

Disciplining Employees for Safety Violations in the COVID-19 Era

OHS Insider Webinar

Adrian Miedema, Partner
Dentons Canada LLP, Toronto

Why discipline for safety violations?

- Supports safety culture
- Supports due diligence defence if charged
- Supports dismissal of persistently unsafe employees

Principles of discipline for safety

1. Safety is a stringent statutory obligation and industrial relations concern.
 2. Safety infractions are among most serious workplace violations.
 3. Employers have a legal obligation to ensure safety, and the right to insist workers work safely.
 4. Deliberate, reckless or negligent behaviour which results in a safety threat or actual injury is grounds for discipline up to and including dismissal.
 5. A safety violation can be serious even if there is no injury or actual harm.
 6. The person making the decision to discipline should consider the likelihood of the employee repeating the safety violation.
- See: *Imperial Tobacco Canada* (Ontario Arbitrator, 2001)

COVID-19

- Clearly safety issue
- High level of awareness amongst society, courts and adjudicators
- Public health guidance
- Government (ministry of labour) guidance
- High level of anxiety
- All of which supports strong measures by employers

Cases: Not Just Cause

Ritchie v. 830234 Ontario Inc. (Ontario, 2009)

- Facts: Employee consumed alcohol at work while performing inventory count.
- Result: Not just cause for dismissal. Employer had supplied the alcohol and other employees drank on that date.
- Lesson: Inconsistent enforcement of safety rules will invalidate dismissal.

Cases: Not Just Cause

***Gerdau Ameristeel v. U.S.W.* (Manitoba, 2012)**

- Facts: Shredder labourer tossed piece of metal over fence which went through van window and accidentally hit another employee in face. His intent was to startle employee not injure him.
- Result: Not just cause for dismissal. Lengthy suspension would suffice.
- Lesson: Lack of intent to injure is relevant consideration.

Cases: Not Just Cause

***Plester v. Polyone* (Ontario Court of Appeal, 2013)**

- Facts: Line supervisor with 17 years service failed to lock out a machine he was clearing, putting himself, and potentially others, at risk of injury. He compounded his mistake by failing to report his error. The next day, others reported it to management.
- Result: Not just cause for dismissal. While the employee had made a serious mistake, it did not put others at risk, and he was a long-standing, good, hard-working employee.
- Lesson: Harder to establish just cause where employee is long-service with good performance record

Cases: Not Just Cause

Canada Malting Co. Limited v. UFCW (Alberta arbitrator, 2015)

- Facts: Two sanitation workers failed to lock out when cleaning a vessel. Company dismissed them for violating standard operating procedures and job safety assessment.
- Result: Not just cause for dismissal. Employer had put in place progressive discipline policy but chose to proceed directly to termination in this case. There was no reason to believe that progressive discipline would not have served its purpose. Employees were remorseful. Suspensions of 15 days were appropriate.
- Lesson: Comply with your own policy. Employee's remorse is relevant.

Cases: Not Just Cause

First Canada ULC v. Operating Engineers (Alberta adjudicator, 2017)

- Facts: Motor coach driver with long disciplinary record dismissed after observed in parking lot not wearing safety glasses or hard hat and without his Drivers Risk Assessment completed.
- Result: Not just cause for dismissal. Employee had inadvertently forgotten his Drivers Risk Assessment at home. It was not a deliberate, reckless or negligent safety violation. Employee reinstated without backpay.
- Lesson: Deliberate, reckless or negligent safety violations are taken more seriously.

Cases: Just Cause

Lac Des Iles Mines Ltd. (2019)

- Facts: Employee ran stop sign with 150 tonne water truck. Near miss.
- Result: Just cause for dismissal. Employer called detailed evidence of its safety program including training. There was no “production over safety” culture here.
- Lesson: Even a near miss can warrant dismissal.

Cases: Just Cause

Murphy v. Sealand Helicopters Ltd. (Nfld., 1988)

- Facts: Helicopter pilot irresponsibly delegated duties of approach and landing to co-pilot, and attempted landing contrary to company's policy and the law.
- Result: Just cause for dismissal. The violated rules were to protect the safety of employees and others. Violation was willful, jeopardized safety and potential loss of business and reputation.
- Lesson: The more serious the hazard, the more likely that a breach will warrant dismissal.

Cases: Just Cause

Invista (Canada) (Ontario Arbitrator, 2010)

- Facts: Two spinning technicians dismissed for smoking in a restricted area, causing safety risk.
- Result: Just cause for dismissal. They were at a minimum reckless and bordered on defiant. Employer had recently reminded them of importance of no smoking policy.
- Lesson: even one safety breach will justify dismissal where it puts others at serious risk.

Cases: Just Cause

***Lac Des Iles Mines v. Steelworkers* (Ontario Arbitrator, 2017)**

- Facts: Miner manually mucked a brow instead of using remote-control scoop, creating potential for collapse.
- Result: Just cause for dismissal. Inherently dangerous workplace. Employee did not accept responsibility nor acknowledge that he breached safety procedures. Reinstatement was not appropriate.
- Lesson: Employees held to high safety standards in inherently dangerous workplaces.

Cases: Just Cause

USW v. Vale Canada Limited (Ontario Arbitrator, 2014)

- Facts: Hoist operator at mine found asleep in hoistroom with movie playing loudly on DVD, in violation of policy. Employee had also left hoistroom earlier in the day without permission, in violation of policy.
- Result: Just cause for dismissal. Employee's conduct constituted three separate acts of misconduct. There was no unfairness in disciplining employee cumulatively for three separate acts. Violation was serious severe and his job was a very important surveillance job.
- Lesson: Separate violations can be considered cumulatively. Employees who hold others' safety in their hands will be held to high standard.

Cases: Just Cause

Unifor v. Grand Lake Timber Ltd. (N.B. Arbitrator, 2018)

- Facts: Stacker operator at sawmill, with long disciplinary history, caught using cell phone while operating equipment and not wearing proper PPE.
- Result: Just cause for dismissal. Employee had not responded positively to progressive discipline in the past, so her stated intention to change her conduct carried little weight. Incident was “very informative” of employee’s attitude towards workplace rules and discipline. Lighter discipline would send the wrong message.
- Lesson: Employee’s attitude towards safety is important. Discipline history will count against employee.

Cases: Just Cause

International Forest Products Ltd. (B.C. Arbitrator, 2009)

- Facts: Mill worker dismissed for not wearing required safety gear and for being insubordinate to his supervisor when confronted.
- Result: Just cause for dismissal. Employee had an “atrocious” discipline record: 13 verbal reprimands, 6 written, 16 suspensions, plus two six-month probations. Progressive discipline had no effect.
- Lesson: safety breach, combined with previous discipline, can be enough to have just cause.

Cases: Just Cause

Butcher Engineering Enterprises Ltd. (Ontario Arbitrator, 2009)

- Facts: Employee drove forklift in unsafe manner.
- Result: Demotion upheld. Employee had significant forklift training and had been warned several times. Continued discipline would not help him drive safely.
- Lesson: Employer may remove employees from job in which they are unable to work safely.

Cases: Just Cause

Sulzer Metco (Canada) (Alberta Arbitrator, 2009)

- Facts: Employee set off firecrackers in “classified” area of highly sensitive workplace.
- Result: Just cause for dismissal. Misconduct was significant and egregious. Potential consequences of his actions were very serious. Progressive discipline was not suitable.
- Lesson: Horseplay can justify dismissal where particularly sensitive work environment.

Cases: Just Cause

Toronto Transit Commission (Ontario Arbitrator, 2009)

- Facts: Employee did not follow proper procedure when passenger became stuck in subway door.
- Result: Just cause. Employer had reasonably lost ability to trust employee with even most simple procedures. Public service employees are expected to meet a high standard of service, safety and security.
- Lesson: Putting public at risk can warrant dismissal.

Cases: Just Cause

Tenaris Algoma Tubes (Ontario Arbitrator, 2009)

- Facts: Employee failed to lockout and de-energize all power sources to machine.
- Result: Just cause for dismissal. Employee knew proper procedure and had a long disciplinary record. Failure to use a lockout procedure is a serious safety violation and would by itself justify a significant suspension.
- Lesson: Lockout violations are taken very seriously.

Cases: Just Cause

Imperial Tobacco Canada (Ontario Arbitrator, 2001)

- Facts: Employee held air gun nailer to stomach of coworker, which accidentally discharged one-inch nail into coworker's abdomen. He then told coworker not to report incident or seek medical attention until end of shift.
- Result: Just cause for dismissal. Safety is a legal obligation. This was a serious violation.
- Lesson: Horseplay that injures another worker, potentially seriously, will warrant dismissal – especially where combined with dishonesty.

Cases: Just Cause

ThyssenKrupp Elevator (Canada) (OLRB, 2011)

- Facts: Employee, influenced by TV show “Jackass”, stapled his genitals to a board in the lunchroom, while others watched and took video of the event.
- Result: Just cause for dismissal.
- Lesson: An act of stupidity that risks tarnishing a company’s safety record can warrant dismissal.

Cases: Just Cause

Con-Agra, Limited – Lamb-Weston Division (Alberta Arbitrator, 2011)

- Facts: Lead mechanic failed to lockout shrink wrapper, held rag to trunnion wheel. Rag caught, removing his thumb nail.
- Result: Just cause for dismissal. Mechanic knew the plant safety policy well and the consequences of breach. He deliberately and defiantly decided to ignore the policy.
- Lesson: The better the training, the more serious the breach.

Recommendations

- Considerations before disciplining for safety violation – *company's obligations*
 - Does the company have a written safety rule specifically prohibiting the employee's act?
 - Did the employer make the employee aware, or should employee have been aware of the safety rule?
 - Has company consistently enforced the rule?
 - How safety-sensitive is the company's operation?
 - Has the company consistently imposed the same level of discipline for similar safety violations in the past?
 - Is the employee unionized?

Recommendations – cont'd

- Considerations before disciplining for safety violation – *seriousness / effect on others*
 - How serious was the safety hazard / potential hazard?
 - Was anyone injured?

Recommendations – cont'd

- Considerations before disciplining for safety violation – *employee's culpability*
 - Was the violation intentional or reckless?
 - Was the violation negligent?
 - What is the employee's safety record – is this violation out of character?
 - What is the employee's general performance record?
 - How long is the employee's service?
 - Has the employee demonstrated a good or bad attitude to safety?

Recommendations – cont'd

- Considerations before disciplining for safety violation – *future risk*
 - Is the employee likely to commit another safety violation if not terminated?
 - Does the employee pose a serious safety risk if not dismissed?
 - Will other coworkers refuse to work with the employee because of his safety record?

Recommendations – cont'd

- Considerations before disciplining for safety violation – *COVID-19*
 - Did employer make the rules clear (required v. recommended)?
 - Did employee violate any local by-law or provincial law?
 - What are the COVID-19 numbers in the locality at the time?
 - Was the violation intentional / reckless / defiant?
 - What was the impact of the employee's violation?
 - Infection?
 - Employees required to self-isolate?
 - Required cleaning?
 - Stress / anxiety to other workers?
 - Other employees refusing to work?

Thank you

大成 DENTONS

Adrian Miedema, Partner
Dentons Canada LLP
77 King Street West
Suite 400
Toronto, Ontario M5K 0A1
416-863-4678
adrian.miedema@dentons.com

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