

Avins: Employers' Misconduct - As Cause for Discipline and Dismissal in India and the Commonwealth

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BOOK REVIEWS

Employees' Misconduct: As Cause for Discipline and Dismissal in India and the Commonwealth. BY ALFRED AVINS. Allahabad, India: Law Book Co., 1968. Pp. 731. \$7.00.

Dr. Alfred Avins, a most prolific writer, has concentrated his outstanding research skills on yet another area of our legal discipline,¹ Indian and Commonwealth labor law. At first glance the book's size appears staggering, but its length and scope are appropriate in terms of the subject matter covered, namely, "employee misconduct." Although the book is primarily concerned with exploring Indian law, the comparative method is used throughout in order to demonstrate diverse solutions reached by the courts and arbitral tribunals of other Commonwealth countries, e.g., Australia, Canada, England, and New Zealand.² In fact, one must "get past" seventy-four pages of introductory material prior to reaching page one of the text. Of the very useful tables and compilations, special notice must be taken of the *Table of Cases*, containing forty-two pages of small print.

The book can be read with surprising rapidity because of the author's exceptionally clear expository style and fine sense of organization. A full review of the contents, however, is impracticable. By way of illustration, Part I, "Breach of Duty," deals with the nature and extent of the offense (and defenses, e.g., condonation); Part II, "Breach of Discipline," covers strikes, physical violence, and disruptive conduct; Part III, "Moral Delinquency," includes such topics as theft, disloyalty, corruption, plus damage to property or goodwill; and Part IV, "Disabling or Disgraceful Conduct," encompasses drunkenness, criminal actions, and untrustworthy behavior.

In addition to its direct application to labor law, this text will serve as a basic source for the study of comparative and foreign law. Indeed, one of the author's chief aims was to apply the comparative method to a narrowly defined problem, and he is to be congratulated for keeping his approach within reasonable bounds (i.e., the British Commonwealth) rather than attempting to cover all of the world's major legal systems or, alternatively, all phases of labor law in a single state. While these approaches have proved extremely valuable in other studies,³ their

1. Dr. Avins has previously written on the topics of military law, constitutional law, urban law, and comparative law. See Gormley, Book Review, 17 DEPAUL L. REV. 621, n.1 (1968). See *infra* note 10.

2. All Commonwealth members, including such small territories as Aden, Barbados, and Zanzibar are included.

3. See, e.g., CASTEL, THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC (1962); THE FINNISH LEGAL SYSTEM (Uotila ed. 1966); Gormley, Book Review, 15 AM. J. COMP. L. 376 (1967); Gormley, Book Review, 13 AM. J. COMP. L. 100 (1964).

application could not have substantiated the thesis: the universality of rules underlying employee misconduct. Moreover, the examination of the Commonwealth has brought to light different legal rules and solutions sometimes at variance with the majority common law norms, for instance, a few jurisdictions in which absence or desertion constitutes civil offenses. In more dictatorial jurisdictions, *e.g.*, Ceylon, India, Northern Rhodesia, and the Union of South Africa, a criminal trial and imprisonment have resulted from violation of a labor contract.⁴ From an examination of such precedent, one generalization emerges: the Commonwealth legal order protects the employer to a greater degree than does American law. Admittedly, a number of the older cases cited—many from the nineteenth century—may have been modified by subsequent practice, even though not specifically overruled; nonetheless, the control exercised over employees becomes one of the strongest messages advanced.

Originally a Ph.D. thesis at Cambridge University, the text has been revised into book form. However, the overtones of British academic requirements are still evident, the most notable point being that the author presents the mass of primary data in a scientific manner, reducing his own comments and analysis to a minimum, thereby permitting the reader to draw his own conclusions. Conversely, this reviewer wishes that Avins had let even more of his own analysis and viewpoints come through to the reader. Yet another phase of the academic approach can be seen from the fact that no concluding chapter, in which the author brings together his best thoughts, has been provided. Nor are conclusions offered at the end of each chapter. Since such conclusions, or at the very least summaries, must have been demanded in the Cambridge thesis, it is unfortunate that some of the salient points were not spelled out to the reader in a more distinct fashion. To compensate, the short *Introduction* serves as a summary of the work.⁵ In addition, the original aims and the main conclusions are set forth. As such, it appears to be a revision of the original thesis summary.

The specific purpose of the book is to refute the generally held belief that there are no fixed rules of law "defining the degree of misconduct which will justify dismissal."⁶ Dr. Avins states that his objective is, "to demonstrate that there are not only a great many fixed rules as to what constitutes misconduct, but also that these rules can be classified in an orderly and logical fashion."⁷ Subsequently, this thesis is tested by showing "that all cases from the British Commonwealth involving misconduct of an employee can be classified in accordance with the nature of the misconduct. . . ."⁸ He argues: "[T]here is no such thing as a misconduct case decided on its peculiar facts."⁹ Thus, he seeks those common

4. AVINS, *EMPLOYEES' MISCONDUCT*, at 23ff (1968).

5. *Id.* at iii-vi.

6. *Id.* § A, at 3, *citing* Lord James of Hereford in *Clouston & Co. v. Corry*, [1906] A.C. 122, 129 (P.C.).

7. *Id.* at iii.

8. *Id.*

9. *Id.*

elements, possessing a *universal application*, which transcend the diverse common and civil law systems functioning within the Commonwealth. In this context, the author employs the technique of an exhaustive case analysis, covering six thousand and twenty-two cases from ninety-three jurisdictions. Consequently, the "book-thesis" becomes a classical example of a positivistic oriented case study, falling within the realm of the school of analytical jurisprudence.

For the purpose of analysis the question can be posed: Has the author weakened the force of his argument by relying almost exclusively on case decisions, to the general exclusion of treatises (including law review articles), philosophical works, and the opinions of jurisconsults? This proposition must be answered negatively, for it is within the sole discretion of a recognized scholar to select his particular problem for investigation and, thereafter, to conduct the enquiry in the manner he believes will produce the most satisfactory results. It is not the province of a review to propose a different subject matter or another approach. Still, other jurisprudential orientations might yield different conclusions. For example, an interesting discussion can be raised as to the method of classification adopted. As already indicated, the book seeks to prove that common rules of employee misconduct do in fact exist within a large number of diverse legal systems. In order to substantiate this proposition, an organizational structure had to be adopted that could lend itself to this type of analysis. Accordingly, the author's framework of inquiry has been drawn, to a large extent, from his prior work in the field of military law.¹⁰ Though modified considerably, the structure, as for example Chapter I, "Absence Without Leave," clearly shows a connotation from this prior system. Perhaps this reviewer, who does not view military law as a legal system incorporating notions of Natural Justice, but rather as a means of administrative control, is reacting a bit emotionally toward certain language symbols; however, this unfortunate connotation persists despite Avins' objective presentation of all of the available cases. Although Avins gives equal attention to cases decided in favor of absent employees and to those jurisdictions more favorably disposed toward the safeguard of individual rights, the future impact of his choice of terminology must be noted.

One basic fact must be recognized: Dr. Avins, as did the authors of some modern collections of cases and materials,¹¹ had an incredibly difficult task of reducing the mass of material into a workable structure and then into a single text that could be presented to a legal audience. Since no previously constructed scheme was available, he was forced to develop his own criteria. Consequently, employee defaults are classified "not on the nature of the act, but rather on the essential nature of, and method by which, damage is done or may be risked to the employer's interest."¹² The assumption behind this approach is that employee's

10. AVINS, *THE LAW OF AWOL* (1957).

11. See, e.g., STEIN & HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA* (1967) in which the editors required over 1,150 pages, plus a separate volume of documents, containing an additional 322 pages.

12. AVINS, *supra* note 4, at iv.

misconduct—because of the growing volume of litigation and the increase in labor-adjudicative machinery in the Commonwealth—constitutes a new field, although admittedly an immature, developing, subject-matter area. Specifically, the premise set forth is that industrial discipline is an emerging field representing more than merely contract law, since it cuts across such traditional areas as torts, restitution, and even criminal law.

This reviewer has had the advantage of conducting and studying the results of research on the topic of international human rights protection, encompassing the Internal Labor Organization, during a period when British Prime Minister Harold Wilson staked not only his own political future but also the continued incumbency of the Labor Party on his Trade Union Reform, which was designed to drastically curtail the right to strike. Many of the issues raised in Parliamentary debate are reflected in the contents of this book; especially the question of industrial and individual sanctions. This book defines industrial discipline as “a series of sanctions (akin to penal law) given to a unit of society commanding facilities for the production of goods or the rendition of services, and necessary to safeguard that unit of production. Without the law of industrial discipline, society’s production facilities could not function, just as without the penal law society itself could not function.”¹³

Obviously, this statement could constitute an excellent debate topic. Admittedly, this reviewer is not fully in accord with the view taken, because he believes that the emphasis on discipline—rather than negotiated labor relationships—could work to the disadvantage of labor groups,¹⁴ and especially private individuals.¹⁵ However, regardless of the position taken toward the several theses and sub-premises advanced, one conclusion seems evident: Dr. Avins can always be relied upon to provide a fresh approach and an original insight into a controversial topic. Fortunately, he is continuing his work in the labor law field; hence, we can look forward to future challenging works.

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13. AVINS, *supra* note 4, at vi.

14. See, e.g., LADOR-LEDERER, *INTERNATIONAL GROUP PROTECTION: AIMS AND METHODS IN HUMAN RIGHTS* (1968). See Gormley, Book Review, to be published in the *BRIT. Y.B. OF INT. L.* (1969).

15. Cf. Dahl, *The Role of the I.L.O.: Standards in the Global Integration Process 1919-1969*, 4 *J. PEACE RESEARCH* 309 (1968); Gormley, *The Use of Public Opinion and Reporting Devices to Achieve World Law: Adoption of ILO Practices by the U.N.*, 32 *ALBANY L. REV.* 273 (1968); and Gormley, *The Emerging Protection of Human Rights by the International Labor Organization*, 30 *ALBANY L. REV.* 13 (1966).

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