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Winning Discipline and Discharge Cases at Arbitration

HRPA Hamilton Chapter

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Winning Discipline and Discharge Cases at Arbitration

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Overview

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?)

Test for Just Cause: A Contextual Approach

The “Contextual Approach”

Aggravating Factors	Mitigating Factors
Serious misconduct	Less serious misconduct
Premeditated	Impulsive
Repetitive behaviour	Isolated incident
Short-term employee	Long-term employee
Progressive discipline	No progressive discipline
Consistent discipline	Arbitrary discipline
Denial of wrongdoing	Acknowledgment of wrongdoing

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

For further assistance contact:
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