

Fireable Offences Without Defences

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Overview

Termination for 'just cause' (and without notice) is often described as the capital punishment of employment law. Consequently, employers face a significant burden when trying to prove just cause at law. Arguing just cause for dismissal may be difficult, but not impossible, especially in circumstances involving dishonesty or lack of trust. Nevertheless, employers should always exercise caution when making just cause allegations, because a legally unsubstantiated just cause termination can be costly. If an arbitrator overturns an employer's termination decision in a unionized environment, this can result in a decision that reinstates that grievor and provides him or her with significant back pay. Non-unionized employees will generally not be entitled to reinstatement, although, unsubstantiated just cause allegations can be equally expensive. Canadian courts have often awarded significant additional bad faith and/or punitive damages in cases where employers create economic hardship by erroneously asserting just cause and failing to pay an employee's notice entitlements.

Considering the difficulty in proving just cause, along with the potential monetary consequences for improperly alleging just cause, employers should engage in sufficient procedural steps prior to asserting just cause for termination. Such steps would likely include engaging in a thorough and fair investigative process and/or providing employees with warnings in relation to misconduct.

Progressive discipline is one factor adjudicators consider when reviewing a just cause termination, and case-law provides that even a minor offence may justify just cause for dismissal if an employee's disciplinary record is sufficient. Although certain types of conduct (such as theft or violence) may be more likely to warrant discharge on first offence, employers must always take a contextual approach and view mitigating factors, which may include: lengthy seniority, clean record, condonation, admission of wrongdoing and/or remorse. Further, employers should always consider whether or not there are any potential human rights considerations linked to the misconduct. For instance, does the employee have a disability that has contributed to the conduct (such as a health condition, addiction or other mental illness)?

Employees facing allegations of misconduct should seek appropriate professional advice to understand what factors may assist in potentially saving their employment relationship (such as candour, honesty and recognition of wrongdoing during the investigation process).

This article will review various decisions upholding a just cause termination, while also canvassing the factors and considerations that impact the determination of whether or not a just cause allegation may be substantiated at law.

Legal Framework – Unionized Versus Non-Unionized

Although various principles in relation to just cause termination are relatively similar in unionized and non-unionized working environments, different standards and processes apply in either situation. When considering any particular circumstance, a review of the applicable employment contract, employment standards legislation and/or collective agreement is required to understand the specific standards and processes. The employment contract or collective agreement could have specific definitions for what constitutes just cause. The applicable employment standards legislation will also contain its own definition for when it is legal to terminate an employment without statutory notice.

Non-Unionized Workplaces

Generally, in a non-unionized environment, an employer's authority to discipline or discharge an employee is regulated under **common law** principles in relation to the contract of employment. Under the common law, an employer is entitled to terminate an employee in two contexts:

- (1) Without cause (which requires that the employer provide the employee with notice or pay in lieu of notice); or
- (2) With just cause (where the employee is not entitled to any notice; however, the employer must be able to prove that the employee's misconduct amounts to a fundamental repudiatory breach of the employment contract).

Employers must also consider applicable employment standards legislation, which notably may impose different standards than common law principles. The end result, an employee could be entitled to statutory notice, but not common law notice on this basis!¹ There are court decisions where an employer has successfully argued that there was 'just cause' for dismissal but at the same time has not proven that the employee is not entitled to statutory notice, resulting in an award for statutory notice (but not common law notice).²

A non-unionized employee can seek a remedy by either filing a complaint for statutory notice (at the applicable Ministry of Labour or Employment Standards Branch, for only minimum

¹ For example, in Ontario, the threshold for a 'just cause' termination at common law is less onerous than establishing a termination without notice under the Employment Standards Act, 2000 (the "ESA"). In fact, the ESA does not contain the phrase 'just cause', and instead, an employee must be: "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" to be deprived of statutory notice entitlements.

² See for example *Plester v. Polyone Canada Inc.*, 2011 ONSC 6068 (CanLII), where the Ontario Superior Court found that an employee's serious mistake at work amounted to 'just cause' for dismissal, but he was still entitled to his statutory notice entitlements under the *Employment Standards Act, 2000*, as the conduct did not amount to wilful misconduct. As such, the plaintiff was entitled to statutory notice and not common law notice.

entitlements), or file a lawsuit seeking common law notice and other damages (such as bad faith damages). A non-unionized employee is not generally entitled to seek reinstatement.³ Instead, such employees can generally seek monetary remedies (such as pay in lieu of notice) and in some circumstances, especially when there have been unsubstantiated cause allegations, the employee may also be entitled to additional ‘bad faith damages’. For example, in *Johnston v. The Corporation of the Municipality of Arran-Elderslie* (2018)⁴, the Ontario Superior Court awarded a terminated employee \$70,860.05 for breach of contract, plus \$100,000.00 in aggravated damages, plus \$200,000.00 for punitive damages as a result of the employer’s conduct at termination which included non-substantiated allegations of just cause (and a failure to provide the employee any notice payments).⁵

Unionized Workplaces

When terminated, unionized employees can seek remedies through the grievance process, including monetary remedies for lost wages as well as reinstatement. The union is required to represent the grievor, and the grievor is barred from bringing a wrongful dismissal action in court as he or she has remedies through the grievance and arbitration process.

When considering the termination of a unionized employee, it is always essential to first review the applicable collective agreement. While some collective agreements may define and/or refer to ‘just cause’, other collective agreements may contain other definitions and requirements for an employer to lawfully terminate a member of the bargaining unit. Employers cannot terminate unionized employees by providing them common law notice. Instead, the employer must prove just or reasonable cause for any discipline or discharge, or otherwise meet the terms as required by the applicable collective agreement and/or arbitral case-law.

Similar to wrongful dismissal case-law from Canada’s courts, there is a general consensus among arbitrators that dishonesty and breach of trust remain some of the most concerning misconduct (and are most likely to attract more significant discipline, up to and including discharge), as well as violence and serious harassment. In this regard, although the mechanisms and jurisprudence differ between unionized and non-unionized settings, similar principles and concepts are considered when decision makers make findings on what constitutes fireable offences in the workplace.

³ There are some exceptions, including federally regulated employees, employees in Quebec and some human rights related provisions.

⁴ [2018 ONSC 7616 \(CanLII\)](#)

⁵ See also *Ruston v. Keddco MFG. (2011) Ltd.*, 2019 ONCA 125 (CanLII), where the Ontario court of Appeal upheld a decision awarding punitive damages in the amount of \$100,000; and moral damages in the amount of \$25,000 (after the employer terminated the employee and alleged fraud, which was not proven at trial).

Fireable Offences

What types of misconduct warrants just cause for dismissal? Employers must always engage in a case-by-case analysis. In [McKinley v. BC Tel, 2001 SCC 38](#)⁶, the Supreme Court of Canada considered whether any dishonesty, in and of itself, suffices to warrant an employee's termination, or whether the nature and context of such dishonesty must be considered in assessing whether just cause for dismissal exists.⁷ The Supreme Court went on to review various court decisions (relating to non-unionized workplaces) that applied different approaches, and ultimately held that the 'contextual approach' was on point, noting that the principle of proportionality underlies this approach, and finding that:

"An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed."⁸

Consistent with this finding, the courts and labour arbitrators' alike will consider the nature of the misconduct, well as other factors such as: the employee's position and employment history, the employee's disciplinary record, the type of workplace and if the employee is remorseful, among other considerations. Nevertheless, there are certain types of misconduct that are repeatedly viewed as serious and have often warranted just cause for dismissal, including: dishonesty and breach of trust (such as: theft, fraud, falsification of documents); and violence and harassment.

(A) Dishonesty & Breach of Trust

Where an employee engaged in dishonest acts and/or breached the employer's trust, decision makers have often found that there has been irreparable breakdown of the employment relationship. This occurs especially when the employee continues to be dishonest about the misconduct throughout the investigative process. As a consequence, there are numerous arbitral and court decisions which support a finding of termination for cause when the circumstance involves dishonesty and a breach of trust. The following are some examples of terminations that have been upheld in relation to dishonest conduct and/or a breach of trust:

- **Teacher Fired for Falsifying Report Cards:** In *Fernandes v. Peel Educational & (Mississauga Private School)*⁹ the Ontario Court of Appeal overturned the decision of the Superior Court of Justice in relation to the termination of employment of a teacher from a private school. The trial judge found that the plaintiff/teacher had committed acts of misconduct, including the creation of false marks and inaccurate grades then lied to cover up the improprieties. Nonetheless, the trial judge held that the school had wrongfully dismissed the plaintiff. The school appealed this decision. The Ontario Court of Appeal allowed the school's appeal

⁶ *McKinley v. BC Tel, 2001 SCC 38* (CanLII)("McKinley").

⁷ *McKinley* at para 1.

⁸ *McKinley* at paras 51-53.

⁹ [2016 ONCA 468 \(CanLII\)](#).

and dismissed the action, finding that the plaintiff's misconduct of falsifying grades could not be reconciled with his obligations as a teacher. The Court of Appeal noted that the intentional disregard for the fair and accurate grading of his students was incompatible with his professional obligations as a teacher and with the essential conditions of his employment obligations.

- **Nurse Fired for Privacy Breach/Improper File Access:** In, *Ontario Nurses' Association v. Norfolk General Hospital*,¹⁰ the termination of a nurse was upheld after she inappropriately accessed electronic hospital records of various patients whom were not under her care. The grievor was a registered nurse in the intensive care unit of a hospital in Ontario. As part of her role she had access to confidential medical records. The hospital required that she sign various policies around patient confidentiality which included a "Confidentiality Pledge" which provided, in part that she was: "...accountable for accessing only the charts of patients as needed to carry out my professional role". The hospital's privacy officer received a complaint from a patient who alleged that the nurse had told persons in the community about the patient's hospital visit. This resulted in an audit of the grievor's access to patient records, which determined that the grievor had improperly accessed information 500 times over a 12-month period, by for instance accessing medical information of individuals not under her care. The grievor admitted to accessing information but claimed that this was for the purpose of seeing who was in emergency and coming to her unit. She also stated she did not tell people in the community the information. In upholding the termination, the arbitrator emphasized the importance of trust in the employment relationship and concluded as follows:

Despite being told by her College that she should access medical information for her "clients only" and signing a Confidentiality Pledge that she would "never access information for which she has no professional need", the grievor accessed many records of patients who were not her clients and for which there was no professional need. The testimony of the grievor and the submissions of the Union on her behalf did not give the Hospital any reason to believe that she appreciated the seriousness of her misconduct or that she accepted responsibility for her wrongdoing and the consequences that flowed from her actions. The trust that is so critical to this employer-employee relationship was broken by the grievor's misconduct. Regrettably, the response of the grievor has done little to restore that trust.¹¹

¹⁰ [Ontario Nurses' Association v. Norfolk General Hospital, 2015 CANLII 62332 \(ON LA\)](#) ("Norfolk")

¹¹ *Norfolk*, at para 182.

- IT Employee Fired for Falsifying Phone Records & Deleting Data:** An Arbitrator in Manitoba upheld the termination of a senior Technology Transfer Specialist at the University of Manitoba for altering his mobile phone records and erasing all data on his phone when advised of an investigation regarding his phone use.¹² The grievor was engaged in an extra marital affair. After the University approached him about overuse of his mobile phone (paid for by the University) he went into the system and attempted to delete the detail pages of his mobile phone records (which showed many calls with his lover) and leaving just the summary page of the phone records. In attempting to make this alteration, the grievor accidentally deleted the detailed pages for all university employees phone records (leaving just the summary page). The Director met with the grievor to advise him that he was under investigation, and as part of this investigation the Director asked for the grievor to turn in his computer and phone. The grievor then attended his office and shut his door, commencing a factory reset on his phone (to delete all phone data). The Director then opened the door and directed the Grievor to stop deleting the data but the Grievor continued anyway. The grievor was ultimately terminated for altering the phone records, and insubordination (deleting the phone data). The arbitrator upheld the grievor's termination despite his clear record and excellent performance, namely as a result of both falsifying the phone records and then engaging in insubordination by deleting his phone despite his employer's unequivocal order to turn it in.
- Long-Service Employee Fired for Petty Theft of Juice in the Cafeteria:** The company terminated the grievor's employment for stealing juice from the cafeteria on three separate occasions within a four-day period.¹³ At the time of dismissal, the grievor had 17 years service and clean record. When initially approached by the company, he failed to admit wrongdoing and instead blamed the cafeteria staff for not liking him (alleging a conspiracy theory as against him). In considering theft, the arbitrator noted that theft is universally considered a serious employment offence, as follows:

“... workplace-related theft is universally considered to be a serious employment offence which merits a significant disciplinary response. Notwithstanding that discharge is not appropriate in every case, once theft is proved discharge remains a prima facie appropriate penalty. Once theft is proved, the union bears the onus to demonstrate that a penalty less severe than discharge (or other penalty imposed by the employer) is just and reasonable in the particular case.”¹⁴

¹² [University of Manitoba v Association of Employees Supporting Educational Services, 2015 CanLII 49535 \(MB LA\)](#)

¹³ [Messier-Dowty Inc v International Association of Machinists and Aerospace Workers, Local Lodge 905, 2015 CanLII 56078 \(ON LA\)](#) (“Messier-Dowty”)

¹⁴ *Messier-Dowty* at para 61.

The decision went on to provide a useful list of factors to be considered in relation to whether or not discharge is appropriate in a case involving theft, as follows:

“In that respect, it is apparent from the cases cited that much depends on the arbitrator’s sense of the grievor and the circumstances. Although there is no limit to the factors that an arbitrator may consider in a particular case, the most commonly referred to factors include:

- whether there was any confusion on the part of the employee personally or resulting from the employer’s rules or policies, or from the employer’s enforcement thereof, particularly regarding the goods in question;
- whether theft is a problem in the workplace, and the employer’s response to other instances of theft in the workplace;
- whether the theft was premeditated, or the result of confusion or an impulsive momentary aberration;
- the nature and seriousness of the theft (including the value of the goods involved);
- whether there was a single act of theft, or a pattern of theft-related or other dishonest conduct;
- the grievor’s behaviour and reaction when confronted with the allegation of theft, and subsequently;
- the grievor’s character and reputation for honesty in the workplace and in the community generally;
- the seniority and employment (not just disciplinary) record of the employee;
- the grievor’s age and other personal circumstances (including any compelling sympathetic personal motivation for the acts in question).”¹⁵

Considering all factors, the termination of the Grievor for stealing three bottles of juice was upheld, demonstrating that even petty theft may constitute just cause for dismissal.

¹⁵ *Messier-Dowty* at para 64.

(B) Violence & Harassment

Canadian laws generally require employers to maintain a safe workplace, often through general duty provisions in occupational health and safety legislation. Over the last decade, we have seen enhanced protections specifically in relation to workplace violence and harassment as many provinces now have explicitly legislated protections in relation to violence, harassment and/or bullying. Considering the legal requirement for a safe workplace, there are numerous legal decisions that find violence in the workplace (including physical violence, threats of violence and even cyber threats) may constitute cause for dismissal. The following are some examples of terminations that have been upheld as a result of violent acts in the workplace:

- **Termination of Long-Service Employee Upheld for Injuring Co-worker with a Knife:** The grievor was terminated for cutting his co-worker with a utility knife. At the time of termination, he had 36 years' service, was 57 years old and was working a custodian for a textiles company. He had a 'clean record' (although the collective agreement contained a sunset clause which limited the timeframe discipline could be relied on). In relation to the incident, the grievor was at a lunch table when he said to his co-worker would you like a straight blade or curved blade, then surprisingly moved the blade towards his co-worker's leg. When his co-worker tried to block the grievor's knife he received a shallow cut on his forearm. The grievor stated later that day "You are lucky I didn't stab you in the heart". In upholding the termination, Arbitrator noted that the grievor's conduct was a 'most serious' act of violence.¹⁶
- **Long-Service Employee Terminated for Uttering Death Threats:** The grievor was terminated for uttering death threats to her co-worker. At the time of termination she was 47 years old with 28 years' service. Although the grievor admitted to having anger management issues she denied the incident in question regarding the death threat. She had a significant disciplinary record and at the time of the final incident she had recently completed anger management training. In upholding the dismissal, Arbitrator Newman reviewed the then recent changes to Ontario's *Occupational Health & Safety Act* (under Bill 168) which included various provisions to protect employees from violence in the workplace (which was defined to include verbal threats), noting that these legislative requirements must be considered in determining if termination was appropriate.¹⁷

¹⁶ [Ontario Public Service Employees' union, Local 367 v. Georgian Bay General Hospital, 2014 CanLII 37651 \(ON LA\)](#)

¹⁷ [Kingston \(City\) v Canadian Union of Public Employees, Local 109, 2011 CanLII 50313 \(ON LA\)](#)

- Canada Post Employee Terminated for Violent and Harassing Social Media Posts:** In a 2012 case involving a Canada Post employee, the termination of a grievor for violent and harassing Facebook comments was upheld. The grievor’s postings referred to the workplace as “Postal Hell”, and made several remarks about running over or otherwise harming a “Voo Doo” doll of the superintendent. Other posts referred to the superintendent as “bitch”, “hag” and “cunt”. Some of the grievor’s Facebook friends included her co-workers. Management ultimately became aware of the postings and investigated. In considering all the circumstances, including that the co-workers were able to view the comments, and that the grievor did not take responsibility, the arbitrator dismissed the grievance, and upheld the termination.¹⁸
- Manager Terminated for Consensual Affair with Subordinate:** The Ontario Court of Superior Justice held that an employer had just cause to terminate a manager for having a consensual sexual relationship with a subordinate.¹⁹ Termination was warranted irrespective of the fact that the court found that: “The relationship was, on its face, consensual. Her interest in the affair was based in lust; the basis of his interest may have been the same or otherwise.” In making this determination that just cause was warranted irrespective of this consent, the court described the female employee as a vulnerable immigrant from Vietnam who did not speak fluent English. Citing the risk of civil action and the need to protect employees, the Court found the plaintiff’s dismissal to have been justified. He took advantage of his position. The plaintiff/manager also negatively impacted the working environment as the female employee’s husband worked at the same workplace.²⁰
- Termination of Firefighter Upheld over Sexist Tweets:** The termination of a Toronto Firefighter was upheld after he posted sexist tweets on his personal Twitter account.²¹ At the outset of the award, the arbitrator noted that: “the grievor made a series of comments on his Twitter account, many of which were sexist, misogynist and racist. Some were offensive in their discussion of people with disabilities. Others were offensive in their references to homeless people. One invaded the privacy of others. Many were jokes, juvenile in nature, with sexual themes.” In upholding his termination, the arbitrator highlights that the grievor’s egregious comments (in breach of the *Human Rights Code*) were inconsistent with his role to serve the public.

¹⁸ *Canada Post Corporation v. Canadian Union of Postal Workers* (Discharge for Facebook postings Grievance), [2012] CLAD No. 85 (Ponak).

¹⁹ *Cavaliere v. Corvex Manufacturing Ltd.*, 2009 CarswellOnt 3199, (“Cavaliere”).

²⁰ *Cavaliere*, at para 21.

²¹ [Toronto \(City\) v Toronto Professional Fire Fighters' Association, Local 3888, 2014 CanLII 76886 \(ON LA\)](#)

The above-cited decisions provide an overview of the types of conduct that is considered serious enough to warrant just cause for termination. Dishonesty, breach of trust, violence and harassment are often seen as the most serious offenses; however, other types of misconduct certainly can warrant discharge, including for example, safety issues.²² In all circumstances, employers must take a contextual approach, including consideration of mitigating and aggravating factors (which will include a review of the employee’s disciplinary record).

Mitigating & Aggravating Factors

There are various factors that may act as mitigating or aggravating factors when considering if discharge is appropriate for an employee. The list below sets out some factors an arbitrator will consider in the labour context when determining whether or not to substitute a penalty less than discharge in the labour context. While this list relates to labour jurisprudence, the courts consider similar factors when determining if a ‘just cause’ termination is substantiated at law.

MITIGATING FACTORS	AGGRAVATING FACTORS
<ul style="list-style-type: none"> • lengthy service • clean disciplinary record • isolated incident • admission of guilt • momentary aberration • candour • remorse • acceptance of responsibility • genuine apology • dire financial circumstances • human rights issues 	<ul style="list-style-type: none"> • short service • prior discipline • related discipline • repeated offensive • pre-mediated conduct • failure to admit wrongdoing • lying during investigation/hearing • lack of remorse

Although the balance of this article has focused on circumstances where just cause terminations have been upheld, the fact remains that it is usually difficult for an employer to prove just cause at law. In light of this, there are numerous decisions where judges and arbitrators have found that even serious

²² See for instance: *Ontario (Metrolinx - Go Transit) and ATU, Local 1587 (Farrell)* 2010 CarswellOnt 11623 where the termination of a public transit operator was upheld for using her cell phone when driving passengers from Toronto to Hamilton. The grievor had warnings for similar conduct and did not admit to wrongdoing. On this basis, the arbitrator dismissed the grievance and upheld the termination.

misconduct may not warrant just cause for dismissal, especially in the presence of some of the above cited mitigating factors.

The decision in [*Canadian Union of Public Employees, Local 109 v Kingston \(City\)*](#)²³, clearly demonstrates the impact of mitigating factors and in particular, how an apology can sometimes provide a sufficient mitigating factor to argue termination is excessive (even in the case of theft). In this decision, there were two grievors, both men who had worked as arena operators for the City of Kingston. After receiving a customer complaint, the City engaged in an investigation which had determined both men routinely engaged in time theft by overstaying breaks and leaving work early. Both men failed to admit wrongdoing during the initial investigation and ultimately they were terminated for time theft. At the time of termination both men were 50 years old and had significantly lengthy service (i.e. 16 and 18 years). In considering mitigating and aggravating factors, the arbitrator upheld the termination of one of the grievors (who failed to admit to wrongdoing) while reinstating the other grievor (who had a better disciplinary record, slightly longer service and who had offered an apology during the grievance process). The decision reflects how mitigating and aggravating factors will impact the determination of whether or not termination is justified. Further, even in the context of time theft (a very serious offence), mitigating factors may redeem an employee in some circumstances.

Mitigating factors also helped the grievor in the decision of [*Health Sciences Association of British Columbia v. Vancouver Coastal Health Authority*](#)²⁴, where an arbitrator reinstated a clinical support coordinator whose employment had been terminated for accessing and disclosing a patient's private health records without consent (to that patient's former sister-in-law). Although the arbitrator noted that the grievor's conduct warranted discipline, a lesser discipline was substituted on the basis of mitigating factors such as: the grievor's lengthy service (24 years), clean record, genuine remorse and the fact that this was an isolated incident that was not premeditated. In light of these mitigating factors, a three-month suspension was substituted instead of discharge.

Similarly, in [*Labourers' International Union of North America, Labourers' International Union of North America, Local 493 v Hydro One Inc.*](#)²⁵ the Ontario Labour Relations Board held that there were sufficient mitigating factors to reinstate the grievor who drank alcohol prior to work then operated the employer's vehicle under the influence. The parties agreed in the seriousness of the misconduct but the union argued that the Board should consider mitigating factors. In considering such, the Board notes that the grievor had a relatively clean record, admitted to wrong doing and has taken steps to address his addiction issues. The Board ultimately found the mitigating factors outweigh

²³ 2016 CanLII 19081 (ON LA)

²⁴ 2014 CanLII 15539 (BC LA)

²⁵ 2014 CanLII 66579 (ON LRB)

the aggravating factors, and therefore, a lesser discipline was substituted (however various terms were included to address the grievor's sobriety such as regular testing and a requirement to seek treatment). In considering the grievor's addiction, this decision touches on human rights matters which should be considered when evaluating an employee's misconduct.

Human Rights Considerations

Canadian employers have a duty to accommodate disabilities under applicable human rights legislation. It follows that employers should always consider whether or not any disabilities and/or other human rights protected grounds are linked, in any part, to an employee's misconduct prior to making decisions to discipline or terminate. For example, if an employee is repeatedly late, an employer should consider whether or not there are outside factors influencing this conduct (does this employee have an addiction, or a family status issue that requires accommodation)? Even when considering more serious misconduct (such as breach of trust or theft) employers should consider if there are any mental health issues impacting the employee's conduct. Employees who have disabilities (including addiction or other mental health illnesses) may not always request accommodation, even in the face of disciplinary conduct. When an employer knows or ought to have known that the individual had a disability when implementing discipline or discharge, there could be a finding that the employer failed in its 'duty to inquire' about the employee's illness. As such, where there are signs that an employee's misconduct could be linked to a human rights protected ground, the employer should canvass the issue prior to taking disciplinary action. An employer is not precluded from disciplining an employee if there are human rights considerations; however, all facts must be considered.

For example, in [McNulty v. Canada Revenue Agency \(2016\)](#)²⁶, the Public Service Labour Relations and Employment Board (the "Board") upheld the Canada Revenue Agency's ("CRA") decision to terminate the grievor's employment on the basis that she had forged and submitted 16 medical certificates.

The grievor had 25 years' service with the CRA and moved up through the ranks until her termination in 2014. In 2013 the grievor's manager became concerned about ongoing attendance issues and tried to discuss matters with the grievor but was told by the grievor that things were fine. The grievor began missing work without calling in and ultimately her manager held a meeting with the grievor to ask if she required help and to advise her of the processes to be followed in relation with absences. The grievor was provided a letter containing information on absences including a section relating to the requirement for medical certificates.

²⁶ 2016 PSLREB 105 (CanLII)("McNulty")

Subsequent to the attendance meeting, the grievor continued with poor attendance. Her manager would ask for medical certificates which were often produced late. The manager attempted to continue open dialogue about the grievor's absences without success. Ultimately, the grievor's manager found that the last two medical certificates provided by the grievor were suspicious and invoked an investigation into the medical certificates.

During the investigation, the grievor justified forging the notes on the basis that she was too drunk to drive to the doctor's office to get a note. The grievor admitted she had been previously treated for alcohol abuse, and although once sober she had since relapsed. The investigation report revealed that the grievor had forged 16 medical certificates that were used to claim 216 hours of paid sick leave (\$9,300) and 218.5 hours of unpaid sick leave.

Throughout the investigation and disciplinary meetings, the grievor expressed no remorse and instead blamed management. She suggested attending a light treatment program that did not reflect the seriousness of her problems. The CRA ultimately terminated the grievor.

The grievor alluded to a breach of the duty to accommodate in relation to her alcohol addiction or disability. In considering the 'medical defence' the decision canvassed the various approaches to considering the nexus between the conduct and the disability, outlining the various tests, in part, as follows:

[96] However, as of today, the favoured approach is more of a hybrid type; that is, the four-part test set out in *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union* (1999), 82 L.A.C. (4th) 1 ("Canada Safeway"),The test is as follows:

Is there an illness, condition or situation being experienced by the grievor?

Is there a link or nexus between the illness, condition, or situation and the misconduct?

If there is a link between the illness, condition, or situation and the misconduct, was there a sufficient displacement of responsibility from the grievor to render her conduct less culpable?

If the first three elements are established, the tribunal still has to be satisfied that the grievor has been rehabilitated.

[97] Arbitrators and adjudicators have approached resolving culpable conduct and disability in another way, which is by carrying out two separate analyses. First is the

standard three-step approach for determining misconduct, as follows: Is there misconduct? Does it give rise to discipline? And is the discipline appropriate? Second, the arbitrator or adjudicator addresses the classic human rights analysis, as follows: Is there a *prima facie* case of a disability? Is the grievor a part of a protected group (person with a disability)? Was there an adverse impact? And is there a nexus between the adverse impact and the disability?²⁷

In dismissing the grievance, the Board held that the grievor “failed to establish a *prima facie* case of discrimination based on her alcohol dependency”.²⁸ The grievor had been terminated for forging medical notes and had not requested any accommodation in relation to her addiction issues. Further, the grievor was not remorseful, she blamed her employer and she had not engaged in rehabilitative activities post termination. The Board noted it was particularly troubling that the grievor did not apologize or admit to wrongdoing in relation to the forgery, but instead stated she forged the documents because she did not want to drive drunk. The decision indicates that forgery and time theft is serious misconduct that may warrant just cause for dismissal, even considering additional complications and accommodation requirements relating to addiction and human rights protections.

Conclusion

Although employers have difficulty proving just cause for dismissal at law, courts and tribunals have consistently found that misconduct that involves dishonesty or creates a lack of trust creates a serious issue with the continued viability of an employment relationship and may warrant termination. Employers should engage in a thorough and fair investigative process in relation to any allegations of misconduct. Where appropriate, employers should also provide the employee with warnings in relation to misconduct. Mitigating and aggravating factors will always play a role in determining whether or not discharge is appropriate in each case. The law recognizes that people make mistakes and decision makers are far more forgiving on those who admit to wrongdoing and apologize when mistakes have been made. To this end, employees facing allegations of wrongdoing are well advised to admit to their transgressions (while always seeking appropriate legal advice in the process)!

“It is the highest form of self-respect to admit our errors and mistakes and make amends for them. To make a mistake is only an error in judgment, but to adhere to it when it is discovered shows infirmity of character” - Dale E. Turner²⁹

²⁷ *McNulty* at paras 96-97.

²⁸ *McNulty* at para 185.

²⁹ Retrieved from <https://www.goodreads.com/quotes/701391-it-is-the-highest-form-of-self-respect-to-admit-our>

About the Author



Deborah is a lawyer at Turnpenney Milne LLP. She regularly advises both employers and employees in relation to matters occurring at all stages of the employment relationship. Deborah also conducts workplace investigations as an external, independent investigator relating to various workplace circumstances and allegations including: harassment/bullying, human rights matter and other related workplace issues.

Deborah has authored and contributed to a number of publications touching on workplace issues. Most recently, Deborah was a contributing author of: [Startup Law 101: A Practical Guide](#) (2017)³⁰; [Ontario Human Rights Code: Quick Reference](#) (2015)³¹; and [Accommodation Issues in the Workplace](#) (2014).³² Deborah has also published numerous articles, including four other articles for Queen’s University IRC:

- [“Workplace Harassment After #MeToo”](#)³³
- [“The Golden Years: The Aging Workforce and Human Rights Matters”](#)³⁴
- [“Invisible Barriers: Accommodating Mental Illness in the Workplace”](#)³⁵
- [“Workplace Bullying and Harassment: Costly Conduct”](#)³⁶

Deborah was called to the Ontario Bar in 2008. She commenced her legal career in 2007 as an articling student at a boutique management-side labour and employment firm where she worked until 2015, when she joined Turnpenney Milne LLP. From 2012 to 2013, Deborah worked in-house for a one-year secondment with the human resources department of a significant Ontario municipality where she gained practical hands-on experience involving both union and non-union staff.

³⁰ Lovrics, Catherine et al, *Startup Law 101: A Practical Guide* (Toronto: LexisNexis Canada, 2017)

³¹ Jamie Knight et al, *Ontario Human Rights Code: Quick Reference*, 2015 ed. (Toronto: Thomson Reuters Canada, 2014).

³² Jamie Knight et al, *Accommodation Issues in the Workplace*, (Toronto: Wolters Kluwer Limited, 2014).

³³ Retrieved from: <https://irc.queensu.ca/sites/default/files/articles/workplace-harassment-after-metoo.pdf>

³⁴ Retrieved from: <https://irc.queensu.ca/sites/default/files/articles/the-golden-years-the-aging-workforce-and-human-rights-matters.pdf>

³⁵ Retrieved from: <https://irc.queensu.ca/sites/default/files/articles/invisible-barriers-accommodating-mental-illness-in-the-workplace-by-deborah-hudson.pdf>

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