Winning Discipline and Discharge Cases at Arbitration

HRPA Hamilton Chapter
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Winning Discipline and Discharge Cases at Arbitration

Presentation by

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Today’s presentation will cover:

1. The test for just cause
2. Addressing disability-related misconduct
3. Procedural requirements relating to discipline and discharge
Test for Just Cause: A Contextual Approach

2-Part Test in Discipline/Discharge Cases:

1. Has the employee *actually done* anything which justifies discipline (just cause to discipline)?

2. If so, does the *nature and degree* of the misconduct justify discipline/termination? (i.e., does the punishment fit the crime? Is there a more equitable discipline?)
The “Contextual Approach”

<table>
<thead>
<tr>
<th>Aggravating Factors</th>
<th>Mitigating Factors</th>
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</thead>
<tbody>
<tr>
<td>Serious misconduct</td>
<td>Less serious misconduct</td>
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<tr>
<td>Premeditated</td>
<td>Impulsive</td>
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<tr>
<td>Repetitive behaviour</td>
<td>Isolated incident</td>
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<td>Short-term employee</td>
<td>Long-term employee</td>
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<tr>
<td>Progressive discipline</td>
<td>No progressive discipline</td>
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<tr>
<td>Consistent discipline</td>
<td>Arbitrary discipline</td>
</tr>
<tr>
<td>Denial of wrongdoing</td>
<td>Acknowledgment of wrongdoing</td>
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Burden of Proof

**Burden of proof on the Employer:**

- Onus is on Employer (exception to general rule)
- Employer must prove that the collective agreement has been *breached* and *misconduct justifies dismissal*
- The more serious the allegation and consequence, the greater the burden of proof

**Burden on the Union:**

- Why there was *no misconduct*
- That *termination (or discipline) was too severe*
Types of Misconduct Constituting Just Cause

1) Single Incident Just Cause

2) Multi-Incident Just Cause

3) After-Acquired Cause
Case Law: Arbitrators Assessing Just Cause

Cases involving serious misconduct BUT discipline SUBSTITUTED:

- Urinating in front of co-workers
- Assault of co-worker
- Violation of “zero-tolerance” policy
- Theft of employer property
- Sexual harassment
Case Law: Arbitrators Assessing Just Cause

Cases involving (less) serious misconduct BUT discipline UPHELD:

- Lateness
- Chronic absenteeism
- Theft
- Sexual harassment
- Facebook
Probationary Employees

Consider:

• The Collective Agreement language
• Probationary employees often enjoy same rights as others with the exception of job security
  – Is there a substantive right to grieve on basis of just cause?
• Whether there is a right to file a grievance
• Human rights legislation and Labour Relations Act
Best Practices

Things to remember:

• Not a vacuum – look at misconduct in *context* of employment
• Communicate standards and policies to employees frequently
• Ensure *progressive discipline* is applied equally and consistently
• Carry out a *proper investigation* prior to any disciplinary action
• Ensure all *procedural obligations* are met when investigating and disciplining employees
• *Reasons for discipline* should always be given
Impact of Addiction or Mental Disability on Discipline

*Three categories of misconduct:*

1. Addiction or mental disability *DID NOT* cause the misconduct

2. Addiction or mental disability *CAUSED* the misconduct

3. Addiction or mental disability *PARTIALLY CAUSED* or *INFLUENCED* the misconduct
Impact of Addiction or Mental Disability on Discipline

- May be a **mitigating factor** in relation to employee misconduct, but will not necessarily outweigh culpable behaviour.

- For reduced culpability, the condition must have **caused** or **influenced** the behaviour and its impact must be substantiated by a valid medical opinion.

- Employers have a **duty to accommodate**.
Impact of Addiction or Mental Disability: The Hybrid Test

Conduct that is *linked* to an addiction or mental disability:
- is considered to be non-culpable
- accommodation required

Conduct that lies *outside* of an addiction or mental disability:
- considered to be culpable; “just cause” applies
- discipline must be “reasonable in all the circumstances”
Impact Of Addiction or Mental Disability: The Hybrid Test

*Prima facie* case of discrimination?

Was disability a factor:

- in the employer’s decision?

- in the employee’s conduct?
Impact Of Addiction or Mental Disability: Employer’s Duty to Inquire

**Triggers:**

- Odd or unusual behaviour/misconduct
- Information provided by co-workers
- Requests for time off, lateness, high absenteeism
Other Considerations

- Who has the **authority** to discipline?
- Are there any **timelines** in respect of discipline?
- What **rights** does an employee have?
- What **notice** to the union is required?
- Content of **discipline** letter – does it set out all of the grounds?
Notice

• Employers are required to explain disciplinary decisions to employees

• Employers may be prohibited from relying on reasons for discipline not conveyed to the employee

• Employees must be provided with sufficient information to respond to the allegations against them

• Must comply with provisions in the Collective Agreement concerning form and content of notice – failure to comply may void discipline
Timeliness

- Look to **Collective Agreement** for any timelines to impose discipline

- Employers must discipline employees in **expeditious fashion/timely manner** if no timeline set out in the collective Agreement

- Employers are generally **afforded time to investigate**
Union Representation

- Seen as a **fundamental right** when discipline is being imposed
- Representation likely required where there is *possibility* of discipline
- Must **advise employee** as to rights of representation and provide **reasonably opportunity** to contact union
- Investigatory interviews *vs.* disciplinary meetings
Possible Consequence of Procedural Breach

- Discipline may be rendered **void ab initio**
  - *Provisions regarded as critical*

- In other cases, arbitrators may uphold discipline – the arbitrator must be satisfied that the employee was not prejudiced by the breach
  - *Breach causes no harm and is technical in nature*
Evidence

• Employer has **burden of proving** discipline justified (balance of probabilities)

• Assessment of the **credibility** of witnesses

• **Hearsay evidence** normally inadmissible/given little weight
  – e.g. complaints about an employee

• **Adverse inferences** may be drawn if certain evidence or witnesses not called
Thank you for coming

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