An Understanding and Appreciation of Employment Protection for Senior Staff in Local Governments in New Brunswick

By

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Abstract

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The purpose of this study was to understand the law related to employee termination and the employment protection clauses in the New Brunswick Municipalities Act and to appreciate its results and effectiveness in respect to Senior Staff working in Local Governments. In New Brunswick, Article 74(5) of the *Municipalities Act* (2014) was meant to prevent the termination of municipal officers without just cause.

Almost 50 years after its adoption, no municipal officers have been reinstated under Article 74(5) of the New Brunswick *Municipalities Act*. As a matter of fact, municipal employees are hired at pleasure by Council. In enacting Article 74(5), the Legislature vested in municipal councils the power to determine what constitutes cause and decide when a municipal officer can be removed from office for cause. Furthermore, in the event that procedural fairness was not followed prior to the termination of employment of a municipal officer, municipalities still have the right to terminate for cause... following a fair hearing.

Article 74(5) is misleading municipal officers to believe they benefit from adequate protection in the performance of their duties while in fact, they are leaving their reputation and professional career at the mercy of municipal politicians.

As it was the intention of the legislators in New Brunswick 50 years ago, and as this belief had been maintained during the last half of a century, I believe that Article 74(5) of the New Brunswick *Municipalities Act* (2014) could become the predominant component to employment protection for municipal officers in local governments in the province.

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INTRODUCTION

The purpose of this study is to determine the implications and the results achieved in respect to employment protection for senior staff in local governments in New Brunswick as a result of Article 74(5) of the *Municipalities Act* (2014) of the Province of New Brunswick. The findings of this study will outline the merits and limitations related to Article 74(5) and will provide provincial decision makers and other stakeholders with the necessary information to assess the appropriateness of implementing this legislation.

In the 2009 case of *Cronkhite v. Nackawic (Town)*, Justice Garnett stated:
"Only New Brunswick and Prince Edward Island have provisions which prevent dismissal of "municipal officers" except for cause. These statutory provisions were introduced to combat the common-law principle that government employees served "at pleasure"" (Paragraph 9).

According to Schwind, Das, Wagar, Fassina and Bulmash (2013), reasonable notice has to be provided by employers to employees terminated without just cause with notice typically varying from two weeks' notice per year of service for a blue-collar position to one month's notice per year of service for senior management employees (p. 407).

Legal representation for an employee to challenge the validity of his/her dismissal represents approximately $10,000 per day in court plus disbursements and taxes (Richard Bureau, litigation lawyer, personal communication, March 13, 2014). According to the *Sackville Tribune* of June 27, 2007, the trial between Barb Campbell v. the Town of Sackville New Brunswick was expected to last two weeks, which would have meant a legal bill of a minimum of $100,000 for the plaintiff.

In Nova Scotia, the case of *Mourant v. Amherst* (*Town*)(1999) is a good example where Mourant was wrongfully terminated from the position of Town Manager after refusing to promote one of the Mayor's friends to a senior managerial position with the Town.

In addition to nine months of pay in lieu of notice for wrongful dismissal, the Town of Amherst had to pay the sum of $15,000 to Mourant "as punitive damages and aggravated damages" because of "the increased mental distress, humiliation, anxiety, indignation and grief endured by the plaintiff as a result of the outrageous conduct of the defendant" (*Mourant v. Amherst* (*Town*), (1999)). As per Levitt (2007), the purpose of punitive damages is to "make an example" to the perpetrators of "unacceptable conduct" (p. 109).

In his closing statement, Justice Scanlan stated:

Mr. Mourant's dismissal will have an adverse [e]ffect in terms of his future chances to obtain a position as a Town Manager/Town Clerk. For any job competition Mr. Mourant would participate in, in the future, he would no doubt be asked to explain his dismissal. There is nothing I can say or do in this decision which could absolutely vindicate Mr. Mourant even though I am completely satisfied that Mr. Mourant was extremely well qualified for the job with the Town of Amherst and that he did indeed perform to the highest possible level that could be expected of anyone holding this position. Mr. Mourant has in all likelihood been permanently denied his career of choice as a result of the actions of the defendant. Mr. Mourant is to be commended in this case for putting his personal interests second to the interests of the Town. He stood against Mayor Gouchie and the Town of Amherst. He paid a very high emotional and financial price. (*Mourant v. Amherst* (*Town*), (1999)).

In New Brunswick, Article 74(5) of the *Municipalities Act* (2014) prevents the termination of municipal officers without just cause. It would be reasonable to argue that, had a clause such as Article 74(5) been in force in Nova Scotia, Mourant would have been reinstated to the position of Town Manager for the Town of Amherst. It is also reasonable to assume that such unfortunate events have very significant negative impacts on the victims of such abuse of power, which would warrant the consideration of legislation to ensure employment protection for not only the highest ranking officers in local governments, but for all employment held at pleasure of the employer.

In Canada, with the exception of the Province of Quebec, the Federal and Provincial jurisdictions are operating under the common law legal system. According to *Duhaime's Law Dictionary*, "a common law legal system is a system of law characterized by case law which is law developed by judges through decisions of courts and similar tribunals". The *Legal Research Tutorial* from the Bora Laskin Law Library of the University of Toronto states that judges have to follow the previous ruling of other judges in higher courts in their province or territory and the Supreme Court of Canada on the same issue and may use decisions from the same level of court or from different provinces and jurisdictions in assisting them to reach a decision.

This means that the decisions of judges set guidelines and affect the outcomes of future cases based on the rulings of precedent cases, which means that a case with identical facts as a previous court case should get the same ruling from the court. Consequently, in addition to the legislation adopted by the various governmental entities, this study will also examine court precedents.

First, I will review the Canadian legislation related to employment reinstatement. I will then focus my energy on the history of Article 74(5) of the New Brunswick *Municipalities Act* to develop a perspective on the justifications surrounding the adoption of this Article along with its journey during the last 48 years.

I will then move on to discuss the employment relationship, natural justice, procedural fairness and organizational justice. I will follow with an analysis of the causes for dismissal to gain a good understanding of the legal aspects related to the employment termination processes. I will continue this analysis with a review of the court rulings related to Article 74(5) of the New Brunswick *Municipalities Act*, followed by an appreciation of the effectiveness of employment reinstatement in Canada.

To conclude this project, I will highlight my major findings and their impact on employment protection for municipal officers in New Brunswick. Finally, I will bring my perspective on the effectiveness of Article 74(5) of the New Brunswick *Municipalities Act* (2014) and will provide recommendations to be considered by the decision-makers.

CANADIAN LEGISLATION ON EMPLOYMENT REINSTATEMENT

The legislation differs from province to province in respect to employment reinstatement. For the purpose of this study, I will briefly examine the Canadian provinces and the Federal Government which have reinstatement provisions in their legislation. According to Levitt (2013), only employees in Quebec under *An Act Respecting Labour Standards* (2014), in Nova Scotia under the Nova Scotia *Labour Standards Code* (2013), and federal employees under the *Canada Labour Code* (2013) can apply for reinstatement (Volume II, p. 8-1). However, Levitt does not include recourses under the New Brunswick *Municipalities Act* (2014) Article (74(5)) and Prince Edward Island *Municipalities Act* (2013) Article (24.(2)) which have provisions to that effect for senior municipal officers.

Canada Labour Code

The *Canada Labour Code* (2013) is basically applicable to employees of the federal government (see Article 4). Any employee with at least twelve consecutive months of continuous employment has a maximum of 90 days following his or her dismissal to make a complaint in writing to an inspector if they believe they have been unjustly dismissed (Article 240).

The inspector will then attempt to have a settlement reached between the former employee and the employer. If this fails, the complaint is referred to an adjudicator (Article 241). The adjudicator shall then consider the complaint and the procedures to be followed and where s/he determines that that person has been unjustly dismissed, s/he can order the employer to reinstate the person in his or her employ (Article 242).

The protection offered by Article 240 does not apply to managers that have the authority and power to make independent actions and final decisions. The reason for this exception is to be able to remove managers where the employer has lost confidence in their abilities or judgment. Since many employees could be described as managers, the definition of managers in respect to this section is to be “narrowly construed” (Levitt, 2013, Volume I, pp. 2-33 to 2-34.1).

According to Levitt (2013), some adjudicators are of the opinion that, without exceptional circumstances, employees dismissed without cause should be reinstated. Some of the exceptional circumstances that may prevent reinstatement are a deterioration of the relationship and trust in the employment relationship, a bad attitude of the employee, a good reason to believe that the employee will not perform well in the future, if the employee’s original position has been eliminated, or if the employee found another work arrangement (Volume I, pp. 2-119 to 2-122).

Based on my search on CanLII, which includes records since year 2000, of the 26 cases referred to the Public Service Labour Relations Board, reinstatement was ordered in 10 cases. It is also to be noted that in the 2010 case of *Tipple v. Deputy Head (Department of Public Works and Government Services)*, more than $1.3 million in lieu of damages and interest was ordered to be paid to a senior executive who was terminated without just cause.

Quebec's Cities and Towns Act

The *Cities and Towns Act* (2014) of the Province of Quebec does not include just cause as a mandatory condition for employment termination. Only a majority of the votes of council is required to terminate an officer of a municipality (Article 71). However, the Act provides recourse to the Commission des relations du travail, which can order reinstatement (Article 72.2(1)).

The Commission des normes du travail du Quebec operates under legislation contained in *An Act Respecting Labour Standards* (2014). Article 124 refers to the possibility of an employee with at least two years of service to present a complaint in writing to the Commission des normes du travail within 45 days of his or her dismissal if s/he believes s/he was wrongfully dismissed. Article 125 refers to the appointment of a person to attempt a settlement between the two parties. If this fails, the matter is referred to the Commission des relations du travail (Article 126) who can order reinstatement of the employee it believes has been dismissed without cause (Article 128).

Since the creation of the Commission des Relations du Travail in 2002 up to the end of 2013, out of the 27,619 files received related to *An Act Respecting Labour Standards*, 557 cases have resulted in an order of reinstatement (Mrs. Danuta Brzezinska, Commission des Relations du Travail du Quebec, personal communication, January 17, 2014).

Prince Edward Island

Article 24 of the Prince Edward Island *Municipalities Act* (2013) states:

24. (1) Every council shall appoint an administrator who is not a member of council and who shall be the chief administrative officer of the council.

(2) The council shall not dismiss the administrator except for just cause.

(3) An administrator may be styled as the manager or clerk of the municipality.

(4) The council shall notify the Minister of the name and business address of the administrator.

Article 35 of the Prince Edward Island *Employment Standards Act* (2010) prevents discrimination against employees making a complaint under this act. There is no reference in this act to wrongful dismissal or to reinstatement.

Nova Scotia

Martin (2005) stated that Nova Scotia is providing “no extraordinary job security” to its municipal officers that are “simply serving at pleasure”. However, Article 71(1) of the Province of Nova Scotia *Labour Standards Code* (2013) states: “Where the period of employment of an employee with an employer is ten years or more, the employer shall not discharge or suspend that employee without just cause…” with some exceptions.

Under these circumstances, the terminated employee has recourse through the Director of Labour Standards who, following an inquiry under his or her supervision, may attempt to have both parties resolve the matter and, and if this fails, has the authority, amongst other things, to reinstate the employee to his/her position (Province of Nova Scotia, *Labour Standards Code*, 2013, Article 21).

In the 2013 case of *Greenwood v Richelieu Hardware Canada Ltd (Atlantic Countertops)*, following a complaint dated March 19, 2009, the Director ruled that Mrs. Greenwood was terminated without just cause by Atlantic Countertops and ordered her reinstatement. After giving 13 years of good service to Atlantic Countertops, she was terminated shortly after returning from bereavement leave as a result of the death of her father.

In the 2010 case of *Beck v. 1528801 Nova Scotia Limited*, the Complainant (Mr. Beck) was the field manager, supervised the blueberry pickers for Hackmatack Farm, and had been an employee for 11 years. Mr. Beck was terminated in September 2009 following the rejection of a blueberry shipment to the United States due to poor product quality.

Although it was part of Mr. Beck's to ensure that the berries were of top quality, it was determined that the loss of the shipment may have been caused by other factors such as the refrigerating unit on the truck and there was no evidence presented that the rejection of the blueberry shipment was the fault of the Complainant.

In this particular case, even if termination with just cause was not founded, reinstatement was not ordered due to the fact that the relationship between the Complainant and the Respondent was "permanently broke[n] down" (*Beck v. 1528801 Nova Scotia Limited, 2010).* This breach was caused by the Respondent wrongfully blaming the Complainant for the lost shipment of blueberries and by the Complainant walking off the job following a previous incident in the spring of 2008 and having not communicated with his employer for three days. Considering the fact that the Complainant obtained employment within a couple of months, he was awarded five months' pay in lieu of notice.

In the 2011 case of *Gosse v. Atlantic Wholesalers Limited*, the Complainant had worked for the Respondent for 25 years and made his way up to the position of Assistant Store Manager in Glace Bay. Before the store opened one day, the Complainant took some cigarettes packs from the Respondent's smoke shop and left without paying for them.

In this case, the behaviour of the Complaint, caught on video while he was taking the cigarettes, was a strong indication that he had no intention of paying for the cigarettes. Furthermore, the Respondent had a written policy of prohibiting any products leaving the store without payment. Based on this evidence, it was determined that the termination was with just cause and reinstatement was not ordered.

New Brunswick

There is no reference in the Province of New Brunswick's *Employment Standards Act* (2013) to wrongful dismissal or to reinstatement. However, Article 28 prohibits the termination of employees for requesting entitled leaves, for whistle blowing or for preventing an employee from taking advantage of any legitimate right or benefit to which s/he is entitled under this act.

With *Bill 21, Municipalities Act* (1966), the New Brunswick *Municipalities Act* was adopted in 1966 where Article 75(5), now 74(5), made the termination of "officers necessary for the administration of the municipality" possible with "dismissal for cause by the affirmative vote of two-thirds of all the members of the council" (*Bill 21, Municipalities Act*, 1966).

Article 74 of the New Brunswick *Municipalities Act* (2014) is as follows:

74(1) The council of a municipality may appoint a chief administrative officer for the municipality.

74(2) The council of every municipality shall appoint a clerk, a treasurer and an auditor.

74(3) The council of a municipality may appoint an assistant clerk, an assistant treasurer, an engineer, a building inspector, a solicitor and such other officers as are necessary for the administration of the municipality.

74(4) A person may be appointed to more than one office.

74(5) With the exception of auditors, all officers employed solely by the municipality on a full time basis and appointed under this section, are entitled, subject to section 85 and subsection (6), to hold office until retirement, death, resignation, or dismissal for cause by the affirmative vote of at least two thirds of the whole council.

74(6) Subsection (5) does not apply to a person in respect of whom a resolution has been made under subparagraph 19(9.1)(b)(i), (ii) or (iii).

Under this article, all officers appointed under section 74(3), who are "necessary for the administration of the municipality" can only be terminated for cause by an affirmative vote of at least two thirds of the whole council, which means that a two-third vote of a council meeting where only quorum has been reached is not sufficient.

THE HISTORY OF ARTICLE 74(5) OF THE MUNICIPALITIES ACT OF THE PROVINCE OF NEW BRUNSWICK

Martin (2005) states that employment protection for municipal officers started in 1950, well before *Bill 21 Municipalities Act* (1966), in the City of Campbellton where the Legislative Assembly passed Bill 35 where the “officers” “shall not be removed from office except for cause by a two-thirds vote of council”(Martin, 2005, p. 8). This had been justified to “give a greater measure of protection to the five office holders of the town” (Martin, 2005, pp. 8, 9). The following year, the Fredericton City Charter followed suit with what would become the basis of the current Article 74(5) of the New Brunswick *Municipalities Act*.

It is important to note that, according to the *Synoptic Report of the Proceedings of the Legislative Assembly of New Brunswick* of 1966 related to *Bill 21, Municipalities Act* (1966), Article 75(5) was never contested... and not even questioned during all the debates preceding the adoption of the controversial *Bill 21*. Furthermore, the *Journal of Assembly* of May 24, 1966 (p. 91) reported objections received by the Committee on Law Amendments to the termination of a municipal officer with cause, even with a 2/3 majority. Unfortunately, there was no additional information included in this journal that could have provided more details on those objections.

In 1997, the Municipalities Act Review Committee published the Report of the Municipalities Act Review Committee with 234 recommendations. Amongst those, the report recommended relaxing the provisions of the *Municipalities Act* in respect to employment protection of municipal officers (Martin, 2005).

In 2002, a Review Panel of the government of New Brunswick, along with senior staff of the Department of Environment & Local Government, reviewed those 234 recommendations and presented the report *Opportunities for Improving Local Governance in New Brunswick, Section 1 Panel Conclusions and Recommendations Respecting Governance in Incorporated Municipalities* (2002).

Both the Review Panel and the senior staff of the Department disagreed with the recommendations of the Municipalities Act Review Committee to relax the provisions of the *Municipalities Act* related to employment protection of municipal officers, stating that the protection of those officers was necessary to allow them to act independently for the best interest of the municipality they represent without compromise from political pressure. The Panel also recommended that this employment protection be extended to include the local governments' solicitors, as provided in the Province of New Brunswick's 2002 *Opportunities for Improving Local Governance in New Brunswick.*

Furthermore, it was also recommended that employees terminated without just cause and not included in this employment protection be terminated with a proper notice, including payment of one month salary per year of service without limitations (*Opportunities for Improving Local Governance in New Brunswick,* 2002). No changes were made to Article 74 of the *Municipalities Act* of New Brunswick following those two reports, which is a testimony to the robustness of these employment protection legislations.

Even today the *Local Government Resource Manual* (n. d.) of the Province of New Brunswick states that the justification that all officers appointed by council can only be terminated with cause by at least 2/3 of council under Article 74(5) is to make sure that they are treated fairly. This is to allow continuity in the operations and to avoid employees being dismissed just because a new council was elected (Section 11, p. 1).

THE EMPLOYMENT RELATIONSHIP

In order to have a better understanding of the situation surrounding the employment protection clauses that include reinstatement, it is important to acquire some knowledge of the basic employment relationship between employees and employers.

In the 2013 New Brunswick case of "Ouellette v. Saint-André (Rural Community)", the Appeal Court refers to the 1963 opinion of Lord Reid in Ridge v. Baldwing in which Reid refers to three types of employment relationships. The first relationship is employment under contract, the second being an employment held at pleasure and the third one where termination can only be done with cause and where the employee has to be provided procedural fairness.

Martin (2005) stated that the rule of thumb for reasonable notice is one month per year of service. However, according to MacKillop, Nieuwland, Ferris-Miles (2010), the Supreme Court's position is that the particular circumstances of each individual employee are to be considered in determining the appropriate period of reasonable notice (p. 195).

Schwind, Das, Wagar,Fassina & Bulmash (2013) also reported that reasonable notice has to be provided by employers to employees terminated without just cause. Based on factors such as age of the terminated employee, his/her length of service, the labour market and his/her occupational status and salary, the guidelines for reasonable notice on termination without cause vary from two weeks' notice per year of service for a blue-collar position to one month's notice per year of service for senior management employees (p. 407). The notice, or any other elements related to the termination of employment for an independent contractor, is as specified in the contractual agreement; if there is no notice specified in the agreement, the employer is not obligated to provide one (MacKillop et al., 2010, p. 23).

However, in some cases, even if the forms of employment were believed to be independent contracts, the courts ruled that the substances of the relationships indicated that they were employment relationships and that the employees were to be considered as dependent contractors of the employers. The employers were then obligated to provide reasonable notice to the employees (MacKillop et al., 2010, pp. 23-26).

NATURAL JUSTICE AND PROCEDURAL FAIRNESS

A study of natural justice and procedural fairness is essential for a full appreciation of the culture and mechanics that have been recognized by the courts as mandatory in the processes leading to the termination of employees.

In the 2002 case of *Lacelle*, the term “natural justice” was defined as:

“The common-law principle of natural justice consists of two notions: nemo judex in causa, which is the right to be judged by an impartial and unbiased decision-maker, and audi alteram partem, which is the right to be given adequate notice of the proceedings and the opportunity to be heard” (Paragraph 6).

In “Ouellette v. Saint-André (Rural Community)”(2013), the New Brunswick Appeal Court refers to the minimum requirements of procedural fairness as one’s right to know the concerns about his/her performance that could lead to termination and the right to explain or demonstrate the validity of those concerns, which includes the opportunity to make enquiries and prepare and present a response to the decision-makers. Furthermore, Levitt (2007) includes the elements of good faith and the absence of bias to the requirements of procedural fairness (p. 158).

The Appeal Court, in the 2008 case of *Dunsmuir v. Province of New Brunswick*, stated that the terms of employment at pleasure provides for summary dismissal and that, because those employees are “truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously” (Paragraph 115).

Those three preceding examples demonstrate clearly the fact that, over the years, the courts have recognized that employees have the right to be treated fairly, which means the right to be made aware of the issues surrounding the performance or behaviour of the employee, sufficient time and resources to prepare a response, an adequate opportunity to respond to the allegations to impartial and unbiased decision-makers. Natural justice is also defined as the "Minimum standards of fair decision making imposed on persons or bodies acting in a judicial capacity" (Schwind et al., 2013, p. 150), which includes a fair hearing with the right to legal representation and bias-free and timely proceedings (Schwind et al., 2013, p. 150).

ORGANIZATIONAL JUSTICE

The concept of justice from an organizational perspective should also be examined to appreciate and understand its relevance and importance to dismissal law. According to Greenberg and Colquitt (2005), organizational justice has four components:

- Distributive Justice – perceived fairness of the equity of the outcome allocation;
- Procedural Justice – perceived fairness under which decisions are made, which includes consistency, accuracy, representativeness and lack of bias;
- Interpersonal Justice – fairness of interpersonal treatment received during the procedures; and
- Informational Justice – justification and truthfulness of information.

No matter what is the reason triggering the organizational justice process, individuals do not assess each and every one of those four forms of justice when forming an opinion on the fairness of the process (Greenberg & Colquitt, 2005, p. 601).

Distributive Justice

According to McShane and Steen (2013), distributive justice is related to the "perceived outcomes received" (p. 141) compared to the outcomes received by others. It was stated earlier that reasonable notice has to be provided by employers to employees terminated without just cause based on factors such as age of the terminated employee, his/her length of service, the labour market and his/her occupational status and salary (Schwind et al., 2013, p. 407).

Referring to the criteria necessary for the determination of distributive justice, Keren-Paz (2007) states: "The central claim of this study is that one of these criteria should be equality"(p. 5). Furthermore, Keren-Paz defines equality as an "attempt to decrease the gaps between the 'haves' and the disadvantaged" (p. 5) and makes the observation that the debate in the distributive justice literature is mostly oriented towards which criteria should be used in the determination of distribution (p. 6). The author also makes reference to two different approaches to equality in distributive justice; one being the equality of opportunity, and the other being the equality to the final outcome (p. 9).

In the 2010 case of *Tipple v. Deputy Head (Department of Public Works and Government Services)* under the *Canada Labour Code* where there are provisions for reinstatement of wrongfully terminated employees, $1,358,454.58 in lieu of damages and interest was ordered to be paid to Tipple, a senior executive who was terminated without just cause.

An amount of $961,037.40 of the total was based on the annual wages, bonuses and benefits plus interest that Tipple lost from the termination of his employment to the end of his specified-term appointment, which was the period from September 30, 2006 to October 6, 2008. Tipple was also awarded an additional $397,417.18 comprised of $250,000 for damages for loss of reputation and $125,000 for damages for psychological injuries plus interest.

The detailed calculation of the amount awarded to Mr. Tipple is as follow:

Damages for lost wages	$ 688,751.08
Damages for lost performance bonus	$ 109,038.46
Damages for lost employee benefits	$ 109,038.46
Interest on damages for lost wages, performance bonus and employee benefits	$ 54,209.40
Damages for psychological injury	$ 125,000.00
Interest on damages for psychological injury	$ 7,472.39
Damages for loss of reputation	$ 250,000.00
Interest on damages for loss of reputation	$ 14,944.79
TOTAL	**$ 1,358,454.58**

Source: Tipple v. Deputy Head
(Department of Public Works and Government Services)(2010)

I believe that Tipple's compensation represented adequately the equality to final outcome approach for distributive justice as he received full compensation for the entire duration of his appointment. I am also of the opinion that the compensation of $250,000 for damages for loss of reputation and $125,000 for damages for psychological injuries addresses also the equality to opportunity approach to distributive justice.

Procedural Justice

According to Greenberg & Colquitt (2005) a monograph on fairness perceptions in legal dispute resolution context was published by Thibaut and Walker in 1975. This research compared two categories of legal procedures: the adversarial system where the judge controls the decision but not the presentation of evidence that leads to the decision (used in Canada and the US) and the inquisitorial system, in which the judge controls both the decision and the process that leads to this decision (used in Central Europe).

For both outcome and procedural fairness, "what is fair depends on what is perceived to be fair" (p. 22). Thibaut and Walker concluded that the participants in an experiment comparing the two categories of legal procedures preferred the adversarial approach as it afforded more controls to the disputants compared to the inquisitorial system controlled by the judge. The findings of this experiment also clearly demonstrated that procedures, not just outcomes, may lead to the conclusion of legitimacy to process fairness (Greenberg & Colquitt, 2005, p. 22).

Interpersonal Justice

In 1986, Bies conducted a study with job applicants on how they should be treated in respect to the four rules of fairness of interpersonal justice presented below:

- Truthfulness : Honesty, openness, candidacy
- Justification : Adequate explanations for decisions
- Respect : Treating others with sincerity and dignity
- Propriety : Absence of prejudicial and improper statements

Truthfulness was cited by one-third of the job candidates while the remaining rules were mentioned less frequently (Greenberg & Colquitt, 2005, p. 30). I am of the opinion that this element is paramount for cases of dismissal as the termination of employment is often based on information received by third parties.

Informational Justice

Greenberg and Colquitt (2005) (p. 165), referring to the research of Greenberg (2000), define informational justice as “the extent to which people believe they have adequate information about the decisions affecting them”.

Johnson (2014) refers to the “Leader’s Shadows” as the bad shadow one can cast with the misuse of the powers and privileges associated with leadership positions (p. 7). One of those is the shadow of mismanaged information, which refers to lies and deceit, withholding or denying having knowledge of information, violating the privacy rights of others and releasing information to the wrong users (pp. 19-21).

CAUSE FOR DISMISSAL

Cause for dismissal is one of the paramount questions in employment relations where the law stipulates that employees can only be terminated with cause. Under such circumstances, the employer does not have the authority to terminate an employee without meeting this with cause requirement. A good understanding of what constitutes just cause for dismissal is therefore required prior to continuing this analysis of employment protection.

According to Levitt (2013), the duty to establish that just cause exists for the termination of an employee resides on the employer and should be based on findings of real incompetence or misconduct. As Levitt states, “Since dismissal without notice is such a severe punishment, it can be justified only by misconduct of the most serious kind” (Volume I, p. 6-2), and should be a “last resort….when all prior methods to correct an employee’s unacceptable conduct have failed” (Levitt, 2007, p. 187).

To be able to justify just cause, the employer has to demonstrate that the actions or performance of the employee clearly indicate that continued employment would represent a risk of damage or injury to the employer. Dismissal can also be justified by the loss of trust and confidence in the employee by the employer in light of the employee’s actions or demonstration of character (Levitt, 2013, Volume I, pp. 6-2, 6-3).

However, contrary to the criminal standard of beyond a reasonable doubt, the responsibility for the employer to justify just cause has to demonstrate that, more than 50 percent of the time, a reasonable person would have come to those same conclusions (MacKillop et al., 2010, p. 212).

In the past, the court would determine just cause by only considering the elements challenged, for example dishonesty. However, the court recognized recently how important employment is in one's life and now takes a broader approach on the situation surrounding the termination. Because of this, a high level of uncertainty exists as to whether or not an employer can justify termination with just cause, making it difficult for counsel representing the employer to speculate on the decision of the court (MacKillop et al., 2010, p. 213).

A good example of termination with just cause is the case of Whitehouse v. RBC Dominion Securities Inc. In this case, one of RBC's vice presidents invited a prostitute to his office and, after a disagreement on a price for her services, left her alone and unattended on the premises with access to confidential information (MacKillop et al., 2010, p. 115).

The Court found that Whitehouse had been dismissed for cause as his actions placed RBC and its clients at a risk of breach of confidentiality. Because of the circumstances and severity of the offence, the Court did not believe that RBC was obligated to give Whitehouse a second chance (MacKillop et al., 2010, p. 115).

Levitt (2013) identified the grounds for dismissal that may constitute cause for termination (see Table 1):

Table 1: Grounds for Dismissal

- Fraudulent misrepresentations as to qualifications;
- Serious misconduct;
- Sexual harassment;
- Breach of duty of fidelity;
- Conflict of interest;
- Wilful disobedience;
- Revelation of character;
- Theft;
- Fraud and dishonesty;
- Insolence and insubordination;
- Absenteeism or lateness;
- Illness;
- Intoxication;
- Undermining the corporate culture;
- Outside activity;
- Breach of rules or company policies;
- Serious incompetence; and
- Frustration

Source: Levitt, 2013, p. 6-13

Fraudulent Misrepresentations as to Qualifications

When applying for a position, if an employee lies about his or her qualifications and experience, this represents grounds for dismissal with cause but only under certain conditions. The qualifications have to be important to adequately perform his or her duties. The employer must terminate the employee as soon as it is made aware of the misrepresentation. If the employer decides to give a chance to this employee and does not terminate his or her employment, the employer cannot terminate the employee at a later date if he or she fails to perform to the expectations of the organization. Furthermore, the employer can sue the employee for the recovery of losses if s/he would not have hired the employee having known of the misrepresentation (Levitt, 2013, Volume 1, pp. 6-13 to 6-15).

Serious Misconduct

With respect to misconduct, it is not always easy to determine what meets the requirements of just cause in a dismissal case as “there is no fixed rule of law defining the degree of misconduct which justifies dismissal” (Levitt, 2013, Volume 1, p. 6-3). Each case has to be considered individually and compared to other cases of law where dismissal was considered justified (Levitt, 2013, Volume 1, p. 6-3).

A justification that is considered sufficient in cases of dismissal for misconduct is when the behaviour or actions of the employee were so inappropriate that it was a good reason for the employer to lose trust in the employee's ability to perform its duties faithfully (Levitt, 2013, Volume 1, p. 6-3).

According to Levitt (2013), the following five elements must exist in order to terminate someone for misconduct:

1. The behaviour must be serious enough.

Fighting with a fellow employee or with clients or racist or abusive behaviour towards others have been held to amount to cause. The refusal of an employee to discuss a disciplinary matter without his solicitor present did not justify cause for his or her discharge. Another situation where just cause was not found was when an employee cursed at other employees for not performing their work to standards. In this particular case, the incident happened in the heat of the moment, was of very short duration and did not upset the other workers (Levitt, 2013, Volume 1, pp. 6-15, 6-16).

2. The employee’s conduct had a significant negative impact on the employer.

Cause was not found for an employee refusing to work as a team player as there were no shortcomings in the employee’s performance and there were no negative consequences to the employer. The termination of an employee drinking while driving the employer’s truck and lying about if after the fact was found to be with cause (Levitt, 2013, Volume 1, p. 6-17).

3. The employee received warnings about his/her behaviour.

A security guard who did not follow the proper chain of command in reporting an incident was wrongfully dismissed because he did not receive previous warnings. Even if his action was considered an error of judgment, it was not considered sufficient for dismissal (Levitt, 2013, Volume 1, p. 6-18).

4. The conduct of the employee caused negative consequences for the public or other employees.

Just cause was found when an employee failing to follow protocols was involved in a car accident. This behaviour also put at risk the other employees. On the other hand, bad temper towards co-workers was not determined to be just cause for termination as it had previously been tolerated by the employer. However, the fact that the disgruntled employee stormed out the door afterwards constituted just cause for abandonment of duty (Levitt, 2013, Volume 1, p. 6-19).

5. Other circumstances to determine if misconduct was serious enough.

An employee told a customer that the product of a competitor was better, was often late for work and, despite regulations forbidding to do so, smoked on the job. As the employer could not prove damage following those instances, cause for discharge was not founded (Levitt, 2013, Volume 1, p. 6-20).

In a casino, where client service is paramount in this industry, an employee was insubordinate to his supervisor and made rude, vulgar, sexually explicit and disrespectful comments on the open floor in front of patrons and employees. Because of the importance of great customer service in this industry, and because the behaviour the employee at fault was such a major violation of the core values of the organization, cause was found for the termination of the employee who had “struck at the very heart of the employment relationship” (Levitt, 2013, Volume 1, p. 6-21).

Sexual Harassment

Sexual harassment can be cause for dismissal if it is very serious. Otherwise, it requires a warning before it becomes just cause. The nature and degree of the sexual harassment, the knowledge by the offender that the behaviour was unwelcome, the fact that the behaviour persisted after being aware that it was inappropriate, the authority of the offender over the victim, the fact that there was a harassment policy in place and the relationship between the offender and the victim are all circumstances of each particular case that are considered in the determination of the severity of the offence and whether or not a warning was necessary (Levitt, 2013, Volume 1, pp. 6-22.1, 6-22.2).

There was no just cause found when an employee sent, as a joke, provocative lingerie to several female employees as this did not violate the company's sexual harassment policy. There was also no just cause found for an employee telling dirty jokes at work. In this particular case, the person doing the firing was also telling dirty jokes at work and there were no policies or training provided to staff informing them of the inappropriateness of such behaviour (Levitt, 2013, Volume 1, p. 6-23).

In the 2009 case of *Van Woerkens v. Marriott Hotels of Canada Ltd*., during the company's holiday party, Mr. Van Woerkens inappropriately touched a subordinate female employee while she was highly intoxicated. Coupled with this incident, the fact that the perpetrator was dishonest about this incident amounted to just cause for termination. Even after 22 years of irreproachable service, these actions by Van Woerkens were enough to justify the loss of trust of his employer (Levitt, 2013, Volume 1, pp. 6-23, 6-24).

Breach of Duty of Fidelity

An employee has to perform his or her duties in what s/he believes to be in the best interest of his employer and not for any other purpose. Employees are obligated to serve their employers faithfully and to the best of their abilities. In one instance, an employee was considered disloyal and terminated for just cause for having sent an email to a customer, criticizing his employer for the way he handles orders, thus creating unnecessary delays in the delivery (Levitt, 2013, Volume 1, pp. 6-24.1 to 6-25).

The unauthorized distribution of confidential information is considered grounds for dismissal. An employee was terminated with cause for breach of confidentiality after having forwarded a confidential letter from his employer to four people from outside the company (Levitt, 2013, Volume 1, p. 6-25).

To hide information to which the employer should have been made aware is also grounds for dismissal. A senior employee lost the trust of his employer after omitting to disclose his relationship with a major supplier and was terminated for cause (Levitt, 2013, Volume 1, pp. 6-26, 6-27).

To knowingly provide inaccurate important and relevant information to the employer may also constitute grounds for dismissal. In one case, a senior employee used his access and privilege to invest his relative's money in an investment fund reserved for company personnel. Following this discovery, the employer had lost faith in this employee who was occupying a position requiring a high level of integrity and trustworthiness (Levitt, 2013, Volume 1, pp. 6-27, 6-28).

For employees to take actions to damage their employer's interests or reputation is considered ground for dismissal. A social worker employee of a company was terminated for cause for the reason that she concealed the fact that she was intimately involved with one of her patients, which then affected the reputation of the employer (Levitt, 2013, Volume 1, pp. 6-28, 6-29).

An employee has to respect his/her employment agreement with the employer. Failure to provide or be able to provide the level of service required can also amount to lawful termination with cause. This can happen when an employee accepts a second full time position and is therefore no longer able to fulfill the responsibilities and duties associated with the original full-time employment, which breaks the “fundamentals of the employment agreement” (Levitt, 2013, Volume 1, pp. 6-29, 6-30).

Conflict of Interest

Similar to theft and dishonesty, conflict of interest is one of the strongest justifications for dismissal. An employee is not to use information or access resources received as a result of employment to his/her benefit or against the employer (Levitt, 2013, Volume 1, p. 6-30).

Providing a capital contribution to a company dealing with the employer was considered sufficient for just cause. Just cause due to conflict of interest was also found when an employee in a car dealership bought an interest in a car salvage company that was a supplier to the employer. However, another case that did not result to just cause was when an employee wanted to start a business on his or her own which did not cause any loss of business or additional competition to the employer (Levitt, 2013, Volume 1, pp. 6-31 to 6-34).

An employee was terminated with cause when he received free services from a contractor of the employer. With this wrongdoing, the employee was in a conflict of interest situation as he was at the mercy of the contractor to remain silent on this incident. However, no conflict of interest was found in a situation where the public engineer of a municipality awarded a contract to an engineering firm with whom he had a previous business relationship (Levitt, 2013, Volume 1, pp. 6-33, 6-34).

Getting a secret commission at the conclusion of a deal is considered conflict of interest. A banker accepting a personal loan from a bank customer placed him in a conflict of interest situation (Levitt, 2013, Volume 1, pp. 6-34, 6-35). Performing work for someone other than the employer while using the employer's resources and when it has been prohibited constitutes conflict of interest and ground for dismissal. However, in one case, there were no policies related to outside work and the dismissal was considered without cause (Levitt, 2013, Volume 1, p. 6-36).

Conflict of interest is not limited to the four categories described above and can take place when the employee's actions conflicts with the best interest of the employer (Levitt, 2013, Volume 1, p. 6-37).

Wilful Disobedience

Wilful disobedience can represent just cause for termination when an employee wilfully disobeys a clear, specific, achievable lawful and reasonable order since it breaches the essential condition that employees must obey their employer's instructions (Levitt, 2013, Volume 1, pp. 6-38 to 6-40).

Other factors to consider in the determination of just cause are the importance of the matter, the number of occurrences of the disobedience, the employee/employer relationship deterioration level resulting from the disobedience, the employee's understanding of the level of risk of termination for disobedience, the employee's length of service, and, of course, the reasonableness of the explanation for disobedience (Levitt, 2013, Volume 1, pp. 6-41 to 6-43).

In one case, an employee was terminated for just cause when he refused to take his turn in performing the important and necessary task of garbage removal, which was part of his normal duties. Despite the fact that the employee was warned of the risk of dismissal he continued to refuse to comply. However, a termination was not considered lawful when an employee took an unauthorized short vacation after having worked for 40 days in a row and having worked an entire year with just one weekend off (Levitt, 2013, Volume 1, pp. 6-39, 6-43).

Revelation of Character

Revelation of character arises most of the time in dishonest conduct cases. Employees have the responsibility to perform their duties in good faith, honestly, and avoid situations of conflict of interest. The contravening actions of employees, especially senior staff, can potentially jeopardize the trust towards that employee to the point where the employee/employer relationship is compromised (Levitt, 2013, Volume 1, p. 6-45).

In one dismissal case where just cause was established, an employee disobeyed company rules and ordered furniture for his company and used it in his own home. This breach, coupled with the level of trustworthiness inherent to this position, was sufficient to justify termination with cause. On the other hand, a dismissal was not considered to constitute just cause when a senior staff did not comply with the employer's overtime policy (Levitt, 2013, Volume 1, p. 6-46).

Theft

Employees caught stealing have very little recourse against termination for just cause, even if it was an isolated case. As discussed earlier in the chapter, under criminal law an individual can only be convicted based on evidence beyond a reasonable doubt. However, the employer burden of proof in employee theft cases is only on the balance of probabilities. It is more the fact that the employee stole than the amount stolen that justifies the loss of trust and the termination with cause (Levitt, 2013, Volume 1, pp. 6-47, 6-48).

In one instance, an employee was terminated for theft since he was the only one present when money was missing in the cash register. Even if he didn’t directly control the cash, the facts reasonably supported that conclusion as he was the only one present when there were shortages in the cash register (Levitt, 2013, Volume 1, p. 6-48).

An employer has the obligation to grant an employee the opportunity to explain or respond to accusations of theft. Termination is without cause if a reasonable explanation exists. In one case, an employee placed personal expenses on a company’s credit card. Since the employee always had for practice to identify his personal expenses and make restitution, his termination was considered without cause (Levitt, 2013, Volume 1, p. 6-49).

Fraud and Dishonesty

Similar to theft, an employer can terminate an employee for cause only on the balance of probability that the employee committed fraud. Similar to theft and revelation of character, it is more the fact that the employee committed the fraudulent act than the materiality of the act itself that compromises the trust in the employee, thus jeopardizing the employee/employer relationship (Levitt, 2013, Volume 1, p. 6-50).

When a manager falsified a medical benefits claim, just cause was found. However, when an employee made a donation to a community group and omitted to complete a donation form, this was not considered cause as this failure to fill out the form was not done dishonestly (Levitt, 2013, Volume 1, p. 6-51).

Lying or concealing matters that are important to the employer's interest are also grounds for dismissal with just cause. Similarly, obtaining a leave of absence under false pretence represents just cause. Charging personal expenses on a company's account and trying to conceal this fact is also grounds for dismissal (Levitt, 2013, Volume 1, pp. 6-52, 6-53).

Dishonesty can only be found if it was the intention of the employee to act dishonestly. An employee who makes a mistake while producing his or her overtime sheet is not dishonest (Levitt, 2013, Volume 1, p. 6-57).

An employee’s failure to report a wrongdoing does not constitute ground for dismissal. However, being dishonest or failing to report wrongdoings during an investigation is considered cause for termination (Levitt, 2013, Volume 1, p. 6-59).

Insolence and Insubordination

Insolence and insubordination are different from disobedience because here we are dealing with “rudeness or provocative behaviour toward the employer” (Levitt, 2013, Volume 1, p. 6-62). In addition to the same principles that applies to willful disobedience, the determination of just cause for insolence and insubordination has to consider if the employee is deliberately challenging the authority, the number of occurrences of insubordination incidents, their gravity and their justifications. Also to be considered is if an apology was made and the context of the incident (Levitt, 2013, Volume 1, pp. 6-62 to 6-64.5).

To refuse to recognize and to comply with the authority of a supervisor can be cause for dismissal. In addition, threatening to blackmail a supervisor in an attempt to get a promotion was also considered cause for dismissal. However, no just cause was found when an employee, acting on behalf of the group, requested in writing the resignation of their supervisor for the best interest of the company (Levitt, 2013, Volume 1, pp. 6-63 to 6-64.3).

Absenteeism or Lateness

Since dismissal is considered as capital punishment in the employment field and has significant negative consequences on one's professional and personal life, dismissal on the grounds of absenteeism or lateness can only be justified at significant levels. Employers are expected to tolerate absenteeism or lateness to some extent (Levitt, 2013, Volume 1, p. 6-64.6).

An employee was found to have been terminated with just cause for having failed to return to work 18 days after the end of his vacation and without having given any notifications. However, another employee who left work two and one-half hours prior to his vacations was not found to have been terminated with cause (Levitt, 2013, Volume 1, pp. 6-64.6, 6-64.6a).

There would be just cause if the time off taken was done so under false pretense and if the absenteeism had created prejudice to the employer. For instance, an employee was found to have been terminated with just cause after taking time off for medical reasons and using the time for some other purpose (Levitt, 2013, Volume 1, p. 6-64.7).

Cause is also justified if the situation causes problems for the employer. Even if discussed with him many times, an employee who was constantly late for work was dismissed for cause as he had to pass in front of 40 employees to reach is office and his ongoing tardiness set a bad example (Levitt, 2013, Volume 1, p. 6-64.7).

Illness

Absence due to temporary illness is not just cause for termination. However, a permanent illness which prevents an employee from working is considered just cause for termination:

"The courts examine illness as cause for dismissal in the context of whether the employee is sufficiently incapacitated so as to have fundamentally repudiated the obligation to provide his or her services to the employer" (Levitt, 2013, Volume 1, p. 6-67).

An employee who missed three weeks of work following a heart attack was considered having been terminated without cause. However, an employee in New Brunswick who was disabled and missed work for two years was found to have been terminated for cause as her position needed to be filled for the continuation of the business of the company (Levitt, 2013, Volume 1, pp. 6-67, 6-70).

Intoxication and Substance Abuse

Intoxication can be found to be termination for just cause if it prevents the employees from performing their duties adequately and if the employee had received warnings after previous offences. The consequences of the intoxication and the prejudice created to the employer, along with the existence of policies related to intoxication and the nature of the work, will also be considered (Levitt, 2013, Volume 1, pp. 6-72 to 6-72.2).

For example, the termination of a sales person that was required to entertain clients at bars and restaurants and pick-up the tab was considered without just cause when the employee “became an alcoholic” as it was part of his duties to entertain clients in bars (Levitt, 2013, Volume 1, pp. 6-72, 6-72.1).

An inebriated employee drove the employer’s vehicle without permission and was responsible for a serious accident. Dismissal with cause was found for this termination as the employee’s actions had severe negative consequences for the employer (Levitt, 2013, Volume 1, p. 6-72.1).

Undermining the Corporate Culture

An employee who is not able to work productively with his or her co-workers and who is jeopardizing the smooth operations of the employer and detrimental to the employer’s interest can be terminated with cause. An employee who complains about the work environment deserves a warning but not termination with cause. However, assaulting a fellow employee can be ground for termination with cause as it jeopardizes the possibility for the employees involved to work together in the future. In addition, for employees to go above the head of their supervisors to make complaints (other than a whistle-blower) may be grounds for termination with cause (Levitt, 2013, Volume 1, pp. 6-72.3 to 6.73).

Outside Activity

Improper conduct of an employee, both at or away from work, can justify termination with cause. The elements to consider are the seriousness of the incident, if it affected the employment relationship, if it was an isolated incident, and if it was done purposely to hurt the employer (Levitt, 2013, Volume 1, pp. 6-75 to 6-77).

An employee who had taken the fork lift of his employer without permission to commit a crime at another location was considered having been terminated with cause. Similar, an employee charged but not yet convicted of possession of child pornography was considered to having been terminated with cause for the reason that this situation was very damaging to the good reputation towards youth that the employer had built in the community (Levitt, 2013, Volume 1, pp. 6-75, 6-77).

A manager who stormed in and disrupted an employee's meeting and subsequently broke a bed and a door at the hotel they were staying was not found to have been dismissed for cause; the incident was isolated, was not likely to reoccur, and it was not the employee's intentions to do any damage to the employer (Levitt, 2013, Volume 1, p. 6-77).

Breach of Rules or Company Policies

The elements to consider in determining if a breach of rules or company policies represents termination with cause are if the rules were distributed, known and unambiguous to the employees. The rules must also be consistently enforced, reasonable and it should be made clear to the employees that termination will occur if the rules are breached. Furthermore, the noncompliance to the rules must be serious enough to justify termination (Levitt, 2013, Volume 1, pp. 6-78 to 6-80).

An employee who, contrary to company policy, sold company scrap material for the company's Christmas party was not considered terminated with cause as he ceased to perform this activity when directed to do so. The fact that the employee still used the proceeds of the sales that had already taken place to pay for the Christmas party did not represent cause as it was not made clear to the employee that these actions would lead to his termination. However, an employee was considered to having been terminated with cause for holding up cash deposits to cover a shortage in money despite a policy requiring him to make daily deposits (Levitt, 2013, Volume 1, p. 6-79, 6-80).

Serious Incompetence

In matters of incompetence, other than a deliberate, conscious, or wilful neglect or abandonment of duties, the employer must demonstrate that the employee's performance or actions were "clearly inconsistent with the proper discharge of the employee's duties" (Levitt, 2013, Volume 1, p. 6-2) and that it could reasonably be detrimental to the employer if employment continues. Furthermore, since dismissal without notice is considered as employment capital punishment, it can only be justified by the most serious kind of misconduct (Levitt, 2013, Volume 1, p. 6-2).

Other elements to consider are if the level of job performance was previously communicated to the employee, if the employee received sufficient instructions and supervision, if the employee was warned that failure to meet the expectations would result in his or her termination, if the employee was told what corrective actions were necessary, and if the employee was provided a reasonable opportunity and training to do so (Levitt, 2013, Volume 1, pp. 6-82.1, 6-82.2).

In one case, instead of providing training and supervision to an underperforming employee, the employer responded with sarcastic remarks and wrongful directives. The employee was then found to have been terminated without just cause (Levitt, 2013, Volume 1, 6-82.6).

However, if it is believed that an employee can perform at a certain level of performance immediately after hiring, termination will be considered with cause if the employee is not capable of performing those functions. For instance, just cause was found to exist when a newly hired employee failed to pass a required licensing examination for a position where the employee was hired based on his/her expertise and experience necessary to pass the examination (Levitt, 2013, Volume 1, p. 6-82.8).

Frustration

Frustration occurs when unforeseen critical long term circumstances out of the control or of no fault of the employer or employee makes the employment contract between the parties completely different from what was intended and makes the parties incapable of performing their contractual obligations. For example, following a union strike, an employee was terminated due to the fact that the enterprise was forced to close. Since the employer negotiated with the union in good faith and reasonably and since the event (plant closure) was not predictable, the termination was considered with cause (Levitt, 2013, Volume 1, pp. 6-89, 6-90).

A truck driver was not considered terminated for cause following the suspension of his driver's license as his position was not filled by a replacement driver during his 20 days of absence. Evidence related that the employer had reduced the number of active drivers during that period (Levitt, 2013, Volume 1, p. 6-91).

Elements of Consideration

One of the circumstances that a court will examine in order to determine whether there is just cause for discharge is if the employer "suffered damages as a result of the misconduct" (Levitt, 2013, Volume 1, p. 6-4). During the court hearing to defend the dismissal of an employee, employers will often bring up every incident that occurred with the terminated employee just to make him/her look bad. Because of this, the court has to be diligent and make a distinction between the elements that are considered grounds for dismissal and the ones that are just an attempt to tarnish the employee (Levitt, 2013, Volume 1, p. 6-4).

Furthermore, a dismissal for cause should be supported with "concrete evidence of the misconduct", which is not easy to achieve if the employer has to rely on the testimony of other employees (Levitt, 2007, p. 144).

In general, the employee's misconduct has to be so bad that it completely negates the employee's previous years of good performance. It is difficult to justify cause in court when the misconduct of a long-service employee is a onetime isolated incident (Levitt, 2013, Volume 1, p. 6-5). Before terminating an employee for cause, the individual should be warned that the misconduct is serious and could result in the termination of employment if it persists or reoccurs (Levitt, 2013, Volume 1, p. 6-8).

As noted by Levitt:

> It is only in exceptional circumstances that an employer is justified in summarily dismissing an employee upon his making a single mistake or misconducting himself once. The test in these cases is whether the alleged misconduct of the employee was such as to interfere with and to prejudice the safe and proper conduct of the business of the company and, therefore, to justify immediate dismissal. (Levitt, 2013, Volume 1, p. 6-11)

COURT RULINGS RELATED TO ARTICLE 74(5) OF THE PROVINCE OF NEW BRUNSWICK MUNICIPALITIES ACT

While my review has provided a discussion of wrongful dismissal principles, my focus will now be on court rulings related to Article 74(5) of the New Brunswick *Municipalities Act*.

According to *The Canadian Statute Citations New Brunswick, Newfoundland and Labrador* (2004 & 2013), only eight cases related to Article 74(5) were decided by the court since the 1966 adoption of this provision in the New Brunswick *Municipalities Act*. An analysis of those seven cases follows. It is to be noted that no records are available for court cases where a settlement had been reached prior to the conclusion of the case.

Saunders v. Town of Rothesay (1983)

After being terminated from his position by a three-two (three out of five) vote of council, the police chief brought an action against the Town of Rothesay, alleging that his termination did not meet the conditions of a two-thirds vote of council as required by Article 74(5) of the New Brunswick *Municipalities Act*.

Hired as a police officer in 1972, Saunders became the police chief in 1976. In 1982, he was dismissed on the basis of eight reasons. Because the motives related to the dismissal of Saunders were not pertinent to this case, Justice Jones did not consider them.

The Court ruled in favour of the Town of Rothesay as the position of police chief was not included in the definition of "municipal officer involved in the administration of the municipality" as per Article 74(3) of the *Municipalities Act* of New Brunswick. Consequently, the provision of Article 74(5) did not apply. Therefore, only a majority vote was required to carry out this council decision as opposed to a two-third majority (Appleby, Almstead, MacCausland, McMinniman & Turgeon, 1983).

MacKinnon v. City of Saint John (1984)

Following preliminary reports from a police investigation and another investigation from the Chief Administrative Officer, the Council of the City of Saint John passed a motion on August 29th, 1983 to terminate a City Commissioner.

Earlier that year, criminal charges had been laid against the City Commissioner by the police and the Chief Administrative Officer reported irregularities in the management of the public work's department related to discrepancies in inventories, renting equipment when City equipment was available, and renting equipment from City staff and building a shower room in the public work building without prior permission.

The Commissioner was only informed of the details of the allegations against him the same morning that his hearing with Council took place. That same evening, after hearing the objections from the Commissioner to respond to the allegation, Council passed a motion to terminate his employment. The Commissioner challenged this decision, alleging he did not have enough time to prepare his response for the hearing.

The Court ruled that the process preceding the termination of the Commissioner was unfair and the resolution dismissing the applicant was voided. In addition to this, Justice Turnbull granted a $5,000 refund to the City Commissioner for costs. In his final remarks, Justice Turnbull recognized the great importance for individuals of issues involving their careers. It should be noted that early during the following year, the City Commissioner was acquitted of all criminal charges.

Justice Turnbull only ruled on the procedural fairness preceding the termination of the City Commissioner. However, Justice Turnbull reinforced the fact that the City of Saint John still has the right to terminate the City Commissioner for cause.... following a fair hearing (Appleby, Almstead, MacCausland, McMinniman & Turgeon, 1984).

McDermott v. Town of Nackawic (1988)

The Secretary/Treasurer of the Town of Nackawic was found to have been terminated with cause due to the fact that she ceased residing within the limits of the Town of Nackawic. This was an infraction of the Town of Nackawic's by-laws that made residence within the town limit a condition for term and permanent employment with the Town.

The advertisement for the position of Secretary/Treasurer was also clear on this condition as a requirement for employment. The Secretary/Treasurer lived within the town limits at the time she was hired but moved outside of town limits three years later. A motion to terminate her employment was passed by Council three months following her relocation (Appleby et al., 1989).

O’Neil v. Hodgins and Village of Belledune (1989)

The Clerk/Administrator of the Village of Belledune, Mrs. O’Neil, was terminated without just cause in a decision of the New Brunswick Court of Queen’s Bench. Following his appointment, the new mayor, Mr. Hodgins, took complete control of the administration of the Village of Belledune. He informed Mrs. O’Neil that he would assume the role of town administrator, changed the locks on all of the doors of the town hall while keeping keys only for himself, and managed the affairs of the town with complete disregard for the staff and even Council. He even went to the extent of listening and interfering in O’Neil’s phone conversations at work and kept his phone off the hook to prevent her from making phone calls by tying up the line.

Following a request from the Department of Municipal Affairs, Mrs. O’Neil took a week vacation followed by a pre-approved week of training at the Emergency Preparedness College in Arnprior. Upon her return, the Mayor attempted to block her from receiving her pay check by forbidding the signees to sign it.

The Mayor made most of the decisions on his own without consulting with Council. During Council meetings, councillors were not allowed to discuss or debate issues and their questions remained unanswered by the Mayor. Having made a formal complaint to the Department of Municipal Affairs, both Council and a representative of Municipal Affairs attempted in vain to resolve the situation.

It was a well-known fact during the municipal elections that the new mayoral candidate's intentions were to terminate the Clerk/Administrator soon after being elected. Originally, when Mrs. O'Neil's position of Clerk/Administrator for the Village of Belledune was posted, both Mrs. O'Neil and Mr. Hodgins had applied.

During his mandate, the Mayor attempted in vain to have Council approve a salary for himself to be paid for his services as the Chief Executive Officer of the Village of Belledune of between $40,000 and $50,000 annually.

Mrs. O'Neil had been a resident of the Village of Belledune all her life and had a well-established circle of friends and activities. She had been the Clerk/Administrator of the Village of Belledune for about two years when she was denied access to the building and denied access to Council meetings. According to members of Council and to the previous Mayor, Mrs. O'Neil's performance and personality were excellent.

The first replacement for Mrs. O'Neil hired by the Mayor was dismissed shortly after for refusing to sign illegal documents. Another Clerk was then appointed by the Mayor who also left following a physical assault by the Mayor.

At the age of 44 and a recent widow with a 13 year-old child to take care of, O'Neil was forced to leave the Village of Belledune and find work in Quebec at a lower rate of pay. In this case, the Clerk/Administrator filed an action for damages for wrongful dismissal and not a claim for reinstatement.

Since the Clerk/Administrator found employment in another province soon after her termination, the judge granted her the equivalent of six months' pay, less what she earned at her new employment during the last four months of this six months period. The judge also allowed her $2,000 for moving expenses and $5,000 for mental suffering and loss of reputation for a total of $11,600. Furthermore, the mayor was ordered to indemnify the Village of Belledune 60% of that amount (Appleby et al., 1989).

Boisvenue v. Town of St. Stephen (1989)

It was determined by the New Brunswick Court of Queen's Bench that the Town Manager of the Town of St. Stephen had been terminated with just cause. Prior to the court hearing, the Town Manager requested a judicial review, which validated that procedural legality and fairness was achieved during the interventions preceding the termination. The Town Manager then sought reinstatement from the Town of St. Stephen for wrongful dismissal.

The Town Manager had been employed by the Town of St. Stephen for five and a half years when he was terminated by Council by a vote of five to one for the reasons of "various acts of dishonesty, misconduct, abuse of authority, errors in judgment, disobedience and incompetence" (Appleby et al., 1989, p. 323).

This motion was preceded by an internal investigation, during which it was found that the Town Manager ordered (without the knowledge or consent of the Town Council) an interim audit by the external auditor and requested an inquiry from the department of Municipal Affairs.

Furthermore, he purchased electronic equipment with a value of $61,000 for the Town but did so without proper authorizations and without following the proper acquisition process. The Town Manager also had a trainee-employee of the Town subsidized by the Federal Government paint 3,000 board feet or decking for his personal residence, along with the stripping and staining of a table and chairs belonging to him.

The Town Manager also had sexual intercourse at various locations, including the town hall, with the female trainee-employee who was allowed several additional weeks of employment on the federally funded project for performing work at the Town Manager's private residence. The Town Manager directed municipal employees to install a toilet and sink owned by the town in his private residence. He was also accused of sexually harassing his private secretary for having repeatedly rubbing her on the shoulders and placing his face in her hair while displaying a "too friendly" attitude (Appleby et al., 1989, p. 336).

The Town Manager, without any authorization, also obtained and used a credit card registered to, and therefore making liable, both himself and the Town. He also ordered work to be performed by the department of public work at the local shopping mall during very inconvenient times for both the merchants and clients. Finally, the threatening remarks and aggressive demeanor of the Town Manager when questioned on some of his actions was also considered highly inappropriate. In his judgment, Justice Higgins ruled that there was just cause for the termination of the Town Manager, whose action was dismissed (Appleby et al., 1989).

Hughes v. City of Moncton (1992)

A staff solicitor for the City of Moncton, who had been terminated following the abolishing of his position was considered not protected under the provision of Article 74(5) of the New Brunswick *Municipalities Act* as his position did not meet the definition of an officer. His position was not considered necessary for the administration of the municipality, nor had the City of Moncton provided the solicitor with the protection of the provisions of Article 74(5), which they could have done by passing a motion stating that this position was essential for the administration of the municipality. This was possible under the provision of Article 74(2) of the *Municipalities Act* of New Brunswick (Appleby et al., 1992).

Ouellette v. Saint-André (Rural community) (2013)

The Chief Administrative Officer/Clerk/Secretary-Treasurer (CAO) of the incorporated Rural Community of Saint-André applied for a judicial review and sought reinstatement for the reason that she was not provided procedural fairness. At a first trial, the Court ruled that the Rural Community of Saint-André did not have to meet the requirement of procedural fairness and the CAO's action was dismissed. The CAO then appealed this decision on the grounds that the Rural Community of Saint-André was obligated to provide her with procedural fairness.

The CAO had been at this position from June 1994 to December 2010 (the date of her termination). The duties of the CAO included, but were not limited to, the maintenance and management of the complete accounting system, which included payroll, accounts payables and receivables. She was also responsible for implementing the recommendations of the financial external auditors.

Following their financial audits, the external auditors provided the Rural Community of Saint-André with recommendations starting in 2007. The following year, the auditor noticed and reported the fact that their nine recommendations were not implemented and that serious errors were recurring every year and thus the number of recommendation increased to 17 that year.

Among the errors were a $4,700 cash deficit in the water and sewer account, the fact that the CAO had overpaid herself for the equivalent of six weeks of salary and had omitted certain benefits on her personal T-4 slip, and the failure to file the remittance for the HST. The CAO was made aware of those irregularities and was given ample opportunities and access to the information system to provide Council with the proof that the moneys were not missing or to find that errors had been made. Since the CAO was not able to provide any explanation for those irregularities, Council unanimously voted to terminate her employment.

Because the issue presented to the Appeal Court was not related to just cause but to procedural fairness, the Appeal Court only considered the latter. Since the CAO was terminated following a minimum vote of 2/3 of the whole council, because she was previously made aware of the irregularities found by the financial auditors, because she was given an opportunity to address council's concerns on those matters and was provided ample time to prepare to do so prior to Council considering her termination, the Court ruled that the Rural Community of Saint-André met the duties of procedural fairness in the termination of the CAO. The CAO's case was dismissed with a cost of $2,500 (Appleby et al., 2013).

It is interesting in this case to see that, for the first time, the Court validated the principle of Article 74(5) of the New Brunswick *Municipalities Act* where a local government "could find itself with a reinstated administrator entitled to significant back pay" (Paragraph 19).

Mourant v. Town of Sackville (2013 and 2014)

In this case, Mourant had been the CAO of the Town of Sackville for approximately one and a half years prior to his termination. Two months preceding his termination, Mourant was placed on administrative leave following a complaint made against him under the town's workplace harassment policy during which an independent investigation took place. Based on the findings of the investigation, the Council of the Town of Sackville passed unanimously, on August 31^{st} 2011, a motion to terminate Mourant for "various breaches of the Town of Sackville Harassment Policy" as well as "other failures to fulfill the responsibilities of his position" (*Mourant v. Sackville* (*Town*)(2013), Statement of Defense, Paragraph 3).

On May 13^{th} 2013, Mourant commenced an action against the Town of Sackville for wrongful dismissal stating that he fulfilled all responsibilities of his appointment in a satisfactory manner, that there were no cause at law for his termination, and that he had never been disciplined by the Town of Sackville prior to his termination. Mourant was claiming reinstatement and retroactive pay plus legal costs against the defendant (*Mourant v. Sackville* (*Town*)(2013), Statement of Claim).

Following this action, the Statement of Defense of the Town of Sackville stated that Mourant's action was "untimely and statute-barred" (Paragraph 8) as he did not request a judicial review within three months of his termination as per Rule 69.01 of the Rules of Court (*Mourant v. Sackville* (*Town*)(2013), Statement of Defense).

Mourant took no issue with procedural fairness alleging his right to proceed by way of an action rather than with Rule 69.01, to be reinstated and receive back pay. On October 4th 2013, Justice Rideout rendered a decision in favor of the Town of Sackville on the basis of compliance with rule 69.01 of the Rules of the Court (*Mourant v. Sackville* (*Town*)(2013)).

On January 29, 2014, George Kalinowski, representing Mourant, appealed the Rideout decision. Kalinowski's arguments were that Mourant did not challenge the question of procedural fairness for the matters preceding to his termination and that he did not request that the decision of his termination be quashed based on lack of procedural fairness. Kalinowski argued that the "cause at law did not exist to terminate his [Mourant's] employment" (Paragraph 10). Kalinowski also argued that the question that "the appellant's dismissal was for cause an issue to be determined at trial" (Paragraph 18) and is not restricted to a judicial review (Paragraph 17) (Kalinowski, G. 2013).

At Paragraph 6, Kalinowski referred to the case of Royal Oaks Golf & Country Club Inc. v. Seguin which stated:

"…as a matter of interpretive policy courts should be hesitant in construing legislation that limit access to intermediate appellant review in respect of issues that involve questions of law and, in particular, the very interpretation of the very legislation under which the parties are proceeding" (Kalinowski, G. 2013).

On September 4th, 2014, the Court of Appeal of New Brunswick rendered a decision in part in favour of the Town of Sackville when it agreed with Justice Bell who stated that reinstatement "is available only by judicial review under Rule 69" (paragraph 32). Furthermore, "in enacting s. 74(5), the Legislature was vesting in municipal councils the power to decide when a municipal officer, to whom the section applies, could be removed from office for cause. It could occur only when two thirds of the whole council affirmatively voted there was sufficient cause for removal" (paragraph 16).

However, in another part of the decision, the Court of Appeal of New Brunswick did not agree with Justice Bell's decision to dismiss Mourant's case and "would allow the appeal and set aside the motion judge's dismissal of the action" (paragraph 42), leaving the opportunity for Mourant to claim damages for wrongful dismissal. This case was still outstanding as of the date of this report.

UNLISTED CASES

The *Canadian Statute Citations New Brunswick, Newfoundland and Labrador* (2013) did not include the 2009 case of *Cronkhite v. Nackawic (Town).* I was not able to find any explanations as to why this case was missing from this listing.

Cronkhite v. Town of Nackawic (2009)

Nancy Cronkhite was 59 years old and, with 19 years of service, was the most senior staff of the Town of Nackawic. She was terminated following a number of complaints regarding her conduct which had been made to the Labour Relations Committee. No further details on the allegations of misconduct and lack of performance were provided. Cronkhite challenged this decision on the basis of lack of procedural fairness.

In her decision, Justice Garnett recognized that the loss of an employment has very serious consequences and that the Town of Nackawic had a high duty to act fairly. She further concluded that, since two an independent investigation was performed about the complaints, since workshops with the plaintiff were organized to resolve the problems identified, since the allegations against the plaintiff were presented to her in a timely manner, along with sufficient time to prepare a response and an opportunity to appear before Council, and since the plaintiff was also provided written reasons justifying her dismissal, the Town of Nackawic met its duties of procedural fairness and she dismissed the application of the plaintiff with costs of $1,500 (*Cronkhite v. Nackawic* (*Town*)(2009)).

OUT OF COURT SETTLEMENTS

According to Martin (2005), it is not often that matters of wrongful dismissals are subject to rulings by the court. The most common outcome in such cases involves municipal officers being offered packages to leave quietly. There are also cases when settlements are reached between the local governments and municipal officers before the end of the trial.

Due to the lack of records surrounding those kind of arrangements, it would be impossible to identify and analyze the nature and outcomes of out of court settlements. However, a review of the employment history of a town in New Brunswick that made the news on many occasions will help to put the element of termination or forced departure in a real context.

The Town of Sackville, New Brunswick has been witness to several municipal senior staff departures during the last two decades. According to the *Sackville Tribune* edition of July 15, 2009, since 1990 the Town of Sackville saw the departure of five CAOs. A subsequent article published in the *Sackville Tribune* on April 4, 2012 reported:

…the loss of two [additional] CAOs, the director of parks and recreation, two directors of economic development and tourism, the manager of recreation programs and special events, a director of community development and programs, and director of economic development – all since 2008. Since 2012, the *Town of Sackville* web site (2014) also reflects the replacement of the departure of the Director of Tourism, the Director of Engineering and Public Works and the Town Clerk.

Even if only the CAOs were eligible for the employment protection of Article 74(5) of the New Brunswick *Municipalities Act*, other than the still outstanding case of Mourant v. Sackville addressed earlier, only Barb Campbell (another CAO who was forced to leave Sackville) initiated proceedings in court.

Campbell v. Town of Sackville

According to the *Sackville Tribune* of June 13 2007, the CAO/Clerk of the Town of Sackville, Barb Campbell, was dismissed for cause from her position in June 2005 without receiving any prior indication that her job was not satisfactory and never receiving any verbal or written warning relating to performance. In a letter signed by the Mayor, Campbell was terminated for "being responsible for poisoning the work environment at town hall, harassment towards other staff members, and showing disrespect towards council" (*Sackville Tribune*, June 13, 2007).

Campbell was a 59-year-old Sackville resident. She graduated from UNB with a Bachelor of Physical Education and began working for the Town in 1989. Ten years later, she was asked by the then-council to take on the position of acting CAO. Less than a year later, she was appointed full-time CAO (*Sackville Tribune*, June 27, 2007).

Terribly shocked and surprised by her termination, Campbell initiated a wrongful dismissal lawsuit and was seeking reinstatement, stating that she had been terminated without cause and in bad faith. The *Sackville Tribune* also reported that, two years following her termination, Campbell had agreed to an undisclosed out-of-court settlement with the town at day three of a trial that was expected to last two weeks (*Sackville Tribune* June 27, 2007).

REINSTATEMENT EFFECTIVENESS

This project would not be complete without addressing the effectiveness of reinstatement. Since no reinstatement has taken place in New Brunswick under Article 74(5) of the *Municipalities Act* since its adoption 48 years ago, I was not able to assess the effectiveness of reinstatement of senior staff in local governments in New Brunswick. However, through my research, I was able to identify two studies which examined the effectiveness of reinstatement as a remedy for employment protection in other Canadian jurisdictions. Those studies (Trudeau, 1991; Eden, 1994) relate to legislative requirements that were previously addressed in this study: *An Act Respecting Labour Standards* in the Province of Quebec and the *Canada Labour Code.*

Reinstatement under An Act Respecting Labour Standards

Trudeau's study involved nonunionized employees reinstated under *An Act Respecting Labour Standards*. Of the 72 respondents to his survey, 39 (54%) of the employees reinstated returned to work. The remaining 33 (46%) opted instead for another form of compensation. Of those 39 participants who had gone back to work, 26 stated that they were unjustly treated by their employer and 15 had lost their job by the time of the survey (80% of those 15 employees had lost their employment within the four months following their reinstatement). Of those 15 employees, nine of them had resigned because of their employer's behaviour while the remaining six lost their employment either because their jobs were abolished or because the business closed (Trudeau, 1991, pp. 307, 310).

In summary, of the 72 respondents, 24 (33%) of the reinstated employees maintained their jobs on a long term basis and 13 (18%) were able to return to work without having to endure unfair treatment from their employer. Trudeau also observed that "most employers are vigorously opposed to reinstatement of management-level employees" (Trudeau, 1991, p. 309).

Reinstatement under the Canada Labour Code

Eden's study was related to nonunionized employees reinstated under the *Canada Labour Code*. Out of the 37 respondents that were reinstated, 25 (67%) returned to work. Of the 25 who returned to work, 7 (28%) left within three months and an additional 3 (12%) left within two years, leaving only 15 out of the original 37 (40%) still employed after two years.

From the employer's perspective, 14 out of the 25 employees that returned to work were assessed as unsuccessful. Consequently, in only 11 out of 37 cases (30%) where reinstatement was ordered, the employee was considered to be an effective worker (Eden, 1994, p. 97).

Reinstatement in the Union Sector

Eden's (1994) review of the previous literature indicated that "between 81 to 91 percent of grievors return to work, and 51 to 80 percent are evaluated favourably by employers". However, 1986 research by Ponak and Shaney reported only "two-thirds of grievors returned to work" (Eden, 1994, p. 90).

Based on the results outlined above, reinstatement of employees is much more favourable in a unionized work environment. Furthermore, Eden also noted that "the study suggests that workers are more easily reintegrated in large-scale work units" (Eden, 1994, p. 100). Based on this finding, it would be reasonable to expect that the reinstatement rate of success would be even worse in organizations that are much smaller than the Federal or Quebec Governments.

As stated by Trudeau and echoed by Eden, reinstated employees may encounter employers that "make their lives miserable upon return through unjust treatment such as modifications in working conditions, excessive supervision, general harassment and discrimination, and isolating the worker from the rest of the group" (Eden, 1994, p. 89). Eden also observed that a unionized work environment provides the employee with the resources necessary for representation (available in the unionized grievance process) and also provides the resources to monitor and enforce the reinstatement order and "a well-defined set of contact rights that limit management's authority and possible reprisals" (Eden, 1994, p. 89).

CONSTRUCTIVE DISMISSAL

Constructive dismissal is another avenue used by employers to avoid their obligations related to termination without cause and should be part of my analysis on employment protection. According to Levitt (2013), “it is an implied term in a contract of employment that the employer will not make a substantial change in the duties and status of the employee so as to constitute a fundamental breach of contract” (Volume I, p. 5-2).

While a dismissal with cause is the result of an employee’s misconduct or lack of performance, a constructive dismissal is “any fundamental breach by the employer of a major term of the employment relationship” (Levitt, 2013, Volume 1, p. 5-1). It should be noted that a minor breach of the term of the employment relationship will not be considered by the courts as sufficient grounds for constructive dismissal (Levitt, 2013, Volume 1, p. 5-1).

As was stated earlier, the onus to prove cause for the termination of an employee rests on the shoulders of the employer. However, the onus to establish that a termination was a constructive dismissal as opposed to a resignation rests on the shoulders of the employee (Newman & Sack, 2013). A case of constructive dismissal is considered as a wrongful dismissal and is subject to the reasonable notice period allowed for termination without cause as discussed earlier (Levitt, 2013, Volume 1, §5:10).

In my opinion, among the various types of fundamental changes presented by Levitt (2013) which have been submitted in court as causes for constructive dismissal, the most probable to be used in retaliation to reinstated “officers as are necessary for the administration of the municipality” (Article 74 (3), NB *Municipalities Act*, 2014) are:

- Forced resignation;
- Demotion;
- Reduced remuneration or refusal to pay;
- Downward change in reporting functions;
- Unilateral change in job responsibilities; and
- Abusive treatment (Levitt, 2013, Volume 1, p. 5-18).

The fundamental changes to a contract of employment listed above are self-explanatory. With respect to abusive treatment, Levitt (2013) states that there are no set rules as to what would represent sufficient abusive treatment to suffice in meeting the requirement of constructive dismissal, but notes that an employee is entitled to decent treatment by the employer and an employer does not have the right to make the conditions of the employee intolerable. As observed by Levitt (2013):

“abusive treatment such as harassment, repeated yelling and screaming, use of vulgar and profane language, and inappropriate insinuations, are sufficient to support a claim for constructive dismissal” (Volume I, p. 5-47).

Following on this point, MacKillop et al. (2010) (p. 147) assert that, “once an action for wrongful dismissal has been commenced the parties cannot be reasonably expected to work together in a relationship of ‘mutual understanding and respect’”.

Like in the cases of Mourant, who was wrongfully terminated by the town of Amherst (*Mourant v. Amherst* (*Town*)(1999)), and of O’Neil, who was wrongfully dismissed from the town of Belledune (O’Neil v. Hodgins and Belledune (Village))(1989), the kinds of abuse and ill treatment described above have been the unfortunate reality of several municipal officers.

The remedy of reinstatement, if ever granted under Article 74(5), would place the reinstated employee in a very vulnerable position and with little recourse to retaliatory actions from the vindictive employer.

EFFECTIVENESS OF ARTICLE 74(5) OF THE PROVINCE OF NEW BRUNSWICK MUNICIPALITIES ACT

The purpose of this study was to outline the merits and limitations related to Article 74(5) of the New Brunswick *Municipalities Act* (2014) and to provide provincial decision- makers and other stakeholders with the necessary information to assess the appropriateness of implementing this legislation.

An employer seeking to justify just cause has to demonstrate that the actions or performance of the employee are inappropriate and the continued employment would represent a risk of damage or injury to the employer. Dismissal can also be justified by the loss of trust and confidence in the employee by the employer in light of the employee's actions or demonstration of character (Levitt, 2013).

A review of the legal literature revealed that termination with cause is a significant event and, unless the misconduct is of the most serious kind, the employee has to be made aware of his or her shortcomings and be provided the opportunity to correct or improve the behaviour or performance (Levitt, 2013).

Prior to termination, the employee has the right to be assessed by an impartial, consistent and unbiased decision-maker and the right to all the pertinent information related to his/her performance that could lead to termination. The employee should also be provided with the opportunity to explain or demonstrate the validity of the employer's concerns, which includes the opportunity to make enquiries and prepare and present a response to the decision-makers (*Lacelle*, 2002). Furthermore, I believe that the "minimum standards of fair decision making imposed on persons or bodies acting in a judicial capacity" (Schwind et al., 2013, p. 150) have to be justified and based on truthfulness, which can be better achieved when the testimony of the parties is made under oath and where the allegations can be challenged.

The court decisions frequently addressed the importance of employment in one's life and revealed a broader approach to the situation surrounding the termination. A high level of uncertainty also exists as to whether an employer can justify termination with just cause, which makes it difficult for counsel representing the employer to speculate on the decision of the court (MacKillop et al., 2010, p. 213).

As noted previously by Martin (2005), it is not often that matters of wrongful dismissals are subject to rulings by the court. The most common outcomes in wrongful dismissal cases involving municipal officers are either providing packages to the employees to leave quietly or settling the matter out of court (or before the court hearing or the end of trial).

Martin (2005) also observes that it is difficult for local governments to prove just cause in the dismissal of a municipal officer. As stated previously, during a hearing to defend the dismissal of an employee, an employer will often bring up every incident that occurred with the terminated employee just to make the person look bad (Levitt, 2013, Volume 1, p. 6-4). Because of this, there are cases where the municipal officers simply give up on pursuing a legal remedy or resign because of embarrassment over the attack on their performance or behaviour (Martin, 2005).

However, the same situation is also applicable to local governments where the terminated municipal officer is often aware of irregularities, misconduct or other damaging information that could be very detrimental to the elected officials if this information was to be provided to their constituencies (Martin, 2005).

Article 74(5) of the New Brunswick *Municipalities Act* was implemented in 1966 and has survived criticism and reconsideration over the years. Its main objective was to make sure that all officers appointed by council were treated fairly (*Local Government Resource Manual, n. d.*).

This article was meant to allow wrongfully-terminated municipal officers to initiate a wrongful dismissal lawsuit and seek reinstatement. However, as of today, 48 years after its adoption in 1966, there are no cases at law in New Brunswick where officers necessary for the administration of the municipality were reinstated following non-compliance of the requirement of dismissal for cause of Article 74(5) of the New Brunswick *Municipalities Act*.

This may be explained, in part, by the high costs of legal representation. A wrongful dismissal lawsuit is expected to take approximately two weeks (*Sackville Tribune*, June 27, 2007). Legal representation fees can be as much as $10,000 per day in court (Richard Bureau, litigation lawyer, personal communication, March 13, 2014), which would represent $100,000 for the terminated plaintiff who could still be without employment. Furthermore, as seen in the case of Campbell v. Town of Sackville, the delay in seeking justice and reinstatement would be of approximately two years following the termination (*Sackville Tribune* June 27, 2007).

In addition to the possible outcomes, Levitt (2007) also identifies the expense of litigation, the delay in the conflict resolution process and the financial ability of the employer as concerns from an employee perspective (pp. 141, 142).

In his closing statements, Levitt (2007) also defines the time and financial means necessary for an employee to complete a conflict resolution process through the court system in Canada as “fortitude”, and also makes the observation that, because of these requirements, “so few cases go to trial” (p. 198).

However, when considering the court cases related to Article 74(5) of the New Brunswick *Municipalities Act* that were decided at trial, terminations were ruled to be with cause in some instances (see, for example, “McDermott v. Nackawic (Town)” (1988); “Boisvenue v. St. Stephen (Town)” (1989); and “Ouellette v. Saint-André (Rural Community)”(2013)).

In the other cases of “Saunders v. Town of Rothesay” (1983) and “Hughes v. Moncton (City)” (1992), the ruling of the Court favoured the defendants as the positions held by the plaintiffs (namely, the Rothesay Police Chief and a staff solicitor for the City of Moncton) were not applicable to Article 74(5). In the case of “MacKinnon v. Saint John, City of” (1984), the annulment of the motion to terminate also did not fall under Article 74(5) as it was a matter of procedural fairness. The case of *Cronkhite v. Nackawic (Town)* (2009) was also related to procedural fairness where the Court found that the defendant acted fairly toward the plaintiff during the process related to her termination.

In the case of “O’Neil v. Hodgins and Belledune (Village)” (1989), termination was ruled to be wrongful but the plaintiff did not seek reinstatement under Article 74(5) but rather claimed damages for wrongful dismissal. If we consider the hardship and duress to which O’Neil was subjected to since the election of Hodgins as the Mayor of Belledune, the fact is that had O’Neil been reinstated to her position, she would have still served under the leadership of Hodgins. Based also on the fact that O’Neil found employment and relocated to another province, we can easily understand why O’Neil did not seek reinstatement.

In the case of *Mourant v. Sackville* (*Town*)(2013), when commenting on the statement of Justice Bell in “Ouellette v. Saint-André (Rural Community)”(2013) related to the reinstatement of wrongfully terminated administrator, Justice Rideout stated that “Added to that, in my view, would be the other risk of a dismissal without cause of the person who has replaced the terminated officer” (Paragraph 29).

However, in the case of *Mourant v. Town of Sackville* (2014), in support of the 90 day time limit to request a judicial review as per Rule 69.01 of the Rules of Court, the Court of Appeal of New Brunswick stated that “without a strict limitation period for having the decision set aside, how could a municipality possibly know when it could safely hire someone to replace the dismissed officer, to avoid the situation of having two individuals in the same role, both with the same security of tenure guaranteed by s. 74(5)? It could not; at least not until the limitation for commencing an action also expired” (*Mourant v. Town of Sackville* (2014), (paragraph 29)).

Despite the fact that this position is contrary to the *Limitation of Actions Act* (2009), which allows for a period of “two years following the date the claim was discovered” (*Limitation of Actions Act*, 2009, Article 5(1)(a)) for an action to be brought forward, I am of the opinion that it has a lot of merit.

In New Brunswick, municipal officers can only be terminated for cause (*Municipalities Act*, 2014, Article 74(5)). If this wasn’t the case, they would be hired at pleasure by Council and, if given reasonable notice, could be terminated without cause (*Cronkhite v. Nackawic* (*Town*), 2009; Schwind et al., 2013).

Nevertheless, in the case of *Mourant v. Town of Sackville* (2014), the Court of Appeal of New Brunswick stated that “in enacting s. 74(5), the Legislature was vesting in municipal councils the power to decide when a municipal officer, to whom the section applies, could be removed from office for cause. It could occur only when two thirds of the whole council affirmatively voted there was sufficient cause for removal” (paragraph 16).

This position of the Court of Appeal of New Brunswick clearly provides municipal councils not only with the power to terminate a municipal officer for cause, which I believe to be appropriate, but also, with a two thirds support of the whole council, the discretion to determine what constitutes cause.

Furthermore, as determined in the case of “MacKinnon v. City of Saint John” (1984), in the event that procedural fairness was not followed prior to the termination of employment of a municipal officer, municipalities still have the right to terminate for cause.... following a fair hearing (Appleby, Almstead, MacCausland, McMinniman & Turgeon, 1984).

Based on this information, I assert that, despite Article 74(5) of the New Brunswick *Municipalities Act* (2014), municipal employees are, in fact, hired at pleasure by Council and, if given reasonable notice, could be terminated without cause. Furthermore, I am also of the opinion that Article 74(5) is misleading municipal officers to believe they benefit from adequate protection in the performance of their duties while in fact, they are leaving their reputation and professional career to the mercy of municipal politicians.

RECOMMENDATIONS AND CONCLUSION

Almost 50 years after its adoption, no municipal officers have been reinstated under Article 74(5) of the New Brunswick *Municipalities Act* and, unless changes are made to the legislation, none will ever be. When we consider the dark senior staff employment history of the town of Sackville, it is hard to imagine that, through all the municipal senior staff movements that happened over the last half century in New Brunswick, similar events did not happen anywhere else and no municipal staff were terminated without cause.

The 2013 case of "Ouellette v. Saint-André (Rural Community)" recognized that local government "could find itself with a reinstated administrator entitled to significant back pay" (Paragraph 19). Furthermore, Justice Rideout, in the case of *Mourant v. Sackville* (*Town*)(2013), referred to the additional consequences of reinstatement of an officer terminated without just cause: "Added to that, in my view, would be the other risk of a dismissal without cause of the person who has replaced the terminated officer" (Paragraph 29). These recent decisions send a strong message to all stakeholders of the consequences related to wrongful termination of employment and the compensation that is available to a wronged party.

Nevertheless, in the case of *Mourant v. Town of Sackville* (2014), the Court of Appeal of New Brunswick rendered a decision where the only requirement for a termination under Article 74(5) of the New Brunswick *Municipalities Act* (2014) is for two-thirds of the whole council to support a termination based on what they believe constitutes cause.

Furthermore, based on the case of "MacKinnon v. City of Saint John" (1984), municipalities that have been found at fault in not providing a fair hearing to a terminated municipal officer can choose to proceed to a fair hearing and still re-terminate the employee for what they believe to be for cause (Appleby, Almstead, MacCausland, McMinniman & Turgeon, 1984).

It is obvious to the author that municipal officers in New Brunswick are hired at pleasure by Council and that Article 74(5) of the New Brunswick *Municipalities Act* (2014) not only does not provide any employment protection, but also misleads municipal officers in believing that it does. In fact, they are leaving their reputation and professional career to the mercy of municipal politicians.

As was the intention of the legislators in New Brunswick 50 years ago, and as this belief has been maintained during the last half of a century, I recognize that Article 74(5) of the New Brunswick *Municipalities Act* (2014) <u>could become</u> the predominant component to employment protection for municipal officers in local governments in the province.

Even if the *Local Government Resource Manual* (n. d.) of the Province of New Brunswick states (in Section 11, p. 1) that Article 74(5) was created to ensure municipal officers are treated fairly, I am of the opinion that this is not the case. Although this initiative was a step in the right direction, more needs to be done if New Brunswick wants this part of the legislation to be more than a misleading fairy tale.

I recommend that the legislators of the Province of New Brunswick take the necessary measures to make Article 74(5) of the New Brunswick Municipalities Act (2014) enforceable.

Under the current circumstances, in the event that Article 74(5) of the New Brunswick *Municipalities Act* (2014) could be utilized, the process necessary for the reinstatement of a municipal officer in New Brunswick would take more than two years (*Sackville Tribune* June 27, 2007). By then, the terminated employee would have probably moved on with his or her life and, if fortunate, found adequate employment, thus making recourse to this employment protection out of reach of the municipal officers already in a precarious position caused by the loss of employment.

During the intervening time, the municipality that terminated the employee would have likely replaced the individual and the new replacement would now be part of the community. Following reinstatement, the employer would have to compensate the wrongfully terminated employee with back pay in addition to giving the person his or her job back, and would also have to dismiss the replacement municipal officer, who would in turn be wrongfully terminated (Paragraph 29) (*Mourant v. Sackville* (*Town*), 2013). Consequently, the wrongful termination of a municipal officer in New Brunswick would not only be very costly to the terminated employee, but also for the municipality.

In the case of *Mourant v. Sackville (Town)*(2014), the Court of Appeal of New Brunswick supported the 90 day time limit to request judicial review as per Rule 69.01 of the Rules of Court. I concur with their reasoning that a longer period, which could have extended for up to two years under the *Limitation of Actions Act* (2009), would be detrimental to the municipality and to the individual it would have hired to replace the dismissed officer.

I am of the opinion that the time restriction of 90 days imposed by Article 240 of the *Canada Labour Code* (2013) for an employee to present a complaint in writing following his or her dismissal is appropriate.

I recommend that a time restriction of 90 days following the dismissal of a New Brunswick municipal officer be imposed to present a written request for reinstatement under Article 74(5) of the New Brunswick Municipalities Act (2014).

In my opinion, the requirement of a judicial review prior to a court hearing is costly, time consuming and a futile exercise when there is no contest as to the procedural fairness preceding leading to the termination of a municipal officer. Furthermore, as determined in the case of "MacKinnon v. City of Saint John" (1984), in the event that procedural fairness was not followed prior to the termination of employment of a municipal officer, municipalities still have the right to terminate for cause.... following a fair hearing (Appleby, Almstead, MacCausland, McMinniman & Turgeon, 1984).

I recommend that the requirements of a judicial review be abolished in procedures related to reinstatement of municipal officers under Article 74(5) of the New Brunswick Municipalities Act (2014).

As I noted previously, the decision to terminate has to be justified and based on truthfulness, which, in my opinion, can be better achieved when the testimony of the witnesses is made under oath and where the evidence can be challenged. I also asserted that the high costs of legal representation for a terminated municipal officer could represent a burden that would prevent the wronged employee from seeking justice. Furthermore, the remedy of reinstatement, if ever granted under Article 74(5), would place the reinstated employee in a very vulnerable position and with little recourse to retaliatory actions from the vindictive employer.

In my opinion, municipal officers in New Brunswick should join together and create a union of municipal officers. Like with the organized labour movement, this union would provide municipal officers with the resources and the representation they would need to challenge the facts and evidence that allegedly justified their dismissals. Furthermore, this union would help make the employer comply with the reinstatement order and both prepare and monitor the employee's return to work that would include a "well-defined set of contract rights that limit management's authority and possible reprisals" (Eden, 1994, p. 89).

I recommend that municipal officers in New Brunswick create a union of municipal officers.

The *Industrial Relations Act* (2010) of the Province of New Brunswick stipulates that: "Every employee has the right to be a member of a trade union and to participate in the lawful activities thereof" (Article 2(1)). However, the definition of employee "does not include (a) a manager or superintendent, or any other person who, in the opinion of the Board, is employed in a confidential capacity in matters relating to labour relations or who exercises management functions…" (Article 1(1)).

The limitations imposed by the *Industrial Relations Act* (2010) of the Province of New Brunswick do not recognize municipal officers as employees in respect to their rights to be members of a union and would have to be addressed by the legislators.

I recommend that the Industrial Relations Act (2010) of the Province of New Brunswick be modified to grant municipal officers the right to be a member of a management union.

Article 1 (1) of the *Industrial Relations Act* (2010) also defines employers' organizations as "an organization of employers formed for purposes that include the regulation of relations between employers and employees…". In Article 44, the *Industrial Relations Act* (2010) stipulates that an employers' organization may be accredited by the Board as the bargaining agent for all employers in a determined geographic area. Furthermore, Article 45(2) requires that this organization of employers shall include all the employers of this geographic area.

Local governments in New Brunswick are independent employers and most of them have a very limited number of municipal officers that would qualify for protection under Article 74(5) of the *Municipalities Act* (2014). In those cases, this would make it practically impossible to create a union. I am of the opinion that it would be a benefit to all parties if all the municipalities in New Brunswick were to form an employers' organization, which would allow for the creation of a union of municipal officers and would result in efficient and effective representation from both the employee and employer perspective.

I recommend that the Province of New Brunswick take the necessary measures to create an employers' organization that shall include all the municipalities in New Brunswick.

Article 71(1) of the Province of Nova Scotia *Labour Standards Code* (2013) states that an employee with ten years or more of employment with an employer shall not be discharged or suspended without just cause.

I assert that the conflict resolution process related to the termination of municipal officers should follow a model similar to that in Nova Scotia where an attempt to have both parties resolve the matter is made prior to undergoing a hearing and where reinstatement can be ordered.

I recommend that the conflict resolution process related to the termination of municipal officers follows a conflict resolution model similar to the Nova Scotia model.

I strongly believe that justification of just cause is the basis of reasonable accountability in Canada and is already applied in many actions that we take. This basic level of accountability is not enforced under Article 74(5) of the New Brunswick *Municipalities Act.* Wrongful termination of a municipal officer has the potential of jeopardizing not only the individual's career, but also his or her life history. In my opinion, this is totally unacceptable.

I sincerely hope that those who have the power to make changes and those who have the power to inspire the legislators will take the necessary measures so that what has happened to people like me no longer happens to others.

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