

CHAPTER VII

RAMIFICATIONS OF BACK-PAY AWARDS IN SUSPENSION AND DISCHARGE CASES

I. RAMIFICATIONS OF BACK-PAY AWARDS IN DISCHARGE CASES

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Problems of back-pay awards in discharge cases stem, of course, from the concept of "just cause"; that is, if an employee is unjustly discharged, he is entitled to reinstatement to his job with full seniority and other benefits, and he must be made whole for the monies lost while separated from his job. The just-cause concept is a mixture of ideas borrowed from contract law, criminal law, and especially modern personnel management.

It is interesting to note that the reinstatement element of the just-cause concept is unique to our system of industrial relations. In most West European countries, for example, if it is found that discharge is not for cause—and this is generally done through a labor court—the individual is entitled to damages but not to reinstatement. The only exception found in some countries is when the individual is discharged for union activity. The basis for damages is breach of the individual's employment contract. Minimum and maximum damages to be awarded are usually set by law, with the actual amount determined by length of service and rate of pay. Underlying this approach is the premise that an employer should not be required to retain an employee whom the employer finds undesirable.¹

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¹ See, for example, Frederic Meyers, "Job Reinstatement: France and the United States," *Industrial Relations*, 2 (May 1963). See also Seyfarth, Shaw, Fairweather,

One should not assume that because other systems do not provide for reinstatement and because the damages assessed are not excessive, employers frequently utilize discharge action. Quite the contrary. Most West European employers are reluctant to impose the discharge penalty for a variety of reasons. American unions insisted upon reinstatement as part of the remedy because of an opposite approach among American employers; the discharge rate of many American firms prior to the rise of mass unionism in the 1930's was very high. In addition, the nature of American unions with their emphasis upon job security made it impossible for them to accept a system which did not provide for reinstatement.

Because the American system does provide for reinstatement, a host of problems are created which are not found in other industrial relations systems. Some of these problems concern the maintenance of discipline in the plant: that is, what is the effect upon the discharged employee's behavior when he is reinstated, and what is the impact upon the behavior of other employees? Certainly, as we know, employers often urge that there will be an adverse effect upon plant discipline if an employee is returned to work. Another problem is the impact of reinstatement upon the management-union relationship. There are many facets to this problem, but an important one is certainly the influence which the possibility of reinstatement may have upon the strategies of the parties in dealing with discharge cases. Clearly involved in all of this is whether the employee is reinstated with no back pay, partial back pay, or full back pay. Thus, the appropriate remedy involves many considerations apart from the problem—and this is a not inconsiderable one—of determining the actual amount of back pay if such is awarded. It is my intention to focus upon the first two problems raised, with some attention to the third.

The problems associated with reinstatement are problems which we cannot ignore. Arbitrators have played an important role in shaping industrial discipline in this country. We have insisted

and Geraldson, *Labor Relations and the Law in the United Kingdom and the United States* (Ann Arbor: Bureau of Business Research, University of Michigan, 1968). This is the first volume of a six-volume study to be published by the Program in International Business of the Graduate School of Business Administration, University of Michigan. Later volumes will deal with Belgium, West Germany, France, Italy, and Spain.

upon due process and the corrective approach for the individual. But we also must be concerned with the impact of our actions upon the discipline and morale of other employees as part of the total disciplinary system, and one does not have to embrace the views of Justice Douglas to take such a position. It is my belief that arbitrators are concerned with this problem in spite of many accusations to the contrary. That this is so is evident in many decisions, sometimes explicit but more often implicit. I also suspect that most of us, for this reason, at one time or another have wished that we could award back pay without reinstatement! It may very well be that such a remedy is the appropriate one in some cases, but I have yet to hear of the arbitrator who has been so innovative—or should I say fearless?

The Discharge Problem in Statistical Perspective

Before proceeding to discuss the implications of reinstatement and back pay upon the individual and the work group, it may be helpful to place the discharge problem in statistical perspective. Table I presents the discharge cases reported in Volumes 40-49 of BNA's *Labor Arbitration Reports*. Because discharge and discipline cases still constitute the largest single category of cases arbitrated—some 25 percent—and only a small percentage can be reported, the usual caveat that the reported cases may not be representative is in order. It may even have more validity in this instance because there is some evidence to indicate that if all discharge cases were reported, the percentage of cases in which the discharge penalty was upheld would be greater than the 46 percent indicated in Table I.² This figure represents, nevertheless, an increase of 2 percentage points over the 1956-1960 period as reported by John Teele and is about the same as the 1951-1956 period as reported by Fred Holly to the Academy in 1957.³

²The author was informed by Joseph Murphy, Vice President, American Arbitration Association, that many of the cases in which discharge is upheld are not reported because they are "run of the mill" cases; that is, cases which present no unusual issues or circumstances.

³The table is reproduced from John W. Teele, "The Thought Processes of the Arbitrator," *Arbitration Journal*, 17:2 (1962), p. 87. The Holly report referred to is found in *Critical Issues in Labor Arbitration*, Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators, Jean T. McKelvey, ed. (Washington: BNA Books, 1957), pp. 1-17.

Table I
DISCHARGE CASES, 1963-1967 ¹

	Total cases	Discharge upheld	Reinstatement ordered	With full back pay	Partial back pay	Without back pay
Quit or Discharge	35	15	20	6	8	6
Strike Activity, Slowdown	84	50	34	4	7	23
Refusal to Accept Job Assignment	42	19	23	5	6	12
Plant Rules Generally	42	17	25	9	4	12
Physical or Mental Disability	27	9	18	7	6	5
Loafing, Leaving Work	30	15	15	3	7	5
Intoxication	21	10	11	1	3	7
Insubordination	79	32	47	13	14	20
Incompetence, Negligence, Low Production	47	15	32	13	8	11
Gambling	8	4	4	2	0	2
Theft	42	15	27	12	3	12
Falsification of Records	36	20	16	4	3	9
Disloyalty, Moonlighting	15	10	5	2	1	2
Dishonesty	16	5	11	3	4	4
Horseplay	11	5	6	0	2	4
Criminal Prosecution or Conviction	7	2	5	0	1	4
Fighting, Troublemaking	45	16	29	4	7	18

Table I—Contd.

	Total cases	Discharge upheld	Reinstatement ordered	With full back pay	Partial back pay	With out back pay
Tardiness	6	4	2	1	1	0
Absenteeism	91	55	36	11	8	17
Miscellaneous	49	20	29	14	3	12
Total	733	338	395	114	96	185
Total (excluding multiple counts) ²	665	307	358	104	82	172
Total (excluding multiple counts—by percent)	100.0	46.2	53.8	15.6	12.3	25.9
Total of Reinstatement cases by percent			100.0	29.1	22.9	48.0

¹ Source: The Bureau of National Affairs, Inc., *Labor Arbitration Reports*, Vols. 40-49, March 1963—February 1968.

² These figures represent the absolute number of cases judged. In contrast to the "total" category these figures take into account the fact that some discharges were for more than one charge.

It should also be noted that the number of cases in which the penalty was completely revoked, i.e., where full back pay was awarded, has declined substantially. This is also true of the cases in which partial back pay was awarded. The decline in these categories has been absorbed, as noted, to a slight extent by the upheld category and more substantially by the reinstatement-without-back-pay category. This type of award now accounts for 26 percent of all cases and approximately half, 48 percent, of those cases in which reinstatement is ordered.

Percent of cases in which:	Holly Figures		Teele Figures
	1942-1951	1951-1956	1956-1960
Management sustained	39.4%	45.4%	44%
Penalty revoked	26.2%	22.2%	24%
Penalty reduced	34.4%	32.4%	32%
	100 %	100 %	100%

Discharge for absenteeism accounts for the largest number of cases by type of offense, followed closely by strike activity and insubordination. Next in importance, with an almost equal number of cases reported, are incompetence (including negligence and low production), refusal to accept job assignments, and fighting. If refusal to accept job assignments is considered a form of insubordination and is included with that group, then insubordination becomes the largest category.⁴

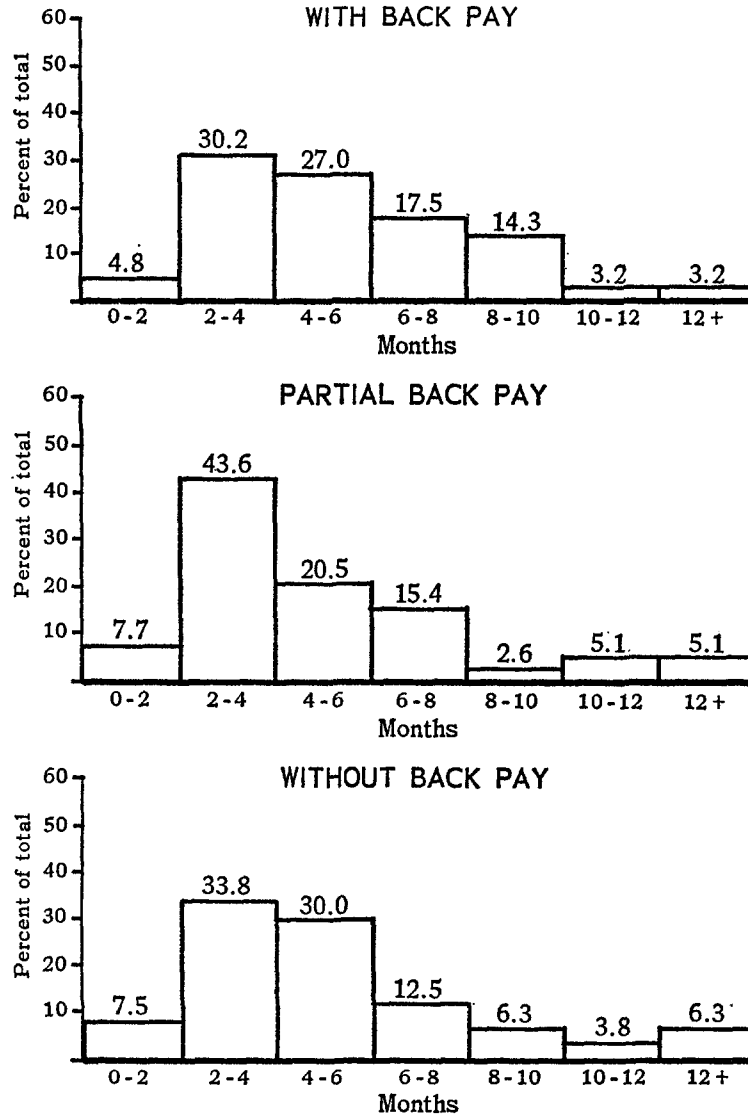
Figure I provides information concerning the amount of time required to hear and decide a case after discharge. The award is rendered in some 70 percent of the cases within six months; the average for all cases is a little over four months. It is interesting to note, however, that most partial-back-pay awards are rendered within a three- to four-month period. One cannot escape the conclusion that the probability of a partial-back-pay award is somewhat greater if the case is heard soon after discharge.⁵

This statistical information also gives us insight into the strategy of processing discharge cases. There is no doubt that management is more carefully screening the cases which go to the arbitrator. Not only are 46 percent of the cases decided fully in management's favor, but another 26 percent result in reinstatement without back pay. These may be termed borderline cases. It is only in certain areas that management is likely to be reversed wholly or in part—fighting, insubordination, theft, and incompetence. This comes about in fighting and insubordination cases because management views these offenses as greater threats to organizational stability than do most arbitrators. Theft and incompetence cases generally require a high degree of proof, and that proof is not always easy to obtain. Thus, reversals in these areas are more common than in others. Clearly, however, the typical case before the arbitrator today is not one of guilt as such, but is one dealing with the reason-

⁴ There has been a considerable increase in the number of absentee cases over the past 10 years. One can query whether this is due to the "affluent society."

⁵ Occasionally one hears the charge that a company has delayed the proceedings because of the reluctance of arbitrators to award large sums in back pay; thus, even if the arbitrator reinstates the employee, it will be without back pay. This charge is difficult to prove or disprove. Although, as noted, there appears to be more likelihood of a partial-pay award if the case is heard soon after the disciplinary action, Figure I also indicates that arbitrators are not reluctant to award large amounts of back pay when necessary. The most that can be said is that some cases in which no back pay was awarded might have carried partial-back-pay awards if heard sooner. See below for further discussion of this matter.

Figure I
 TIME REQUIRED TO HEAR AND DECIDE DISCHARGE CASES¹



¹Source: Bureau of National Affairs, *Labor Arbitration Reports*, Vols. 40-49, March 1963-Feb. 1968.

ableness of the penalty in terms of the offense committed. The appropriate remedy thus becomes the critical decision that the arbitrator has to make.

Effect of Reinstatement on Employee's Behavior

The question which we now examine is: What is the effect of reinstatement upon the individual's behavior? There are two research studies of this matter which we can use in seeking an answer to the question. The first is a questionnaire study by Arthur Ross, the results of which were reported to the Academy in 1957.⁶

Ross set out to answer the question of what happens to the individual after reinstatement. Did he stay with the company? Did he become a satisfactory employee? Ross also obtained information on such matters as seniority status at the time of the discharge, grounds for discharge, and terms of reinstatement (no back pay, partial back pay, or full back pay).⁷ In statistical terms, Ross found of the 123 employees about whom information was received, 63 were still working for the company and 65 percent of them were considered to be satisfactory employees by their employers (a slightly higher percentage by their supervisors), and most in this group had made normal occupational advancement. Subsequent disciplinary history was obtained for only 97 of the employees. Of these, 67, or 70 percent, had presented no further problems. With respect to the others, 12 never returned to work (these are part of the 27 for whom no subsequent record was reported), 23 had quit, 8 had retired or passed away, and 15 were discharged a second time, 4 for the same offense.

At the time Ross reported his findings, I had just started an interview study of the same general problem.⁸ In addition to learning what happened to the individual, I was interested in discovering, among other things, the impact of reinstatement upon the discipline and productivity of the work group, the impact upon the

⁶ Arthur M. Ross, "The Arbitration of Discharge Cases: What Happens after Reinstatement," *Critical Issues in Labor Arbitration*, pp. 21-56.

⁷ Ross found that a large number of the discharged workers were low-seniority employees; 28 percent had less than two years' seniority, and another 23 percent had from three to five years. *Id.*, p. 29.

⁸ Dallas L. Jones, *Arbitration and Industrial Discipline* (Ann Arbor: Bureau of Industrial Relations, University of Michigan, 1961).

disciplinary system, and the impact upon the union and management organizations. I studied in considerable depth 19 cases in two companies.

Statistically, my results were similar to those of Ross. Fourteen of the 19 reinstated employees were still working for the company. Of these, three were considered below average in terms of performance and they were so rated before discharge; three were considered better employees after reinstatement, and the remainder were rated the same as before discharge, average or above. (It should be noted that six were considered very good employees at the time they were discharged and remained so after reinstatement; in all but one case, these employees were discharged for improper union activity.) With respect to those employees who were no longer employed, one never returned to work and three had been discharged a second time, two for the same offense. Some time after the study was completed, I learned that another employee had quit and another had been discharged, again for the same offense.

The results of these studies indicate that the factors which determine whether an employee will return to work are seniority and the terms of reinstatement. Regardless of the terms of reinstatement, the long-service employee is likely to return to work. Not only may it be more difficult for him to find other work because of age, but he also has a considerable stake in resuming his employment because of vacation, pension, and other benefits. The short-service employee, on the other hand, is not likely to return to his job if he has found comparable employment and no back pay is awarded. He realizes that he has a black mark on his record which only time can eradicate, and the slightest slip on his part might lead to additional disciplinary action. If he has found other employment and is awarded back pay, he frequently returns to work only long enough to receive his pay and then quits.

(These results raise some interesting back-pay questions. Is the employee who is reinstated without back pay entitled to vacation benefits even though he does not return to work? Should the payment of back pay be conditioned upon continued employment for some period of time? There is some merit in such an approach, although the very substantial argument can be advanced that the employee is entitled to the back pay because of the injustice that was committed.)

Whether the employee remains at work after reinstatement and becomes a satisfactory employee appears to depend upon four factors: the nature of the offense, the employee's prior performance record, the terms of reinstatement, and the method used in returning the employee to work. Many of the cases in which employees were discharged a second time involved such offenses as absenteeism—offenses for which corrective discipline was used. This indicates that there is a problem which discipline will not affect. On the other hand, many of the employees who were discharged for offenses such as insubordination and strike activity had good records prior to discharge, and they usually continued to be good employees after reinstatement, especially when no back pay was awarded. In other words, these are offenses which often spring from emotional upset and are not likely to be repeated.

This is not so often true, however, when the employee has a poor prior record and/or is awarded full or partial back pay. When this combination of factors occurs, it can lead to a feeling of "victory" on the part of the employee that can cause trouble in the future. This is especially so when an employee who was discharged for insubordination is placed upon his return to work under the supervisor who discharged him or who recommended he be discharged.

The arbitrator has little control, of course, over the assignment of the employee upon his return to work. Neither does he have control over another factor of great importance: the manner in which the employee is returned to work. If the employee is simply told to report for work at a certain time without any explanation of where he stands and what is expected of him, he is more likely to get into further trouble than if he receives constructive help from company and union officials. This is an important aspect to reinstatement that is often overlooked by the parties.

Effect of Reinstatement on Other Employees

There is little evidence that reinstatement, in most instances, results in a deterioration of the performance or discipline of other employees. This results in part because other disciplinary actions, including discharges, are sustained. It is clear, however, from the comments of many fellow workers that the reinstated employee was

considered "lucky" by them; that is, he did not lose his job. The implication here, of course, is that one might not be so fortunate as the other fellow if the same offense is committed. And again, it should be noted, in only a small percentage of the cases is the employee found "not guilty" in the sense that full back pay is awarded. Most cases involve a determination of the reasonableness of the penalty rather than a finding of guilt. Most employees recognize this, and only rarely do they take the position that no discipline should have been levied. Employees have a greater sense of fair play than is often assumed.

It is only when the work group believes that the discipline was unjustified or the offense was committed against the work group or a member of it, that reinstatement affects discipline. An example of perceived unjust disciplinary action is when a company discharges several employees for falsification of their application forms after several years of employment. Examples of the second type are when an employee attacks another employee without provocation or takes actions which lower production when a group incentive is involved. The former is a type of case for which the company must bear full responsibility, but in the latter, should the arbitrator take into account the effect that reinstatement might have? He should do so in fashioning his remedy if we accept the premise advanced earlier.

Arbitral Reasoning in Reinstatement

There can be no doubt, from the data presented, that an arbitral decision reinstating an employee can have unexpected results in terms of both the individual and the work group. The arbitrator's first concern must be to see that the individual receives justice; if he finds that the individual has been unjustly treated, then he must take appropriate action. But one can question how well we have been meeting the problem of insuring justice to the individual as well as dealing with the other problems.

A reading of many arbitral decisions gives one cause to ponder the reasoning which led to the award. One cannot escape the conviction that in many cases of reinstatement without back pay, the basis for reinstating the individual to work was simply the arbitrator's belief, based upon some unknown standard of fair play, that

the individual should have another chance and that such a decision will seemingly harm no one. One can also query the formula used in partial-back-pay cases. Why, for example, should a three-month layoff with one month of back pay be ordered?

Perhaps the best studies of arbitral reasoning in this area are those of John Teele.⁹ He made a study of 50 discharge cases; 30 were cases in which the discharged individuals were reinstated without back pay, which he called "equated penalty" cases, and 20 involved partial back pay, called "differential penalty" cases. It was his conclusion from an analysis of these awards that the penalties in the "equated penalty" cases were much too severe as compared to the "differential penalty" cases. Thus, for what appeared to be similar offenses under similar circumstances, the penalties ranged from a few days to several months. Teele suggests that this result may spring from the arbitrator's reluctance to make a value judgment.¹⁰

Teele's conclusion may be correct, but another argument can be presented. The arbitrator may also be concerned with what happens after reinstatement as well as with what might be called "absolute" justice. The corrective approach involves a judgment as to whether the discharged individual will be a useful employee after reinstatement. The studies cited indicate that this is less likely to be true if large amounts of back pay are awarded. Moreover, the corrective approach, at least in theory, does not require that penalties be equal; the penalty should be one that will correct the individual's behavior. The arbitrator may also be concerned with the impact of the reinstatement on the work group. Perhaps the arbitrator gets a "feel" at the hearing and acts accordingly. Such a judgment would be difficult to express in words, and this may be why we find so many awards that simply state without explanation that "the grievant shall be returned to work with full seniority and other benefits but without back pay."

It would seem that this approach, even though based upon intuition, has been fairly successful when measured by what happens after reinstatement. On the other hand, we have little to congratu-

⁹ In addition to the article cited at note 3, see also John W. Teele, "But No Back Pay Is Awarded," *Arbitration Journal*, 19:2 (1964), pp. 103-113.

¹⁰ *Id.*, pp. 108-109.

late ourselves about if the award without back pay is based upon the easy way out or simply upon a time element. Even though the results may appear satisfactory, such an approach does little to enhance the arbitration profession, nor does it provide justice for the individual.

The need for research in this area is clear. It is strange that so little has been done. We need to know more concerning the thought processes of the arbitrator. Research into present procedures in discipline cases might lead to innovation in these procedures which could better insure that justice is done the individual as well as permit greater consideration of the total problem. There are many other facets of the problem which have to be explored if we are to do our job well. Let us hope that a beginning will be made soon.

II. RAMIFICATIONS OF BACK PAY IN SUSPENSION AND DISCHARGE CASES

PATRICK J. FISHER *

The title of this discussion is "Ramifications of Back Pay in Suspension and Discharge Cases." As far as your speaker is concerned, it is appropriate to place the accent on the ram. It could be said that he got rammed into this. From the viewpoint of some of the guests who will be here tomorrow, they might consider harpoon to be a better word.

Perhaps it should be pointed out that back pay can have ramifications in other than suspension and discharge cases. Don't you think that back pay could apply in cases relating to failure to grant overtime, layoff out of seniority, and refusal to recall? Although one memorable case was in the last category, I'll forgo the advantage over this captive audience and restrict my comments to the area designated by the program committee—suspension and discharge cases.

It is expected that all of you will participate in this discussion. It is not a lecture course. I don't know that we have any answers. However, we do have some questions.

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