Relations industrielles
Industrial Relations

The Criminal Law and the Civil Code in Day-to-Day Employee Relations

Erskine Buchanan, Philip Cutler and Paul-F. Renault

Volume 14, Number 1, January 1959

URI: https://id.erudit.org/iderudit/1022345ar
DOI: https://doi.org/10.7202/1022345ar

See table of contents

Publisher(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (print)
1703-8138 (digital)

Explore this journal

Cite this document

Buchanan, E., Cutler, P. & Renault, P.-F. (1959). The Criminal Law and the Civil Code in Day-to-Day Employee Relations. *Relations industrielles / Industrial Relations*, *14*(1), 102–110. https://doi.org/10.7202/1022345ar

Article abstract

The following are excerpts of a panel discussion sponsored some months ago (October 24th, 1957) by the Employee Relations Section of The Montreal Board of Trade. The panelists were: Messrs. Erskine Buchanan, Philip Cutler and Paul F. Renault, barristers and solicitors. Here is what they had to say on the terminating of employees' services (Mr. Buchanan), other aspects of the Civil Code concerning employee relations (Mr. Cutler), and the Criminal Law aspects of such relations (Mr. Renault).

The Criminal Law and the Civil Code in Day-to-Day Employee Relations

The following are excerpts of a panel discussion sponsored some months ago (October 24th, 1957) by the Employee Relations Section of The Montreal Board of Trade. *The panelists were: Messrs. Erskine Buchanan, Philip Cutler and Paul F. Renault, barristers and solicitors. Here is what they had to say on the terminating of employees' services (Mr. Buchanan), other aspects of the Civil Code concerning employee relations (Mr. Cutler), and the Criminal Law aspects of such relations (Mr. Renault).*

ERSKINE BUCHANAN

The Civil Code has never had many articles on the question of employment, or the lease and hire of work, as we know it. As a matter of fact, it is confined to about four or five articles only, as compared with other sections of the Code dealing with sale, obligations, successions, etc., which have numerous articles. It has been somewhat silent on the lease and hire of work.

The particular article dealing with the termination of employment is Article 1668, and this is the only article that I am going to read. It says that the contract of employment « is terminated by the death of the party hired or his becoming, without fault, unable to perform the services agreed upon. It is also terminated by the death of the party hiring, in some cases, according to circumstances ». Then we come to this part: « In the case of a domestic, servant, journeyman or labourer, hired by the week, the month, or the year, but for an indefinite period of time, his contract may be terminated by a notice given by one of the parties to the other, of a week, if the contract is by the week; of two weeks, if the contract is by the month; of a month, if the contract is by the year ».

I would ask you to note that this last paragraph — about the week or the two weeks' notice — refers only to domestics, servants — or « serviteur » in French — journeymen or labourers. In other words, it deals pretty much with only what we might call « manual » workers. So you see, it does not go very far in telling us what should be the case in the terminating of the services of other employees. I might say that this part of this Article was put into the Code only in 1949 — just some seven years ago. Before that, it was a major searching job to find out exactly what did govern. There was an Act of the Province known as the Masters and Servants Act, but it did not apply in the City of Montreal or the City of Quebec, or in other places governed by the Cities and Towns Act. For the City of Montreal, you had to go back to a By-Law enacted about 1860 in which, as I remember, the language was most archaic, and it was very, very difficult to know what the rule was. Luckily, seven years ago, they decided to scrap all those old Masters and Servants Acts, the By-Laws of the City of Montreal, the City of Quebec, and the relevant sections of the Cities and Towns Act, and this clause became part of the law.

Now, I do not think I could do better than to read to you an excerpt, which is rather badly translated by me from the French, of what the late Honourable Mr. Justice Mignault said in his work dealing with this Article 1668, as it was before this last amendment, dealing generally with the dismissal of employees. He said the dismissal of an employee without sufficient cause before the expiry of the term gives to the latter the right to claim the damages which he has sustained. He is speaking there, of course, of an employee who is engaged for a definite term, as would be more the case many years ago where people might have been hired for a definite term like a year, as they most often were where there was the case of apprenticeship, and so on. Well, if an employee was engaged for a year, then, as Judge Mignault says, if he was dismissed before the end of that term, it gave the right to the employee to claim damages. He said a large number of decisions had been rendered by our Courts with respect to the recourse which the employee may exercise in the case of his dismissal before the expiry of the term of his engagement. The employee who had been dismissed without sufficient reason before the expiry of the term had not only the right to an action in damages resulting from the inexecution of the agreement, but he might, should he prefer, also demand the execution of the agreement and claim his salary. It goes without saying that the employee who was dismissed for sufficient cause has only a right to his salary up to the moment of his dismissal. In order that there may be sufficient cause for dismissal, it is necessary that the employee shall have committed the fault and that this fault be of a nature to cause a prejudice to his employer.

Then Judge Mignault goes on to recite a number of different cases of faults of employees which justify dismissal and, as some of the questions that will be put to us later bear on this point, I might just run over these broad causes of « discharge for cause ».

I want you to remember, though, that a lot of these are very, very old decisions. Some of them might not be looked upon as faults today; as the matter of employee-employer relations has been greatly modified over the years. He (Judge Mignault) says that, amongst the sufficient causes for dismissal are: disobedience, insolence, insubordination (I am not going to burden you with the various judgments of the Courts, but under each one of these references he quotes the various judgments), negligence in his work, absence of the employee from work without permission, taking employment in a rival industry. I must tell you of a curious case of discharge for sufficient cause in which a large newspaper — I will not mention any names — dismissed an employee who refused to be vaccinated. This was many years ago, but it was held to be proper justification for dismissal and the employee had no right to recover damages.

I have told you of this question of discharge or dismissal for cause — I have given you a few examples of them — and, in such cases, there can be no need for any notice or payment in lieu of notice. Of course, the employer must be very certain of his ground and of being able to prove that this fault, or the negligence of the employee, has actually been committed and that he can substantiate it, should the employee bring an action in damages against him.

Now we come to the question of the termination by giving due notice to an employee and, as I say, we have two sets of employees to consider. There is the

employee who is covered by Article 1668, which I read to you. This article deals with manual workers and refers to an engagement for an indefinite period of time. Practically all employment today is of this type. Some few people are tied up for a year, or five years, or something like that; but the average person who is engaged for manual work is engaged on an indefinite basis and is paid either semi-monthly, or weekly or every two weeks. In that case, the employment can be terminated by a notice given to the employee, if he is paid by the week, of one week; if paid semi-monthly, by a half month's notice, and so on. The notice can be given in any manner, either by letter or verbally, by the foreman or representative of the employer; so long, of course, as it can be proved. If necessary, instead of giving the notice that the employment will be terminated on such and such a date, payment in lieu of notice may be made, that is, a payment of one week's salary or wages, if it is a question of one week's notice. So, in the case of these manual workers, as covered by Article 1668, there really does not seem to be much problem.

However, when one gets into the question of other employees — and I might start off with what I consider a large section of the employee population, such as office workers, who could not come under this head of Article 1668 — there is nothing actually laid down except what we learn from the jurisprudence and the numerous cases that have been decided regarding these employees. This jurisprudence really flows from another article of the Section which deals with the Contract of Lease and Hire of Personal Services — Article 1670. I said I was not going to read another article, but this is a very short one, anyway, and, I think, very much to the point. It says « the rights and obligations arising from the lease or hire of personal services are subject to the rules common to contracts ». That refers us back to the articles of the Civil Code, being all those articles dealing with contracts. Out of this has grown this jurisprudence with regard to the employment of employees who are not already referred to by the previous Article 1668.

There are two main judgments which are of interest on this point and are well known to all lawyers. The first is the case of Cook and Asbestos Corporation, and the second is Stewart versus The Hanover Insurance Company. They have pretty well laid down the law regarding the term of notice to be given in the case of a contract of employment for an indefinite period (as I said before, the law has never varied with regard to the contract for a definite period which always terminates on the terminable date without notice and without any other formalities) such as one governing a person who may be paid so much a year, or at so much a month, and who is employed for a period of five, six, or seven years until his employer wishes to determinate the services; then such employer must give a notice of termination of a certain length of time.

First of all, in the Asbestos case, it was laid down that a *reasonable* notice must be given. In The Hanover Insurance Company case it was held that the length of notice should be along the same lines as the same notice given in the termination of the lease of a house. There is only one other article of the Civil Code which mentions specific periods of notice and, for some reason or other, the Courts have assimilated the contract of employment and the contract of the lease of a house, and I am not going to read this article. But it does vary slightly from Article 1668.

Then there have been other cases in recent years which have pretty well settled the law. One was the case of Mr. Justice C. Gordon Mackinnon in Concrete Column Clamps Limited versus Pepin rendered in 1948. This was the case of a man who was driving a truck whose contract was terminated by his company. He sued the company, and the company was condemned to pay him the equivalent of a week's pay *because he was paid by the week.*

Then there was the later judgment by Mr. Justice Batshaw in 1952 which follows this last case up to that point but went a little further. Although this case never went to appeal, and although there do not seem to have been any other similar judgments following it, it should be mentioned, as it is a judgment of the Superior Court. In this case the Judge held that an employee who was paid every half-month was entitled to his half-monthly pay in lieu of notice. He also held that that half-monthly notice *could not start* until the next pay-day after his employer had decided to get rid of him. I submit that this is going a little far, but that is a judgment that must be considered, and it may be modified later on.

PHILIP CUTLER

As far as a general strike is concerned, the prime consideration is not a legal, but a social one, and labour generally is of the opinion that it is wrong to punish the non-interested employer who respects his contractual relations because of some situation at, say, Murdochville, as in the case of this resolution, or anywhere else. Of course, there is also another very good reason why no general strike was called, and that is because the membership just would not go for it. And so I propose to you that the general strike, at this time, is something that just is not to be; cannot be; is legally, and socially, wrong; and labour will not go for it.

The second point I would deal with — also equally important — is the delays that are brought by recourse to the Courts and which have created a mockery of our system — our juridical system in this Province in particular, although elsewhere as well. There are what we term « prerogative writs », whereby Administrative Boards, such as the Labour Relations Board and Arbitration Board, can have their proceedings, their decisions, brought before the Courts for review. These are lengthy procedures under which, sometimes, regardless of what is decided or when they were instituted by the employers — and even if the judgment goes in favour of the union — there is no union to receive the victory. This may be worthwhile as far as the individual employer is concerned, and — if my colleagues will forgive and excuse this trespass — it may even be lucrative for certain attorneys to undertake it but, in the long run, it will bring disgrace upon the Bar; it will bring shame upon the employer concerned; and it will solve nothing as far as labour relations are concerned. True, the employer is entitled to his difference of opinion. True, both employers and employees need not share the same position in a dispute; but, surely when we are participating in the intercourse of a highly intricate society, we must bring about conclusions in more rapid fashion than to wait two and a half years to find out, for example, that the union was right in the first place in seeking recognition, or that, in any case, most of the people who were there at the

time are no longer employed, or perhaps the employer is no longer in business. This is something that is deserving of a crash program; something that is deserving of the consideration not only of labour, not only of the many interested members of the Bar, but the employers themselves and such groups as the Board of Trade. We must have the kind of legal situation — legal system — that will deal with things when they are to be dealt with and not long after the crisis has come and gone and has punished people unnecessarily.

I will conclude with this one remark, or one thought. Apart from the various questions that have been submitted, our laws can be divided into two main categories: laws that cannot be set aside because of what is known as public order and good morals; and laws that exist as guidance but, nevertheless, leave the parties free to seek a different understanding providing it is mutually acceptable to those interested. Fortunately, in the labour relations field, whether it be what period of notice to give before a lay-off; what severance pay; whether it be « can an employee be searched or not ? »; whether it be the many other things that come up here, the law sanctions that it be worked out between the parties themselves. It is important that we have laws. It is important that the various mores of society be converted into law. It is important that these laws be respected, for these laws become the barometer of what is happening in our society. It is a good thing that the legislator does not decide to legislate on every conceivable aspect of the relationship between the employer and employee. Therefore, aside from the answers that will be given to these questions, there is still a lot of work to be done by the employer or his representative and the employee and his representative in order to work out these many problems from day to day. In saying that, I also add that it is important that employer groups be well organized and be strong, and that they encourage their employee groups to be equally as strong. Secure people are unafraid and commit less abuse. I think the same can also be said for organizations.

PAUL-F. RENAULT

I will limit myself to the very ordinary day-to-day employer-employee relations; such as, to situations arising when an employee is hired, or while he is employed, and at the severance of his employment.

When reviewing what could happen when you hire an employee and what situations could be covered by Criminal Law, I was unable to find any real problems in connection with this matter. We all know, of course, that when you employ an individual, there is a contract which intervenes between the employer and the prospective employee, whether this contract is verbal or written. It is common now, with larger industries at least, to have a prospective employee sign an application card. If he is accepted, this application can be regarded, depending on its form and formalities, either as a written contract or at least as, what we call in law, « beginning of the proof in writing ». You will, therefore, realize that it is important for any company to be careful in the preparation of its application forms, and due notice should be taken as to whether or not there is a union in the plant, whether or not there is a closed shop and also, whether or not union dues are automatically deducted and remitted to the union, etc.

An employee relations matter which comes within the scope of the Criminal Code — at least indirectly — is that of the searching of employees.

The problem of searching employees certainly does not belong to the employer as « of right ». Though the employee works for the employer, he is entitled to his freedom and to his private life. However, in some industries, either on account of the product manufactured or the number of employees who have to furnish their own expensive tools, the problem is of some importance. In such cases, I would suggest that the application form signed by the employee bear an authorization and agreement to be searched at any time, either alone or in groups as, for exemple, for a spot check. What would be the recommendation if there is no such authorization signed by the employees and if management wishes to search either all the employees or only one or two of them? In such a case, of course, the manager or person responsible has usually called the police but, even there, the police cannot, without a search warrant, search an employee who objects to it. In such cases, it is not the search in itself which is dangerous, but the consequences of such a search, especially actions in damages, if nothing is found on the employee; because the search, it will be claimed, was an attempt to discredit the employee. At any rate, I have always considered and have in some cases suggested to management that, in order to avoid giving an employee grounds for action in damages, it is better to order a search of *all* employees and to do it in such a way that one employee could not, in an action for damages, say that management's action singled him out as being dishonest or a thief. If this cannot be done, either because the circumstances are such that the employee has already been called before the manager or his assistant, or is already in a room by himself, the only recommendation we suggest is to avoid, as much as possible, that other employees know about the fact that this employee has been brought up to be searched. If the employee refuses to be searched, and management insists, the only remedy is to obtain a search warrant.

In dealing with the question of employment, I might just mention that it is my personal opinion that, for the good of society, personnel managers should try to avoid the very strict rule of never employing a person who has a criminal record. From my personal experience of having acted as private prosecutor for some corporations — especially banks — I feel that, in such cases, additional information should be obtained concerning the offence, the record, etc., before a decision is made; provided, of course, the prospective employee fulfills all other requirements of the job.

What can happen now during employment? In restricting myself to day-to-day relations between employers and employees coming under our Criminal Law, I have chosen to speak of the following: What to do when an employee has committed a criminal act. It is not necessary for me to stress to you the necessity of being certain that the employee has committed the criminal act before either accusing him or issuing summons or complaints against him. Usually the criminal act consists of theft. If you think that an employee is stealing property or money from you, you should organize a system by which you could be sure that he is the person responsible before doing anything. Lawyers are sometimes in the position of having to advise management, in arbitration cases for dismissal or in actions for damages, that management does not have sufficient proof and that the case should

be settled or dropped. In some cases, it might even be necessary to advise the client that it is dangerous even to allege, in a plea in an action for damages, any dishonesty because this further allegation can be further grounds for another damage action. I do not think we can ever stress enough the necessity of obtaining *sufficient proof before accusing an employee of a criminal act.*

If you are dealing with a union, the necessity of strong proof against a particular employee is, of course, equally as important. In many cases, when relations between management and union are as they should be — business-like, etc. — union officials will refuse to bring to arbitration a complaint by an employee to the effect that he has been unjustly discharged when the circumstances of the case are given to the union. In most cases, however, it is advisable, when the case is good, to take criminal complaint against the guilty employee.

On the other hand, it may happen that management, for special reasons, is prepared to overlook the matter and is content with only the dismissal of the employee. I have seen some cases where the union, or some other third parties, in their eagerness to bring such dismissals to arbitration, have forced management to take criminal proceedings which, in some cases, may be very harmful to a family and be a more severe punishment than is warranted by the misdeed.

In résumé, I would say that management, in most cases, would be well advised, when criminal acts are committed by one of their employees, whether it be a case of theft, a question of morals, etc., after careful examination of the facts and of the proof and after consultation with their lawyers, to issue a complaint in the Criminal Courts — even though it might be expensive. I said « in most cases » because it is difficult to establish a rigid rule. There are cases which deserve special treatment; but, in general, employers have a duty to society, to other employers, and to their employees to single out a dangerous employee by taking criminal proceedings. It is important, however, once management has made up its mind to take proceedings and has filed a complaint, not to agree to the withdrawal of such a complaint only because the employee or his relatives are prepared to reimburse the company. This is important not only because the judges are entitled to deny any such withdrawal of complaints and may, as has been done recently, make statements in open Court against such use of our Courts, or Criminal Courts, to collect money but, also, because it is a discredit against the company. If, of course, for some very particular reasons — reasons outside the question of reimbursement — management decides to withdraw a complaint, it should instruct its lawyer to give the reasons to the judge and, therefore, allow the judge to agree that the case should be dropped. It is never good policy for a company — or anyone, as far as that is concerned — to dictate its decisions to the Court.

In dealing with criminal acts which can be committed by employees, it might be interesting to note that Article 341 of the Criminal Code states that « it is an offence to falsify an employment record by any means, including the punching of a time clock ». If you have in your plant any « joker » who is not satisfied to punch only his own card but wishes to punch four or five other cards, it might be useful to apprehend him and, if necessary, use the Article just mentioned.

One of the most important situations in employer and employee relations which is covered by our Criminal Code deals directly or indirectly with what I would

call the formation of a union in the plant. Let us consider the following situations:

It is a recognized right, not only by legislation, but by our basic principle of law, that employees are entitled to form a union and that the employers cannot prevent them from so doing. Article 367 of our Criminal Code says distinctly that an employer or his agent is responsible for an offence punishable on summary conviction if he refuses to employ or dismisses any person because he is a member of a trade union. The article goes as far as saying that an employer cannot even intimidate nor make threats to an employee because he is a member of a union. On the other hand, though the employee has a basic right of association, he has to do it according to law. He cannot force other employees to enter the union. He cannot make threats. He cannot block highways; he cannot even watch the house or business-place for the purpose of trying to intimidate the other employees or the employer. This is covered by Article 366 of the Criminal Code.

Of course I must draw your attention to the fact that a distinction has to be made between the watching of a house and the attending at a place for the purpose of obtaining or communicating information. In other words, a person may be near a place to try to obtain information from other members of the union without being accused of trying to intimidate the other employees. There is much jurisprudence on this subject. It may develop into a ticklish situation, and you should consult your lawyer in each every case before taking any proceedings of this nature.

There is also the extraordinary situation covered by Article 365 of the Criminal Code known as « Criminal Breach of Contract ». This is not an ordinary situation and I do not intend to spend time on this matter. It may interest, specially, corporations known as public utilities. In such cases, when there is a criminal breach of contract, the Attorney General of Quebec has to give permission to take proceedings. I should also consider briefly the recourse concerning what could be illegal strikes or illegal but not criminal acts committed when a strike or lock-out is called. I think I can safely say that this situation is not, as such, covered by our Criminal Code. The calling of an illegal strike or illegal work stoppage, whether by union officials or by the employees, is not per se a criminal act and it not per se covered by the Criminal Code. The calling of an illegal strike or picketing in such a way that illegal but not criminal acts are committed falls under our Civil Law and Civil Courts. In such a case, the ordinary procedure is the obtaining of an injunction against the union, the union officials, or the employees, calling the illegal strike. If the injunction is granted, and the employees disobey the orders of the Court, this disobedience is covered by our Criminal Code by the Contempt-of-Court proceedings.

We have also in the Criminal Code an Article which is entitled « Mischief ». It is Article 372. It deals with the destruction or damage to property or the obstruction of the enjoyment and operation of property or the rendering of such property dangerous. This procedure cannot be used without being sure that you have given all the facts to your lawyer because the article goes on to make some restrictions which I have already mentioned.

Now, the dismissal of employees. When an employee is dismissed, one of the common situations which can arise has to deal with the non-return of

tools, samples, etc., which should otherwise be returned. It is, of course, all a question of facts. If proof is sufficient, the employee can be accused of stealing, but the proof must be strong if your case is to succeed.

In concluding these remarks, may I be permitted to give some kind of general advice which is not strictly legal, but which is distated by common sense. In general, I feel that management should carefully weigh the pros and cons before using criminal proceedings in cases of labour disputes. One must never forget that, after such disputes, he is still bound to live with his employees. On the other hand, except in special cases, management owes it to society not to hesitate to spend money to bring before our Criminal Courts any employee who commits a crime. I am of the opinion that management does not discharge its responsibility towards society when it renounces its right to bring before our Criminal Courts one of its employees who has committed a crime only because, in so doing, the company is required to spend some money.

INFORMATIONS

Le chômage

L'ampleur tenace du chômage au Canada, et dans le Québec en particulier, ne laisse pas d'inquiéter les observateurs de la vie sociale et économique, et davantage encore les travailleurs, touchés directement. Nous avons donc cru utile de présenter ici le texte intégral du Mémoire sur le chômage *soumis conjointement par la Fédération des travailleurs du Québec (CTC) et la Confédération des travailleurs catholiques du Canada au cabinet provincial québecois le 13 juin 1958.*

Le présent mémoire déposé conjointement par la Fédération des Travailleurs du Québec (C.T.C.) et par la Confédération des Travailleurs Catholiques du Canada, veut saisir les autorités provinciales de la vive inquiétude que nos deux centrales éprouvent au sujet du chômage et formuler au nom des 275,000 membres qu'elles représentent et des quelques 263,000 travailleurs en chômage dans la province (Cf. Situation de l'emploi, fév. 1958, Ministère du Travail B.S.F.), les mesures qu'elles attendent du gouvernement provincial.

Ce mémoire veut d'abord rappeler qu'au cours des dernières années et plus particulièrement depuis les derniers cinq ans, soit dans leurs mémoires annuels soit par la présentation de résolutions, nos deux centrales n'ont cessé de faire part de leur préoccupation et de leur inquiétude sur la situation aggravante de l'emploi.

Cet hiver, la crise de l'emploi a atteint des dimensions sans précédent. D'après les chiffres actuels, il est facile de prévoir que le chômage aura touché cette année,