongly disagree and 6 = strongly agree). A summary of the dependent variables and the items used to construct them are presented in Table 7-2.

Perceived Just Cause. Whether the employee in the vignette had been terminated with cause. Just cause consisted of two items ($\alpha = .69$).

Notice in Months. A single item in which the respondents entered the number of months of dismissal notice or severance that they would have been inclined to pay, if any, to the dismissed employee in the vignette.

Perceived Fairness of the Dismissal. A four item measure of the respondent's perception of the overall fairness of the employee's dismissal ($\alpha = .79$). This measure was adapted from Blancero (1995) to construct what Lind and Tyler (1988) referred to as a *direct measure* of fairness as opposed to Colquitt's (2001) organizational justice constructs in which fairness is measured *indirectly* as a set of criteria or dimensions of justice, such as lack of bias, adequate explanation, and so on. The direct measure is used here to provide a global measure of fairness.

Perceived fairness is a broader measure of a respondent's reaction to dismissal relative to perceived just cause. While HR practitioners may believe that they have the relatively narrow legal grounds (just and sufficient cause) to terminate the poorly per-

forming employee, they may not perceive the employee's dismissal to be the fair thing to do. Therefore, the respondent's perception of the fairness of the dismissal may differ from his or her perception of just cause.

Table 7-2: Dependent Variables

Dependent Variables	Items used to construct Dependent Variables
Perceived Just Cause $\alpha = .69$	1. The employer had just and sufficient cause to terminate the employee without notice. 2. Given the facts provided, I would have provided the employee with minimal or no notice.
Notice in Months	A single item in which the respondent entered the number of months of dismissal notice or severance that they would have been inclined to pay, if any, to the dismissed employee.
Overall Fairness of the Dismissal $\alpha = .79$	1. The procedure used to dismiss Taylor was fair. 2. The severance pay offered to Taylor was fair. 3. The explanation given to Taylor for the dismissal was fair. 4. Overall, Taylor's dismissal was fair.

Primary Independent Variables: Manipulations

A summary of the primary independent variables and the items used to construct them are presented in Table 7-3.

Employee Sex. A dichotomous manipulation embedded in the vignette, which portrays the sex of a dismissed employee (Taylor). Respondents were presented with a vignette with one of two versions, an employee named Jill or an employee named Jack (female = 1; male is the omitted group).

Warning Received. A dichotomous manipulation embedded in the vignette. In one version, the employee has been warned that dismissal may result from poor performance. In the alternative version the employee has never received such a warning, or any other kind of warning.

The effectiveness of the manipulation was checked with a single-item manipulation check. The item (Taylor was warned about the consequences of poor performance.) was measured on a 6-point scale (1 = strongly disagree and 6 = strongly agree). The warning in the vignette is moderately to strongly and positively correlated (.38) with the item in the manipulation check at a significant level ($p < .01$).

Satisfactory Performance. A dichotomous manipulation embedded in the vignette. In one version, the employee has excelled with the employer. In the alternative version, the employee's performance was less than satisfactory and frequently deficient.

The effectiveness of the manipulation was checked with a single item manipulation check. The item (Taylor's past performance was exemplary.) was measured on a 6-point scale (1 = strongly disagree and 6 = strongly agree). The performance manipulation in the vignette is strongly and positively correlated (.81) with the item in the manipulation check at a significant level ($p < .01$).

Table 7-3: Primary Independent Variables

Variables and Interactions	Items used to construct the variable
Employee Sex	A dichotomous manipulation embedded in the vignette, it portrays the sex of a dismissed employee (Taylor). Respondents were presented with a vignette with one of two versions, an employee named Jill, or an employee named Jack (female = 1; male is the omitted group).
Respondent Sex	A dichotomously coded dummy variable where 1 = female respondent and male is the omitted category.
Warning Received	A dichotomous manipulation in the vignette, in one version it portrays an employee who has been warned about the consequences of poor performance. In the alternative version, the employee has never received such a warning, or any other kind of warning: Moreover, Taylor had been warned that his (her) poor performance could lead to dismissal. Nevertheless, Taylor had never been warned that his (her) poor performance could lead to dismissal.
Satisfactory Performance	A dichotomous manipulation in the vignette, in one version it portrays an employee who has excelled with the employer. In the alternative version, the employee was less than satisfactory and frequently deficient: Taylor's performance was more than satisfactory as he (she) excelled in all areas of his (her) job. Moreover, for the next fourteen years, he (she) was the NBS top salesperson in each year. Taylor's performance was less than satisfactory, and for the next fourteen years, certain aspects of his (her) performance were satisfactory while other areas were frequently deficient. Taylor never achieved better than average sales relative to his (her) co-workers at NBS.
Interaction of Employee Sex and Respondent Sex	Each interaction is a single dichotomous item coded 1 for a female dismissed employee and a female respondent.
Interaction of Warning Received and Satisfactory Performance	Each interaction is a single dichotomous item coded 1 when the dismissed employee has received a performance warning and has performed satisfactorily.

Independent Variables Related to the Respondent

The following variables are descriptive of the respondent's experience or personal characteristics. A summary of the independent variables related to the respondent and the items used to construct them are presented in Table 7-4.

Respondent Sex. A dichotomously coded dummy variable where 1 = female respondent and male respondent is the omitted category.

Respondent Occupational Status. The occupational status of the respondent was captured with a five-point hierarchical scale identical to that used in the study of wrongful dismissal cases as well as to the scale used in the study of dismissal in the workplace. A higher score indicated a higher status position. For example, CEOs or executives were scored 5, the highest status position, and clerical workers, 1.

Respondent Role in Dismissal. A two item measure of the respondent's experience in employee dismissal ($\alpha = .78$). Each item was measured on a 6-point scale (1 = strongly disagree and 6 = strongly agree).

Respondent's Union Experience. If the HR practitioner's experience is primarily in a union environment, the variable is coded 1 and primarily non-union experience is the omitted category.

Respondent CHRP. The respondent's possession of a Canadian Human Resource Practitioner (CHRP) designation is coded as 1 and no CHRP designation is the omitted category.

Independent Variables Related to the Respondent's Employer

A summary of the independent variables related to the respondent's employer and the items used to construct them are presented in Table 7-4.

Industry / Manufacturer. If the respondent's employer is a manufacturer, this variable is coded 1 and non-manufacturing is the omitted category.

Employer Size (# employees). The employer size is a continuous variable based on the number employed by the organization in Canada.

Grievance System (NUGS). The presence of a non-union grievance system in an employer's workplace is coded 1 and the absence of a NUGS is the omitted category.

Table 7-4: Independent Variables Related to Respondent and Employer

Independent Variables	Items used to construct the variable
Respondent Sex	A dichotomously coded dummy variable where 1 = female respondent and male is the omitted category.
Respondent Occupational Status	The occupational status of the respondent was captured with a five-point hierarchical scale identical to that used in the study of Wrongful Dismissal Law as well as the study of dismissal in the workplace. A higher score indicated a higher status position. For example, CEOs or executives were scored 5, the highest status position, and clerical workers, 1.
Respondent Role in Dismissal $\alpha = .78$	1. You have been the primary decision maker in a number of dismissals. 2. You have played a role in making the decision to dismiss by providing recommendations or advice.
Respondent's Experience Union	Union environment is coded 1 and non-union is the omitted category.
Respondent CHRP	The possession of a CHRP is coded 1 and no is the omitted category.
Industry / Manufacturer	Respondent's employer: Manufacturer is coded as 1 and non-manufacturing is the omitted category.
Employer Size (# employees)	The employer size is a continuous variable based on the number employed by the organization in Canada.
Grievance System (NUGS)	If the HR practitioner's employer has a NUGS, the variable is coded 1 and no is the omitted category.

Results

The results of the examination of the simulated employee dismissal are presented in two parts. First, the results with respect to two dependent variables, perception of just cause and overall fairness are presented. Second, the results with respect to the notice that the respondent HR practitioner would have been inclined to pay to the employee are reported. OLS regression results for perceived just cause are contained in Table 7-6, for perceived fairness in Table 7-7, and for notice in Table 7-9.

Descriptive statistics relating to the examination of perceived just cause and perceived fairness are contained in Table 7-5 and are described immediately below (n = 208). Descriptive statistics for the examination of notice provided are reported in Table 6-8 and described with the results for the OLS regression examination of notice (n = 200). The small difference in the number of cases for the two samples is due to eight cases omitted because the notice period that the respondent claimed they would offer is greater than or equal to 36 months. The inclusion of these cases unduly skews the mean notice provided by respondents. In addition, reasonable notice awards of 36 months or more have clearly exceeded the period found to be acceptable in Canadian courts, in particular the Supreme Court of Canada where 24 months has become the favoured upper limit of awards. Pair-wise deletion was employed for the descriptive analysis of both samples.

Descriptive Statistics for Perceived Just Cause and Perceived Fairness

Descriptive statistics related to perceived just cause and perceived fairness are reported in Table 7-5. The mean of perceived just cause was 1.63 (SD = 0.87), very close

to the scale minimum of 1, which indicates that respondents were likely to disagree or strongly disagree that the employee had been dismissed for cause. As with perceived just cause, the mean of perceived overall fairness was also close to the scale minimum at 1.60 (SD = 0.74), which indicates that respondents were likely to disagree or strongly disagree that the employee had been dismissed fairly.

Respondents are well qualified for their roles in HR management as more than two of three report that they are employed in a management capacity or as an HR professional. The average occupational status for all respondents was much higher (M = 3.91; SD = 0.68) than the mid-point of the 5-point scale. Moreover, the average respondent appears to have had significant experience in the dismissal of employees. The mean score for the participants' role in dismissal scale (Mean = 4.11 SD = 1.44) is a little higher than the scale mid-point of 3.5, an indication that the average respondent slightly agrees that they had been the primary decision maker in a number of dismissals and had also provided recommendations or advice in dismissal decisions. Forty-three percent of respondents describe their work experience as primarily in a union environment and 40% reported that they are Certified Human Resource Practitioners (CHRP).

There were three manipulations presented in the experimental vignette: the dismissed employee's sex, whether the employee had received a warning, and whether the employee had performed satisfactorily. Women were considerably over-represented in the sample as they comprised 67% of the dismissed employees in the vignette. In other words, the female version of the vignette was accessed by approximately two-thirds of the survey respondents. Moreover, 75% of the survey respondents were also women. The dismissed employee had received a warning in 52% of the cases as opposed to hav-

ing never received a warning. In 51% of the cases, the employee had been performing more than satisfactorily as opposed to less than satisfactorily.

The average number of Canadian employees of the respondents' employer is almost 6,000 employees, 18% are in the manufacturing sector, and 33% of the HR practitioners report that their employer has adopted a non-union grievance procedure (NUGS) allowing non-union employees to challenge management decisions.

Results of OLS Regression Analysis of Perceived Just Cause

In the first step of my analysis, regarding the determinants of the HR practitioners' perceived just cause in the simulated dismissal, the results are as follows. Table 7-6 presents the results of OLS regression, the main effects plus sex of the respondent in Model 1 and the full estimation in Model 2. In the first equation (Model 1, $R^2 = .071$, F = 2.44, $p < .05$), perceived just cause was regressed on the dismissed employee's sex, respondent sex, performance warning, and satisfactory performance. The second equation (Model 2, $R^2 = .111$, F = 1.76, $p < .10$) also includes additional characteristics of the respondent (occupational status, role in dismissal, union experience, and CHRP) and of the employer (number of employees, industry, and NUGS). The full model explained 11.1% of the variance in perceived just cause. In addition, the ΔR^2 was not statistically significant.

No relationships are found between perceived just cause and employee sex or respondent sex, thus supporting Hypothesis H1. In addition, no interaction effect between employee and respondent sex was found. Performance warning was not related to perceived just cause, thus providing no support for Hypothesis H2a. However, satisfac-

tory performance was negatively related to just cause ($p < .05$), consequently supporting Hypothesis H3a. No interaction effect was found between warning and performance, hence, only the coefficients for main effects are reported in Table 7-9.

Results of OLS Regression Analysis of Perceived Fairness

In the next step, the determinants of perceived overall fairness of the dismissal are examined and presented in Table 7-5. In the first equation (Model 1, $R^2 = .079$, $F = 2.73$, $p < .05$) perceived fairness of the dismissal was regressed on the main effects plus the sex of the respondent and the second equation (Model 2, $R^2 = .128$, $F = 2.06$, $p < .05$) includes the additional characteristics of the respondent and the employer. The estimated equations only explain 12.8% or less of the variance in perceived fairness, the dependent variable. In addition, the ΔR^2 was not statistically significant.

The analysis revealed no relationship between perceived fairness and the sex of the dismissed employee or of the respondent. In addition, no interaction effect between employee and respondent sex was found, thus supporting Hypothesis H1. Performance warning was positively related to perceived just cause ($p < .05$), thus partially supporting Hypothesis H2a. In addition, satisfactory performance was negatively related ($p < .05$), hence supporting Hypothesis H3a. No interaction effect was found, hence, only the coefficients for main effects are reported in Table 7-9. Interestingly, the respondents' union experience is negatively related to the perceived fairness ($p < .05$) of the dismissal.

Table 7-5
Descriptive Statistics and Inter-correlations for Analysis of Just Cause and Fairness.

Variable	*M(%)*	*SD*	1	2	3	4	5	6	7	8
1. Perceived Just Cause	1.63	0.87								
2. Perceived Fairness	1.60	0.74	.63†							
3. Warning Received	(.52)	0.50	.12	.18*						
4. Satisfactory Performance	(.51)	0.50	-.23†	-.19†	.03					
5. Employee Sex (female)	(.67)	0.47	.05	.01	.03	-.03				
6. Respondent Sex (female)	(.75)	0.43	.05	.04	.17*	.04	.01			
Emp. Sex X Respondent Sex										
7. Female & Female Resp.	(.51)	0.50	-.05	.03	.12	.04	.71†	.58†		
8. Female & Male Resp.	(.16)	0.37	-.01	-.02	-.13	-.09	.31†	-.78†	-.45†	
9. Male & Female Resp.	(.25)	0.43	-.01	.01	.03	.00	-.82†	.33†	-.58†	-.25†
Warning X Performance										
10. Warned & Satisfactory	(.27)	0.45	-.07	-.03	.59†	.60†	.02	.13	.11	-.13
11. Warned & Not Satisfactory	(.25)	0.43	.23†	.24†	.54†	-.58†	.02	.07	.02	-.01
12. Not Warned & Not Satisf'y	(.25)	0.43	.04	-.02	-.58†	-.58†	.02	-.12	-.07	.11
13. Resp. Occupation Status	3.91	0.68	.02	.02	.13	.02	.16*	-.04	.09	.08
14. Resp. Role in Dismissal	4.11	1.44	.00	-.02	-.05	.00	.06	-.25†	-.11	.23†
15. Resp. Exp. in Union	(.43)	0.50	-.11	-.15*	.05	.03	.23†	-.05	.15*	.09
16. Respondent CHRP	(.40)	0.50	-.12	-.10	-.02	.14*	.16*	-.15*	.00	.19†
17. Industry / Manufacturer	(.18)	0.39	.07	.07	-.05	-.08	.06	-.02	.07	-.01
18. Employer Size (# employees)	5,984	18,020	-.02	-.12	.01	.10	-.07	.00	-.08	.02
19. Grievance System (NUGS)	(.33)	0.47	-.13	-.09	-.01	.11	.03	-.01	-.03	.08

Table 7-5 *continued ...*
Descriptive Statistics and Inter-correlations for Analysis of Just Cause and Fairness.

Variable	9	10	11	12	13	14	15	16	17	18
10. Warned & Satisfactory	.00†									
11. Warned & Not Satisfactory	.04	-.35†								
12. Not Warned & Not Satisf'y	-.04	-.35†	-.33†							
13. Resp. Occupation Status	-.15*	.10	.04	-.06						
14. Resp. Role in Dismissal	-.12	-.06	-.01	.01	.24†					
15. Resp. Exp. Union	-.22†	.01	.05	-.09	-.03	-.07				
16. Respondent CHRP	-.15*	.11	-.13	-.04	.16*	.15*	.18†			
17. Industry / Manufacturer	-.10	-.04	-.01	.11	-.12	-.04	.07	.02		
18. Employer Size (# employees)	.09	.06	-.04	-.07	.02	.06	-.05	-.03	-.08	
19. Grievance System (NUGS)	.03	.05	-.09	-.04	.05	.05	.00	.05	-.06	.11

Note. $n = 208$.

All correlations were calculated with pair-wise deletion.

Two-tailed tests of significance. * $p < .05$. † $p < .01$.

Table 7-6
Hierarchical OLS Regression on Perceived Just Cause

Variable	Model 1	Model 2
Sex of Dismissed EE	0.14 (0.26)	0.29 (0.27)
Sex of Respondent	0.11 (0.25)	0.13 (0.25)
Warning Received	0.22 (0.18)	0.23 (0.19)
Satisfactory Performance	-0.41** (0.18)	-0.34** (0.19)
Respondent Occupation Status		0.03 (0.10)
Respondent Role in Dismissal		0.00 (0.05)
Respondent Union Experience		- 0.19 (0.13)
Respondent CHRP		- 0.20 (0.13)
Industry – Manufacturer		0.14 (0.16)
Employer Size (# of employees)		0.00 (0.00)
Grievance System (NUGS)		- 0.20 (0.13)
Constant	1.60† (0.24)	1.57† (0.47)
F	2.44**	1.76*
Overall R^2	.071	.111
ΔR^2, step		.040

Note: $n = 208$.

All models were calculated using list-wise deletion.

Two-tailed test of significance with the exception of warned and not satisfactory as well as not warned and not satisfactory.

* $p < .10$ ** $p < .05$. † $p < .01$.

Regression equations were also estimated with the Number of Employees substituted by the natural log of the Number of Employees. No substantive differences in results were noted.

No significant interaction effects were found. Hence, only the coefficients for main effects are reported above.

Table 7-7
Hierarchical OLS Regression on Perceived Fairness

Variable	Model 1	Model 2
Sex of Dismissed EE	0.00 (0.22)	0.11 (0.22)
Sex of Respondent	-0.06 (0.20)	-0.05 (0.21)
Warning Received	0.30** (0.15)	0.33** (0.15)
Satisfactory Performance	-0.28** (0.15)	-0.21* (0.15)
Respondent Occupation Status		0.00 (0.08)
Respondent Role in Dismissal		0.00 (0.04)
Respondent Union Experience		- 0.25** (0.11)
Respondent CHRP		- 0.07 (0.11)
Industry – Manufacturer		0.14 (0.13)
Employer Size (# of employees)		0.00 (0.00)
Grievance System (NUGS)		- 0.12 (0.11)
Constant	1.61† (0.19)	1.67† (0.37)
F	2.73**	2.06**
Overall R^2	.079	.128
ΔR^2, step		.049

Note: $n = 208$.

All models were calculated using list-wise deletion.

Two-tailed test of significance with the exception of warned and not satisfactory as well as not warned and not satisfactory.

* $p < .10$ ** $p < .05$. † $p < .01$.

Regression equations were also estimated with the Number of Employees substituted by the natural log of the Number of Employees. No substantive differences in results were noted.

No significant interaction effects were found. Hence, only the coefficients for main effects are reported above.

Results of the Analysis of Notice

Descriptive statistics related to the notice period that respondents would pay to the dismissed employee are reported in Table 7-8. The average notice period was 11.45 months (SD = 6.68). Descriptive statistics were similar to those previously discussed for perceived just cause and fairness. For the examination of notice period, the HR practitioners were more frequently women (75%) than in the larger sample and their occupational status was also slightly higher at 3.92 (SD = 0.69). The average respondent also had slightly more experience in the dismissal of employees (Mean = 4.12, SD = 1.44). Slightly fewer (42%) respondents describe their work experience as primarily in a union environment. The average number of employees in the respondent's organization is slightly higher at 6,069 employees and 19% of employers are in manufacturing.

In the final step of my analysis, the determinants of notice that the respondents would have provided to the dismissed employee are investigated. Table 7-9 presents two OLS regression equations, the main effects plus sex of the respondent in Model 1and the full estimation in Model 2. In the first equation (Model 1, $R^2 = .035$, F = 1.15, not statistically significant), notice provided is regressed on the experimental manipulations plus respondent sex and the second equation (Model 2, $R^2 = .118$, F = 1.85, $p < .05$) includes the additional characteristics of the respondent and the employer. The equations explained no more than 11.8% of the variance in notice. In addition, the ΔR^2 of Model 2 is statistically significant ($p < .05$).

No relationship was found between the sex of the dismissed employee and the HR practitioner and the notice period provided. In addition, no interaction effect between the sex of the employee and the HR practitioner was found, thus supporting Hypothesis H1.

Performance warning was positively related to notice period ($p < .05$), thus supporting Hypothesis H2a. However, satisfactory performance was not related to notice period. Hence, Hypothesis H3a is not supported. In addition, no relationship was found between notice period and the interaction between warning and performance. Therefore, only the coefficients for the main effects are reported in Table 7-9.

Interestingly, the respondent's level of experience in dismissals is marginally related to notice ($p < .10$). In addition, the possession of a CHRP designation is also positively related to notice ($p < .05$). Respondents with a CHRP designation would have provided approximately 3.5 months more notice than respondents without a CHRP designation. Finally, the presence of a grievance system in the workplace is also marginally significant ($p < .10$).

Summary

The purpose of this study of a simulated dismissal was to investigate how HR practitioners would respond to a scenario similar to the influential Supreme Court of Canada's *Wallace* (1997) decision. To that end I wanted to tease out the relationship between the dependent variables (perceived just cause, perceived fairness, and the notice period justified by the circumstances) and the interaction of several independent variables. (the sex of the dismissed employee in the experimental vignette, the sex of the respondent, whether the dismissed employee had received a warning, and whether the performance of the employee had been satisfactory). Characteristics of the respondent and the employer are included as control variables.

Table 7-8
Descriptive Statistics and Inter-correlations for Simulated Notice Decisions.

Variable	*M(%)*	*SD*	1	2	3	4	5	6	7	8
1. Notice in Months	11.45	6.68								
2. Warning Received	(.52)	0.50	-.11							
3. Satisfactory Performance	(.52)	0.50	.22†	.02						
4. Employee Sex (female)	(.67)	0.47	.05	.01	-.04					
5. Respondent Sex (female)	(.75)	0.43	-.03	.19†	.05	.01				
Emp. Sex X Respondent Sex										
6. Female & Female Respondent	(.50)	0.50	.00	.11	.03	.71†	.58†			
7. Female & Male Respondent	(.17)	0.37	.07	-.14*	-.09	.31†	-.77†	-.45†		
8. Male & Female Respondent	(.25)	0.43	-.03	.06	.01	-.81†	.33†	-.58†	-.25†	
Warning X Performance										
9. Warned & Satisfactory	(.28)	0.45	.04	.59†	.59†	.00	.12	.10	-.12	.01
10. Warned & Not Satisfactory	(.24)	0.43	-.20†	.54†	-.59†	.00	.08	.02	-.03	.06
11. Not Warned & Not Satisf'y	(.24)	0.43	-.06	-.56†	-.59†	.05	-.14	-.05	.13	-.08
12. Resp. Occupation Status	3.92	0.69	.12	.11	.00	.16*	-.04	.09	.07	-.15*
13. Resp. Role in Dismissal	4.12	1.43	.18*	-.04	.03	.07	-.24†	-.10	.22†	-.13
14. Resp. Exp. Union	(.42)	0.50	.02	.03	.03	.23†	-.05	.15*	.09	-.23†
15. Respondent CHRP	(.40)	0.49	.19†	-.03	.15*	.14*	-.14*	-.01	.19†	-.13
16. Industry / Manufacturer	(.19)	0.39	-.13	-.06	-.08	.06	-.01	.09	-.04	-.09
17. Employer Size (# employees)	6,069	18,370	-.06	.01	.10	-.07	.00	-.08	.02	.09
18. Grievance System (NUGS)	(.33)	0.47	.13	-.02	.11	.01	-.02	-.06	.09	.05

Table 7-8 ***continued ...***
Descriptive Statistics and Inter-correlations for Simulated Notice Decisions.

Variable	9	10	11	12	13	14	15	16	17
10. Warned & Not Satisfactory	-.35†								
11. Not Warned & Not Satisf'y	-.35†	-.32†							
12. Resp. Occupation Status	.09	.03	-.04						
13. Resp. Role in Dismissal	-.03	-.02	-.01	.26†					
14. Resp. Exp. Union	.00	.04	-.08	-.03	-.06				
15. Respondent CHR	.11	-.15*	-.03	.16*	.16*	.19†			
16. Industry / Manufacturer	-.03	-.03	.12	-.13	-.06	.06	.01		
17. Employer Size (# employees)	.06	-.04	-.07	.02	.06	-.05	-.03	-.08	
18. Grievance System (NUGS)	.05	-.09	-.04	.05	.07	.02	.02	-.06	.11

Note. $n = 200$.

All correlations were calculated with pair-wise deletion.

Two-tailed tests of significance. * $p < .05$. † $p < .01$.

Table 7-9
Hierarchical OLS Regression on Months of Notice

Variable	Model 1	Model 2
Dismissed EE Sex	2.81 (2.80)	0.72 (2.80)
Respondent Sex	2.93 (2.65)	2.96 (2.63)
Warning Received	-3.41** (1.89)	-3.18** (1.89)
Satisfactory Performance	1.12 (1.94)	0.32 (1.92)
Respondent Occupation Status		-0.54 (1.01)
Respondent Role in Dismissal		0.85* (0.48)
Respondent Union Experience		0.02 (0.39)
Respondent CHRP		3.52** (1.43)
Industry – Manufacturer		-2.44 (1.68)
Employer Size (# of employees)		0.00 (0.00)
Grievance System (NUGS)		2.55* (1.42)
Constant	10.65† (2.52)	8.41* (4.74)
F	1.15	1.85**
Overall R^2	.035	.118
ΔR^2, step		.082**

Note: $n = 200$.

All models were calculated using list-wise deletion.

Two-tailed test of significance with the exception of warned and not satisfactory as well as not warned and not satisfactory.

* $p < .10$ ** $p < .05$. † $p < .01$.

Regression equations were also estimated with the Number of Employees substituted by the natural log of the Number of Employees. The only substantive difference in the results was that the case where it was reported that the employer had a non-union grievance system (NUGS) was not significant.

No significant interaction effects were found. Hence, only the coefficients for main effects are reported above.

Study 3 findings are summarized in Table 7-10. I made several interesting findings. As hypothesized, HR practitioners were less likely to perceive that just cause existed or that the dismissal was fair if the employee had a satisfactory past performance record. Likewise, practitioners were more likely to perceive that the dismissal was fair if there had been a warning of the employee's inadequate performance. Surprisingly however, no relationship was found between warning and just cause. Although a performance warning did decrease the length of notice provided, satisfactory performance did not increase notice periods. No evidence of an interaction between warning and performance was found. Similarly, no evidence of a main or interaction effect between the sex of the respondent and the sex of the dismissed individual was found. Finally, HR practitioners' experience and training contribute to significantly different views with respect to perceived fairness and to reasonable notice.

My research program considered wrongful dismissal case law, workplace dismissal from the perspective of the HR practitioner, and a simulated dismissal experiment in order to explore the legal and workplace basis of dismissal as well as the development of perceptions of justice and the psychological contract. In Chapter 8, I discuss the findings of each study in greater depth, and then integrate the findings and discuss the implications of my findings for HR management and other employment practices, as well as the implications of my studies considered together for a conceptual basis of workplace justice. Such an approach can help to escape the silos of legal and HR beliefs and practices in addition to addressing the relative absence of a broader theoretical context.

Table 7-10: Summary of Study 3 Findings

Hypotheses	Variable	Perceived Just cause	Perceived Fairness	Notice Period
H1: Neither the sex of a dismissed employee nor an HR practitioner's sex will be related to perceived just cause, perceived fairness, or notice provided.	Dismissed EE Sex Respondent Sex			
H2a: The likelihood of perceived just cause and perceived fairness of the dismissal will increase when an employee has received a warning that her or his performance could lead to dismissal. H2b: The notice period provided will decrease when an employee has received a warning that her or his performance could lead to dismissal.	Performance Warning			-
H3a: The likelihood of perceived just cause and perceived fairness of the dismissal will decrease when an employee has achieved a satisfactory performance record. H3b: The notice period provided will increase when an employee has achieved a satisfactory performance record.	Satisfactory Performance	-	-	
	Resp Occ Status Resp Role in Dismissal Resp Union Exp Resp CHRP Manufacturer ER Size NUGS		- 	+ + -

Chapter 8 – A Comparison of Workplace Dismissals and Practitioner Attitudes with the Courts' Decisions: Implications for Management Practice and Workplace Justice

In this chapter, I discuss the findings of my three studies, compare and contrast the results, and discuss the implications for management of the employment relationship from both a practical and a theoretical perspective. A summary of the findings of the studies is presented in Table 8-1.

My examination of dismissal in the courts, the workplace, and in HR practitioners' decisions is an extension of Lam and Devine's (2001) innovative approach to the examination of the application of employment law in HR managers' decisions, and seeks to ground the legal, workplace, and HR perspectives in an examination of organizational justice. As Lam and Devine (2001) claim, the linking of employment law, organizational theory, and HR practice makes my study one of a very short list of studies to empirically contrast the legal and HR perspectives. However, I examine employee performance management in contrast to Lam and Devine's (2001) investigation of reasonable notice period decision making. In addition, I incorporate an examination of actual workplace decisions in addition to simulated dismissals in contrast to Lam and Devine's (2001) consideration of simulated dismissals only.

The findings and conceptual basis of Study 1 form the basis of my study of the determinants of dismissal in the workplace in Study 2 as well as the examination of a simulated dismissal in Study 3. However, while the studies are linked in that Study 2 is informed by Study 1, and Study 3 is informed by both of the preceding studies, each

study is unique and makes its own contribution. Hence, I will discuss the findings of the three studies separately beginning my examination of wrongful dismissal cases, followed by workplace dismissals, and finishing with the simulated dismissal. In the next section I will discuss implications for workplace policies and practices by contrasting the results of all three studies. I finish my presentation of the findings with a discussion of implications for workplace justice. The discussion of the implications for workplace practice and justice is delayed so that the findings of each study can be linked and in order to fulfill my primary research objective, to better understand the nature of the employment relationship and dismissal in a legal, workplace, and justice framework.

Study 1 – Wrongful Dismissal Case Outcome and Reasonable Notice

The primary purpose of Study 1 (Chapter 5) was to examine non-union employee incompetence or poor performance in wrongful dismissal cases. I investigate the relationship between both case outcome and reasonable notice awards (the dependent variables) and several determinants of case outcome and notice which have remained largely unstudied in past empirical research. The independent variables of primary interest are associated with the performance management of an employee, HR practices associated with fair decision processes, the unequal bargaining relationship in non-union employment contracts, and the notion of employee vulnerability as set out in the *Wallace* (1997) decision, and illustrated by the *Wallace* decision itself.

Case Outcome – What accounts for a Dismissed Employee's Victory?

The objective of this study is to explore the factors which influence the outcomes of Canadian courts' decisions (that is, did the employee or the employer win the case?). To be successful, an employer must demonstrate that it had just and sufficient cause to terminate. Where the court has held that there is not just cause for dismissal, it must then determine the length of notice which is considered reasonable under the circumstances.

The hierarchical probit analysis of case outcomes suggests that several factors are related to the dismissed employee's success in the outcome of a case. The employer's ineffective use of performance standards and the ineffective use of performance warnings are the most important determinants of a plaintiff's (dismissed employee) success. The employee's past satisfactory performance is the next most important predictor of a plaintiff's success though it is somewhat less important than performance standards and warnings. Moreover, an involuntary workplace change, the failure to use certain workplace practices which are consistent with the principles of procedural justice, and the failure to use progressive discipline are almost equally important determinants of plaintiff success but somewhat less important than past satisfactory performance. Furthermore, the employee vulnerability which results from the manner of dismissal as well as the lack of seriousness of the poor performance are also important determinants in that their presence in the case perfectly predicts plaintiff victory. The dismissed employee always wins when these factors appear in the case report.

Let's consider the specific implications of my findings on the behaviour of employers. In my analysis, the plaintiff (dismissed employee) is approximately 20% more likely to win the wrongful dismissal case where the employer has failed to use perform-

ance standards as compared to cases where the factor is not present. This factor is the courts' most important determinant in the probit analysis of the probability of a plaintiff victory (see Table 5-4). This result implies that if employers want to win their case then they need to set and appropriately communicate clear, realistic, and reasonable performance standards as well as to provide the necessary support, including instruction, supervision, training, and feedback to employees. In addition, this means that the employer should enforce standards consistently, and ensure that standards and expectations do not conflict. Moreover, the employer should not terminate the employee because of new, higher standards that are introduced after the employee has been hired on the basis of the old standards unless it provides the necessary support and time for the employee to meet the higher standards.

With regard to the employer's failure to effectively use performance warnings, there is more than a 15% greater likelihood of a plaintiff's victory where the employer has failed to use performance warnings effectively. Where the employee's performance does not meet expectations, the employer should provide a clear warning that performance is not meeting expectations and that dismissal may result from failing to meet standards. In addition, the employer must tell the employee what is required in order to improve performance as well as provide a timeline and opportunity for the employee to improve. In the end, the employee should understand clearly that her or his job is in jeopardy.

The employee's past satisfactory performance is more modestly related to the probability of a plaintiff's victory, which is approximately 9% more likely when one or more factors indicate that the employee has performed satisfactorily or when there is

some other explanation for the poor performance. Employers may fail to consider evidence of the employee's satisfactory performance prior to or even during the incidence of alleged poor performance. For example, a short term or temporary decrease in performance should be weighed against the employee's overall performance with the employer. The overall performance might be better judged by considering such factors as the employee's long, satisfactory service, previous exemplary performance, positive performance appraisals or other positive feedback, and whether there are other explanations for the poor performance such as the poor performance on a task is unrelated to duties within the employee's area of responsibility or that the performance is not worse than that of other employees in comparable positions.

Several factors have a smaller but still significant influence on the likelihood of a plaintiff's victory. There is a more than 5% greater probability of a plaintiff win if the employer fails to use progressive discipline and instead abruptly terminates the employee. Progressive discipline is an intermediate response to employee performance problems which is based on the principle of proportionality (*McKinley*, 2001). In *McKinley* (2001), the Supreme Court of Canada asserted that the employer should balance the discipline imposed on the employee with the severity of the misconduct. The Court considers the employer's requirement to respond proportionately to employee performance problems and other misconduct to be an important principle in light of the employee's vulnerable position relative to the employer and the value placed on employment by individuals and by Canadian society. In many of the cases, the Court would have supported a lesser form of discipline rather than harsher discipline of dismissal.

A plaintiff victory is more than 5% more likely if the employee has experienced a recent involuntary change in his or her employment relationship. In *Wallace* (1997), the Court asserted that work is a central feature of an employee's life, helping to define our identity, self-worth, and well-being. Furthermore, any change of an employee's work-place status, whether voluntary or involuntary, will increase the likelihood of the employee's vulnerability as a result of his or her need to both adapt to the changed circumstances as well as to continue to perform satisfactorily as required. This is particularly the case where the change is involuntary, such as where the employee suffers an illness which adversely affects performance, or where the conditions of employment are changed by the employer unilaterally without consultation with the employee. Hence, employers may consider it prudent to accommodate the employee when illness strikes or some other change beyond the employee's control impedes the employee's ability to perform, and to provide a reasonable period of notice and consultation when an essential element of the employee's relationship is to change.

Involuntary changes share a conceptual link with constructive dismissal. The courts frequently find that a unilateral change imposed by the employer leads to the constructive dismissal of the employee. Constructive dismissal is a legal finding that indicates that the employer unilaterally changed a fundamental condition of employment in a way that does not favour the employee's interests, such as an employee's demotion, or a decrease or change in the basis of pay. An employer can prevent an allegation of constructive dismissal by providing reasonable accommodation of the employee's needs during a period of change or by giving reasonable notice of the change, just as they would in the event of a dismissal.

There is also moderate support for the finding that the application of practices consistent with the elements of procedural justice may also be an important expectation of the courts. The likelihood of a plaintiff victory increases by approximately 5% if the employer has failed to use one or more of the practices. The courts consider four practices including: (1) the employer's provision of a reasonable explanation for the dismissal decision, (2) an adequate investigation of the circumstances of the poor performance, (3) a hearing prior to dismissal, and (4) an appeal process once the decision has been taken.

In addition to the factors noted above, other factors related to the employee's vulnerability in the employment relationship were also found to be important factors in a plaintiff's victory. The employee's vulnerability (the psychological distress and damaged reputation in the community caused by the manner of dismissal) and the employer's failure to consider the weight of the seriousness of the consequences arising from the poor performance each predicted plaintiff victory perfectly. That is, each time these variables appear in a case, the plaintiff wins the case. In the courts' view the employee's vulnerability arose not only because the dismissal was conducted in 'bad faith,' but also because the dismissal was frequently unexpected given the representations of the employer and its relationship with the employee. A 'bad faith' dismissal frequently results because the employer has misrepresented the conditions of employment as well as the reasons for dismissal, perhaps even misleading the community about the character of the terminated employee in the process. Psychological distress and damaged reputations often result from the very poorly managed dismissals of otherwise satisfactory, even exemplary, employees. Moreover, employers should also be concerned about the effect that poorly-managed dismissals have on their remaining employees.

The employer's failure to consider the weight of the seriousness of the consequences arising from the employee's poor performance predicts a plaintiff's victory perfectly. Employers should consider several factors that the courts consider in weighing the seriousness of the poor performance. First, the employer should take into account whether the employee intended to perform poorly in order to benefit from the failure to meet standards, or to repudiate the employment contract. Second, the employer should examine whether it suffered any real loss, risk, or jeopardy as a direct result of the employee's poor performance. Finally, the employer should establish whether the poor performance was serious in the context of the employee's overall duties or responsibilities.

Several variables which have been found to be significant predictors of reasonable notice in previous studies are also associated with a plaintiff's victory. Large employers (500 or more employees) are more likely to successfully defend their allegations of just cause than are employers of fewer than 500 employees. Plaintiffs who are terminated from large employers are almost 10% less likely to win the court case. A possible explanation for this finding is suggested by Wagar and Jourdain's (1992) study of reasonable notice, in which it was suggested that the courts may hold the view that large employers have greater resources to provide longer notice periods. Likewise, larger employers may also be more likely to have greater resources available for effective management practices related to employee performance. As a result, a large employer may be more likely to successfully defend its rationale of just cause for dismissal.

Surprisingly, a dismissed employee with limited job prospects is approximately 5% more likely to win the case. A possible explanation for this finding is that the terminated employee's limited prospects are due to the fact that they are more specialized

workers and the employer is less able to objectively evaluate the quality of the performance given the employee's more specialized role. This factor's influence in the courts' deliberations is also discussed later when the determinants of reasonable notice are addressed where limited job prospects does not lead to increased notice periods.

Finally, an employee's victory is more likely (about 5%) in cases heard in British Columbia and Ontario than in the rest of Canada (excluding Quebec where the employment contract is governed by civil code, not common law). A possible explanation for such a result is that British Columbia and Ontario may have court systems which are somewhat more favourably oriented toward a dismissed employee than in the other provinces (Manitoba, Saskatchewan, Alberta, and Atlantic Canada) which account for the remaining cases.

Reasonable Notice Awards

The objective of this part of the study is to explore the factors that determine the Canadian courts' reasonable notice awards. If the court has determined that the employer did not have just and sufficient cause to terminate the employee, it must then determine the quantum of damages that should have been paid to the dismissed employee. Damages are typically calculated based on the length of reasonable notice the employee would be entitled to if the employer had not violated the implied term of the employment contract. In this analysis of reasonable notice awards, I examine the same variables as in the previous examination of case outcome because I want to investigate the relationship of these factors to the second important criterion of employer or employee success in wrongful dismissal cases. However, there are two important differences. Some of the

primary independent variables in this part of the study have been constructed as the sum of the relevant factors present in each case rather than the dichotomous coding that is employed in the analysis of case outcome. In that part of the study, the primary independent variables are all coded dichotomously. In addition, I included two primary independent variables in the current analysis which are omitted from the examination of case outcome. The variables are whether the dismissed employee had been made vulnerable by the manner of dismissal and whether the employer had failed to consider the lack of seriousness of the poor performance in terminating the employee. Each had predicted plaintiff victory perfectly. That is, each time the factor appeared in the case the dismissed employee was successful.

The analysis suggests that only two of the primary independent variables are related to the length of notice awarded. They are the dismissed employee's vulnerability that was caused by the manner of dismissal and whether the decision had been published before the *Wallace* (1997) decision (see Table 5-6). Where the courts found that a plaintiff had suffered psychologically or had a damaged reputation as a result of the manner of dismissal, the plaintiff received approximately three months of additional notice when all other factors were controlled. This finding is consistent with the principle of bad faith dismissal and "*Wallace* damages" as set out by the Supreme Court of Canada.

However, in addition to the extra notice awarded as a result of these damages, the courts also seem to increase the average length of notice by almost two months in cases that were decided following the *Wallace* (1997) decision. In *Wallace*, the Supreme Court of Canada states that bargaining power in the employment relationship is inherently unequal, that employees are in a vulnerable position, and that the inequality extends to other

facets of the employment relationship. It may be that the courts have put the views enunciated by the Court in *Wallace* into action. Perhaps the courts are adopting a more sympathetic view of the dismissed employee as a result. The manner of dismissal, a key finding of the Court in *Wallace* (1997), captures the employer's requirement to treat the employee with respect and propriety, and to be candid and truthful in interactions with the employee, particularly (but not only) during dismissal.

While the '*Wallace* bump' may be thought of as a generalized increase in reasonable notice awards, the 'bump' may be partly explained by the courts' consideration of factors that are not considered in this study which, if identified, would put additional limits on the employer's superior power. For instance, the generalized increase in the reasonable notice period shrinks with the addition of the variables employee vulnerability and whether the poor performance is not serious in the second equation (Model 2, Table 5-6). The courts regularly increase the notice period by adding a number of months for '*Wallace* damages' which are recognition of an employer's contribution to a dismissed employee's vulnerability as a result of a bad faith dismissal. It is also possible that factors such as failure to use procedural justice or progressive discipline may account for some of the '*Wallace* bump' as these are practices that employers can undertake voluntarily which limit the more arbitrary exercise of power that might be likely without the use of these practices. Moreover, other factors not discussed by the courts may also account for some portion of the 'bump.'

Some of the variables which have been significant predictors in previous studies of wrongful dismissal law also merit discussion. Consistent with previous studies of reasonable notice, there was strong evidence that employee tenure (McShane, 1983;

McShane & McPhillips, 1987; Wagar & Jourdain, 1992; Lam & Devine, 2001), occupational status (McShane & McPhillips, 1987; Wagar & Jourdain, 1992; Lam & Devine, 2001), and having been induced to leave previous secure employment (McShane & McPhillips, 1987; Wagar & Jourdain, 1992), continue to be significant determinants of reasonable notice. Employee tenure and occupational status were consistently important determinants in previous studies. In my study, the courts increased the notice award by approximately 1/3 of a month for every year of service. This result is nearly identical to the findings of McShane and McPhillips (1987). Moreover, a comparison of my study to previous findings with respect to occupational status is made possible with the use of expert raters. A five-point scale, which closely parallels the method of McShane and McPhillips (1987), is used to assign the dismissed employee's job status on a scale from 1 (lowest status such as clerical) to 5 (highest status such as CEO). In both studies, an executive at the high end of the scale, might expect to receive an additional five to five and one-half months of notice or more compared to a clerical employee.

Surprisingly, plaintiffs who had been induced to leave previous, secure employment were found to receive almost four months additional notice, about double that found in McShane and McPhillips (1987). A possible explanation again may be *Wallace* (1997). The courts could be inclined toward an even longer period of notice than before the landmark case in recognition of the vulnerable employee's increased reliance and expectation created by an employer's promises of increased job security, responsibility, and opportunity.

The results also suggest that the courts' reasonable notice awards are related to the size of the employer, consistent with Wagar and Jourdain's (1992) findings. The

courts seem willing to award almost four months longer notice period if the plaintiff was terminated by a larger employer (500 or more employees). Possibly, the courts perceive that larger employers have a greater ability to pay. However, a possible alternative explanation may also be plausible. Large employers seem more likely to benefit from long-tenured employees in addition to possessing greater resources with which to manage the employment relationship. Therefore, the courts may hold large employers to a higher standard with respect to the successful management of the employment relationship, perhaps more so because these long-tenured employees also tend to have a greater number of indicators of previous satisfactory performance. In other words, the longer notice period, which represents a higher quantum of damages, may reflect a higher standard of management capability expected of the larger employer.

Surprisingly, the employee's limited job prospects was not a significant predictor of notice awards. This finding seems contrary to the most widely-cited purpose of reasonable notice, to provide the employee with adequate time to locate employment comparable to that from which he or she has been terminated. Moreover, the courts have recognized that the more specialized the position of the employee (in addition to higher status and responsibility), the longer the notice to which she or he should be entitled (Levitt, 2004). The finding is all the more perplexing given that I found that limited job prospects is a significant predictor of plaintiff victory in terms of case outcome. These results for case outcome and reasonable notice are both contrary to what is expected.

Earlier in this chapter I speculated on a partial explanation for this surprising result. The terminated employee's limited prospects may be related to the extent to which the employee is a specialized workers, and that the employer may be less capable of ap-

preciating good and bad performance where the work is more specialized. As for reasonable notice, limited job prospects are moderately correlated with employee vulnerability. It may be that the increased notice award expected by a dismissed employee who faces limited job prospects is partly explained by the employee's vulnerability as a result of the manner of dismissal.

Study 2 – Perceived Just Cause and Notice in Workplace Dismissal

In Study 2 (Chapter 6), a set of factors comparable to, and derived from, my content analysis of the wrongful dismissal cases in Study 1 were examined. As such, many of the measures have been uniquely constructed for this study of dismissal at the individual level because I want to contrast the determinants of workplace dismissal with those considered most important by the courts. I reserve my discussion of these comparisons to a later section of this chapter, *Implications for Management*, where the implications for workplace policy and practice of Study 1, Study 2, and Study 3 are considered together.

This study is also unique for other reasons. It is the first time that HR practitioners have been surveyed about their own experience with the dismissal of non-union employees in the workplace. HR practitioners have an important mediating role in the employer-employee relationship, yet their views are rarely examined. In addition, several studies have examined dismissal rates at the organizational level (Klaas, Brown et al, 1998; Shaw, Delery et al., 1998) but the determinants of workplace dismissal at the individual level have not been investigated. This study is uniquely placed to make important contributions to workplace policy and practice.

Perceived Just Cause

The results of this study suggest that the employer's effective use of performance warnings followed closely by the effective use of performance standards is the most important determinant of HR practitioners' perceived just cause in the workplace (Table 6-7). The more likely respondents are to agree that the employer used warnings effectively, the more likely they are to perceive that just cause for termination exists. Likewise, the more HR practitioners agree that performance standards are effectively employed, the more likely they are to perceive just cause exists.

However, other factors may be related to perceived just cause depending on whether performance warnings or performance standards are excluded or included in the analysis. For instance, whether the employer considered the employee's intent to perform poorly is a significant predictor of perceived just cause if the variable performance standards is excluded but only moderately significant when it is included. A possible explanation for this finding is that where employers use effective performance standards, there is a greater likelihood that perceived just cause exists in spite of evidence that the employee did not intend to perform poorly. In addition, this finding may suggest that employers that use effective employment standards are also less likely to consider other mitigating factors in determining whether just cause exists.

The presence of a non-union grievance system (NUGS) is also significantly related to perceived just cause but only if the variable employee warned is excluded from the analysis. NUGS is only moderately related to just cause when employee warned is included. A possible explanation for this finding is that the effective use of performance warnings is perceived to lessen the need for, or value of, a formal grievance system.

Finally, employee illness is also a moderately significant predictor of just cause in the full model, but in the opposite direction to that expected. That is, a recent serious employee illness is associated with an increased likelihood that the dismissal was perceived to be for cause. This is a disturbing finding given that a serious illness may lead to increased demands on the employee brought about by the need to both adapt to the resulting health changes and to the continuing demand to perform.

Notice Provided

The purpose of this analysis is to determine which variables contributed to the length of the notice period provided by the employer. The results suggest that among the primary independent variables only the employee's previous disciplinary history is an important determinant of notice. Employees who have been previously disciplined receive one and one-half to two months less notice than employees who had not been disciplined. Nevertheless, it is not readily apparent whether employers consistently reduce notice periods because of past performance problems. Rather, the lower notice period may be explained by the employer's choice to provide some notice even where it may have been just and sufficient cause to dismiss. The provision of notice where none is warranted may be motivated by the employer's desire to reduce the risk of legal action, to manage the impression created in other employees by an abrupt termination, or to meet the employee's immediate needs because of genuine concern for the employee's welfare. However, if the notice is provided out of concern for the employee, it is difficult to understand why the employee's vulnerability is not a significant predictor of notice.

The employee's tenure and occupational status are the only other significant determinants of reasonable notice. Employee's received approximately one-third of a month for each year of employment and just more than one month for each additional level of the occupational status code[11]. These coefficients are very close to those found in studies of the wrongful dismissal case law, although they appear to represent a slightly more conservative method for calculating reasonable notice in the workplace. This finding may help explain the somewhat shorter notice periods provided to dismissed employees by HR managers, in contrast to the typical notice awarded by the courts (Lam and Devine, 1997). Moreover, employers do not consider whether the employee had been induced from other secure employment, the organization's size, or the employee's limited job prospects, factors that are considered important by the courts in previous studies of wrongful dismissal cases. Overall, employers seem to have a very simple calculus with respect to reasonable notice calculation.

Study 3 – A Simulated Dismissal

Unlike Study 1 and 2, my third study is an examination of workplace dismissal in a simulated employee termination. Its purpose is to investigate the perceptions of HR practitioners and the factors influencing their decisions about just cause, reasonable notice period, and fairness. The context of such decisions is the simulated dismissal of a non-union employee. HR practitioners are likely to be part of dismissal decisions either by making the decision to dismiss or by advising other managers in the dismissal process. Although HR practitioners may be well informed about wrongful dismissal law and em-

---

[11] Occupational status is measured with the same code employed in Study 1.

ployee and employer rights flowing from the law, it is probable that HR practitioners are guided as much by their perceptions of fairness and justice in the employment relationship, that is by the so-called psychological contract, as they are by law.

This study will provide insight into how HR practitioners deliberate and advise other managers on the dismissal of an employee and how this advice might differ from legal requirements. This study will also have implications for the formation of psychological contracts and the perception of justice and fairness in the workplace from the HR practitioner's perspective.

Findings

In Study 3 (Chapter 7), no evidence of a main or interaction effect between the sex of the respondent and the sex of the dismissed individual was found. In addition, no evidence of an interaction between warning and performance was found. However, HR practitioners were less likely to perceive that just cause existed or that the dismissal was fair if the employee had a satisfactory past performance record. Likewise, practitioners were more likely to perceive that there was just cause and that the dismissal was fair if there had been a warning of the employee's inadequate performance.

As to notice period, although a performance warning did decrease the length of notice provided, satisfactory performance did not increase notice periods. Notice was more than three months shorter when the employee had received a warning about his or her performance.

Finally, respondent experience and training are also significantly related to perceived fairness of the dismissal and notice provided, but not to perceived just cause. Re-

spondents whose experience is primarily in a union environment are significantly less likely to perceive the dismissal to be fair after controlling for other factors. In addition, those with a Canadian Human Resource Practitioner (CHRP) designation typically offered three and one half months more notice than respondents without a CHRP designation. The relationship between respondents' role in dismissal and the presence of a grievance system to notice period were also marginally significant. The more likely respondents were to agree that they had played a role in previous employee dismissal, the more likely they were to offer a longer notice period. In addition, the reported presence of a non-union grievance system also increased notice periods.

Implications for Management: A Comparison of the Legal, Workplace, and HR Practitioner Perspectives

In this section, I identify the similarities and differences in the findings of the analysis of wrongful dismissal cases (Study 1) and workplace dismissal (Study 2). Then I discuss their implications. A comparison of the court perspective and workplace perspective will reveal differences in practices and insights into the contrasting views. Next, I discuss the implications of Study 3 in light of the preceding examination of Study 1 and 2. The findings of each study are summarized in Table 8-1.

Contrasting Wrongful Dismissal Cases and Workplace Dismissals

The most striking difference in my results between the wrongful dismissal court case analysis and the workplace dismissal study is that the determination of whether just cause for dismissal exists and the length of notice of termination decisions are dependent

on a much smaller set of factors in the workplace than in the court decisions. For example, determining notice in the workplace was based on only three significant predictors in contrast to the six predictors identified in my examination of court decisions. Among the six variables identified as significant predictors in previous studies of reasonable notice in the courts, only the employee's tenure and occupational status are significant predictors of notice in the workplace study. Moreover, while ten factors are related to case outcome in my examination of wrongful dismissal cases, only five study variables predict perceived just cause in the workplace.

A possible explanation for the small number of factors used to determine notice in the workplace is required for why HR practitioners employ a relatively simple calculation which incorporates only the employee's tenure and occupational status when determining the length of notice (or severance) to provide to dismissed employees. HR practitioners may regularly adopt a common and simplified method for all decisions about the notice period to provide in order to ensure more consistent decisions. Such an outcome may be perceived as especially important to maintain equity in the workplace, which may be more easily accomplished if a simple, common method is used for all employees. This method seems to offer very little latitude for the consideration of the unique circumstances of each dismissed employee. Moreover, the method is apparently widespread in spite of an assertion in the courts that employers cannot take "refuge in the application of a blanket formula" since the "individuality" of each employment contract must be considered and "fairness requires a balancing of the applicable factors" (Kothlow, 1987; p. 10-11) .

Nevertheless, the interpretation of these findings warrants caution because important determinants of both just cause and notice in the workplace may be absent from my study. For example, the full model for notice paid in the workplace (Model 3, Table 6-11) accounts for less than 40% of the variance in months of notice paid. This suggests that there may be other significant predictors of notice that are absent. For instance, Lam and Devine (2001) found that age (a covariate of tenure), salary (a covariate of occupational status), the reason for termination, and the company's financial situation are significant predictors of the reasonable notice provided by HR managers in a simulated dismissal.

Interestingly, the formula used to calculate notice in the workplace is only modified to the extent that a previous disciplinary history will reduce notice by just less than two months. There are at least two plausible explanations for this finding. First, it may be that HR practitioners are inclined to provide some period of notice to dismissed employees even where just cause for dismissal may exist, perhaps in recognition of the hardship created by the dismissal. However, there is no evidence that the employee's vulnerability, which may result from the termination, has influenced the length of notice provided. This suggests that the reduced notice provided to employees who have been previously disciplined is perhaps better explained by the employer's desire to punish the employee. It appears that the employees' poor performance is a factor that influences the length of the notice period in the workplace. However, it is no longer recognized in the courts where the Supreme Court of Canada has rejected 'near cause' as a factor leading to a shorter notice period (*Dowling*, 1998 in Mole and Stendon, 2004). Lam & Devine's (2001) study of reasonable notice seems to support this explanation. They found that HR

managers not only expressed the view that poor performance should reduce notice periods but it also caused the HR managers to reduce the notice provided in a simulated dismissal.

It is surprising to find that the employer's size (measured as the number of employees) is not related to the length of notice provided to dismissed employees in the workplace, nor to perceived just cause, even though plaintiffs are less likely to win their wrongful dismissal case against large employers but more likely to receive a longer notice period in the courts. Larger employers are expected to have greater resources for management of the employment relationship and for severance payments if they become necessary. In the courts, this manifests as greater success defending dismissal for cause but in longer notice awards where the plaintiff wins. However, regardless of size, employers seem to rely on a relatively simple calculation of notice described above, as well as a relatively straightforward determination of just cause.

Perceived just cause is predicted by only two factors, the extent to which the employee was warned and the effective implementation of performance standards, although several other variables are moderately significant predictors. Only the dismissed employee's lack of intent to perform poorly or to benefit from the poor performance reduces the perception that just cause existed.

The effect of involuntary change on the employee has a moderately significant influence on perceived just cause in workplace dismissal. However, the effect is in the opposite direction to that which is expected. For instance, plaintiffs (dismissed employee) are more than 5% more likely to win their cases than employees who had experienced no involuntary change. However, employee illness (the only involuntary factor incorporated

in this variable in Study 2's examination of workplace dismissal) is significantly and positively related to perceived just cause. That is, there is likely to be a greater perception that just cause for dismissal exists in the workplace where the employee has experienced a recent serious illness.

The Supreme Court of Canada has asserted that any change of the employee's workplace status, whether voluntary or involuntary, will have ramifications for the employee and increase her or his vulnerability as a result of the need to both adapt to the changed circumstances as well as to continue performing satisfactorily (*Wallace*, 1997). This is particularly the case where the change is involuntary, such as where the employee suffers an illness which adversely affects performance. Employers should consider accommodation where the employee's illness impedes his or her ability to perform.

The dismissed employee's past satisfactory performance does not have an effect on the perceived just cause in HR practitioners in workplace dismissals. However, in the courts, the plaintiff (dismissed employee) is approximately 9% more likely to win if there is evidence of past satisfactory performance. The courts seem to take a longer view of the employment relationship and look for evidence that the employee's poor performance is temporary or perhaps has some alternative explanation. This may suggest that employer's may fail to consider the employee's performance record in full when determining if just cause for termination exists. The employer may value short-term measures of performance more greatly than indicators of long-term employee success, or are perhaps less willing to consider the possibility of alternative explanations for the employee's poor performance.

In addition to the foregoing, employers who fail to consider past satisfactory performance may also undermine the psychological contracts of other employees who have not been terminated. The employee who has performed satisfactorily prior to a period of poor performance may have an expectation and reliance that her or his positive contribution would continue to be valued by the employer. In such a case, the employee may feel that periods of temporary poor performance should be tolerated to a greater extent than for employees who have not performed satisfactorily. That is, his or her previous contribution should have been valued by the employer. The terminated employee who has performed satisfactorily in the past has a sense of inequity if dismissed for no greater cause than is the case for other poorly performing employees. Moreover, employees who witness the betrayal of a temporarily poorly performing employee may also feel that their prior contributions may not be valued, which could cause them to reduce their effort. On balance, the employer's productivity is likely harmed by signalling that it does not place greater value on the dismissed employee's overall contribution.

Surprisingly, an employee's disciplinary history does not significantly affect perceived just cause in workplace dismissal, in contrast to the effect it has on reduced notice periods. In the courts, the employer's failure to employ progressive discipline increases the likelihood of plaintiff success. The Supreme Court of Canada has asserted that employers should consider lesser forms of discipline before resorting to dismissal (*McKinley*, 2001). Moreover, the prior use of progressive discipline should improve the employer's likelihood of defending a dismissal for incompetence in the courts. While it is possible that the employer's effective use of performance warnings may help to explain

why discipline is not related to just cause in the workplace, it appears that employers may fail to employ lesser forms of discipline prior to termination.

Employee vulnerability is not related to just cause or notice in workplace dismissals but it is related to case outcome and notice in wrongful dismissal cases where it arises from the manner of dismissal. This result may be explained by the different constructs embodied by the variable in each study. In the legal analysis, the employee's vulnerability is caused by the manner of dismissal while it is a result of the dismissal only in the study of workplace dismissals. Compensation in the form of *Wallace* damages is only awarded by the courts where the employer has caused intangible damages as a result of the way in which the termination was carried out, not as a result of the dismissal itself. Therefore, an influence on just cause or notice in the workplace should not be expected. However, as discussed earlier in the chapter, it is somewhat surprising that the dismissed employee's particular circumstances do not seem to influence the dismissal decision, especially given the courts' desire for the employer to consider shaping the decision to the employee's needs.

Likewise, it seems perplexing that employers would not consider the employee's limited job prospects upon termination or whether the employee had been enticed to leave previous, secure employment on joining the new employer in the determination of the notice to provide. These circumstances are related to key themes in the wrongful dismissal law. The primary purpose of reasonable notice is to provide the time required for the dismissed employee to obtain comparable employment to the position left. The acknowledgement of the employee's limited prospects should indicate a longer notice period. Nonetheless, the plaintiff's limited job prospects do not have an influence on notice

in the wrongful dismissal cases either, which doesn't clarify the outcome for the employee. In addition, the courts have lengthened notice awards where the employee had been induced to join the defendant (employer) in recognition of the reliance and expectation created by the employer's promise of job security, responsibility, or other considerations. Once again, the employer's use of an apparently simplified calculation for notice or severance seems to preclude consideration for individual circumstances, as well as for any obligations the employer may have helped to create in the employee's psychological contract.

Despite several differences, there are a number of important consistencies between decisions in the courts and in the workplace. For example, the effective use of warnings and of performance standards are the most important predictors of case outcome in the cases and of perceived just cause in the workplace dismissals. Similarly, employee tenure and occupational status are the most important predictors of notice in both Study 1 and Study 2. This finding is consistent with previous studies of reasonable notice in the courts as tenure and status are the most consistently significant predictors in these studies.

In addition, the use of workplace practices that are consistent with procedural justice is a significant predictor of case outcome in the courts. In workplace dismissals, it is moderately related to perceived just cause. In the wrongful dismissal cases, these practices include the employer's requirement to fully investigate the circumstances leading to dismissal, to provide an adequate explanation of the reasons for dismissal, and to provide a hearing prior to dismissal and an appeal following the decision. Where an employer has instituted a non-union grievance system (NUGS), it is more likely to have employed

fair practices (such as a willingness to adequately investigate an incident before moving to dismiss, to provide an unbiased hearing in which the employee would have an opportunity to respond to the allegations, and to provide a reasonable and frank explanation) when dismissing an employee. Employers who have instituted such practices are more likely to be certain that the dismissal was for cause because there would have been a greater opportunity for sober second thought and the discipline imposed is more likely to be proportionate to the severity of the poor performance.

Finally, where the dismissed employee demonstrates no intent to perform poorly or to benefit from not performing to the required standard, perceived just cause for termination is less likely, which is consistent with my findings in the analysis of wrongful dismissal cases. The courts consider several factors which tend to mitigate against just cause. These include the employee's intent, whether the employer suffered loss, risk, or jeopardy as a direct result of the poor performance, whether other explanations exist for the employee's poor performance, and whether the performance was worse relative to others in comparable positions.

Practical Implications Arising from a Simulated Dismissal

The findings in Study 3 (a simulated dismissal) should be of particular interest to HR practitioners because there are important implications for HR practice and education. In the study, I found no evidence of a main or interaction effect between the sex of the respondent and the sex of the dismissed individual or of an interaction between warning and performance.

HR practitioners were less likely to perceive that just cause existed or that the dismissal was fair if the employee had a satisfactory past performance record. However, there was no evidence that of a relationship between the perception that the dismissal was for just cause if there had been a warning of the employee's inadequate performance although was a significant relationship between perceived fairness and performance warning. A performance warning also decreased the length of notice provided by more than three months, However, an employee's satisfactory performance did not increase notice period. In addition, some HR practitioners' experience and training characteristics contributed to a decreased perception of fairness of the dismissal and to increased reasonable notice.

HR practitioners seem to view the provision of a warning as an inoculant against a longer notice period (or severance), perhaps even as a basis for alleged incompetence. In addition, fairness – but not just cause – was related to a performance warning. This provides evidence that an HR practitioner may see fairness differently than the just cause. HR practitioners should be made aware that if they sense that a dismissal is unfair, the employer may not have a basis for just dismissal either. As I demonstrated in Study 1, an analysis of the courts' decisions, a warning of the employee's inadequate performance is an essential determinant of the existence of just cause. Because a warning was a significant predictor of fairness, practitioners seem to be uncomfortable with the basis of dismissal even though they were not likely to view it as a necessary basis for just cause.

Furthermore, analysis of interaction revealed that there was no evidence that there was a significant difference in the reduction of notice period provided to the dismissed employee after a warning whether performance had been exemplary or deficient. HR

practitioner's provided a shorter notice period in either case. This is a troubling finding given that an employer must prove that an employee had failed to reach some objective performance standard in order to demonstrate just cause (Levitt, 2004) and reduce or eliminate notice as a result. If such a standard for just cause dismissal did not exist, an employer could simply construct the basis on which to dismiss for alleged cause by providing warnings that the employee's performance is not meeting expectations. However, HR practitioners must exercise caution with respect to undermining the rights of the employee. While performance warnings are a necessary precondition for the dismissal of a poorly performing employee, warnings should not be employed in a manner that may deny the employee his or her rights under wrongful dismissal law.

This finding shares some characteristics with the legal concept of 'near cause.' Prior to the Supreme Court of Canada's decision in *Dowling* (1998), some courts may have argued that 'near cause' existed because dismissal is seldom a clear cut issue and greater latitude is required to arrive at a reasonable settlement. In these cases, the courts chose to reduce notice as a result of questionable employee conduct rather than deny notice altogether. For example, the court may have reduced the notice award even though the employee's performance was not deficient enough to warrant dismissal with cause. However, the Court rejects 'near cause' as a basis for reducing notice (*Dowling*, 1998 in Mole and Stendon, 2004). As a result, where the courts determine that there is no just cause sufficient to justify dismissal, such as for incompetence or poor performance, the employee has the full entitlement to reasonable notice. Similarly, the dismissed employee must not be denied rights under the law only because the employer has issued warnings that the employee's job may be in jeopardy. While the employer has the right

to terminate an employee at any time, the employee has the same full entitlement to reasonable notice regardless of any warning provided if there is not also an objective basis for the warning.

Finally, some HR practitioners' experience and training characteristics contributed to a decreased perception of fairness of the dismissal and to increased reasonable notice. For instance, respondents who had worked primarily in a union environment were significantly less likely to perceive that the dismissal was fair. Union experience may act to construct HR practitioners who are more familiar with the collective bargaining and arbitral processes. Therefore, they may be more likely to appreciate the need to safeguard employee interests and the processes used to accomplish this in the union environment. As a consequence of this experience, they may be less likely to perceive that the dismissal was fair.

Respondents with a CHRP designation typically offered three and one half months more than respondents without a CHRP designation. A possible explanation for this finding is that HR practitioners with lesser training or experience are less knowledgeable of employee wrongful dismissal rights. Therefore, they are likely to provide shorter notice periods than more experienced and educated HR practitioners. In addition, although only marginally significant, respondents who were more likely to agree that they played a role in previous dismissals would have offered a slightly longer notice period. Likewise, respondents reporting that the workplace had a non-union grievance system also tended to give longer notice periods.

These findings taken together highlight the vital importance that education, training, HR policy, and experience play in providing workplaces where worker rights are

fully appreciated. This is as equally true of managers and employees as it is of HR practitioners. Rather than placing the entire burden of protecting the rights of workers on the HR practitioner, managers must also recognize their own responsibility for the protection of worker rights and act in accordance. Likewise, employees who are more knowledgeable of their own rights should be more resistant to oppressive workplace conditions and onerous employment contract provisions.

In addition, these findings highlight the need for scholarly activity that links legal opinion and management practice, as well as management scholarship and practice. As a result of the comparison of legal and management perspectives, we can construct a deeper understanding of the management process and what is seen to be fair or just.

Workplace Justice and the Nature of the Employment Relationship

I have linked the views expressed by the Supreme Court of Canada to a discussion of justice in the workplace, particularly the conceptual basis of relational justice (Lind & Tyler, 1988), of power and dependence theory (Thibaut & Kelly, 1959), and of the four-factor model (Colquitt, 2001). In this section I summarize the implications of my findings for justice in the workplace. Insights generated can assist in an examination of the structure of wrongful dismissal decisions and in generating a deeper appreciation of the Supreme Court of Canada's views on the nature of the employment relationship. Finally, I argue for a more inclusive depiction of justice in the workplace which incorporates the unequal distribution of power inherent in the theories of Lind and Tyler (1988), Thibaut and Kelley (1959), and the Court's views on the nature of the employment contract (Wallace, 1997). Moreover, such a depiction would not compete with but rather

augment an instrumental conceptual basis of organizational justice such as that found in the four-factor model of organizational justice (Colquitt, 2001).

Wallace Damages and the Four-Factor Model of Organizational Justice

In Study 1, I demonstrated that the lower courts have increased reasonable notice periods by approximately three months on average in recognition of vulnerability suffered by a dismissed employee as a result of the manner of dismissal. These damages flow from the psychological distress or damaged reputation that was a result of the manner of an employee's dismissal. These dismissals have been characterized by the Supreme Court of Canada (Wallace, 1997) as lacking a reasonable explanation, "untruthful, misleading and unduly insensitive" (para. 98), "humiliation, embarrassment, damage to one's sense of self-worth and self-esteem," (para. 103). These characteristics align very closely with the informational and interpersonal dimensions of Colquitt's (2001) interactional justice.

Evidence of informational and interpersonal justice (Colquitt, 2001) may also be observed in the additional notice awarded where the courts find that the dismissed employee has been enticed to leave secure employment and to join the employer. In Study 1, notice periods awarded were almost four months longer than if the employee had not been induced to leave secure employment in order to join the employer (defendant). The Supreme Court of Canada asserts that dismissed employees in this position have developed reliance and an expectation based on promises made by the employer, which are subsequently found to be less than candid and lacking consideration for the employee's welfare (*Wallace*, 1997).

In addition, an employer's failure to use workplace practices consistent with principles of procedural justice (the provision of a reasonable explanation for the dismissal, a full investigation of the circumstances of the poor performance, a hearing prior to dismissal, and an appeal process) was found to be a significant predictor of a plaintiff's victory. Together, these findings from Study 1 provide evidence that the courts are concerned with the fairness of the procedural, informational, and interpersonal dimensions of fairness. These dimensions of workplace justice are likely valued by the courts because they help to ensure that a dismissed employee's interests are fairly represented in a one-shot decision process. The courts consider these practices necessary in order to ensure improved outcomes for a dismissed employee. However, although these findings are consistent with instrumental justice the rationale for their importance is the recognition of the innate inequality of the employment relationship, an employee's vulnerability, and the need to limit an employer's ability to act unilaterally without regard for an employee's welfare.

Wallace (1997) and the Power and Dependence Model of Interpersonal Relations

In the courts, a serious obligation is placed on the employer to manage the employee's performance effectively, not only for its own benefit but also with consideration for the employee's welfare as well. The findings of Study 1 provide strong evidence that the courts seek to construct outcomes that will limit the employer's ability to act unilaterally. For instance, my study demonstrates that where the employer fails to effectively use performance standards and warnings when performance fails to meet those standards, a dismissed employee's victory is significantly more likely. In requiring the effective use

of performance standards and warnings, the courts ensure that the employer gains less advantage from not paying close attention to the employee's performance and from not being careful in its own actions, which are among the employer advantages suggested by Thibaut and Kelley's (1959) theory of power and dependence. The courts accomplish this by increasing the penalty for not employing more effective performance management, and for not having greater concern for the employee's inability to perform successfully and for her or his welfare.

Two additional themes from the decisions of the Supreme Court of Canada are exemplified in Study 1's findings: how employees are made especially vulnerable at the time of change, and the requirement that the employer must balance the severity of the employee's incompetence with the discipline imposed. In *Wallace* (1997), the Court asserts that change of the employee's workplace status, particularly involuntary change, will have ramifications for the employee and increase the employee's vulnerability. Such change ensures that employees are made even more vulnerable by the need to both adapt to the changed circumstances as well as to the continuing requirement to perform satisfactorily. In Study 1, a dismissed employee's likelihood of victory increased where the employee had experienced an involuntary change, indicating that the courts acted to protect an employee where change beyond the employee's control affected his or her ability to perform the job.

Past performance may also be related to change in that an employee who is not performing well though he or she has in the past is likely to have experienced some change which adversely affected ability to perform the job. The courts may interpret evidence of satisfactory past performance as an indication that the employee is performing

poorly temporarily or that there is another explanation for the perception that the performance is poor. That is, either some aspect of work-life has changed which may have lowered performance (such as an illness or a new supervisor), or something has changed in the way that performance is evaluated (for example, different performance outcomes than in the past are valued). The result is that employers should be more cautious when dismissing an employee who has performed satisfactorily in the past because of the likelihood that some change, perhaps involuntary, accounts for the poor performance. The courts may reason that there is a likelihood that such an employee will perform well in the future, particularly if the employer fulfills its obligations with respect to performance management and is considerate of the employee's welfare.

The principle of proportionality (*McKinley*, 2001) exemplifies the Supreme Court of Canada's desire to limit the unequal distribution of outcomes that could accrue to the employer, a result anticipated by the power and dependence model (Thibaut & Kelley, 1959). In Study 1, proportionality may be used to characterize several factors that are significantly related to a plaintiff's victory. First, the courts require employers to respond proportionately to the severity of the poor performance by employing progressive discipline rather than resorting to dismissal prematurely. Second, the use of employment practices related to procedural justice may encourage the employer to pay closer attention to its employee's actions and to take care in its own actions. The courts' view is that a more considered and balanced outcome is likely where an employer has made use of these practices. Finally, the courts also require employers to consider several factors in weighing the severity of the alleged poor performance in order to respond more proportionately. These factors include whether the employee displayed intent to perform

poorly, whether the employer suffered any real loss, risk, or jeopardy, and whether the poor performance was serious in the context of overall duties or responsibilities.

In addition to the foregoing, reasonable notice of termination, the requirement that employees be given the time and opportunity to improve after a warning, the use of progressive discipline, and the necessity to consider the employee's past satisfactory performance may all be viewed as an expression of the courts' desire to limit the employer's ability to dictate the course and pace of interaction with too little consideration for the employee's welfare.

Reasonable notice is an example of an obligation of the employment relationship which cannot be traced to the will of the parties (Langille and Macklem, 2007). As a result, it is an obligation that is unique to the employment contract which specifically limits the employer's ability to terminate the employee at will, at a time that is most beneficial to the employer and without consideration for the employee's welfare. *Wallace* (1997) has had the effect of lengthening reasonable notice in cases where the manner of dismissal is found to lead to the employee's vulnerability as well as having an additional direct effect on reasonable notice awards. Reasonable notice is a direct expression of the Court's desire to protect the employee and to ensure his or her needs are met within the framework of the established principles of employment law. It is also a specific limit to the employer's ability to dictate the course and pace of interactions with the employee.

In addition, an employer who fails to provide a reasonable opportunity and timeline to improve after being told what is required improve, to use progressive discipline, or to consider the employee's past satisfactory performance is penalized by the courts. The

requirement to consider each factor has the effect of limiting the employer's ability to act solely in its own interest and at a pace that it alone dictates.

Summary of the Discussion on Workplace Justice

I have demonstrated that the views of the Supreme Court of Canada (*Wallace,* 1997; *McKinley,* 2001) and the lower courts, are consistent with Thibaut and Kelley's (1959) power and depedendence model of interpersonal relations, with Lind and Tyler's (1988) conceptualization of relational justice, and with Colquitt's (2001) four-factor model of organizational justice.

In *Wallace* (1997), the Court expresses the view that the innate nature of the employment relationship is that the employee and employer are in an unequal bargaining relationship and that the employee is in a vulnerable position. In *Wallace* (1997) and in subsequent decisions (for example, *McKinley*, 2001; *Rizzo & Rizzo Shoes Ltd.*, 1998), the Court acts to create new forms of protection for the non-union employee while asserting that the inequality extends to virtually all facets of the employment relationship. The Court maintains that employee rights must be protected in an attempt to lessen both the economic and personal damage inflicted. Furthermore, the Court claims that it will work to create limits on the employer's ability to act unilaterally in order to encourage employers to consider the employee's welfare, and to redress the inequality by constructing rules for specific contexts.

The Court achieves that purpose in *Wallace* (1997) and *McKinley* (2001), decisions in which it constructs a rationale and a penalty for *Wallace* damages and proposes the principle of proportionality. My research demonstrates that the structure of the lower

courts' decisions renders the dimensions of the Court's views more concrete. In addition, my research provides specific guidance with respect to disciplinary policy, performance management, and enacting fairness in the workplace. In short, in acknowledging the power and dependence innate to the employment relationship, the courts have acted to create a set of external incentives or legal requirements that encourage a consideration of the employee's welfare while still permitting an employer to determine the composition of its workforce.

In sum, my examination of the structure of the courts' decisions as well as the close reading of decisions of the Supreme Court of Canada (*Wallace*, 1997; *McKinley*, 2001) suggests that a more inclusive depiction of fairness in the workplace must incorporate both the instrumental needs of the employee and employer as well as the power and dependence that is innate to the employment relationship, and is the context in which management decisions are made. While an instrumental conceptualization of organizational justice can assist in the investigation of what is fair about particular decision processes, a theory of power and dependence (Thibaut and Kelley, 1959) can help us appreciate the nature of the employment relationship and to identify the decision processes likely to reinforce inequality and injustice rather than to remedy it. The Supreme Court of Canada, through Justice Iacobucci's reasons, makes clear that, "reinforcement [of inequality] is wrong, and redress is right" (Langille and Macklem, 2007; p. 348).

Table 8-1 Summary of Findings

Common Law Decisions			Workplace Dismissals			Simulated Dismissal			
Variable	Plaintiff Victory	Notice Award		Perceived Just Cause	Notice Paid		Perceived Just Cause	Perceived Fairness	Notice Offer
Change of Status			Change of Status			Sex in Vignette X Sex of Respondent			
Illness/Unilateral Change	+		Employee Illness	+		Female X Female Respondent			
Satisfactory Performance	+		Satisfactory Performance			Female X Male Respondent			
No Progressive Discipline	+		Disciplinary History		-	Male X Female Respondent			
Procedural Justice	+		Grievance System	+		Warning X Performance			
Employer Failed to Warn	+		Employee Warned	+		Warned X Satisfactory Performance			-
Performance Standards	+		Performance Standards	+		Warned X Not Satisfactory	+	+	-
Pre-Wallace Decision		-	Vulnerability Considered			Not Warned X Not Satisfactory	+	+	-
Vulnerability	+	+	No Intent	-					
Not Serious	+					Respondent Occupation Status			
			Employee Tenure		+	Respondent Role in Dismissal			+
Employee Tenure		+	Occupation Status		+	Respondent Union Experience (yes)		-	
Occupation Status		+	Employee Sex (female)			Respondent CHRP (yes)			+
Large Employer	-	+	Number of Employees						
Limited Job Prospects	+		Limited Job Prospects			Industry – Manufacturer			
Induced to Leave		+	Induced to Leave			Employer Size (# of employees)			
						Grievance System (NUGS)			
Industry (Manufacturer)			Industry – Manufacturer						
Ontario or BC	+		Resp. Sex (female)						
Employee Sex (female)			Resp. Occ. Status						
			Resp. Role in Dismissal						

Chapter 9 – Research Summary

The Challenges of Studying Justice in the Courts and in the Workplace

The challenge of studying unjust dismissal can be seen in the methods adopted for choosing the cases to examine. For instance, in my first study I examined wrongful dismissal cases. However, the common law courts are not the sole arbiter of wrongful dismissal in the workplaces of Canada. Disputes taken to judgment do not represent a random sample of all workplace disputes (Priest and Klein, 1984). Only a small number of dismissals in which the employee believes that they were wrongfully dismissed become formal disputes and, likewise, only a small number of such disputes reach the courts. Nevertheless, my examination of wrongful dismissal law is not intended to be a study of all workplace dismissal, rather it is an exploration of the views of the Supreme Court of Canada on the nature of the employment relationship and whether and how these views are reflected in the lower courts' decisions.

These cases are central to HR management because it is from these legal decisions that HR practitioners draw much of their knowledge of wrongful dismissal law and the practices related to dismissal, which has been acquired largely through the interpretation and translation of labour lawyers. Moreover, my study also incorporates a follow-up exploration of workplace dismissals. By examining both the structure of the courts' decisions and dismissal decisions in the workplace, as well as HR practitioners' dismissal decisions, I have captured a broad range of practices and views related to employee dismissal.

Second, although the case reports are often detailed in terms of the factors considered, they are essentially a retrospective rationalization of a court's decision. While my

examination of the wrongful dismissal cases explains much of the variance in both case outcome (who won and who lost) and reasonable notice awards, other factors which are not made explicit in the court reports may also have much to contribute to an understanding of employment law. For example, the extent to which the Supreme Court of Canada made explicit its view of the nature of the employment contract in the *Wallace* (1997) decision seems an uncommon occurrence in wrongful dismissal cases. In this study, I begin to investigate the case law with respect to those views but much remains to explore in the courts' reasons. Other methodologies may be required.

Third, in my second and third studies I survey only HR practitioners. Organizations that don't have a HR management function may employ different methods for determining just cause and notice periods and may typically offer significantly different severance payments than in organizations where HR practitioners are employed. Nevertheless, the survey of HR practitioners provides access to a wide variety of organizations in a wide variety of industries which would be difficult to accomplish with other sampling methods.

Fourth, perhaps the most important weakness of this research is that the voice and experience of the dismissed employee is missing from this examination of workplace dismissal, as it is for the dismissal literature generally. I examine only the views of the courts and HR practitioners. While my research makes an important contribution in that it explores actual employee dismissal much more closely to the site of the discipline than much of the previous research, the perspective of the dismissed employee is not studied.

The voice of the dismissed employee is virtually absent from both the arbitration and the non-union literature with the exception of several studies of the reinstatement ex-

periences of terminated employees under labour arbitration and certain limited statutory provisions (see Williams & Taras, 2000). A lone example is provided by Miller and Hoppe (1994) who studied the psychological reactivity of terminated and laid-off working-class men. They suggest that future research should give attention to the role of job loss attributions as certain combinations seem to have implications for psychological outcomes. In addition, research on the unemployed should not exclude the dismissed. Little is known of the social and organizational cost of unfair dismissal in terms of the productivity loss of both the dismissed and those they leave behind, and in terms of the less tangible cost of loss of identity, self-worth, and well-being.

In terms of survey methods, an opportunity to explore HR practitioners' perceptions related to the psychological contract may have been lost because a measure of organization justice was not included in the study of workplace dismissal. Rousseau (1995) suggests that perceived justice is an important determinant of the individual's psychological contract. The results of my examination of simulated dismissal suggest that HR practitioners employ a different, yet not entirely unique, set of criteria from the courts in determining the level of just cause and notice to be provided, as well as whether the dismissal was fair. Some of this difference may be accounted for in the HR practitioner's expectations of the obligations of the employee as well as the employer, the psychological contract, which is parallel to and intertwined with, but also different from, the legal contract. The use of a measure of the HR practitioner's perceived fairness of workplace dismissal may have provided a far richer view of the construction of psychological contracts in the workplace.

Finally, the small number of cases, particularly in my analysis of reasonable notice in wrongful dismissal cases, is problematic in that it may raise questions about the validity of the results. However, the use of stepwise regression may help to restore confidence, at least in part, as the coefficients for the primary independent variables are relatively stable as the analysis moves from relatively small models to more complex models. Nevertheless, a replication or extension of this study with a larger sample of cases must be a recommendation of this study.

Future Research

Future research should attempt to bridge the divide between the legal and the managerial perspectives. From a public policy perspective, Godard concludes that policy makers should recognize that "there may not be a universal coincidence of interests" between workers and employers, and that there is therefore the need for "state policies, laws and institutions that promote good management practices ... [and it is on this basis that] ... meaningful advances for workers and their unions are likely to depend" (p. 371). In addition, Dannin (2007) concludes from her analysis of the American 'at-will' doctrine "that employers would be better off as managers with a just cause employment regime" rather than the at-will regime (p. 6). On the basis of my study's findings, I argue that the courts, rather than interfering with management, are actively promoting minimum standards for 'good management' while also acting to protect worker rights. Therefore, I suggest that, from the perspectives of both public policy and worker rights, as well as that of good management, future research should focus on the analysis of management practices in wrongful dismissal cases.

Nevertheless, the courts are only one source of guidance for workplace practice. For instance, the nature of employment law in terms of its implications for managers may also be revealed in other judicial and quasi-judicial settings such as the provincial and federal adjudications of both union and non-union dismissal brought under the labour codes of the various jurisdictions. Performance management and what is fair has rarely been the focus of study in any area of employment law. In addition, many wrongful dismissal disputes are settled long before they reach the courts because they are mediated by lawyers for each of the parties. It would seem prudent to explore the effect that this form of dispute resolution may have on workplace practices.

Furthermore, only a handful of studies in which managers were the unit of analysis have been identified (Folger & Skarlicki, 1998; Klaas & Dell'omo, 1997; Klaas & Feldman, 1994; Klaas & Wheeler, 1990) and HR managers have been the subject of study even less frequently (Klaas & Wheeler, 1990; Lam & Devine, 2001). In one study, HR managers were found to have a significantly different attitude toward dismissal than managers (Klaas & Dell'omo, 1997) and in another they were shown to employ several additional criteria not considered by the courts when deciding on length of notice to provide a terminated employee (Lam & Devine, 2001). Clearly, attitude, behavioural and perceptual differences among managers may provide a practical contribution to management practice.

In addition, as I have suggested, the experience of the worker, the subject of dismissal, is missing from the study of wrongful dismissal. At least two plausible explanations for the missing worker are suggested. First, the overwhelming focus on managerial concerns in organizational studies has judged non-managerial consequences to be less

significant. Second, the dismissed employee is not easy to question in an organizational context. Typically, dismissed employees are removed from the workplace as quickly as possible. Therefore, surveying dismissed employees requires the researcher to overcome a unique set of obstacles and to have an interest in the rights and outcomes of the non-union employee who is wrongfully dismissed.

Finally, as is clear in the review of the literature, it is apparent that women tend to receive more lenient treatment than men from predominantly male arbitrators and judges, which is consistent with the chivalrous / paternalism thesis (Bemmels 1988ac). While sex bias has not been found in every study of sex differences, particularly in my own, the question remains why do women seem to experience arbitration and legal action differently? Furthermore, since organizational research has shown that a variety of managerial decisions may be subject to sex bias (Dalton & Todor, 1985) and since women appear less likely to pursue remedies to unfair dismissal Grant & Wagar, 1992), to what extent do the implied and psychological contracts of women and their experience of the employment relationship differ from that of men?

Some studies have noted that reasons other than arbitrator or judge bias may explain the difference. Bemmels (1988c) offered the possibility that female grievors may have had stronger cases or that male grievors may be more persistent. Mesch (1995) added that women may receive less support in pursuing their grievances, that women may receive more favourable treatment prior to arbitration, or that employers are more reluctant to withdraw from a woman's case regardless of how weak their defense may be. In any event, it is apparent that women experience the employment relationship differently than men.

Summary

From the foregoing, one could deduce that relatively little research has been devoted to making sense of the different ways in which we experience the employment relationship. It is in this broader context that my work can be located. It is one piece of the puzzle of understanding employee-employer relationships in light of the law, management practices, the workplace, and society's changing values.

My contribution began with a summary of the law of wrongful dismissal because, in contrast to the study of labour, the study of non-union employment contracts and employee dismissal is greatly under-represented in the management and organization literature despite the large proportion of non-union workers in the developed countries. Protection of the non-union Canadian worker was situated in the legislative and common law framework. The individual contract of employment was compared to the collective bargaining of the union worker and briefly contrasted the unique development of the wrongful dismissal law with the predominant forms of employment law in other common law countries including the United States and United Kingdom. I also reviewed the theoretical and conceptual basis of the law of wrongful dismissal which was carried forward to my empirical studies.

In Chapter 3, I investigated the intersection of organizational justice, the psychological contract, and employee dismissal. By incorporating organizational justice, I situate my study of dismissal in the courts and in the workplace in a broader theoretical context which has been largely missing in studies of dismissal in the courts. Some concepts in organizational justice were useful in the explanations of the courts' decisions and also created a broader context in which to contrast the determinants of the decisions of the

courts with those of employers and HR practitioners. I also undertake a more extensive review of workplace justice and fairness in order to better incorporate employee interests. I argue that HR practitioners' role of balancing interests may be understood by examining employee dismissal within a legal, justice, and organizational framework.

In introducing the psychological contract, I am able to demonstrate that HR practitioners will have subjective understandings of the nature of the employment relationship and beliefs about expectations and obligations that diverge from those of the courts as a result of gaps in HR practitioners' knowledge. I also undertake a more extensive examination of competing views in the organizational justice literature in order to demonstrate that an understanding of the employment relationship which represents a better balance of employee and employer interests must also incorporate a better balance of views of workplace justice and fairness.

My investigation of justice revealed relatively little use of organizational justice and remarkably diverse conceptualizations of justice in the workplace, which are largely absent from the study of employee dismissal. Hence, in Chapter 4 I examine the current state of knowledge and the relative lack of work in the study of non-union dismissal and the employer-employee relationship. My review will highlight the relative absence of management and organization theory generally in addition to gaps in the dismissal literature including: a relatively small number of studies of the dismissal of the non-union employee overall, the lack of a complete theory of non-union dismissal, a relative absence of guidance from management and organization scholars for HR practitioners, and few studies that examine managerial psychology and behaviour.

I demonstrated that the investigation of dismissal of non-union employees has been a diverse but inadequately studied field with rich opportunity for a clearer understanding of the nature of the individual employment relationship. I argue that future research of should focus on the underutilized reports of Canadian wrongful dismissal cases, the application of management and organization theory and management practice in dismissal, and the development of a conceptual or theoretical grounding for the study of the non-union employment relationship.

The major contribution of this study is that, following Lam and Devine (2001), I contrast the views and experience of HR practitioners with the views of the courts in a legal, workplace and justice context. However, I examine employee performance management in contrast to Lam and Devine's (2001) investigation of reasonable notice period decision making. In addition, I incorporate an examination of actual workplace decisions in addition to simulated dismissals in contrast to Lam and Devine's (2001) consideration of simulated dismissals only.

In the first study, I examined wrongful dismissal cases which involve allegations of incompetence or poor performance. I discovered that factors related to performance management including the employer's failure to effectively use performance standards and performance warnings, and evidence of an employee's past satisfactory performance are significant predictors of a dismissed employee's success. In addition, the use of progressive discipline and workplace practices that are consistent with the principles of procedural justice, as well as the weight to give to the seriousness of poor performance, the impact of involuntary change, and the manner of dismissal are also important HR practices and considerations with respect to case outcome.

My examination of reasonable notice awards in the courts found that an employee's vulnerability brought about by the manner of dismissal whether the case was decided before *Wallace* (1997) increased the reasonable notice period. In addition, large employers, longer employee tenure, higher occupational status, and whether the dismissed employee had been induced to leave secure employment are significant predictors of longer reasonable notice periods. Surprisingly, the employee's limited job prospects are not related to longer notice awards, a finding that is contrary to the accepted basic purpose of providing notice of termination.

In Chapter 5, the court cases examined do not represent all wrongful dismissals, or even all wrongful dismissal litigation. Since their examination can only identify the values, principles and processes that are used by the courts it would be inappropriate to generalize these findings to workplace dismissals. In Study 2 (Chapter 6), the sample of employee dismissals investigated was more representative of workplace dismissals permitting inferences with respect to workplace practices. In this study, I constructed survey items from the content analysis of the wrongful dismissal cases in the preceding study. This step ensured that the factors examined were comparable to the factors investigated in the court cases.

Surprisingly, I found that a relatively basic calculation was used for the determination of reasonable notice period paid in workplace dismissals. Likewise, the HR practitioners' perception of whether just cause existed relied greatly on a minimal number of factors that did not consider the employees' particular circumstances. I concluded that gaps exist between what the law necessitates and its application in workplace dismissals. These findings also point to gaps in HR practitioners' knowledge of employee rights

flowing in law and their beliefs about responsibilities and obligations in the employee-employer relationship. Hence, in my final study (Chapter 7) I examined HR practitioners' responses to a simulated dismissal of a non-union employee in order to determine if particular gaps could be identified.

I made several interesting findings. I found no evidence of a main or interaction effect between the sex of the respondent and the sex of the dismissed individual. There was also no evidence of an interaction between warning and performance. However, HR practitioners were less likely to perceive that just cause existed or that the dismissal was fair if the employee had a satisfactory past performance record. They were more likely to perceive that there was just cause and that the dismissal was fair if there had been a warning of the employee's inadequate performance. Although a performance warning did decrease the length of notice provided, satisfactory performance did not increase notice periods.

Finally, HR practitioners' experience and training contribute to significantly different views with respect to perceived fairness and to reasonable notice. These findings highlight the need for scholarly activity that links legal opinion and management practice, as well as management scholarship and practice. As a result of the comparison of legal and management perspectives, we can construct a deeper understanding of the management process and what is seen to be fair or just.

My research program considered wrongful dismissal court cases, actual workplace dismissals, and HR practitioners' responses to a simulated dismissal in order to investigate the legal and workplace basis of dismissal as well as the development of perceptions of justice and the psychological contract. In Chapter 8, I discussed the findings of

each study in greater depth, and then integrated the findings and discussed the implications for HR management and other employment practices. In addition, I examined the implications for a conceptual basis of workplace justice. I conclude that a more inclusive depiction of fairness in the workplace must incorporate both the instrumental needs of the employee and employer as well as the inequality of power and dependence that is innate to the employment relationship.

Such an approach helped my research to escape the silos of legal and HR beliefs and practices in addition to addressing the relative absence of a broader theoretical context. For instance, my findings can help to shape management practices that are fairer to the employee and better reflect the practice of the law and workers' experience of the employment relationship. I found that the present treatment of dismissed employees in the workplace understates the relevance of factors considered important in both the law and workplace justice. Furthermore, I conclude that if HR practitioners are to achieve a better balance of employee and employer interests in order to avert the "crisis of trust and loss of legitimacy" among their stakeholders, management and organization scholars must be more prepared to examine a broad range of employee, employer, and social outcomes within a legal, justice, and organizational framework (Kochan, 2004; p. 132).

References

4th Annual Employment Law Forum. (2003). Toronto: The Law Society of Upper Canada.

Abraham, S. E. (1998). Can a wrongful discharge statute really benefit employers? *Industrial Relations, 37*(4), 499.

Adams, J. S. (1965). Inequity in social exchange. In L. Berkowitz (Ed.), *Advances in Experimental Social Psychology* (Vol. 2, pp. 267-299). New York: Academic Press.

Bamberger, P. A., & Donahue, L. H. (1999). Employee discharge and reinstatement: Moral hazards and the mixed consequences of last chance agreements. *Industrial & Labor Relations Review, 53*(1), 3.

Bardal v. Globe and Mail Ltd., 24 D.L.R. (2d) 140 (H.C.J. 1960).

Barrett, G. V., & Kernan, M. C. (1987). Performance Appraisal and Terminations: A Review of Court Decisions Since Brito v. Zia with Implications for Personnel Practices. *Personnel Psychology, 40*(3), 489.

Bemmels, B. (1988a). The Effect of Grievants'Gender on Arbitrators' Decisions. *Industrial & Labor Relations Review, 41*(2), 251.

Bemmels, B. (1988b). Gender Effects In Discharge Arbitration. *Industrial & Labor Relations Review, 42*(1), 63.

Bemmels, B. (1988c). Gender Effects In Discipline Arbitration: Evidence From British Columbia. *Academy of Management Journal, 31*(3), 699.

Bemmels, B. (1990a). Arbitrator characteristics and arbitrator decisions. *Journal of Labor Research, 11*(2), 181.

Bemmels, B. (1990b). Gender Effects in Grievance Arbitration. *Industrial Relations, 29*(3), 513.

Bemmels, B. (1991a). Attribution Theory and Discipline Arbitration. *Industrial & Labor Relations Review, 44*(3), 548.

Bemmels, B. (1991b). Gender Effects in Grievance Arbitration. *Industrial Relations, 30*(1), 150.

Bemmels, B. (1994). The determinants of grievance initiation. *Industrial & Labor Relations Review, 47*(2), 285.

Bemmels, B., & Foley, J. R. (1996). Grievance procedure research: A review and theoretical recommendations. *Journal of Management, 22*(3), 359.

Bhalloo, S. (2006). Bad faith damages in wrongful dismissal cases: post-*Wallace* jurisprudence (Canada). *The Advocate.*

Bies, R. J., & Moag, J. F. (1986). Interactional justice:Communication criteria of fairness. In R. J. Lewicky, B. H. Sheppard & M. H. Bazerman (Eds.), *Research on Negotiations in Organizations* (Vol. 1, pp. 43-55). Greenwich, CT: JAI press.

Bigoness, W. J., & DuBose, P. B. (1985). Effects of Gender on Arbitrators' Decisions. *Academy of Management Journal, 28*(2), 485.

Blancero, D. (1995). Non-union grievance systems: System characteristics and fairness perceptions. *Academy of Management Journal*, 84.

Block, R. N., & Stieber, J. (1987). The Impact of Attorneys and Arbitrators on Arbitration Awards. *Industrial & Labor Relations Review, 40*(4), 543.

Carley, K. (1993). Coding Choices for Textual Analysis: A Comparison of Content analysis and Map Analysis. *Sociological Methodology, 23*, 75-126.

Carveth v. Railway Asbestos Packing Co., 4 O.W.N. 872 (H.C.J. 1913).

Colquitt, J. A. (2001). On the dimensionality of organizational justice: A construct validation of a measure. *Journal of Applied Psychology, 86*(3), 386.

Dalton, D. R., & Todor, W. D. (1985). Gender and Workplace Justice: A Field Assessment. *Personnel Psychology, 38*(1), 133.

Dannin, E. (2007). Why At-Will Employment is Bad for Employers and Just Cause is Good for Them. *Labor Law Journal, 58*(1), 12.

Day v. Wal-Mart Canada Inc., 188 N.S.R. 69 (CA 2000).

Dickens, L. (1987). Law and the Personnel Practitioner: The Impact of Unfair Dismissal Legislation. *Employee Relations, 9*(6), 23-27.

Dowling v. Halifax (City), 136 D.L.R. (4th) 352; 1996

Dunford, B. B., & Devine, D. J. (1998). Employment at-will and employee discharge: A justice perspective on legal action following termination. *Personnel Psychology, 51*(4), 903-934.

Eden, G. (1992). Progressive Discipline: An Oxymoron? *Relations Industrielles, 47*(3), 511.

Eden, G. (1993). Industrial discipline in the Canadian federal jurisdiction. *Relations Industrielles, 48*(1), 163.

Eden, G. (1994). Reinstatement in the nonunion sector - An empirical analysis. *Relations Industrielles, 49*(1), 87.

Elangovan, A. R. (1998). Managerial intervention in organizational disputes: testing a prescriptive model of strategy selection. *International Journal of Conflict Management*, 9 (4), 301-335.

Evans v. Teamsters Local Union No. 31, 20 SCR (Supreme Court of Canada, 2008).

Feild, H. S., & Holley, W. H. (1982). The relationship of performance appraisal system characteristics to verdicts in selected employment discrimination cases. *Academy of Management Journal, 25*(2), 392.

Folger, R., & Skarlicki, D. P. (1998). When tough times make tough bosses: Managerial distancing as a function of layoff blame. *Academy of Management Journal, 41*(1), 79.

Gardner v. Rockwell International of Canada, 59 D.L.R. (3d) 513 (H.C.J. 1975).

Gismondi v. Toronto (City), O.J. No. 1490 (OCA, 2003).

Grant, J. D., & Wagar, T. H. (1992). Willingness to ake legal action in wrongful dismissal cases: perceptual differecnes between men and women. *Perceptual and Motor Skills, 74*, 1073-1074.

Grant, J. D., & Wagar, T. H. (1995). Employee misconduct and dismissal for cause: Evidence from Canada. *Journal of Individual Employment Rights, 4*(2), 111-121.

Greenberg, J. (1990). Organizational justice: Yesterday, today, and tomorrow. *Journal of Management, 16*, 399-432.

Greenberg, J. (1993). The social side of fairness: Interpersonal and informational classes of organizational justice. In R. Cropanzano (Ed.), *Justice in the workplace: Approaching fairness in human resource management* (pp. 79-103). Hillsdale, NJ: Erlbaum.

Greene, W. H. (2000). *Econometric Analysis* (4 ed.). Toronto: Prentice Hall.

Grosman, B. A. (1984). *The Executive Firing Line: Wrongful Dismissal and the Law.* Agincourt, ON: Carswell/Methuen.

Harris, D. (1990). *Wrongful Dismissal* (Rev. 4th cumulative supplement ed.). Don Mills, Ontario: Richard De Boo Publishers.

Homans, G. C. (1961). *Social Behaviour: Its Elementary Forms*. London: Routledge and Kegan Paul.

Honda Canada Inc. v. Keays, 39 SCR (SCC 2008).

Jewitt v. Prism Resources Ltd., 110 DLR (3d) 713 (BCSC 1980).

Kesselring, R. G., & Pittman, J. R. (1993). Employment-at-will: An empirical analysis. *Journal of Labor Research, 14*(1), 59.

Kirby v. Motor Coach Industries Limited, 6 Man. R.(2d) (Co. Ct. 1980).

Klaas, B. S. (1989a). Determinants of Grievance Activity and the Grievance System's Impact on Employee Behavior: An Integrative Perspective. *The Academy of Management Review, 14*(3), 445.

Klaas, B. S. (1989b). Managerial decision making about employee grievances: The impact of the grievant's work history. *Personnel Psychology, 42*(1), 53.

Klaas, B. S., Brown, M., & Heneman III, H. G. (1998). The determinants of organizations' usage of employee dismissal: Evidence from Australia. *Journal of Labor Research, 19*(1), 149.

Klaas, B. S., & Dell'omo, G. G. (1997). Managerial use of dismissal: Organizational-level determinants. *Personnel Psychology, 50*(4), 927.

Klaas, B. S., & Feldman, D. C. (1994). The impact of appeal system structure on disciplinary decisions. *Personnel Psychology, 47*(1), 91.

Klaas, B. S., & Wheeler, H. N. (1990). Managerial Decision Making About Employee Discipline: A Policy-Capturing Approach. *Personnel Psychology, 43*(1), 117.

Knight, K. G., & Latreille, P. L. (2001). Gender effects in British unfair dismissal tribunal hearings. *Industrial & Labor Relations Review, 54*(4), 816.

Knight, T. R., McPhillips, D. C., & Shetzer, L. (1992). Incompetence vs. Culpable Non-Performance: The Canadian Arbitration and Adjudication Experience. *Relations Industrielles, 47*(3), 529.

Kochan, T. A. (2004). Restoring Trust in the Human Resource Management Profession. *Asia Pacific Journal of Human Resources, 42*(2), 132.

Kornblau, D. L. (1987). Common Law Remedies for Wrongfully Discharged Employees. *Industrial Relations Law Journal, 9*(4), 660.

Kothlow v. Westcoast Savings Credit Union, 4 A.C.W.S. (3d) 191 (B.C. Co. Ct. 1987).

Lam, H., & Devine, K. (2001). Resonable notice for wrongful dismissal: Court versus human resource decisions. *Relations Industrielles, 56*(2), 365.

Leventhal, G. S. (1976). The distribution of rewards and resources in groups and organizations. In L. Berkowitz & W. Walster (Eds.), *Advances in experimental social psychology* (Vol. 9, pp. 91-131). New York: Academic Press.

Leventhal, G. S. (1980). What should be done with equity theory? New approaches to the study of fairness in social relationships. In K. Gergen, M. Greenberg & R. Willis (Eds.), *Social exchange: Advances in theory and research* (pp. 27-55). New York: Plenum Press.

Leventhal, G. S., Karuza, J., & Fry, W. R. (1980). Beyond fairness: A theory of allocation preferences. In G. Mikula (Ed.), *Justice and social interaction* (pp. 167-218). New York: Springer-Verlag.

Levitt, H. A. (1992). *The Law of Dismissal in Canada* (2nd ed.). Aurora, Ontario: Canada Law Book.

Levitt, H. A. (2004). *The Law of Dismissal in Canada* (3rd ed.). Aurora, ON: Canada Law Book Inc.

Levitt, H. A. (2008). Supreme Court Makes an Impact: Keays v. Honda Canada. In N. Fera (Ed.), *InBrief* (pp. 24). Toronto: Lang Michener LLP.

Lind, E. A. (1995). Justice and authority relations in organizations. In R. S. Cropanzano & K. M. Kacmar (Eds.), *Organizational politics, justice, and support: Managing the social climate of the workplace* (pp. 83-96). Westport, CT: Quorum Books.

Lind, E. A., & Tyler, T. R. (1988). *The Social Psychology of Procedural Justice.* New York: Plenum Press.

McIntyre v. Hockin, 16 O.A.R 498 (O.C.A. 1889).

McKinley v. BC Tel, B.C.D. Civ. J. 878 (B.C. C.A., 1999).

McShane, S. L. (1983). Reasonable notice criteria in common law wrongful dismissal cases. *Relations Industrielles, 38*, 618-633.

McShane, S. L., & McPhillips, D. C. (1987). Predicting Reasonable Notice in Canadian Wrongful Dismissal Cases. *Industrial & Labor Relations Review, 41*(1), 108.

McShane, S. L., & Redekop, B. (1990). Compensation Management and Canadian Wrongful Dismissal - Lessons from Litigation. *Relations Industrielles, 45*(2), 357.

Mesch, D. J. (1995). Arbitration and gender: An analysis of cases taken to arbitration in the public sector. *Journal of Collective Negotiations in the Public Sector, 24*(3), 207.

Miller, M. V., & Hoppe, S. K. (1994). Attributions for job termination and psychological distress. *Human Relations, 47*(3), 307.

Mole, E. E., & Stendon, M. J. (2004). *The Wrongful Dismissal Handbook* (3rd ed.). Markham, Ont.: LexisNexis Butterworth.

Nelson, N. E., & Curry, E. M. J. (1981). Arbitrator Characteristics and Arbitral Decisions. *Industrial Relations, 20*(3), 312.

Nierobisz, A. M. (2001). *In the Shadow of the Economy: Judicial Decisions on Wrongful Dismissal in Eras of Economic Uncertainty.* Unpublished Thesis submitted in conformity with the requirements for the degree of Ph. D., University of Toronto, Toronto.

O'Reilly, S. (2003, August 13, 2003). Work wallflowers afraid to bloom: Many fear they will upset bosses by raising sensitive issues such as pay. *The Globe and Mail,* p. C2,

Olson-Buchanan, J. B. (1996). Voicing discontent: What happens to the grievance filer after the grievance? *Journal of Applied Psychology, 81*(1), 52.

Olson-Buchanan, J. B., & Boswell, W. R. (2002). The role of employee loyalty and formality in voicing discontent. *Journal of Applied Psychology, 87*(6), 1167.

Oswald, S. L. (1991). Students as Arbitrators: An Empirical Investigation. *Industrial Relations, 30*(2), 286.

Parks, J. M., & Schmedemann, D. A. (1994). When promises become contracts: Implied contracts and handbook provisions on job security. *Human Resource Management, 33*(3), 403.

Ponak, A. (1991). Discharge Arbitration and Reinstatement: An Industrial Relations Perspective. In W. Kaplan, J. Sack & M. Gunderson (Eds.), *Labour Arbitration Yearbook.* Toronto: Buttersworth/Lancaster House.

Priest, G. L., & Klein, B. (1984). The Selection of Disputes for Litigation. *Journal of Legal Studies, 13*, 1-55.

R. v. Arthurs: Exparte Port Arthur Shipbuilding Co., 2 O.R. 49 (C.A. 1967).

Rawls, J. (1971). *A Theory of Justice.* New York.

Re British Columbia Telephone Co. (1967)

Reilley v. Steelcase Canada Ltd., 103 D.L.R. (3d) 704 (H.C.J. 1979).

Robinson, S. L., Kraatz, M. S., & Rousseau, D. M. (1994). Changing Obligations and the Psychological Contract: A Longitudinal Study. *Academy of Management Journal, February*, 137-152.

Rodgers, R. C., & Helburn, I. B. (1984). *The Arbitrariness of Arbitrators' Decisions.* Paper presented at the Proceedings of the IRRA's Thirty-Seventh Annual Meeting.

Rogers v. Canadian Acceptance Corporation, 50 N.S.R. (2d) 537 (N.S.S.C. 1982).

Ross v. Willards Chocolates Ltd., 2 D.L.R. 461 (Man. K. B. 1927).

Rosse, J. G. (1988). Relations Among Lateness, Absence, and Turnover: Is There a Progression of Withdrawal? *Human Relations, 41*(7), 517.

Rousseau, D. M. (1995). *Psychological contracts in organizations : understanding written and unwritten agreements*. Thousand Oaks: SAGE Publications.

Rousseau, D. M., & Anton, R. J. (1991). Fairness and Implied Contract Obligations in Job Terminations: The Role of Contributions, Promises, and Peformance. *Journal Of Organizational Behavior, 12*(4), 287.

Saridakis, G., Sen-Gupta, S., Edwards, P., & Storey, D. J. (2008). The Impact of Enterprise Size on Employment Tribunal Incidence and Outcomes: Evidence from Britain. *British Journal of Industrial Relations*, 46 (3), 469-499.

Scott, C., & Shadoan, E. (1989). The Effect Of Gender On Arbitration Decisions. *Journal of Labor Research, 10*(4), 429.

Shaw, J. D., Delery, J. E., Jenkins, G. D., & Gupta, N. (1998). An organization-level analysis of voluntary and involuntary turnover. *Academy of Management Journal, 41*(5), 511.

Simpson, P. A., & Martocchio, J. J. (1997). The influence of work history factors on arbitration outcomes. *Industrial & Labor Relations Review, 50*(2), 252.

Skarlicki, D. P., & Folger, R. (1997). Retaliation in the workplace: The roles of distributive, procedural, and interactional justice. *Journal of Applied Psychology, 82*(3), 434.

Smerd, J. (2008). Unions Reverse Decline. *Workforce Management, 87*(2).

Sooklal, L. (1987). Identification and analysis of the wrongful dismissal lawsuit problem in Canada. *Labor Law Journal, 38*, 596-603.

Sproat, J. R. (2002). *Wrongful Dismissal Handbook* (2nd ed.). Toronto: Carswell: A Thomson Company.

Stieber, J. (1985). Recent developments in employment at-will. *Labor Law Journal, 36*, 557-563.

Sweeney, P. D., & McFarlin, D. B. (1993). Workers' evaluations of the "ends" and "means": An examination of four models of distributive and procedural justice. *Organizational Behavior and Human Decision Processes, 55*, 23-40.

Taras, D., & Ponak, A. (2001). Mandatory agency shop laws as an explanation of Canada-U.S. union density divergence. *Journal of Labor Research, 22*(3), 541.

Thibault, J., & Walker, L. (1975). *Procedural justice: A psychological analysis*. Hillsdale, NJ: Erlbaum.

Thibaut, J. W., & Kelley, H. H. (1959). *The Social Psychology of Groups*. New York: John Wiley & Sons, Inc.

Thornicroft, K. W. (1994). Do lawyers affect grievance arbitration outcomes? The Newfoundland experience. *Relations Industrielles, 49*(2), 356.

Thornton, R. J., & Zirkel, P. A. (1990). The Consistency and Predictability of Grievance Arbitration Awards. *Industrial & Labor Relations Review, 43*(2), 294.

Troy, L. (2004). *The Twilight of the Old Unionism.* Armonk, NY: M. E. Sharpe.

Trudeau, G. (1991). Is Reinstatement a Remedy Suitable to At-Will Employees? *Industrial Relations, 30*(2), 302.

Tyler, T. R. (1989). The Psychology of Procedural Justice: A Test of the Group-Value Model. *Journal of Personality and Social Psychology, 57*(5), 830-838.

Tyler, T. R., & Lind, E. A. (1992). A relational model of authority in groups. In M. P. Zanna (Ed.), *Advances in Experimental Social Psychology* (Vol. 25, pp. 115-191). San Diego, CA: Academic Press.

Unionization. (2007). *Perspectives on Labour and Income, 19*(3), 6.

Wagar, T. H., & Grant, J. D. (1992). *Determinants of Just Cause and Reasonable Notice in the Dismissal of Nonunion Employees: Evidence from Canada.* Paper presented at the Industrial Relations Research Association 44th Annual Meeting, New Orleans, Louisiana.

Wagar, T. H., & Grant, J. D. (1993). Dismissal for incompetence: Factors used by Canadian courts in determining just cause for termination. *Labor Law Journal, 44*(3), 171-177.

Wagar, T. H., & Grant, J. D. (1996). The Relationship Between Plaintiff Gender and Just Cause Dtermination in Canadian Dismissal Cases. *Sex Roles, 34*(7/8), 535-547.

Wagar, T. H., & Jourdain, K. A. (1992). The determination of reasonable notice in Canadian wrongful dismissal cases. *Labor Law Journal, 43*, 59-62.

Wallace v. United Grain Growers Ltd., 3 SCR 701 (SCC 1997).

Weber, R. P. (1990). *Basic Content Analysis* (2nd ed.). Newbury Park, CA: Sage Publications.

Williams, K., & Taras, D. (2000). Reinstatement in arbitration: The grievors' perspective. *Relations Industrielles, 55*(2), 227.

Winship, C., & Mare, R. D. (1992). Models for Sample Selection Bias. *Annual Review of Sociology, 18*, 327.

Wright, B., & Barling, J. (1998). "The executioners' song": Listening to downsizers reflect on their experiences. *Canadian Journal of Administrative Sciences-Revue Canadienne Des Sciences De L Administration, 15*(4), 339-355.

Zapata-Phelan, C. P., Colquitt, J. A., Scott, B. A., & Livingston, B. (2009). Procedural justice, interactional justice, and task performance: The mediating role of intrinsic motivation. *Organizational Behavior and Human Decision Processes*, 108, 93-105.

Zeigler v. Victoria (City), 1 W.W.R. 75 (B.C.S.C. 1972).

Zirkel, P. A., & Breslin, P. H. (1995). Correlates of grievance arbitration awards. *Journal of Collective Negotiations in the Public Sector, 24*(1), 45.

Zorn-Smith v. Bank of Montreal, 127 A.C.W.S. (3d) 462 (Ontario Superior Court of Justice, 2003)

List of Court Cases Analysed

Agarand v. Farm Business Consultants Inc., Alta. Q.B., 2000 Alta. D. J. 94; 2000 Alta. D. J. LEXIS 147, April 17, 2000

Ahdemar v. Gabriel Dumont Institute Community Training Residence Inc., Saskatchewan Queen's Bench, *1997 A.C.W.S.J. LEXIS 153355; 1997 A.C.W.S.J. 413826; 68 A.C.W.S. (3d) 873*, January 14, 1997

Alexander v. Padinox Inc., Prince Edward Island Supreme Court Appeal Div, 1999 A.C.W.S.J. LEXIS 54256; 1999 A.C.W.S.J. 670930; 93 A.C.W.S. (3d) 87, November 25, 1999

Annand v. Peter M. Cox Enterprises Ltd., Nova Scotia Supreme Court (Trial Division), 1992 A.C.W.S.J. LEXIS 29739; 1992 A.C.W.S.J. 565624; 31 A.C.W.S. (3d) 601, January 9, 1992

Antonacci v. Great Atlantic & Pacific Co. of Canada, Ltd., Ontario Court (General Division), 1998 A.C.W.S.J. LEXIS 81637; 1998 A.C.W.S.J. 519171; 77 A.C.W.S. (3d) 1202, March 4, 1998

Atwood v. CAC Computers & Communications Inc., B.C. S.C., 2001 B.C.D. Civ. J. 2239; 2001 B.C.D. Civ. J. LEXIS 718, June 15, 2001

Babcock v. C.R. Weickert Enterprises Ltd., Nova Scotia Supreme Court (Trial Division), 1993 A.C.W.S.J. LEXIS 44166; 1993 A.C.W.S.J. 577526; 38 A.C.W.S. (3d) 709, January 4, 1993

Bagnall v. Calvin Klein Cosmetics (Canada) Ltd., Ontario Court (General Division), 1994 A.C.W.S.J. LEXIS 72387; 1994 A.C.W.S.J. 406150; 48 A.C.W.S. (3d) 1166, June 30, 1994

Bandura v. Vidamar Holdings Corp., B.C.S.C., 2001 A.C.W.S.J. LEXIS 25077; 2001 A.C.W.S.J. 706890; 108 A.C.W.S. (3d) 999, October 24, 2001

Baughn v. Offierski, Ontario Superior Court of Justice, 2001 A.C.W.S.J. LEXIS 11767; 2001 A.C.W.S.J. 609151; 102 A.C.W.S. (3d) 738, January 22, 2001

Baumgartner v. Jamieson, B.C. S.C., 2004 B.C.D. Civ. J. LEXIS 1313; [2004] B.C.D. Civ. 315.90.60.20-13, November 24, 2004

Baxter v. Hallmark Ford Sales Ltd., B.C.S.C., 1995 A.C.W.S.J. LEXIS 55747; 1996 A.C.W.S.J. 643997; 60 A.C.W.S. (3d) 101, December 18, 1995

Beck v. Dumais, Ontario Superior Court of Justice, 2003 A.C.W.S.J. LEXIS 3912; 2003 A.C.W.S.J. 19994; 123 A.C.W.S. (3d) 95, March 31, 2003

Benford v. Roy, Ontario Court (General Division), 1995 A.C.W.S.J. LEXIS 46390; 1995 A.C.W.S.J. 631681; 53 A.C.W.S. (3d) 543, February 9, 1995

Bhasin v. Best Buy Canada Ltd., Ontario Superior Court of Justice, 2005 O.J. No. 5282; 2005 ON.C. LEXIS 6372, November 23-24, 2005 Judgment: December 9, 2005.

Blake v. O'Neill Motors Ltd., Newfoundland Supreme Court, 1991 A.C.W.S.J. LEXIS 33093; 1991 A.C.W.S.J. 483793; 27 A.C.W.S. (3d) 1008, May 29, 1991

Bogden v. Purolator Courier Ltd., Alberta Queen's Bench, 1996 A.C.W.S.J. LEXIS 136094; 1996 A.C.W.S.J. 646251; 61 A.C.W.S. (3d) 1110, March 26, 1996

Boulet v. Federated Co-operatives Ltd., Manitoba Queen's Bench, 2001 A.C.W.S.J. LEXIS 15685; 2001 A.C.W.S.J. 613378; 106 A.C.W.S. (3d) 659, June 25, 2001

Bouvier v. Shorthouse, B.C. S.C., 2003 B.C.D. Civ. J. 1053; 2002 B.C.D. Civ. J. LEXIS 1764; [2003] B.C.D. Civ. 315.90.50.50-01, October 23, 2002

Brown v. Law Society of Upper Canada, Ontario Court (General Division) *1997 A.C.W.S.J. LEXIS 161512; 1997 A.C.W.S.J. 422146; 76 A.C.W.S. (3d) 108*, October 24, 1997

Browne v. Polson-Wylie Investments Ltd., B.C. S.C., 1998 B.C.D. Civ. J. 515; 1998 B.C.D. Civ. J. LEXIS 441, December 21, 1998

Bullock Estate v. Kennebec Manor Inc., New Brunswick Court of Queen's Bench (Trial Divison), 1994 A.C.W.S.J. LEXIS 79301; 1994 A.C.W.S.J. 671849; 52 A.C.W.S. (3d) 336, December 14, 1994

Burden v. Bank of Nova Scotia, British Columbia Supreme Court, 1997 A.C.W.S.J. LEXIS 159190; 1997 A.C.W.S.J. 419821; 74 A.C.W.S. (3d) 70, April 11, 1997

Burton v. Howlett, Nova Scotia Supreme Court, 1999 A.C.W.S.J. LEXIS 52248; 1999 A.C.W.S.J. 625169; 92 A.C.W.S. (3d) 1000, July 7, 1999

Byer v. Himark Enterprises Inc., Ontario Court (General Division), 1998 A.C.W.S.J. LEXIS 56229; 1998 A.C.W.S.J. 17262; 84 A.C.W.S. (3d) 508, December 02, 1998

Cagigal v. Mill Dining Lounge Ltd., Ontario Court (General Division), 1991 A.C.W.S.J. LEXIS 31724; 1991 A.C.W.S.J. 482391; 26 A.C.W.S. (3d) 971, April 25, 1991

Caissie v. Family and Children's Services of Yarmouth County, Nova Scotia Supreme Court, 1999 A.C.W.S.J. LEXIS 48023; 1999 A.C.W.S.J. 620880; 88 A.C.W.S. (3d) 393, January 28, 1999

Callihoe v. F.A.C.T.S. Oil Tools Ltd., Alberta Queen's Bench, 1994 A.C.W.S.J. LEXIS 70702; 1994 A.C.W.S.J. 404422; 47 A.C.W.S. (3d) 998, May 18, 1994

Campbell v. Akula Subs Ltd., Saskatchewan Provincial Court, 1997 A.C.W.S.J. LEXIS 161327; 1997 A.C.W.S.J. 421961; 75 A.C.W.S. (3d) 1059, May 27, 1997

Campbell v. J.I. Case Canada, Alberta Queen's Bench, 1990 A.C.W.S.J. LEXIS 54786; 1990 A.C.W.S.J. 436449; 22 A.C.W.S. (3d) 813, August 28, 1990

Carr v. Ireco Canada II Inc., Alberta Queen's Bench, 1991 A.C.W.S.J. LEXIS 31429; 1991 A.C.W.S.J. 482084; 26 A.C.W.S. (3d) 824, April 25, 1991

Caudle v. Louisville Sales & Service Inc., Sask. Q.B., 1999 Sask. D. J. 699; 1999 Sask. D. J. LEXIS 775, December 30, 1999

Chambers v. Omni Insurance Brokers, Ontario Divisional Court, 2001 A.C.W.S.J. LEXIS 13696; 2001 A.C.W.S.J. 611316; 104 A.C.W.S. (3d) 692, April 5, 2001

Chester v. Pepsi-Cola Canada Ltd., Q.B.2003 Saskatchewan Queen's Bench, 2005 A.C.W.S.J. LEXIS 1727; 2005 A.C.W.S.J. 5292; 138 A.C.W.S. (3d) 92, March 1, 2005

Chiang v. Intrawest Corp., B.C. S.C., 2002 B.C.D. Civ. J. 1882; 2002 B.C.D. Civ. J. LEXIS 932; [2002] B.C.D. Civ. 315.90.50.50-01, June 28, 2002

Christensen v. Armtec, Div. Jannock Steel Fabricating Co., British Columbia Supreme Court, 1996 A.C.W.S.J. LEXIS 139848; 1996 A.C.W.S.J. 650078; 64 A.C.W.S. (3d) 1316, August 19, 1996

Clark v. Rocky View No. 44 (Municipal District), Alberta Queen's Bench, 1996 A.C.W.S.J. LEXIS 139541; 1996 A.C.W.S.J. 649760; 64 A.C.W.S. (3d) 1051, July 23, 1996

Cooper v. C & M Engineering Ltd., Alberta Provincial Court (Civil Division), 1999 A.C.W.S.J. LEXIS 52570; 1999 A.C.W.S.J. 625501; 92 A.C.W.S. (3d) 634, August 20, 1999

D. (D.M.) v. Artesian Realty and Insurance (G.P.) Ltd., Alberta Provincial Court, 2001 A.C.W.S.J. LEXIS 23137; 2002 A.C.W.S.J. 1546; 112 A.C.W.S. (3d) 697, May 8, 2001

Daniel v. Survival Systems Ltd., Nova Scotia Supreme Court, 2000 A.C.W.S.J. LEXIS 53833; 2000 A.C.W.S.J. 512569; 100 A.C.W.S. (3d) 811, October 20, 2000

Dash v. Hudson Bay Co., Alberta Queen's Bench, 1992 A.C.W.S.J. LEXIS 32560; 1992 A.C.W.S.J. 568562; 33 A.C.W.S. (3d) 915, May 29, 1992

Day v. Wal-Mart Canada Inc., Nova Scotia Court of Appeal, 2000 A.C.W.S.J. LEXIS 53985; 2000 A.C.W.S.J. 512724; 100 A.C.W.S. (3d) 1018, November 9, 2000

Deildal v. Tod Mountain Development Ltd., British Columbia Court of Appeal, 1997 A.C.W.S.J. LEXIS 154955; 1997 A.C.W.S.J. 415543; 70 A.C.W.S. (3d) 283, April 10, 1997

Dick v. Zaduk, Ontario Court (General Division), 1993 A.C.W.S.J. LEXIS 45753; 1993 A.C.W.S.J. 579187; 39 A.C.W.S. (3d) 989, April 7, 1993

Di Costanza v. Jaguar Beauty Supplies Ltd., Ontario Court (General Division), 1995 A.C.W.S.J. LEXIS 51436; 1995 A.C.W.S.J. 636850; 57 A.C.W.S. (3d) 602, September 12, 1995

Dignean v. White Bear First Nation No. 70, Sask. Q.B., 1999 Sask. D. J. 452; 1999 Sask. D. J. LEXIS 545, August 5, 1999

Donovan v. Maritime Beverages Ltd., New Brunswick Court of Queen's Bench (Trial Divison), 1991 A.C.W.S.J. LEXIS 32770; 1991 A.C.W.S.J. 483465; 27 A.C.W.S. (3d) 830, June 24, 1991

Doucet v. Downey's Ltd., New Brunswick Court of Queen's Bench (Trial Divison), 1991 A.C.W.S.J. LEXIS 32768; 1991 A.C.W.S.J. 483463; 27 A.C.W.S. (3d) 832, June 17, 1991

Dow v. B.C. Rail Ltd., British Columbia Supreme Court, 1990 A.C.W.S.J. LEXIS 58323; 1990 A.C.W.S.J. 687370; 23 A.C.W.S. (3d) 1198, June 25, 1990,

Duffett v. Squibb Canada Inc., Newfoundland Supreme Court, 1992 A.C.W.S.J. LEXIS 29488; 1992 A.C.W.S.J. 565308; 31 A.C.W.S. (3d) 102, January 9, 1992

Dumoulin v. Magna International Inc., Ontario Superior Court of Justice, 2000 A.C.W.S.J. LEXIS 47908; 2000 A.C.W.S.J. 506441; 95 A.C.W.S. (3d) 501, March 1, 2000

Dusconi v. Fujitsu-ICI Canada Inc., British Columbia Supreme Court, 1996 A.C.W.S.J. LEXIS 136581; 1996 A.C.W.S.J. 646751; 62 A.C.W.S. (3d) 505, April 11, 1996

Edwards v. Irwin, Ontario Court (General Division), 1993 A.C.W.S.J. LEXIS 44416; 1993 A.C.W.S.J. 577808; 38 A.C.W.S. (3d) 708, February 23, 1993

Feldman v. 933332 Ontario Inc., Ontario Court (General Division), 1993 A.C.W.S.J. LEXIS 49729; 1993 A.C.W.S.J. 682396; 42 A.C.W.S. (3d) 1011, October 6, 1993

Fewer v. Michelin North America (Canada) Inc., Nova Scotia Supreme Court, 2000 A.C.W.S.J. LEXIS 47397; 2000 A.C.W.S.J. 505867; 94 A.C.W.S. (3d) 923, January 11, 2000

Forth v. Scott's Plains Recycling Inc., Ontario Court (General Division), 1994 A.C.W.S.J. LEXIS 69543; 1994 A.C.W.S.J. 403243; 46 A.C.W.S. (3d) 1288, February 18, 1994

Fox v. Souris Ambulance (1989) Ltd., Saskatchewan Queen's Bench, 1992 A.C.W.S.J. LEXIS 35523; 1992 A.C.W.S.J. 571581; 36 A.C.W.S. (3d) 398, October 7, 1992

Garrett v. Alouette Laser Products Inc., B.C.S.C., 1996 A.C.W.S.J. LEXIS 142343; 1996 A.C.W.S.J. 652612; 67 A.C.W.S. (3d) 295, November 15, 1996

Geluch v. Rosedale Golf Assn., Ontario Superior Court of Justice, 2004 A.C.W.S.J. LEXIS 4189; 2004 A.C.W.S.J. 7486; 131 A.C.W.S. (3d) 884, June 25, 2004

Gibson v. Western Paint and Wallcovering Co., Manitoba Queen's Bench, 1992 A.C.W.S.J. LEXIS 38450; 1993 A.C.W.S.J. 576808; 37 A.C.W.S. (3d) 1226, December 11, 1992

Glass v. Systemetrix Corp., Ontario Court (General Division), 1997 A.C.W.S.J. LEXIS 159262; 1997 A.C.W.S.J. 419893; 74 A.C.W.S. (3d) 230, September 4, 1997

Goodkey v. Dynamic Concrete Pumping Inc., B.C. S.C., 2004 B.C.D. Civ. J. 2132; 2004 B.C.D. Civ. J. LEXIS 795; [2004] B.C.D. Civ. 315.90.50.25-03; [2004] B.C.D. Civ. 315.90.60.20-06, July 5, 2004

Graf v. Saskatoon Soccer Centre Inc., Sask. Q.B., Saskatoon, Q.B.G. J.C.S., 2004 Sask. D. J. 3070; 2004 Sask. D. J. LEXIS 215; [2004] Sask. D. 315.90.40.20-01, June 22, 2004

Guenther v. Saskatoon Livestock Sales Ltd., Sask. Q.B., 1999 Sask. D. J. 11; 1999 Sask. D. J. LEXIS 208, January 7, 1999

Hawley v. Webb, British Columbia Supreme Court, 2002 A.C.W.S.J. LEXIS 1816; 2002 A.C.W.S.J. 2669; 111 A.C.W.S. (3d) 507, February 15, 2002

Hennessy v. Excell Railing Systems Ltd., B.C. S.C., 2005 B.C.D. Civ. J. 2114; 2005 B.C.D. Civ. J. LEXIS 623; 2005 BCSC 734; [2005] B.C.D. Civ. 315.90.60.20-11, May 17, 2005

Henry v. Foxco Ltd., New Brunswick Court of Appeal, 2004 A.C.W.S.J. LEXIS 11215; 2004 A.C.W.S.J. 24833; 130 A.C.W.S. (3d) 109; 2004 NBCA 22, March 25, 2004

Henson v. Champion Feed Services Ltd., Alta. Q.B., 2005 Alta. D. J. 1846; 2005 Alta. D. J. LEXIS 91; [2005] Alta. D. 315.90.60.20-02, March 24, 2005

Hildebrandt v. Wakaw Lake Regional Park Authority, Sask. Q.B., 1999 Sask. D. J. 140; 1999 Sask. D. J. LEXIS 234, January 27, 1999

Hodge v. United Co-operatives of Ontario, 1991, Ontario Court (General Division), 1993 A.C.W.S.J. LEXIS 49337; 1993 A.C.W.S.J. 681996; 42 A.C.W.S. (3d) 684, September 10, 1993

Horvath v. Nanaimo Credit Union, British Columbia Supreme Court, 1998 A.C.W.S.J. LEXIS 86278; 1998 A.C.W.S.J. 523929; 82 A.C.W.S. (3d) 86, July 15, 1998

Horvath v. SAAN Stores Ltd., B.C.S.C., 2003 A.C.W.S.J. LEXIS 11342; 2004 A.C.W.S.J. 23304; 128 A.C.W.S. (3d) 94; 2003 BCSC 1845, December 8, 2003

Jasnoch v. Provincial Plating Ltd., Sask. Q.B., 2000 Sask. D. J. 704; 2000 Sask. D. J. LEXIS 12, February 1, 2000

Jeewa v. Med-Chem Laboratories Ltd., Ontario Court (General Division), 1998 A.C.W.S.J. LEXIS 81176; 1998 A.C.W.S.J. 518692; 77 A.C.W.S. (3d) 770, February 6, 1998

Jost v. Western Railco Products Ltd., B.C.S.C., 2000 A.C.W.S.J. LEXIS 53430; 2000 A.C.W.S.J. 512163; 100 A.C.W.S. (3d) 254, October 10, 2000

Kaiser v. Dural, a division of Multibond Inc., Nova Scotia Court of Appeal, 2003 N.S.J. No. 418; 2003 NS.C. LEXIS 745; 2003 NSCA 122, November 20, 2003.

Kellas v. CIP Inc., British Columbia Supreme Court, 1990 A.C.W.S.J. LEXIS 53416; 1990 A.C.W.S.J. 435031; 21 A.C.W.S. (3d) 674, May 25, 1990

Khunkhun v. Continental Steel Ltd., British Columbia Court of Appeal, 1995 A.C.W.S.J. LEXIS 46849; 1995 A.C.W.S.J. 632152; 53 A.C.W.S. (3d) 1005, February 23, 1995.

King v. Kenair Apartments Ltd., Ontario Superior Court of Justice, 2001 A.C.W.S.J. LEXIS 14008; 2001 A.C.W.S.J. 611645; 104 A.C.W.S. (3d) 886, April 25, 2001

Kitcher v. Royal Canadian Legion, Manitoba Queen's Bench, 2003 A.C.W.S.J. LEXIS 9063; 2003 A.C.W.S.J. 26583; 127 A.C.W.S. (3d) 85, November 17, 2003

Lane v. Unity (Town), Sask. Q.B., 2003 Sask. D. J. 856; 2002 Sask. D. J. LEXIS 391; [2003] Sask. D. 315.90.50.50-01, December 31, 2002

Lavery v. A.M.P.M. Service Ltd., B.C. S.C., 1999 B.C.D. Civ. J. 2470; 1999 B.C.D. Civ. J. LEXIS 4030, December 17, 1999

Lee v. Parking Corp. of Vancouver, British Columbia Supreme Court, 1998 A.C.W.S.J. LEXIS 85378; 1998 A.C.W.S.J. 523011; 81 A.C.W.S. (3d) 86, July 3, 1998

Lesage v. Garden River Band of Ojibways, Ontario Court (General Division) *1991 A.C.W.S.J. LEXIS 35648; 1991 A.C.W.S.J. 486380; 30 A.C.W.S. (3d) 211*, November 20, 1991

Lewis v. Ontario Plymouth Chrysler Ltd., Ontario Superior Court of Justice, 2001 A.C.W.S.J. LEXIS 16738; 2001 A.C.W.S.J. 614449; 107 A.C.W.S. (3d) 792, August 27, 2001

Lloyd v. Kelsey Students' Assn. Inc., Sask. Q.B., 2001 Sask. D. J. 563; 2001 Sask. D. J. LEXIS 23, January 16, 2001

Lowery v. Calgary (City), Alta. Q.B., 2000 Alta. D. J. 513; 2000 Alta. D. J. LEXIS 663, November 23, 2000

MacDonald v. Tamitik Status of Women Assn., B.C.S.C., 1998 A.C.W.S.J. LEXIS 91772; 1998 A.C.W.S.J. 629955; 83 A.C.W.S. (3d) 956, November 19, 1998

MacFarlane v. Westfair Foods Ltd., Alberta Queen's Bench, 1994 A.C.W.S.J. LEXIS 74939; 1994 A.C.W.S.J. 408756; 50 A.C.W.S. (3d) 1237, October 21, 1994

Manchulenko v. Hunterline Trucking Ltd., B.C.S.C., 2002 A.C.W.S.J. LEXIS 5044; 2002 A.C.W.S.J. 7385; 114 A.C.W.S. (3d) 875, June 27, 2002

Mattson v. ALC Airlift Canada Inc., British Columbia Supreme Court, 1993 A.C.W.S.J. LEXIS 51577; 1993 A.C.W.S.J. 684264; 44 A.C.W.S. (3d) 718, December 9, 1993

McEwan v. Irving Pulp & Paper, Ltd., New Brunswick Court of Queen's Bench (Trial Divison), 1995 A.C.W.S.J. LEXIS 48159; 1995 A.C.W.S.J. 633514; 54 A.C.W.S. (3d) 1147, April 26, 1995

McKeage v. Calgary (City), Alta. Q.B., 1999 Alta. D. J. 392; 1999 Alta. D. J. LEXIS 566, May 17, 1999

McKinley v. BC Tel, B.C. C.A., 1999 B.C.D. Civ. J. 878; 1999 B.C.D. Civ. J. LEXIS 2601, May 7, 1999

McNaughton v. Sears Canada Inc., New Brunswick Court of Queen's Bench (Trial Division), 1996 A.C.W.S.J. LEXIS 140433; 1996 A.C.W.S.J. 650672; 65 A.C.W.S. (3d) 608, September 10, 1996

Meyer v. Partec Lavalin Inc., Alta. Q.B., 1999 Alta. D. J. 41; 1999 Alta. D. J. LEXIS 320, February 26, 1999

Middelkoop v. Canada Safeway Ltd., Manitoba Court of Appeal, 2000 A.C.W.S.J. LEXIS 50711; 2000 A.C.W.S.J. 509385; 98 A.C.W.S. (3d) 124, June 19, 2000

Milsom v. Corporate Computers Inc., Alberta Queen's Bench, 2003 A.C.W.S.J. LEXIS 8859; 2003 A.C.W.S.J. 26316; 126 A.C.W.S. (3d) 964, March 31, 2003

Minns v. 943372 Ontario Inc., Ontario Superior Court of Justice, 1999 A.C.W.S.J. LEXIS 51125; 1999 A.C.W.S.J. 624040; 91 A.C.W.S. (3d) 257, September 14, 1999

Mitchell v. Paxton Forest Products Inc., British Columbia Supreme Court, 2001 A.C.W.S.J. LEXIS 20498; 2001 A.C.W.S.J. 234976; 111 A.C.W.S. (3d) 79, December 21, 2001

Moffat v. Saan Stores Ltd., British Columbia Supreme Court, 1998 A.C.W.S.J. LEXIS 85532; 1998 A.C.W.S.J. 523167; 81 A.C.W.S. (3d) 272, June 6, 1998

Monaghan v. Utilase Canada Inc., Ontario Court (General Division), 1999 A.C.W.S.J. LEXIS 44832; 1999 A.C.W.S.J. 617341; 85 A.C.W.S. (3d) 585, January 14, 1999

Morrison v. G.P.M. Distributing Ltd., British Columbia Supreme Court, 1994 A.C.W.S.J. LEXIS 69671; 1994 A.C.W.S.J. 403372; 47 A.C.W.S. (3d) 81, April 5, 1994

Munro v. Thompson, Tooze, McLean, Rollo & Elkin, Ontario Court (General Division), 1998 A.C.W.S.J. LEXIS 86952; 1998 A.C.W.S.J. 524610; 82 A.C.W.S. (3d) 921, September 25, 1998

Murphy v. Amram's Distributing Ltd., Nova Scotia Supreme Court, 1999 A.C.W.S.J. LEXIS 47537; 1999 A.C.W.S.J. 620382; 88 A.C.W.S. (3d) 107, March 1, 1999

Musgrave v. Levesque Securities Inc., Nova Scotia Supreme Court, 2000 A.C.W.S.J. LEXIS 52122; 2000 A.C.W.S.J. 510830; 98 A.C.W.S. (3d) 1218, March 31, 2000

Nelson v. Boyle, Prince Edward Island Supreme Court (Trial Division), 1994 A.C.W.S.J. LEXIS 67770; 1994 A.C.W.S.J. 401141; 45 A.C.W.S. (3d) 674, January 11, 1994

Nikolaou v. Purolator Courier Ltd., Ontario Court (General Division), 1998 A.C.W.S.J. LEXIS 85082; 1998 A.C.W.S.J. 522713; 80 A.C.W.S. (3d) 1024, July 3, 1998

O'Donnell v. Bourgault Industries Ltd., Sask. Q.B., 1999 Sask. D. J. 407; 1999 Sask. D. J. LEXIS 500, June 7, 1999

O'Grady v. Emcon Emanation Control Ltd., Ontario Court (General Division), 1994 A.C.W.S.J. LEXIS 78057; 1995 A.C.W.S.J. 630389; 52 A.C.W.S. (3d) 564, December 2, 1994

Orman v. Graves, Nova Scotia Supreme Court, 1998 A.C.W.S.J. LEXIS 92540; 1999 A.C.W.S.J. 618959; 86 A.C.W.S. (3d) 728, June 30, 1998

Otting v. Elkford (District), British Columbia Supreme Court, 1993 A.C.W.S.J. LEXIS 48104; 1993 A.C.W.S.J. 581624; 41 A.C.W.S. (3d) 1155, July 23, 1993

Packer v. Century International High School Ltd., B.C. S.C., 2000 B.C.D. Civ. J. 3221; 2000 B.C.D. Civ. J. LEXIS 618, February 24, 2000

Paddon v. Kamloops Electric Motor Sales and Service Ltd., British Columbia Supreme Court, 1994 A.C.W.S.J. LEXIS 72655; 1994 A.C.W.S.J. 406421; 48 A.C.W.S. (3d) 1371, June 17, 1994

Panton v. Everywoman's Health Centre Society (1988), B.C.S.C., 1998 A.C.W.S.J. LEXIS 86297; 1998 A.C.W.S.J. 523950; 82 A.C.W.S. (3d) 84, August 26, 1998

Parsons v. NI Cablesystems Inc., Newfoundland Supreme Court, 1994 A.C.W.S.J. LEXIS 73054; 1994 A.C.W.S.J. 406829; 49 A.C.W.S. (3d) 502, July 20, 1994

Patterson v. Boudreau Sheet Metal (1999) Inc., New Brunswick Court of Queen's Bench (Trial Division), 2004 A.C.W.S.J. LEXIS 10744; 2004 A.C.W.S.J. 24360; 129 A.C.W.S. (3d) 114; 2004 NBQB 99, March 8, 2004

Pattyson v. T. Thue Building Materials Ltd., Saskatchewan Queen's Bench, 1996 A.C.W.S.J. LEXIS 97267; 1997 A.C.W.S.J. 413557; 68 A.C.W.S. (3d) 658, December 20, 1996

Phillips v. Hilinex Packaging Inc., British Columbia Supreme Court, 1994 A.C.W.S.J. LEXIS 71577; 1994 A.C.W.S.J. 405304; 48 A.C.W.S. (3d) 103, June 3, 1994

Price v. Kingstreet Investments Ltd., New Brunswick Court of Queen's Bench (Trial Division), 2001 A.C.W.S.J. LEXIS 22040; 2001 A.C.W.S.J. 675714; 108 A.C.W.S. (3d) 96, August 16, 2001

Regan v. Chaleur Entrepreneurship Centre Inc., New Brunswick Court of Queen's Bench (Trial Divison), 1994 A.C.W.S.J. LEXIS 75154; 1994 A.C.W.S.J. 408973; 51 A.C.W.S. (3d) 78, October 27, 1994

Renwick v. MacMillan Bloedel Ltd., Vancouver, B.C.S.C., 1995 A.C.W.S.J. LEXIS 45935; 1995 A.C.W.S.J. 631176; 53 A.C.W.S. (3d) 85, February 6, 1995

Rieckhoff v. DC Diagnosticare Inc., British Columbia Supreme Court, 2001 A.C.W.S.J. LEXIS 15354; 2001 A.C.W.S.J. 613039; 105 A.C.W.S. (3d) 877, June 14, 2001

Roney v. Knowlton Realty Ltd., British Columbia Supreme Court, 1995 A.C.W.S.J. LEXIS 49403; 1995 A.C.W.S.J. 634789; 55 A.C.W.S. (3d) 963, June 2, 1995

Ross v. Premier Horticulture Ltee., Manitoba Queen's Bench, 2006 A.C.W.S.J. LEXIS 297; 2006 A.C.W.S.J. 84; 145 A.C.W.S. (3d) 444; 2006 MBQB 15, January 27, 2006

Rowe v. Keg Restaurants Ltd., British Columbia Supreme Court, 1996 A.C.W.S.J. LEXIS 134223; 1996 A.C.W.S.J. 644180; 60 A.C.W.S. (3d) 303, January 9, 1996

Russell v. Nova Scotia Power Inc., Nova Scotia Supreme Court, 1996 A.C.W.S.J. LEXIS 137295; 1996 A.C.W.S.J. 647475; 63 A.C.W.S. (3d) 274, April 18, 1996

Sandy v. Beausoleil First Nation, Ontario Superior Court of Justice, 2003 A.C.W.S.J. LEXIS 3254; 2003 A.C.W.S.J. 19087; 122 A.C.W.S. (3d) 484, April 14, 2003

Santos v. Honda of Canada Mfg., Ontario Superior Court of Justice, 2002 A.C.W.S.J. LEXIS 8471; 2002 A.C.W.S.J. 12141; 118 A.C.W.S. (3d) 830, October 22, 2002

Saumer v. Genie Office Services Ltd., Alberta Queen's Bench, 1991 A.C.W.S.J. LEXIS 32586; 1991 A.C.W.S.J. 483279; 27 A.C.W.S. (3d) 831, June 13, 1991

Schimp v. RCR Catering Ltd., Nova Scotia Court of Appeal, 2004 A.C.W.S.J. LEXIS 10553; 2004 A.C.W.S.J. 24213; 129 A.C.W.S. (3d) 115; 2004 NSCA 29, February 18, 2004

Schroder v. All Languages Ltd., Ontario Small Claims Court, 1997 A.C.W.S.J. LEXIS 163917; 1998 A.C.W.S.J. 662817; 76 A.C.W.S. (3d) 564, December 8, 1997

Seeley v. Bob Brown Pontiac Buick GMC Ltd., British Columbia Provincial Court (Small Claims Division) Penticton, British Columbia, [2002] B.C.J. No. 2706; 2002 BCPC 500; 2002 BC.C. LEXIS 5300, September 12, 2002

Sherman v. Sarsfield Foods Ltd., Nova Scotia Supreme Court (Trial Division), 1991 A.C.W.S.J. LEXIS 35316; 1991 A.C.W.S.J. 486046; 29 A.C.W.S. (3d) 1107, October 29, 1991

Sparkes v. Enterprise Newfoundland and Labrador Corp., Newfoundland Court of Appeal, 1998 A.C.W.S.J. LEXIS 87120; 1998 A.C.W.S.J. 524778; 82 A.C.W.S. (3d) 922, September 29, 1998

Squires v. Ayerst, McKenna & Harrison Inc., Nova Scotia Supreme Court (Trial Division), 1991 A.C.W.S.J. LEXIS 33163; 1991 A.C.W.S.J. 483864; 27 A.C.W.S. (3d) 1190, June 28, 1991

Stackhouse v. Stackhouse, New Brunswick Court of Queen's Bench (Trial Division), 1996 A.C.W.S.J. LEXIS 134414; 1996 A.C.W.S.J. 644452; 60 A.C.W.S. (3d) 534, January 9, 1996

Stevens v. HSBC James Capel Canada Inc., Ontario Court (General Division), 1998 A.C.W.S.J. LEXIS 86364; 1998 A.C.W.S.J. 524017; 82 A.C.W.S. (3d) 85, April 23, 1998

Stroppa v. Globe Foundry Ltd., B.C. S.C.2005 B.C.D. Civ. J. 1437; 2005 B.C.D. Civ. J. LEXIS 330; [2005] B.C.D. Civ. 315.90.60.20-08, March 7, 2005

Stumborg v. Aquatain Consulting Inc., Prov. Ct., S.C., 2006 Sask. D. J. 67; 2005 Sask. D. J. LEXIS 433; 2005 SKPC 55; 2006] Sask. D. 315.90.40.00-01, April 28, 2005

Swanson v. Western Canadian Beef Packers, J.C.M.J., Saskatchewan Queen's Bench, 2003 A.C.W.S.J. LEXIS 272; 2003 A.C.W.S.J. 629; 119 A.C.W.S. (3d) 959, January 10, 2003

Taweel v. T.R.A. Foods Ltd., Prince Edward Island Supreme Court (Trial Division), 1990 A.C.W.S.J. LEXIS 57079; 1990 A.C.W.S.J. 686111; 22 A.C.W.S. (3d) 1114, September 24, 1990

Taylor v. Bank of Nova Scotia, Ontario Court (General Division), 1998 A.C.W.S.J. LEXIS 85045; 1998 A.C.W.S.J. 522676; 80 A.C.W.S. (3d) 1025, May 25, 1998

Theriault v. North American Forest Products Ltd. New Brunswick Court of Queen's Bench (Trial Division), *2004 A.C.W.S.J. LEXIS 9336; 2005 A.C.W.S.J. 854; 136 A.C.W.S. (3d) 287*, December 17, 2004

Thomas v. Canex Foods Ltd., B.C. S.C., 2000 B.C.D. Civ. J. 3890; 2000 B.C.D. Civ. J. LEXIS 1268, May 9, 2000

Tornquist v. Sandy Bay (Northern Village), Saskatchewan Queen's Bench, 1996 A.C.W.S.J. LEXIS 136966; 1996 A.C.W.S.J. 647140; 62 A.C.W.S. (3d) 925, April 8, 1996

Trotter v. Chesley (Town), Ontario District Court, 1990 A.C.W.S.J. LEXIS 51244; 1990 A.C.W.S.J. 432773; 19 A.C.W.S. (3d) 996, February 16, 1990

Vandall v. Axys Technologies Inc., BCSC, 2006, B.C.J. No. 14; 2006 BCSC 8; 2006 BC.C. LEXIS 14, January 4, 2006.

Wallace v. United Grain Growers Ltd., Supreme Court of Canada, 1997 3 S.C.R. 701; 1997 S.C.R. LEXIS 2845, October 30, 1997

Wawro v. Westfair Foods Ltd., Saskatchewan Court of Appeal, 1996 A.C.W.S.J. LEXIS 141860; 1996 A.C.W.S.J. 652127; 66 A.C.W.S. (3d) 1088, October 22, 1996

Weyland v. Famous Players Inc., Alta. Q.B., 1999 Alta. D. J. 522; 1999 Alta. D. J. LEXIS 693, July 14, 1999

Widney v. Nor-Pac Marketing, B.C. S.C., 1999 B.C.D. Civ. J. 1190; 1999 B.C.D. Civ. J. LEXIS 2899, May 20, 1999

Wilson v. Pincher Creek Women's Emergency Shelter Assn., Alta. Prov. Ct., 2000 Alta. D. J. 1053; 2000 Alta. D. J. LEXIS 363, June 8, 2000

Wright v. G.P.C. Government Policy Consultants, Ontario Court (General Division), 1998 A.C.W.S.J. LEXIS 91525; 1998 A.C.W.S.J. 629707; 83 A.C.W.S. (3d) 612, November 5, 1998

Zadorozniak v. Community Futures Development Corp. of Nicola Valley, B.C. S.C., 2005 B.C.D. Civ. J. 240; 2005 B.C.D. Civ. J. LEXIS 16; [2005] B.C.D. Civ. 315.90.60.40-01, January 10, 2005

Zorn-Smith v. Bank of Montreal, Ontario Superior Court of Justice, 2003 A.C.W.S.J. LEXIS 9626; 2003 A.C.W.S.J. 27349; 127 A.C.W.S. (3d) 462, December 2, 2003

Appendix A - Factors that mitigate against incompetence in the courts

Note: (complied from various sources including Brown & Beatty, 2003 and Levitt, 2004)

1. The employee's job duties and the standards of performance established by the organization must be clearly communicated and the parties have agreed that failure to reach these standards will constitute cause.
2. The employee who is performing poorly must be made aware that there is a discrepancy between his or her performance and the standards for the job, or the terms of the employment contract. Recent positive feedback or evaluations will seriously weaken evidence of incompetence.
3. Not acceptable for grounds for dismissal if other employees with similar job duties are also performing below standard but are not recognized by the organization as poor performers (condonation).
4. The employee must be provided with adequate training or must be informed of what to do to improve performance.
5. The employee must be given a reasonable amount of time to improve performance after being warned. If new to the job, she or he must be given a reasonable opportunity to learn the job and perform accordingly.
6. If the performance continues to be below standard, the employee must be warned that his or her job is in jeopardy.
7. The standards of performance expected of a new employee should not be increased above the level of competence upon which the employee was hired, or set unrealistically or unreasonably.

8. The employee's poor performance must not have been partly due to the actions of the company such as failing to provide the necessary support or failing to act to remedy the problem, or other factors beyond the employee's control.
9. If relying on results such as business losses, reduced sales, poor morale, etc., the employer must establish that it was what the employee did or failed to do which caused the problem.
10. If employees are routinely dismissed for failing to obtain a specific level of performance, it must be made clear to the employee at the time of hire.
11. The employee's performance is improving, there is a reasonable belief that the poor performance is temporary, it was a single incident of poor performance, the incompetence was not of a serious or gross nature, or the employee learns to adapt slowly.
12. The employee advised the company at the time of hire of his or her capabilities and was hired on that basis, or the incompetence falls outside the area of competence for which the employee was hired.
13. There was a reasonable explanation for the problem.
14. The employee had a history of good performance or was senior in age or tenure.
15. The incompetence did not affect the safety of others.

Appendix B: Content Analysis Coding Sheet

Employee Characteristics	Y / N Plaintiff is female _____ Years _____ Months of tenure with the defendant _____ Occupation Y / N Limited Job Prospects Y / N Induced to leave secure employment
Employer Characteristics	Y / N Employer size (more than 500 employees) Y / N Industry (manufacturer)
Case Characteristics	Y / N Plaintiff Win _____ Months of notice if plaintiff was successful (nearest week) Y / N Case heard in BC or Ontario Y / N Case Published before October 1997
Change of Status	A recent change of the dismissed employee's status due to: o Promotion, o New relationships such as a new boss, o New duties, or o Relocation.
Illness / unilateral change	The employee experienced an unexpected change due to: o Employees' Illness, or o Unilateral change of the employment relationship imposed by employer
Satisfactory Performance	Evidence of the terminated employees satisfactory past performance including: o Long satisfactory service, o Other explanation for the poor performance, not in employees area of responsibility, or not poor performance relative to other employees, o Previous exemplary service, o Positive performance appraisal, or o Other recent positive feedback.
No Progressive discipline	The court noted that the: o Employer had failed to employ progressive discipline, or had responded disproportionately with dismissal, or o Employee had an unblemished disciplinary record.
Procedural Justice	The employer failed to: o Provide an adequate explanation for the dismissal, or had misrepresented the reason for dismissal, o Investigate the circumstances leading to dismissal fully, o Provide a hearing prior to dismissal, or o Provide and appeal after the dismissal decision.
Employer Failed to Warn	The employer had failed to: o Provide a timeline and opportunity to improve, o Inform the employee that dismissal may result from failure to

	meet standards, o Inform the employee that job is in jeopardy, o Inform the employee that performance not meeting standards, or o Inform the employee what is told to improve.
Performance Standards	The employer had failed in the implementation of standards by: o Communicating conflicting standards or expectations, o Not establishing performance standards, o Not demonstrating that employee had failed to meet objective standards, o Not enforcing standards consistently, or o Not communicating standards adequately, o Not providing feedback, instruction, supervision, support, or training necessary to accomplish the standards, o Setting unreasonable or unrealistic standards, or by imposing new higher standards.
Vulnerability *	The terminated employee was made vulnerable as a result of the dismissal. The vulnerability consisted of either: o Psychological distress, or o Damaged reputation or integrity.
Not Serious *	The employer had failed to consider the lack of seriousness of the poor performance: o By not considering that the employee had no intent to not meet standards, to benefit from the failure to meet standards, or repudiate the employment contract, o Employer had not suffered loss, risk, or jeopardy, o Employer had not established the serious nature of the poor performance in the context of the employee's duties or overall employment relationship.
Pre-Wallace Decision	o Cases that were published prior to the publication of *Wallace* in October, 1997.

Appendix C – List of Canadian Legal Reports Represented in Lexus-Nexus

LexisNexis Canadian Case Law – a file containing all available reported and unreported full text judgements from Canadian courts, encompassing publications from Butterworth's Canada Ltd., Canada Law Book, and Manitoba Law Book Ltd., as well as material received directly from federal and provincial courts.

Canadian Legal Publications included:

Alberta Cases
Alberta Civil Decisions and Judgements
Alberta Criminal Decisions and Judgements
All Canada Weekly Summaries and Judgements
British Columbia Cases
British Columbia Civil Decisions and Judgements
British Columbia Criminal Decisions and Judgements
British Columbia Labour Arbitration Decisions and Judgements
Canada Federal Courts Reports
Canada Industrial Relations Board
Canada Supreme Court Reports
Canadian Criminal Cases
Canadian Labour Arbitration Summaries and Judgements
Canadian Labour Relations Boards Reports, Second Series
Canadian Patent Reporter
Canadian Privy Council Reports
Canadian Rights Reporter, Second Series
Causes du Quebec
Charter of Rights Decisions and Judgements
Dominion Law Reports
Exchequer Court Reports
Federal Court Cases
Federal Court of Appeals Decisions and Judgements
Federal Court of Canada
Labour Arbitration Cases
Manitoba Cases
Manitoba Civil Decisions and Judgements
Manitoba Criminal Decisions and Judgements
National Cases
New Brunswick Cases
Newfoundland and Labrador Cases
Nova Scotia Cases
Ontario Cases
Ontario Court of Appeal Cases
Ontario Reports
Ontario Superior Court of Justice
Saskatchewan Cases

Saskatchewan Civil Decisions and Judgements
Saskatchewan Criminal Decisions and Judgements
Supreme Court of Canada
Supreme Court of Canada Decisions and Judgements
Tax Court of Canada
Trade and Tariff Reports
Weekly Criminal Bulletin and Judgements

Appendix D – Email Invitation to Participate

My name is Jim Grant and I am a doctoral candidate at Saint Mary's University (SMU) in Halifax as well as an assistant professor of human resource management at Nipissing University in Ontario (705-474-3450 Ext. 4118). As part of my doctoral dissertation, I am conducting research on performance management and discipline for poor performance in Canada under the supervision of Dr. Terry Wagar, also of SMU (420-5770).

My study involves the management of employee performance and discipline for poor performance from the human resource practitioner's perspective. The results of this study will be of interest to HR practitioners and managers of all types. The survey can be completed on-line and has typically taken about 20 minutes. I invite you and any of your colleagues in human resources to participate.

The link to the survey is:

http://athena.smu.ca/survey/jimgrant/survey.htm

For participation, you may be entered in a draw for several small gifts including an HR association membership, two CHRP recommended HRM texts, as well as two personality profiles. The draw will take place at the completion of the study. At that time, you may also access the results of the study at:

http://www.smu.ca/academic/sobey/biographies/students/jim-grant.html

Appendix E: HR Practitioners On-Line Surevy

[SMU logo]

Directions: Please respond to the questions by marking the appropriate box. If the required figures are not available your closest approximation is sufficient.

About The Most Recent Employee Dismissal

You are asked to recall the most recent dismissal of a **non-union employee** for **performance related issues** (in contrast to misconduct such as harassment, theft, or insubordination for example) that you have been involved in or have direct knowledge of with your present OR most recent employer.

Please indicate the extent to which you agree or disagree:

1. In terminating the employee, the employer claimed to have had just and sufficient cause for the termination.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

2. At the time of termination, I believed that the employer had just and sufficient cause to terminate the employee.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

3. In hindsight, I now believe that the employer had just and sufficient cause to terminate the employee.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

4. Was notice of termination or severance pay provided? Yes No

•

- If yes, what was the notice period or severance as expressed in months? _____ months

- 5. The employee's dismissal: Yes No

  1. Arose out of safety concerns.

  2. Resulted from an accumulation of shortcomings.

  3. Was triggered by a culminating incident.

  4. Was due to other misconduct in addition to performance issues.

[SMU logo]

About the Dismissed Employee's Characteristics

1. The dismissed employee was: ☐ Male ☐ Female

2. The dismissed employee was _____ years of age.

3. The dismissed employee's tenure with the employer was _____ years and _____ months.

4. The dismissed employee was: Yes No

1. Induced to leave a previous employer .
2. On probation when dismissed.
3. Previously disciplined for any reason.
4. Facing limited job prospects upon dismissal.
5. Employed under a written contract.
6. A member of a self-directed work team.

6. The dismissed employee's position was:
☐ Executive
☐ Manager
☐ Supervisor
☐ Professional
☐ Clerical / labour
☐ Sales
☐ Personal or technical service
☐ Other (Please specify) _____

[SMU logo]

About the Dismissed Employee's Circumstances

Please indicate the extent to which you agree or disagree:

1. The dismissed employee relied on an expectation of continued employment with the employer.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

2. The possibility of damage to the employee's mental health was considered in deciding whether to dismiss.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

3. The possibility of damage to the employee's reputation in the community was considered in deciding whether to dismiss.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

4. Lack of experience contributed to the poor performance.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

About Communication and Performance Standards

1. The employer had established performance standards.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

2. The employer's performance standards/expectations were contradictory.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

3. Performance standards were enforced consistently.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

4. Performance standards were reasonable and realistic.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

5. The employer communicated performance standards clearly.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

6. The employee's performance had fallen below an objective standard.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

7. The employee received sufficient performance feedback.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

8. The employee received sufficient instruction and support.

1	2	3	4	5	6

Strongly disagree	Disagree	Somewhat disagree	Somewhat agree	Agree	Strongly agree
O	O	O	O	O	O

9. The employee received sufficient training.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

10. The employer represented job security unfairly.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

About Warnings Provided

1. The employee was warned that performance was not meeting standards.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

2. The employee was warned about the consequences of poor performance.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

3. The employee was warned that continued employment was in jeopardy.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

4. The employee was given a reasonable opportunity to improve after a warning.

1 Strongly	2	3 Somewhat	4 Somewhat	5	6 Strongly

disagree	Disagree	disagree	agree	Agree	agree
O	O	O	O	O	O

5. The employee was told what was required to improve.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

6. The employee failed to improve performance after a warning.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

[SMU logo]

About the Dismissed Employee's Performance

1. The employee had performed long, satisfactory service.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

2. The employee's past performance had been exemplary.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

3. The employee had received recent positive feedback.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

4. The employee was learning slowly.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

5. The employee had shown improved performance.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

6. The employee's poor performance was temporary.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

7. There was another explanation for the poor performance.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

8. The employee's performance was NOT worse relative to others.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

About the Seriousness of the Poor Performance

1. The employer suffered actual or potential loss.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

2. The employee's poor performance was serious in the context of his or her overall duties.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

3. Poor performance led to a loss of trust and confidence in the employee's ability to carry out the responsibilities of the position.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

4. The employee did not intentionally perform poorly.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree

O	O	O	O	O	O

5. The employee demonstrated no intent to benefit personally from any of her/his actions.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

About the Dismissed Employee's Working Conditions

1. The employee had recently experienced a serious illness.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

2. The employee had recently experienced a significant change of employment status.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

3. The employee had recently experienced a significant relocation.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

4. The employer had unilaterally changed the employee's conditions of employment.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

5. An attempt was made to accommodate the employee's changing needs.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

[SMU logo]

About Your Organization

1. What is your organization's major product / service? _____

2. How many employees does your organization employ in Canada? _____

3. How many employees at your location? _____

4. Your organization: Yes No

1. Is unionized.
2. Is a branch or subsidiary of a larger company.
3. Has adopted a non-union grievance procedure allowing non-union employees to challenge management decisions.
4. Has had a legal claim filed against it by an employee in the courts or with a government agency (eg. a human rights complaint) in the past two years.
5. Has permanently reduced its workforce over the past two years.

5. What proportion (%) of the workforce:
%

1. Is employed under a collective agreement?
2. Is employed on a part-time or temporary basis?
3. Has worked for the employer for five or more years?
4. Has at least some college or university education?
5. Has your organization dismissed in the past year?
6. Had formal disciplinary action (eg. warning, suspension) recorded in their personnel file in the past year?

Please indicate the extent to which you agree or disagree:

5. A lot of time is involved in reaching and carrying out a decision to dismiss an employee.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

6. An extensive record of inadequate performance is typically required before an employee would be dismissed.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

7. The employer is very committed to avoiding lawsuits / cases by current or former employees.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

8. Labour / employment lawyers in our region are very active in trying to help employees sue their employer.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

9. An employee with a poor absenteeism record is likely to be dismissed.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

10. An employee who is insubordinate to supervisors more than once in the same year is likely to be fired.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

11. We can take a chance in hiring a new employee, since if they do not work out it is relatively easy to terminate their employment.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

12. We expend a great deal of effort to attract and retain the most talented employees available.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

13. How would you describe the strategic focus of your organization?

1 Controlling Costs	2	3	4	5	6 Developing new prod-ucts / ser-vices
O	O	O	O	O	O

14. Over the past two years, how would you describe the demand for your organization's primary product/service.

1 Substantial increase	2	3	4	5	6 Substantial decrease
O	O	O	O	O	O

Substantial increase Substantial decrease

[SMU logo]

About You (for descriptive purposes only)

1. You have been the primary decision maker in a number of dismissals.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

2. You have played a role in making the decision to dismiss by providing recommendations or advice.

1 Strongly disagree	2 Disagree	3 Somewhat disagree	4 Somewhat agree	5 Agree	6 Strongly agree
O	O	O	O	O	O

3. What is your age? _____

4. How many years of full-time work experience do you have? _____

5. How many years of human resources experience do you have? _____

6. How long have you worked for your present employer? _____Years _____months

7. What is your gender?
☐ Male ☐ Female

8. Would you describe your work experience as being primarily:
☐ Union environment
☐ Non-union environment

9. Are you a Certified Human Resource Professional (CHRP)?
☐ Yes ☐ No

10. If no, are you working toward a CHRP?
☐ Yes ☐ No

11. Have you ever been dismissed from a position yourself?
☐ Never been dismissed
☐ Been dismissed at least once

12. What is your level of education?
☐ High school or less

☐ Some college/university
☐ Completed undergraduate
☐ Masters degree or higher

13. What is your present position (pick one)?
☐ Managerial
☐ Consultant
☐ Professional
☐ Administrative / clerical
☐ Other Please specify _____

14. Have you been directly involved in dismissing employees?
☐ Yes ☐ No

15. If yes, how many? _____ dismissals

Appendix F: Consent Form and Invitation to Participate

[SMU logo]

Learning more about Human Resource Management and Employee Dismissal
Jim Grant, Saint Mary's University, Halifax, NS B3H 3C3
Contact: 902-496-8232; jim.grant@smu.ca

I am a doctoral candidate as well as a faculty member in management at Saint Mary's University. As part of my doctoral thesis, I am conducting research on employee dismissal and performance management in Canada under Dr. Terry Wagar. I invite you to participate in my study.

This study involves the management of employee performance and dismissal from the human resource practitioner's perspective. You will be asked about your perceptions of employee performance when dismissal has been the final outcome. For each section, you will find instructions to guide you. If the required figures are not available, your closest approximation is sufficient. The survey should take approximately 20 minutes to complete.

For your participation, you may enter a draw for a gift including an HR association membership, two CHRP recommended HRM texts, as well as two personality profiles. Complete the form at the end of the survey and you will be eligible to win. The draw will take place at the completion of the study. At that time, you may access results at: http://www.smu.ca/academic/sobey/biographies/students/jim-grant.html

Your participation is voluntary and you may withdraw from the study at any time without penalty. All information obtained will be kept strictly confidential. The appropriate actions will be taken to ensure the data is securely stored. To further protect confidentiality, the results will be presented in aggregated form only and no individual participants or responses will be identified.

This research has been reviewed and approved by the Saint Mary's University Research Ethics Board. If you have questions or concerns about the study, you may contact Dr. Veronica Stinson, Chair of the Saint Mary's University Research Ethics Board, at ethics@smu.ca or 420-5728.

By clicking on "CONTINUE", you are indicating that you fully understand the above information and agree to participate in this study. Thank you in advance for your cooperation.

CONTINUE ...

Appendix G: On-Line Experimental Materials – Taylor's Dismissal

Participants received one of eight versions of a vignette that portrays the dismissal of an employee.

The participant instructions were:

Please read the case below and respond to the questions that follow by marking the appropriate box. This is not a test; there are no right or wrong answers. Be sure to answer every question. If you are unsure of an answer your best estimate is fine.

The eight versions of the vignette and the questions they were asked to complete follow below.

A Case of Dismissal

In 1989, National Bulk Sellers (NBS) approached Jack Taylor to work for them. At the time, Taylor had been employed for 25 years at a company which competed with NBS. Taylor told the NBS representative that he was 45 years old and did not want to leave a secure position without some guarantee of job security. The NBS representative assured Taylor that if his performance was satisfactory, he could expect to continue working with NBS until retirement.

Taylor's performance was more than satisfactory as he excelled in all areas of his job. Moreover, for the next 14 years, he was the top salesperson each year. But in 2003, shortly after a review of his performance by the sales manager and general manager, Taylor was fired.

NBS alleged that it had just cause to terminate Taylor because he was unable to perform his duties satisfactorily and, therefore, offered him no severance pay. Nevertheless, Taylor had never been warned that his performance could lead to dismissal.

As a result of the dismissal, Taylor was put in a particularly vulnerable position. He had expected to continue working for NBS until retirement. In addition, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor. These allegations led to emotional problems for Taylor, for which he required extensive psychiatric assistance. He was devastated and depressed. In addition, he was almost 59 years old when he was fired and he had difficulty finding another job.

1. The employer had just and sufficient cause to terminate the employee without notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

2. Given the facts provided, I would have provided the employee with minimal or no notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

3. What, if any, notice period or severance would you have been inclined to provide as expressed in months?

☐ months _____ ☐ no notice at all

4. Taylor's past performance was exemplary.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

5. Taylor was warned about the consequences of poor performance.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

6. The procedure used to dismiss Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

7. The severance pay offered to Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

8. The explanation given to Taylor for the dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

9. Overall, Taylor's dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

A Case of Dismissal

In 1989, National Bulk Sellers (NBS) approached Jack Taylor to work for them. At the time, Taylor had been employed for 25 years at a company which competed with NBS. Taylor told the NBS representative that he was 45 years old and did not want to leave a secure position without some guarantee of job security. The NBS representative assured Taylor that if his performance was satisfactory, he could expect to continue working with NBS until retirement.

Taylor's performance was less than satisfactory, and for the next 14 years, certain aspects of his performance were satisfactory while other areas were frequently deficient. Taylor never achieved better than average sales relative to his co-workers. In 2003, shortly after a review of his performance by the sales manager and general manager, Taylor was fired.

NBS alleged that it had just cause to terminate Taylor because he was unable to perform his duties satisfactorily and, therefore, offered him no severance pay. Nevertheless, Taylor had never been warned that his performance could lead to dismissal.

As a result of the dismissal, Taylor was put in a particularly vulnerable position. He had expected to continue working for NBS until retirement. In addition, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor. These allegations led to emotional problems for Taylor, for which he required extensive psychiatric assistance. He was devastated and depressed. In addition, he was almost 59 years old when he was fired and he had difficulty finding another job.

1. The employer had just and sufficient cause to terminate the employee without notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

2. Given the facts provided, I would have provided the employee with minimal or no notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

3. What, if any, notice period or severance would you have been inclined to provide as expressed in months?

☐ months _____ ☐ no notice at all

4. Taylor's past performance was exemplary.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

5. Taylor was warned about the consequences of poor performance.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

6. The procedure used to dismiss Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

7. The severance pay offered to Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

8. The explanation given to Taylor for the dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

9. Overall, Taylor's dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

A Case of Dismissal

In 1989, National Bulk Sellers (NBS) approached Jack Taylor to work for them. At the time, Taylor had been employed for 25 years at a company which competed with NBS. Taylor told the NBS representative that he was 45 years old and did not want to leave a secure position without some guarantee of job security. The NBS representative assured Taylor that if his performance was satisfactory, he could expect to continue working with NBS until retirement.

Taylor's performance was less than satisfactory, and for the next 14 years, certain aspects of his performance were satisfactory while other areas were frequently deficient. Taylor never achieved better than average sales relative to his co-workers. In 2003, shortly after a review of his performance by the sales manager and general manager, Taylor was fired.

NBS alleged that it had just cause to terminate Taylor because he was unable to perform his duties satisfactorily and, therefore, offered him no severance pay. Moreover, Taylor had been warned that his performance could lead to dismissal.

As a result of the dismissal, Taylor was put in a particularly vulnerable position. He had expected to continue working for NBS until retirement. In addition, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor. These allegations led to emotional problems for Taylor, for which he required extensive psychiatric assistance. He was devastated and depressed. In addition, he was almost 59 years old when he was fired and he had difficulty finding another job.

1. The employer had just and sufficient cause to terminate the employee without notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

2. Given the facts provided, I would have provided the employee with minimal or no notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

3. What, if any, notice period or severance would you have been inclined to provide as expressed in months?

☐ months _____ ☐ no notice at all

4. Taylor's past performance was exemplary.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

5. Taylor was warned about the consequences of poor performance.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

6. The procedure used to dismiss Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

7. The severance pay offered to Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

8. The explanation given to Taylor for the dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

9. Overall, Taylor's dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

A Case of Dismissal

In 1989, National Bulk Sellers (NBS) approached Jack Taylor to work for them. At the time, Taylor had been employed for 25 years at a company which competed with NBS. Taylor told the NBS representative that he was 45 years old and did not want to leave a secure position without some guarantee of job security. The NBS representative assured Taylor that if his performance was satisfactory, he could expect to continue working with NBS until retirement.

Taylor's performance was more than satisfactory as he excelled in all areas of his job. Moreover, for the next 14 years, he was the top salesperson each year. But in 2003, shortly after a review of his performance by the sales manager and general manager, Taylor was fired.

NBS alleged that it had just cause to terminate Taylor because he was unable to perform his duties satisfactorily and, therefore, offered him no severance pay. Moreover, Taylor had been warned that his performance could lead to dismissal.

As a result of the dismissal, Taylor was put in a particularly vulnerable position. He had expected to continue working for NBS until retirement. In addition, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor. These allegations led to emotional problems for Taylor, for which he required extensive psychiatric assistance. He was devastated and depressed. In addition, he was almost 59 years old when he was fired and he had difficulty finding another job.

1. The employer had just and sufficient cause to terminate the employee without notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

2. Given the facts provided, I would have provided the employee with minimal or no notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

3. What, if any, notice period or severance would you have been inclined to provide as expressed in months?

☐ months _____ ☐ no notice at all

4. Taylor's past performance was exemplary.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

5. Taylor was warned about the consequences of poor performance.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

6. The procedure used to dismiss Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

7. The severance pay offered to Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

8. The explanation given to Taylor for the dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

9. Overall, Taylor's dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

A Case of Dismissal

In 1989, National Bulk Sellers (NBS) approached Jill Taylor to work for them. At the time, Taylor had been employed for 25 years at a company which competed with NBS. Taylor told the NBS representative that she was 45 years old and did not want to leave a secure position without some guarantee of job security. The NBS representative assured Taylor that if her performance was satisfactory, she could expect to continue working with NBS until retirement.

Taylor's performance was more than satisfactory as she excelled in all areas of her job. Moreover, for the next 14 years, she was the top salesperson each year. But in 2003, shortly after a review of her performance by the sales manager and general manager, Taylor was fired.

NBS alleged that it had just cause to terminate Taylor because she was unable to perform her duties satisfactorily and, therefore, offered her no severance pay. Nevertheless, Taylor had never been warned that her performance could lead to dismissal.

As a result of the dismissal, Taylor was put in a particularly vulnerable position. She had expected to continue working for NBS until retirement. In addition, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor. These allegations led to emotional problems for Taylor, for which she required extensive psychiatric assistance. She was devastated and depressed. In addition, she was almost 59 years old when she was fired and she had difficulty finding another job.

1. The employer had just and sufficient cause to terminate the employee without notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

2. Given the facts provided, I would have provided the employee with minimal or no notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

3. What, if any, notice period or severance would you have been inclined to provide as expressed in months?

☐ months _____ ☐ no notice at all

4. Taylor's past performance was exemplary.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

5. Taylor was warned about the consequences of poor performance.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

6. The procedure used to dismiss Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

7. The severance pay offered to Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

8. The explanation given to Taylor for the dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

9. Overall, Taylor's dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

A Case of Dismissal

In 1989, National Bulk Sellers (NBS) approached Jill Taylor to work for them. At the time, Taylor had been employed for 25 years at a company which competed with NBS. Taylor told the NBS representative that she was 45 years old and did not want to leave a secure position without some guarantee of job security. The NBS representative assured Taylor that if her performance was satisfactory, she could expect to continue working with NBS until retirement.

Taylor's performance was less than satisfactory, and for the next 14 years, certain aspects of her performance were satisfactory while other areas were frequently deficient. Taylor never achieved better than average sales relative to her co-workers. In 2003, shortly after a review of her performance by the sales manager and general manager, Taylor was fired.

NBS alleged that it had just cause to terminate Taylor because she was unable to perform her duties satisfactorily and, therefore, offered her no severance pay. Nevertheless, Taylor had never been warned that her performance could lead to dismissal.

As a result of the dismissal, Taylor was put in a particularly vulnerable position. She had expected to continue working for NBS until retirement. In addition, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor. These allegations led to emotional problems for Taylor, for which she required extensive psychiatric assistance. She was devastated and depressed. In addition, she was almost 59 years old when she was fired and she had difficulty finding another job.

1. The employer had just and sufficient cause to terminate the employee without notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

2. Given the facts provided, I would have provided the employee with minimal or no notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

3. What, if any, notice period or severance would you have been inclined to provide as expressed in months?

☐ months _____ ☐ no notice at all

4. Taylor's past performance was exemplary.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

5. Taylor was warned about the consequences of poor performance.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

6. The procedure used to dismiss Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

7. The severance pay offered to Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

8. The explanation given to Taylor for the dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

9. Overall, Taylor's dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

A Case of Dismissal

In 1989, National Bulk Sellers (NBS) approached Jill Taylor to work for them. At the time, Taylor had been employed for 25 years at a company which competed with NBS. Taylor told the NBS representative that she was 45 years old and did not want to leave a secure position without some guarantee of job security. The NBS representative assured Taylor that if her performance was satisfactory, she could expect to continue working with NBS until retirement.

Taylor's performance was less than satisfactory, and for the next 14 years, certain aspects of her performance were satisfactory while other areas were frequently deficient. Taylor never achieved better than average sales relative to her co-workers. In 2003, shortly after a review of her performance by the sales manager and general manager, Taylor was fired.

NBS alleged that it had just cause to terminate Taylor because she was unable to perform her duties satisfactorily and, therefore, offered her no severance pay. Moreover, Taylor had been warned that her performance could lead to dismissal.

As a result of the dismissal, Taylor was put in a particularly vulnerable position. She had expected to continue working for NBS until retirement. In addition, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor. These allegations led to emotional problems for Taylor, for which she required extensive psychiatric assistance. She was devastated and depressed. In addition, she was almost 59 years old when she was fired and she had difficulty finding another job.

1. The employer had just and sufficient cause to terminate the employee without notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

2. Given the facts provided, I would have provided the employee with minimal or no notice.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

3. What, if any, notice period or severance would you have been inclined to provide as expressed in months?

☐ months _____ ☐ no notice at all

4. Taylor's past performance was exemplary.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

5. Taylor was warned about the consequences of poor performance.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

6. The procedure used to dismiss Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

7. The severance pay offered to Taylor was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

8. The explanation given to Taylor for the dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

9. Overall, Taylor's dismissal was fair.

1	2	3	4	5	6
Strongly Disagree					Strongly Agree

Appendix H: Debriefing Notes for Experimental Materials - Taylor's Dismissal

A Case of Dismissal

In 1989, National Bulk Sellers (NBS) approached Jack (Jill) Taylor to work for them. At the time, Taylor had been employed for 25 years at a company which competed with NBS. But he (she) told the NBS representative that he (she) was 45 years old and did not want to leave a secure position without some guarantee of job security. The NBS representative assured Taylor that if his (her) performance was satisfactory, he (she) could expect to continue working with NBS until retirement.

Taylor's performance was more than satisfactory as he (she) excelled in all areas of his (her) job. Moreover, for the next fourteen years, he (she) was the NBS top salesperson in each year. But in 2003, shortly after a review of his (her) performance work by the sales manager and general manager, Taylor was fired.

(Taylor's performance was less than satisfactory, and for the next fourteen years, certain aspects of his (her) performance were satisfactory while other areas were frequently deficient. Taylor never achieved better than average sales relative to his (her) co-workers at NBS. In 2003, shortly after a review of his (her) performance by the sales manager and general manager, Taylor was fired.)

NBS alleged that it had just cause to terminate Taylor because he (she) was unable to perform his (her) duties satisfactorily and, therefore, offered him (her) no severance pay. Nevertheless, Taylor had never been warned that his (her) poor performance could lead to dismissal.

(NBS alleged that it had just cause to terminate Taylor because he (she) was unable to perform his (her) duties satisfactorily and, therefore, offered him (her) no severance pay. Moreover, Taylor had been warned that his (her) poor performance could lead to dismissal.)

As a result of the dismissal, Taylor had been put in a particularly vulnerable position. He (She) had expected to continue working for NBS until his (her) retirement. In addition, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor. These allegations led to emotional problems for Taylor, for which he (she) required extensive psychiatric assistance. He (She) was devastated and depressed. In addition, he (she) was almost 59 years old when he (she) was fired and he (she) had difficulty finding another job.

(As a result of the dismissal, Taylor had been put in a particularly vulnerable position. He had expected to continue working for NBS until his retirement. Although, NBS continued to maintain that it had just and sufficient cause to dismiss Taylor, he was able to accept that his dismissal was just a normal part of work today. He was, therefore, able to move on with his life and regained his positive mental attitude. Nevertheless, he (she)

was almost 59 years old when he (she) was fired and he (she) had difficulty finding another job.)

***Wallace v. United Grain Growers Ltd.*, 1997**

This simulated dismissal was based on the Supreme Court of Canada (SCC) appeal of Jack Wallace. The SCC found that the trial judge had the discretion to extend the notice to which Wallace was entitled – damages that have come to be known as "Wallace damages" – because "employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal." The employer's bad faith conduct and unfair dealing led to an injury to Wallace in the manner of humiliation, embarrassment, and damage to his sense of self-worth, which, the court held, should be compensated even if the injury hadn't led to the employee's inability to find new employment.

Even though Wallace had been the top salesperson for each of the 13 years he had been employed by the defendant, he was summarily discharged without explanation and subsequently suffered emotional difficulties forcing him to seek psychiatric help. In its judgement, the SCC restored the trial judge's award of 24 months notice, which the lower appeal court had reduced to 15, in part because Wallace had been induced to leave previous secure employment but in particular because the employer had been "untruthful, misleading and unduly insensitive." During the course of dismissal, employers should be, "candid, reasonable, honest and forthright."

The Simulated Dismissal

The purpose of this study is to investigate the attitudes of human resource (HR) practitioners with respect to perceptions of justice and fairness in the simulated dismissal of non-union employees. Non-union employees are protected by a labrynth of statute and common laws but, in particlular, the common law of wrongful dismissal is the last word on the rights and wrongs of the employment contract in Canada. Nevertheless, non-union employees may be guided more by their perception of fairness and justice in the employment relationship, what Rousseau (1995) has referred to as the psychological contract, than by the law. In this study, we hope to identify the relationship of perceptions of organizational justice and HR practitioners' propensity to dismiss and to take legal action to the employer and employee behaviour in a simulated dismissal scenario.

The manipulations of the variables of interest are presented above in brackets. In this scenario (the dismissed employee is Taylor) the manipulations include the sex of the employee portrayed, the employee's performance, whether the employer provided a warning of the possibility of dismissal, and whether the employee was psychologically vulnerable. Each participant received one of 16 possible variations of this scenario but will not know what, if any, material in the case has been altered relative to other participants. You were asked to respond to a series of items for each scenario, which include items related to whether there existed cause for dismissal and your propensity to take legal action, as well as items related to the fairness of the dismissal.

In the past, we have found that the sex of employees in real world dismissal cases as well as in simulated dismissal studies can explain a significant proportion of the variation in responses. Female respondents have been less likely to be willing to pursue legal action in simulated dismissals but, nevertheless, more likely to be successful in their actual court proceedings for wrongful dismissal.

Three general hypotheses, in addition to other more specific ones, are being explored. First, it is hypothesized that an employee's previous exemplary performance will decrease the likelihood of HR practitioners perceiving that the employer had just and sufficient cause to dismiss and increase the likelihood that the respondent will be willing to pursue legal action.

Second, the provision of a warning that the employee's failure to reach a standard of employment would result in dismissal should significantly increase the likelihood that the employer had just and sufficient cause to dismiss and would decrease the likelihood the respondent would be willing to take legal action against the employer. Finally, the psychological vulnerability of the dismissed employee will lead to a decreased likelihood that dismissal was for just cause and a greater likelihood that the respondent would be willing to take legal action.

Appendix I: Occupational Status Code

Level 5
senior management
business / general manager

Level 4
principal (of a small private school)
professional (hodge-podge - insurance broker to social worker to engineer)
sales manager
manager

Level 3
shift foreman / supervisor
health technologist
bar manager
computer consultant
head greenskeeper
negotiator / sales

Level 2
skilled clerical (eg accounting clerk)
skilled labour / technical (automotive technician, horse trainer, electrician, etc.)
salesperson

Level 1
bar tender
clerical
nanny/housekeeper

Saint Mary's University
Halifax, Nova Scotia
Canada B3H 3C3

Patrick Power Library
tel 902.420.5534
fax 902.420.5561
web www.stmarys.ca

Research Ethics Board Certificate Notice

The Saint Mary's University Research Ethics Board has issued an REB certificate related to this thesis. The certificate number is: 07-071

A copy of the certificate is on file at:

Saint Mary's University, Archives
Patrick Power Library
Halifax, NS
B3H 3C3

Email: archives@smu.ca
Phone: 902-420-5508
Fax: 902-420-5561

For more information on the issuing of REB certificates, you can contact the Research Ethics Board at 902-420-5728/ ethics@smu.ca .