Termination for Incompetence

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If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer’s business, or if he has been guilty of willful disobedience to the employer’s orders in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee.¹

In fact, in almost all cases the allegations of incompetence will ‘merge with other factors of greater severity’…as the reported cases demonstrate, a finding of just cause for incompetence is exceedingly rare.²

The first quote above, although taken from a 1967 case, relates a principle that is still applicable today: employers are permitted by law to summarily dismiss an employee for certain acts or omissions, including incompetence. However, as the second quote indicates, an employer’s right to terminate an incompetent employee is constrained. This paper will seek to explain this limit upon employers’ rights to terminate for incompetence and will then proceed to provide an overview of the most necessary elements of an incompetence case.

Introduction: The Elusive Definition of Just Cause

There are various labels that are used to describe the circumstances in which summary dismissal might be justified. These circumstances include acts of dishonesty, insubordination, and incompetence. These labels, or rather the actions or inactions to which they attach, are collectively referred as “just cause” for dismissal. At the heart of each just cause argument is the existence of circumstances that indicate that the employee has repudiated the contract of employment.³

That employers should have such a right has a common sense appeal. It seems illogical to suggest that employers should be required to continue to employ (or pay to get rid of) someone who is substantially harming their interests, especially through neglect or willfulness. The problem for employers is that this common sense principle does not take into account a number of competing interests that seek to blunt or manage its application.

The primary principle competing with the employer’s right to summarily dismiss finds its source in the argument that contract law, with its cornerstones of freedom to contract and equality of bargaining power, does not fit comfortably in the employment context. The Supreme Court of Canada has commented upon this poor fit on numerous occasions. In the seminal case of *Wallace v. United Grain Growers Ltd.*, [1997] S.C.J. No. 94 at para 90 the majority of the court said that “[t]he contract of employment has many characteristics that set it apart from the ordinary commercial contract”. The court also referred with approval to the following excerpt from an article by K. Swinton:

… the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer…”

Similarly, in an oft quoted passage from *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para. 91 the majority of the Supreme Court of Canada said that:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.

These pronouncements lead to the inescapable conclusion that in Canada today the employer-employee relationship is no longer viewed by the courts through the lens of black letter contract law.

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Geoffrey England et al., have suggested a theoretical framework for analyzing this tension between employees and employers. The authors argue that the principles of employment law that currently hold sway are the product of the tension between two competing paradigms – the rights paradigm and the efficiency paradigm. Briefly, these two paradigms can be summarized as follows: the rights paradigm seeks to ensure that employers’ disciplinary decisions are rational, proportional, made in good faith, made with procedural fairness, and made in the same way for both unionized and non-unionized employees. In contrast, the efficiency paradigm seeks to advance the position that employers should be afforded a lot of latitude in managing their employee relations because they are the most qualified to determine how their enterprises can be efficiently run, which will allow a spill over of benefits to employees.5

In short, although pure contract law might support it, the courts will no longer permit employers to terminate employees summarily because the employment relationship is one of such significance and because it is very susceptible to abuse. Therefore, the argument is that if there is ambiguity in the definition of just cause, then it may be an ambiguity that is the product of necessity.6

As a result of this reality employers are forced to contend with just cause jurisprudence that is difficult to understand and even more difficult to apply. An examination of the case law and commentary reveals that there is no rigid test that can be applied by employers with assurance when terminating an employee for cause. This lack of certainty does make it difficult for employers to know when they are justified in terminating an employee without notice or payment in lieu of notice.7 It will be demonstrated that the flexibility of the just cause analysis is particularly apparent in the area of termination for incompetence and makes it very difficult for employers to succeed

6 This tension has been at the foundation of developments in both unionized and non-unionized workplaces. Although this paper is focusing on the non-unionized workplace it is important to note that there are many points of intersection and the courts (whether admittedly or no) have taken much from the jurisprudence that has been developed by arbitrators and boards. In the end, however, non-unionized employees are more at the mercy of employer decisions. These employees can be fired at any time as long as the employer provides reasonable notice (and assuming no violation of the Employment Standards Act or the Human Rights Code). See e.g. Randall, supra note 3 at 15.16 – 15.29.
7 See e.g. Randall, supra note 3 at 6-1, 6-4 – 6-6.
in justifying such terminations.\(^8\) However, the analysis that follows will be of assistance to employers as it will provide a practical and succinct guide to the dangers that employers face in alleging termination for incompetence and the steps that they can take to increase their chances of proving just cause.

**Implications of terminating without cause**

Uncertainty as to when an employee can be terminated for cause is problematic for employers because if an employer terminates an employee without notice or payment in lieu of notice, and is not able to prove that it had just cause for termination, then the consequences to the employer may be twofold. First, if the employee has the wherewithal to protest against the employer’s actions and bring a complaint, then the employer will be faced with the cost of defending its decision (which may include both an economic cost and a cost in terms of employee morale). Second, if it fails to justify its decision on a balance of probabilities\(^9\) then the employer will be required to pay out the reasonable notice that was owed to the employee or, in some cases, reinstate the employee (i.e. if it is found that the employee was suffering from a disability that the employer did not accommodate or if the employer was found to have terminated the employee in violation of her statutory rights under the Employment Standards Act 2000, S.O., 2000, c. 41 (ESA)). What constitutes reasonable notice is itself a difficult question to answer and is beyond the scope of the present analysis. However, it can be said that the common law calculation of reasonable notice usually results in an employer owing an employee significantly more notice than the statutory minimum mandated by the ESA.\(^10\)

In addition, employers must be aware that while the ESA does allow employers to summarily terminate employees who can be shown to be guilty of willful misconduct, neglect or disobedience, this standard is not the same as just cause under the common law. In other words, while an employer may be able to make out a case for termination

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\(^8\) See e.g. Handbook, supra note 3 at 4-11.

\(^9\) See e.g. Randall, supra note 3 at 6-2 where the authors discuss the onus of proof and the standard of proof which apply in wrongful dismissal cases.

for incompetence under the common law, it is unlikely that it will be able to avoid paying
the statutory minimum notice required by the *ESA*.\textsuperscript{11} This result is due to the fact that
incompetence, by its very nature, is generally viewed as unintentional.\textsuperscript{12}

However, it is not accurate to say that employers are completely without guidance
in their attempts to terminate employees for incompetence. First, there are several
theoretical bases for this persisting ambiguity that, if understood by employers, can assist
them in preparing their case for summary dismissal. Second, and of more tangible
assistance, the courts have developed guidelines that, if followed by the employer, greatly
increase the chances that decisions to terminate for cause will be upheld upon review.
This is especially so in the area of termination for incompetence which will be the focus
of this analysis.

Before delving into the shifting minutiae of the test for termination for
incompetence, some theoretical explanations for the ambiguity of just cause will be
briefly outlined.

**Employees’ Rights – What are they?**

Non-unionized employees cannot be terminated by their employers without
reasonable notice (or payment in lieu of reasonable notice) unless the employer can prove
that it had just cause for summary dismissal. Also, as was discussed above, the employee
has the right not to be terminated (even if reasonable notice is given) if the reason for the
termination is associated with a disability or the accessing of a right under the *ESA*.\textsuperscript{13}

This recitation of the primary right of employees is unfortunately only the beginning
of a murky but necessary analysis. The primary question that arises is: What constitutes
just cause for dismissal? More specifically for the present analysis, what rights do
employees have in cases where the employer wishes to terminate for incompetence?

– 19-154 [hereinafter *Act*].

\textsuperscript{12} See e.g. David Harris, *Wrongful Dismissal* (Toronto: Carswell, 2003) at 3-152.2(1) [hereinafter *Harris*].

\textsuperscript{13} See below for more on dismissing a disabled employee.
Once again, a deceptively simple step-by-step list of rights can be related. A reading of the case law and commentary reveals that in order to be justified in terminating an employee for incompetence the employer must:

1) establish, and communicate to the employee, the objective standards of competence that are required;

2) if there is a non-trivial and objective performance problem, warn the employee that their performance is not acceptable and clearly state that the employee’s job could be in jeopardy if their performance does not improve; and

3) afford the employee a reasonable opportunity to improve.\(^{14}\)

Once again, questions arise that cannot easily be answered. What constitutes reasonable notice of the job requirements? What are acceptable objective standards? What level of performance will be deemed to fall below the objective standards? What will constitute sufficient warning of poor performance? What amount of time must be afforded to the employee to improve her performance?

Each of these questions will be addressed in turn.

**Communicating the Job Requirements to the Employee**

An employer who that has failed to communicate the job requirements to the employee will have a difficult time arguing that they are justified in terminating an employee for not meeting those requirements.

Ideally, job requirements should be communicated to the employee at the time of hiring. In “The Wrongful Dismissal Handbook” John R. Sproat writes that employers should use employment contracts that limit the period of notice as well as provide an

\(^{14}\) See e.g. *Levitt, supra* note 10 at 181 to 195 where the author lists 37 factors that employers have to establish in order to show cause for discharge based on incompetence; *Randall, supra* note 3 at 15-6 - 15-7; *Harris, supra* note 12 at 3-152.2(1) – 3-152.3
unconditional termination provision that sets out the level of competence required. Sproat argues that such an agreement, if communicated to the employee in its entirety at the beginning of the relationship (before any oral agreement is entered into) and signed by the employee, will likely be enforced by the courts and trump common law entitlements.

Unfortunately, entering into employment contracts has not, in practice, proved to be a miracle cure for employers. First, employers cannot contract out of the Employment Standards minimums and, as discussed above, under the ESA employers probably have to pay incompetent employees their minimum notice even though they have just case under the common law. Second, employers must be very careful in drafting these agreements if they wish to completely avoid entering into the murky waters of what constitutes cause for dismissal under the common law.

Courts have routinely implied into employment contracts a condition that the employer, in exercising its discretion to terminate, will act in a fair and reasonable manner. Similarly, courts have construed any ambiguity present in the contract in favour of the employee. The courts justify these practices by stating that to contract unfettered discretion for the employer is unconscionable considering the vulnerable position of the employee, or by saying that if the employee had turned its mind to the issues it would clearly have intended that the employer would be required to act in a fair and reasonable manner. Alternatively, the courts may say that they are merely applying the principles of contract interpretation by interpreting ambiguities against the party who drafted the contract.

Employers must also be aware that if they hire an employee knowing that that employee lacks certain qualifications and experience then they cannot then turn around and demand that those aspects of the performance requirements be fulfilled without further training, etc. Similarly, however, if an employee makes representations as to their

15 Handbook, supra note 3 at 3-12.2 – 3-13. Sproat provides more recommendations re: ensuring the enforceability of the employment contract that may be useful for employers (e.g. a system to require the employee to reaffirm the contract form time to time).
16 Employment Standards Act, 2000, S.O. 2000, c. 41, s. 5.
17 Levitt, supra note 10 at 429 – 431, 437-440; See e.g. Randall, supra note 3 at 15.56.
abilities at the time of hiring and then is discovered not to have those skills, the employer may be justified in terminating for incompetence.18

**Acceptable Objective Standards of Performance**

Absent a clause in the employment contract that defines competence (as discussed above), the court will often examine the performance standards set by the employer to determine if they are fair.19 If the court did not conduct this review then it is possible that employers would promulgate standards and then label any deviation from them as incompetence, no matter how unrealistic the possibility that employees could achieve the established goals.20

It is difficult to articulate a definition of a fair and objective standard, but one possible formulation is that a standard is fair and objective if it is such that a reasonable employee could achieve it through his efforts considering the surrounding circumstances. Circumstances that the courts may deem to be relevant to this inquiry might include the state of the economy, the resources and assistance available to the employee, and the standards set for, or achieved by, employees in comparable positions.21

**When does an Employee fall below the Acceptable Standards?**

Throughout the cases and commentary dealing with termination for incompetence run the following phrases: “an employer must show more than mere dissatisfaction with the employee’s work…it is not enough to show that the employee was careless or indifferent…it is not enough for the employer to dismiss for what he honestly believes to be just cause; the true test is whether just cause existed…”22 Therefore, it is apparent that

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18 See e.g. *Harris, supra* note 12 at 3-152.3 – 3-152.4; *Manual, supra* note 2 at 4-11.
19 See e.g. *Randall, supra* note 3 at 15.35
20 See e.g. *Ibid. at 3-152.7.*
it is not sufficient for employers to be merely dissatisfied with the employee’s performance. The employee must fall below the objective standard of competence.\(^{23}\)

In addition, although there some cases to the contrary (as will be discussed below in the context of the requirement to give warnings) even if the employee falls below the objective standard, if she does so only once or twice, then it is very unlikely that termination would be found to be justified unless the failure was very serious.

Further, the employer must establish that the negative impact upon its interests has been caused by employee’s incompetence rather than other factors that are beyond the employee’s control. As an example, employers commonly have a hard time sustaining a termination for incompetence where the employer alleges that the employee must be terminated because the employer is suffering economically from, for example, poor sales. The court will require the employer to demonstrate that the employee’s alleged incompetence is, in fact, the cause of the reduction in sales. The case law reveals that this is often a difficult link for employers to make. In the *Employment Law Manual* John H. Sproat writes that “there are few occupations in which the results achieved will not be the product of a broad range of factors extraneous to the individual employee, and perhaps extraneous to the employer as well”\(^{24}\). The author argues that these extraneous factors play a significant role in persuading the court that the employee’s allegedly incompetent behaviour is not just cause for dismissal.

It is, as always, also important to remember that the court will be even more hesitant to make a finding against a long-service employee.\(^ {25}\) Other mitigating factors that the courts often consider when deciding if the employee has been incompetent include: any unreasonable treatment by the employer; the fact the employee was acting under medication or stress (especially if it is the result of the job); the potential for improvement; or, generally, the presence of a reasonable excuse.\(^ {26}\)

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\(^{24}\) *Manual*, supra note 2 at 4-12.

\(^{25}\) *Ibid.* at 4-14.

\(^{26}\) *England*, supra note 5 at 15.44 – 15.45.
Required warnings and documentation

Is a warning always required before an employer is able to dismiss an employee for incompetence? Many of the authorities in this area go out of their way to insist that it is the quality of the acts or omissions of the employee, not the quantity, that is relevant to determining if summary dismissal is justified. The argument is that if the act of the employee is sufficiently serious then the employer would be justified in terminating summarily with no warning and improvement period being afforded to the employee. In fact, John R. Sproat argues that employers should be cautious about providing warnings to employees until they have had advice as to the possibility of terminating the employee outright. While these arguments may advance the correct theory, in practice, especially in incompetence cases, an employer will rarely be able to succeed in terminating an employee after one incident and without providing any warning.

It is often difficult for employers to determine what constitutes sufficient warning of poor performance and time to improve. Generally, the warning to the employee must have been clearly understood, must have related the precise areas of deficiency, the exact performance standards expected, the deadline by which those standards must be met, and that dismissal will result if the standards are not met. Warning in writing is preferable (see “Most Common ways that Employers End up in Hot water” below for more on putting warnings in writing).

It is important to note (as was also discussed above) that the obligation to provide warnings of unsatisfactory performance will be scrutinized with even more vigor where the employee has a record of long and faithful service with an otherwise good record. In such a case the courts appear more likely to feel that the warnings must have been inadequate or unclear, as otherwise a long time exemplary employee would have

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27 See e.g. Randall, supra note 3 at 6-7.
28 Handbook, supra note 3 at 4-7. The author provides this caution due to the danger that the employer will condone the employees’ acts by providing the warning and then be unable to terminate until time for improvement has bee provided. Condonation will be discussed at greater length below.
29 See e.g. Harris, supra note 12 at 3-152.6.
30 See e.g. England, supra note 5 at 15.42, 15.50, 15.51 – 15.52. note that performance reviews or tests may be seen as sufficient warning depending on the circumstances, see e.g. Randall, supra note 3 at 15-16 – 15-17.
corrected his or her behavior. Not only the content of the warnings but their timing and frequency will be carefully examined.\textsuperscript{31}

The only way that an employer could terminate an employee without the above-mentioned warning would be if there was a very serious incident of incompetence. Also, the employer cannot string together a series of trivial incidents, provide warnings, and then terminate the employee. The court will look with a wary eye at the nature of each incident to determine if, on the whole or separately, incompetence sufficient to warrant termination can be made out.\textsuperscript{32}

**Allowing the Employee Time to Improve**

The employee must be afforded a reasonable amount of time in which to improve his performance after the warning has been issued. What is reasonable will depend upon the circumstances of each case. The case law is fairly clear that if the employer indicates to the employee that she has a certain amount of time to improve, then the employer will have a very difficult time terminating that employee before that period of time has expired. In the same vein, if the employee’s performance begins to improve, then the employer will not be permitted to terminate the employee during that process.\textsuperscript{33} If an employee is terminated under either of these circumstances it is possible that additional time will be tacked onto the reasonable notice period for unfairness exercised by the employer in the manner of dismissal.\textsuperscript{34}

**When is it appropriate and what are the risks in terminating a disabled employee**

Traditionally, an employer was justified in terminating an employee if the contract became “frustrated”. A contract was considered to be frustrated when an unforeseeable event occurred that prevented either party from fulfilling their obligations

\textsuperscript{31} See e.g. *Harris, supra* note 12 at 3-152.9, 3-152.11, 3-155.
\textsuperscript{32} See e.g. *England, supra* note 5 at 15.31; *Randall, supra* note 3 at 6-11, 15-9 – 15-11.
\textsuperscript{33} *Randall, supra* note 3 at 15-4.
\textsuperscript{34} *Ibid.* at 3-159; See also *England, supra* note 5 at 15.13.3.
under the contract.³⁵ One can clearly envision situations in which an employer would feel that an employee’s disability was frustrating the employment contract. Once again, however, pure contract principles come into conflict with a competing interest, namely, the principle (now predominate in Canadian society) that disabled individuals cannot be discriminated against in the employment context.

Does that mean that a disabled employee can never be terminated? The answer to this question is clearly no. However, employers will have to navigate a difficult road if they choose to dismiss a disabled employee. Not only must the employer guard against having a human rights complaint brought against it under the Human Rights Code, R.S.O. 1990, c. H-19, the employer must also understand that the law is now settled that an employer cannot show frustration of the contract where an employee is ill or disabled, unless the employer has fully complied with its obligation of reasonable accommodation under human rights legislation.³⁶ In practical terms, this means that employers who have an employee who is not meeting performance standards due to the challenges posed by a disability must first attempt to accommodate the employee by changing his/her job position, duties or schedule or by altering the physical environment.³⁷ These changes must be made to accommodate the employee unless to do so would constitute undue hardship for the employer.

The general test that an employer must meet is to demonstrate that the disabled employee has been accommodated to the point of undue hardship. A great deal of case law and commentary has developed to explain and apply this statutory, and now common law, imperative. An in-depth analysis of this aspect of the law is beyond the scope of this paper, however, it is hoped that the preceding analysis provides employers with a basic understanding of the additional layer of complexity that they will have to address if they seek to terminate a disabled employee for incompetence.³⁸

³⁵ See e.g. Levitt, supra note 10 at 195-197.
³⁶ England, supra note 5 at 15.9.3, 15.40, 15.51.5; Levitt, supra note 10 at 534.
³⁷ See e.g. Randall, supra note 3 at 15.40.
³⁸ For more on the duty to accommodate disabled employees see e.g. James A. D’Andrea et at., Illness and Disability in the Workplace: How to Navigate through the Legal Minefield (Aurora: Canada Law Book Inc., 2003); Kevin D. MacNeill, The Duty to Accommodate in Employment (Aurora: Canada Law Book Inc., 2003).
Most common ways employers end up in hot water

Much of what will be said here has already been referred to in the above analysis, however, it may be useful for employers to have a concise list of the main problem areas that they will likely encounter in attempting to terminate an employee for incompetence.

1) Condonation and Sending Mixed Signals

Condonation occurs when an employer, either verbally or by its conduct, indicates to an employee that it is overlooking conduct which would have given the employer just cause for dismissal. In *Just Cause – the Law of Summary Dismissal in Canada* the following factors are listed as those considered in determining whether an employer has condoned the employee’s misconduct:

1) whether the employer had actual knowledge of the employee’s incompetence;
2) whether, despite that knowledge, the employer decided to continue the employment;
3) whether the employee has shown, on a balance of probabilities, that the employer condoned his conduct;
4) whether the employer intended to condone the employee’s misconduct (consider acts of omission including delay);
5) whether the employer decided to dismiss the employee within a reasonable amount of time, considering the facts of the case;
6) whether the employee breached the implied condition of future good conduct, such that the previously condoned misconduct is revived upon the occurrence of the new misconduct; and
7) whether the employee specifically pleaded condonation.

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40 Randall, *supra* note 3 at 7-5.
Generally, what employers must guard against is sending mixed signals to the employee. For example, if an employee is warned on one day about poor performance and then praised the next, then he will be justifiably confused. If an employee has engaged in certain behaviour for a significant amount of time and has not been reprimanded, then the employer will undoubtedly be found to have condoned the employee’s conduct by indicating that the behaviour is acceptable.

As with the rest of the challenges that employers confront in arguing just cause, the courts will make a very fact specific determination as to whether condonation has occurred. The factors listed above should provide some assistance to employers in making decisions regarding discipline and, if the employee seeks to prove condonation in a wrongful dismissal case, in defending against that claim.

2) Failing to put the warning in writing

While failing to put the warning in writing may not be fatal to an employer’s efforts, it is not wise. Verbal warnings become the subject of he-said she-said debates before the court and even where it is accepted that the employer did warn the employee it is harder to prove that the warning was sufficiently precise and understandable. Even more wise would be for the employer to have the employee sign the written warning indicating that they have received and understood it.41

3) Failure to conduct any examination into the reasons for the poor performance

At this time non-unionized employees have no independent right to procedural fairness or to a pre-termination hearing.42 However, providing an employee with a chance to be heard before proceeding with summary dismissal may benefit the employer by revealing any mitigating factors that the court might consider in determining if the

41 See e.g. Harris, supra note 12 at 3-165; Randall, supra note 3 at 15.43.
42 See e.g. England, supra note 5 at 15.13 – 15.13.3; Randall, supra note 3 at 6-11 - 6-12, 6-14 – 6-15.
termination was warranted. It may be more efficient for the employer to learn of any relevant surrounding circumstances at the front end. This knowledge may, in fact, explain the conduct or point to a solution that can allow the employee to retain her job and save the employer the costs of hiring and training a new employee as well as prevent any damage to employee morale. Further, the court may look more favourably upon an employer who provides a hearing to employees, thus increasing the employer’s chance of success in justifying the termination.

4) Attempting to raise cause after termination

There is conflicting case law as to whether the dismissal of an employee with some notice (or payment in lieu of notice) and with a non-cause explanation, operates as condonation or estoppel to raising the issue of just cause. There is recent Ontario case law that suggests that the test will be a factual one: In this case does the employer’s failure to allege cause at the time of dismissal indicate that there was condonation? Due to this possibility of estoppel employers who decide to terminate an employee and provide ESA notice, even though they feel that they have cause, should ensure that the termination letter clearly indicates that the offer to pay the notice is without prejudice to later raising a just cause argument. It would also be wise, if there appear to be problems with incompetence, to follow the process of warnings, etc. mandated above regardless, so that the employer has a record to support it and the employee cannot later claim that the employer’s allegations of incompetence are taking them by surprise.

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44 England, supra note 5 at 15.13 – 15.13.2.
45 Ibid. This possibility will be further illuminated by reference to the study conducted by Wagar and Grant which is referred to below.
46 Mole, supra note 39 at 4.63-4.68; see also England, supra note 5 at 15.60 – 15.63, 15.68; Harris, supra note 12 at 3-166 – 3-168.
47 See e.g. Handbook, supra note 3 at 4-4 – 4-5.
Applying the Test

This paper has sought to provide an overview of the factors that the courts consider in a termination for incompetence case and to highlight the steps that employers should take in an effort to succeed in sustaining a dismissal. An in-depth examination of particular cases has not been provided because the fact-driven nature of the analysis renders a case-by-case comparison relatively unhelpful. However, an interesting case study was conducted by authors Terry H. Wagar and James D. Grant in 1993. This study was entitled: “Dismissal for Incompetence: Factors Used by Canadian Courts in Determining Just Cause for Termination” and was published in the Labor Law Journal. This study is helpful, although now a bit dated, in that it provides a statistical analysis of the factors that courts most commonly weigh in favour of employers. A brief look at the findings of the study provides a helpful summary of these factors and is evidence of the difficulty that employers face in making out a case for termination for incompetence.

The authors examined 90 Canadian cases decided over a fifteen-year period to track what factors the courts generally considered in coming to their decisions and what impact those factors had on the decision. Their findings were summarized in the article in the following way:

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48 Wagar, supra note 43.
Description Statistics for 90 Incompetence Cases

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<td>Warning of Unsatisfactory Performance</td>
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<td>Other Circumstances Negating Seriousness</td>
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<tr>
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This study confirms that the courts take into consideration a myriad of factors which vary with the circumstances of each case when they decide whether termination for incompetence was justified. The factors that were found to weigh in the employer’s favour included if the employer provided the employee with a hearing before the termination and if the employee had been warned and disciplined in the past.49

In the 90 cases examined, employers were only successful in 31.1% of the cases. This poor result suggests two things. First, that courts are very reluctant to make a finding that an employee was incompetent to the point of being justifiably dismissed and, second, that employers are not taking the proper steps before summarily terminating employees for incompetence.

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49 *Ibid.* at 175.
Conclusions

In summary, what this study and the above analysis has clearly demonstrated is that competing principles have lead to the formation of a test for termination for incompetence that is very difficult to apply and which results in a low success rate for employers in maintaining such terminations. However, part of this lack of success may be due to a poor understanding by employers of the requirements mandated by the jurisprudence.

This paper has suggested some steps that will bolster a case for termination for incompetence. At a minimum, it is clear that employers must clearly communicate to employees the job requirements; relate any concerns that they are having with the employee’s performance in a timely manner (including that termination may be a consequence); and indicate the ways in which the employee must improve and the time that they have to do so.

Employers do have a legitimate interest in terminating employees who are not capable of meeting minimum objective job requirements. However, if they understand that most employees do wish to perform well and are amenable to change if they are given some guidance on how to improve their performance, then they may be able to achieve their own ends while at the same time assisting their employees and, ultimately, avoiding a costly legal defeat if summary dismissal does become necessary.