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The Law of Dismissal (Second Edition)

Howard A. Levitt

Aurora, Ont.: Canada Law Book, 1992, 579 pp.

Reviewed by Christopher Spiteri*

The rapidly changing face of Canada's corporate culture coupled with a multiplicity of judicial approaches has resulted in a state of confusion surrounding the law of employment in Canada. Howard Levitt's second edition of *The Law of Dismissal in Canada*,¹ clears the confusion and crystallizes the law as it stands today. In one volume, Levitt analyzes recent employment case law, statutory developments, as well as protective strategies for employers and employees. For students and practitioners alike, *The Law of Dismissal* is an authoritative and practical discussion of employment law that will prove to be an invaluable resource.

Given the number of decisions and developments since Levitt's first edition, an updated book was urgently needed. Accordingly, Levitt has improved upon the first edition by updating case law to 1991, and including areas of employment law not previously explored.

The additional two hundred pages provide a more comprehensive analysis of the state of employment law in Canada. For example, a new area of discussion is a chapter on federal jurisdiction employees. With the exception of Levitt's discussion of the basic principles of employment law, to which there has been little change, every chapter includes new discussion on related topics.

Levitt's revised discussion of mitigation of damages, which has evolved rapidly since the first edition, is of particular note. While most areas are addressed quite thoroughly, however, this newer edition offers little guidance in timely human rights issues. Still, Levitt's second edition remains the most comprehensive examination of employment law in Canada.

Levitt first introduces the reader to conventional principles of employment

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¹ H.A. Levitt, *The Law of Dismissal in Canada* (Aurora, Ont.: Canada Law Book, 1992) [hereinafter *The Law of Dismissal*].

law. He outlines the various “control tests” that the courts use to establish an individual’s status within the employment relationship. He then eases the reader into a conceptual understanding of the world of employment law by exploring fundamental concepts such as the different classes of employees, the parameters of the employment relationship, as well as the basic statutory framework that governs non-unionized employees. Levitt lays the foundation for both the experienced and inexperienced student of employment law, ensuring that the reader has an understanding of the field before focusing the discussion on the law of dismissal. The point of departure for the book is the consolidation of judicial approaches to termination of employment.

In the absence of cause, employers may find themselves faced with a wrongful dismissal action. Levitt explores this area of employment law at great length: he outlines the tests courts have used to establish cause; highlights the different types of employee behaviour that justify dismissal; and examines employer conduct that can negate the right to dismiss. Levitt also discusses the length of notice required to dismiss an employee, the quantum of damages that can be sought, the employee’s duty to mitigate, and the rights of the employer.

Levitt’s discussion of the realm of dismissal brings together a world which desperately needed visitation. Addressing a series of issues which are faced daily, the reader is provided with a picture of what courts expect of both employers and employees.

Levitt surmises events to which most readers will have been exposed at some time. In this way, the book does not lose its flavour, but, rather, makes the subject matter tangible. The discussion covers reasons for dismissal that include, but are not restricted to, an employee’s refusal to perform unsafe work, fraud and dishonesty, willful disobedience, incompetence, absenteeism, and tardiness.

The analysis covers the vast spectrum of dismissal. Perhaps because of the myriad of reasons that can vilify the discharge of an employee, however, a few grounds for dismissal are examined too summarily. Most noteworthy, given the mounting problems, interest, and litigation that surrounds the issue of sexual harassment, it is ironic that Levitt devotes a mere six lines to the subject. At a time when employers are increasingly faced with wrongful dismissal actions and human rights complaints for ignoring allegations of sexual harassment expeditiously or properly, Levitt’s analysis of this area is superficial at best. Analysis of this theme was equally cursory in his first edition; it is interesting to note, however, that in the earlier edition, Levitt’s discussion centred on the victim’s perspective – highlighting the possibility of wrongful dismissal actions where sexual harassment is alleged by the dismissed employee. In the second edition, Levitt approaches the area from the perspective of the employee

dismissed because of sexual harassment allegations raised against him or her. Unfortunately, neither edition of Levitt's "employment handbook" offers substantial assistance to the accused employee, the complainant, or the employer where an allegation of sexual harassment has been raised.

The same criticism can be made of the analysis of types of employer's actions which make the conditions of employment intolerable. At the time of writing Levitt could not have anticipated the recent proposed changes to Unemployment Insurance legislation which deny benefits to employees who quit their jobs without justification. Nevertheless, the cursory analysis is of little value to employees who resign because of conditions made unbearable by their employer. A deeper analysis would prove useful to such employees, particularly those who are adversely affected by the new legislation. Had Levitt contemplated such draconian legislation he might have conducted a more in-depth analysis of this issue. Fortunately, perfunctory analysis is mostly limited to these points of discussion.

The issue of notice is examined at great length. Levitt details courts' considerations with regard to reasonable notice. This section will prove most helpful to the practitioner because of the forty-five page flow chart analysis that is included. This flow chart, highlighting several hundred decisions, compares dismissed employees' positions, ages, salaries and lengths of service to judicial findings of what constitutes appropriate notice.

Levitt has also undertaken a comprehensive discussion of damage awards. Here no stone is left unturned. It would have been impossible to scrutinize the numerous quantum of damages awards of the courts. Accordingly, any reader wishing to find such statistical chronicle will be disappointed. More appropriately, Levitt walks the reader through the numerous factors which courts consider when awarding damages.

The discussion of mitigation is the most praiseworthy chapter in his book. In one chapter, Levitt reviews an area of the law which, thus far, has only received perfunctory consideration in many other legal texts. Because of the numerous changes since his first edition, Levitt doubles his attention to the subject in this edition. It is clear that there is no concise formula by which courts determine whether a wrongfully discharged employee has effectively mitigated his or her damages. Accordingly, Levitt enumerates the guidelines which courts have established to determine whether an employee has properly discharged his or her duty to mitigate damages. This section may well prove to be the most helpful chapter in the book given the increasing number of employees who attempt to mitigate by setting up their own businesses. Unfortunately, Levitt does not address the timely issue of whether a return to school constitutes mitigation of damages. In fairness, however, very little case

law exists on this issue.

In the final chapters of the book, employers and employees alike will find helpful suggestions, where the author outlines strategies for strengthening their respective positions within the employment relationship. Employees should consider eighteen listed elements to protect themselves in the event of dismissal. These range from soliciting reasons for the discharge to procuring witnesses. In the event of a wrongful dismissal action, these recommendations will prove helpful. Conversely, employers will find a detailed list of procedures which could insulate them from an adverse wrongful dismissal judgment. These suggestions highlight the procedural fairness which must be followed when dismissing an employee as well as tactical strategies which should be considered during litigation.

As in the first edition, Levitt ends his discussion with a chapter designed specifically to assist practitioners as they manage a wrongful dismissal action. Beginning with a brief discussion of the elements that must be raised in pleadings, Levitt points out the various legal issues that can arise during the litigation process. This section promises to be an invaluable checklist for lawyers as they work through the stages of a wrongful dismissal action.

The book's title does little justice to its contents. Far from being concerned solely with one facet of employment law, as the title suggests, it discusses both fundamental principles of employment in general, and the law as it exists in Canada. Despite the rather weak analysis of some developing areas, all other areas of employment law are explored effectively. Levitt's book will be an indispensable addition to any course on employment law. For the student interested in employment law, this book will prove to be insightful and instructive. For the practitioner working in the field, *The Law of Dismissal* is a must.