

Extended abstract:

**TOLERATING EMPLOYEE MISBEHAVIOUR:
WHERE DOES OUR FEDERAL INDUSTRIAL TRIBUNAL STAND?**

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TOLERATING EMPLOYEE MISBEHAVIOUR: WHERE DOES OUR FEDERAL INDUSTRIAL TRIBUNAL STAND?

Purpose

Industrial tribunal decisions are believed to contribute to public standards (Donaghey 2006) and to reflect societal values (Wright 2002). How much tolerance employers and unions must show towards employees who may have engaged in misbehaviour is therefore likely to be influenced by unfair dismissal decisions made by Australia's federal industrial tribunal. The endless manifestation of employee misbehaviours can be classified according to Robinson and Bennett's (1995) employee deviance typology. Using this typology, the research question examined the level of 'judicial' tolerance for offences committed by employees across Australian workplaces that culminated in an arbitration hearing before the country's federal industrial tribunal.

Methodology

Using a quantitative research method, 565 misbehaviour-related, unfair dismissal arbitration decisions made by Australia's federal industrial tribunal between July 2000 and July 2010 were examined. This accounted for all misconduct-related dismissals arbitrated during that period. Through a content analysis process, each tribunal decision was coded and converted into count data. Logistic regression was used to determine statistically significant influences on whether or not a dismissal was upheld or overturned. In addition to the type of misbehaviour, examples of other independent variables included in the model related to the gender of both the arbitrator and worker; the worker's occupation, disciplinary history, service period, whether the worker apologised, and his (or) her explanation for the incident; the industry sector and employee headcount; the type of advocacy used by both the worker and employer; employer errors in administering the dismissal; and the presence of a HR expert in the workplace.

Key findings

In 55 percent of the decisions, the arbitrator upheld the employer's decision to dismiss the worker. Significance tests verified that Robinson and Bennett's typology of personal aggression, production deviance, political deviance and property deviance were all considered unacceptable in Australian workplaces. In short, acts of personal aggression are targeted at individuals within the organisation whilst acts of property deviance are targeted at the organisation itself. Importantly, the results enabled us to *order* the range of tolerance, as shown in Table 1. From this ordering, a picture emerged as to what factor may be framing the extremities of the arbitrators' tolerance for the misbehaviours: *the target of the behaviour*.

Table 1. *Increasing degree of tolerance exhibited by arbitrators towards misbehaviour*

| Type of misbehaviour | Tolerance level | Target of misbehaviour | Justification |
|----------------------|---|------------------------|--|
| personal aggression | least tolerated | person | the worker harmed or potentially harmed a person either physically and/or psychologically |
| production deviance |  | organisation | the worker harmed or threatened the employer's profitability |
| political deviance | | person | the worker harmed or potentially harmed a person's reputation or career |
| property deviance | most tolerated | organisation | the worker damaged or misappropriated the employer's physical assets |

Table 1 indicates that arbitrators had the *least tolerance* - meaning they were most likely to support a dismissal - where the behaviour involved *personal aggression* such as fighting, verbal abuse and sexual harassment. At the other extreme, acts under the banner of property deviance were found to be those *most tolerated* by arbitrators as these behaviours were influential in decisions that were favourable to the worker and resulted in the worker either being reinstated or compensated for their dismissal. *Property deviance* targets the material nature of the business' physical assets, such as pilfering the employer's property or wilful damage to equipment. As arbitrators were most inclined to sustain the employer's punishment in response to personally aggressive acts, and least so over property related misdeeds, the message being subtly promulgated is that people are valued over property; a welcome finding from a humanistic perspective.

Research limitations

This analysis, with its focus on arbitration, did not include in its analysis events where an employee either abandoned an unfair dismissal claim, or moreover, the extensive number of claims settled through conciliation which occurs off the public record. The size and nature of the dataset limited the statistical analysis in several aspects: measuring the distinct shifts over the three legislative regimes of the 10 year data period; limiting variables reflecting a wide variety of factors at play in arbitration; and 'perfect prediction' associated with two of the independent variables.

Practical, Policy and Social implications

All four categories of deviance are intolerable to arbitrators and this intolerance consequently guides and (or) reinforces our general societal values about appropriate employee behaviours. If we can reduce the occurrence of these dark behaviours, economic efficiencies, happier workplaces and healthier workers, would hopefully ensue. Personal aggression in the workplace is considered the most offensive behaviour in which a worker can engage. With this knowledge, policy efforts can be concentrated on reducing these behaviours by promoting national workplace cultures that reinforce the societal intolerance for personally aggressive acts.

Industry associations can promote similar behavioural expectations by providing resources such as running awareness sessions that support employers in the implementation or revision of codes of conduct, with a view to reinforcing the vilification of personally aggressive behaviours. Unions could offer similar support, but in particular could engage with employers to develop workplace 'behaviour charters'. And, as the remaining three deviance categories - production, political and property – were only marginally less abhorred, they too can be used to inform future codes of conduct or behaviour charters at the workplace and industry level, and policy directions at a national level.

The highest tolerance for property deviance may be a function of the tangible and objective nature of property related offences, making them the 'simpler' cases for employers to investigate and for arbitrators to identify if any subsequent weaknesses occurred in the employer's investigations and rationales leading to a dismissal. If this is the case, then it may not be a situation of arbitrators having a higher tolerance for property deviance, but rather a weakness in a particular employers' ability to execute fair and just investigations and dismissal processes when it is believed employees engaged in acts of property deviance. This conclusion reinforces the importance of expertise in procedural justice, workplace investigations and disciplinary options as a factor in the HRM manager's toolkit.

Arbitrators overturned employer decisions to dismiss 'misbehaving' workers in nearly half of the claims examined, giving workers and unions a reasonable incentive to pursue arbitration if they felt conciliation failed to achieve a satisfactory resolution. The federal tribunal's arbitration system thus provides a sound justice mechanism for the lesser-powered, and possibly ill-accused worker: as intended ideologically, legislatively and in the ILO conventions. However, it also means a gap exists between employers' and arbitrators' beliefs about what constitutes appropriate applications of an employer's managerial prerogative when employees 'misbehave'. Employers appear to hold workers to higher standards of behaviour than those expected by people in broader circles of society. This incongruence needs to be minimised to reduce the financial and emotional implications for the worker and employer, as well as economic impacts on the taxpayer dollars funding the federal tribunal to adjudicate these grievances.

References

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