



Update on Discipline and Discharge: Build Your Just Cause Out of Bricks, Not Straw

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As a boutique labour and employment law firm, Emond Harnden has represented the interests of management in both official languages for over 30 years.

Originally rooted in the Ottawa community, we have grown to represent employers in all territories and provinces of Canada.





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ABOUT

Kecia is an experienced advocate who represents her clients in formal and informal settings, including grievance arbitration and human rights proceedings, mediation, interest arbitrations and in employment-related litigation. Her clients include those in the not-for-profit, health, manufacturing, technology and professional services sectors, as well as First Nation governments and related organizations.

Kecia is passionate about providing guidance and advice to her clients in their day-to-day human resources matters, including statutory compliance, development and review of employment agreements and policies, managing employee accommodation and return to work, attendance management, investigations and other matters that may lead to discipline or dismissal. Kecia's experience combined with her plain language approach and engaging manner means that she is frequently called upon to conduct training sessions and to deliver seminars and workshops.





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ABOUT

Kyle advises employers across Ontario who appreciate his straight forward, down-to-earth approach in providing strategic advice towards resolving their human resources concerns. His practice includes all areas of employment law with a specific emphasis on advocacy and litigation. Kyle focusses on the areas of just cause terminations, alleged wrongful and constructive dismissals, human rights concerns, and employment standards compliance.

Kyle represents clients in a variety of industries, including technology and professional services.

In addition to being a litigator, Kyle also conducts workplace investigations into issues concerning harassment, discrimination, theft, fraud and workplace violence.



Framing the Discussion:

Port Arthur Shipbuilding (ONCA, 1967)

“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right to summarily dismiss the delinquent employee.”



Framing the Discussion:

Carscallen v. FRI Corp. (ONSC, 2005)

“The important factors emerging from these expressions of the principle of law include that the misconduct must be "serious"; that the misconduct must amount to "a repudiation of the contract"; that the acts "evinced intention to no longer be bound by the contract"[sic]; that dismissal is an "extreme measure"; and must not be resorted to in trifling cases. As previously observed, just cause is truly the "capital punishment of employment law".”



- What happens when you get it wrong?
- What are the basics of just cause?
- When should you use performance management?
- How do you use progressive discipline?
- When can you terminate for a single act?



Why You Need to Get it Right



Unionized and *Canada Labour Code s. 240*

- Reinstatement with back wages; damages
- Compensation in lieu of reinstatement
- Disruption to the workplace
- Impact on management credibility
- Resources (people, financial)



Your Turn – Just Cause?

Facts:

- Grievor, a Special Constable, was a long time “difficult employee”
- She returned from LTD to accommodated work in a clerical position
- Grievor was scheduled for a full day, but had a specialist’s note that indicated she could only work 5 hours per day, 3 days per week
- Grievor terminated when she left work after five hours and did not return the next day
- Employer argued she had abandoned reasonable accommodation, which was grounds for summary discharge
- Did the arbitrator find just cause for discharge?



OPSEU, Local 529 v. Toronto Community Housing Corporation (Arbitrator Cummings, 2018)

Findings:

- No just cause to dismiss grievor for insubordination – *“the employer has not come close to establishing grounds for the grievor’s termination”*
- Awarded compensation in lieu of reinstatement, given employee’s poor attitude
- Despite finding employee was “difficult” and made several unsubstantiated allegations of racism and torture, arbitrator still awarded:
 - 1.25 month’s pay per year of service (7 years); and
 - 15% for loss of benefits

Takeaway:

- No reinstatement, but there is still a cost



Non-Unionized

- Increased risk of legal action
 - Resources (people, financial)
 - Plaintiff's legal costs
 - S. 240
- “Bad faith” and exemplary damages
 - Dishonest and misleading conduct



Non-Unionized: Civil Actions

- If employer alleges cause for termination but court finds no cause, damages will be awarded:
 - Statutory minimum notice periods set out in employment standards legislation are just a “floor” based solely on length of service
 - Common law reasonable notice entitlements are significantly higher
 - Courts look at a variety of factors:
 1. Length of service
 2. Age
 3. Position
 4. Compensation
 5. Availability of similar employment





Just Cause – The Basics

Things to Keep in Mind

- Context-dependent
- High threshold to meet
- Balance of probabilities
- Forum matters



Examples (Context, Context)

- Theft of large sums of cash from the employer
- Acceptance of bribes
- Fraudulent misrepresentation of qualifications/credentials
- Death threats against a colleague
- Sexual assault of a colleague
- Insubordination
- Conflict of interest
- Incompetence
- Culpable absenteeism
- Fundamental breach of policy



Your Turn – Just Cause?

Facts:

- Labourer/assembler with 16 years' service terminated after he punched a coworker in the nose during a verbal altercation
- Employee alleged coworker had previously made racist comments towards him, threatened him and, earlier that day, elbowed him
- Employer investigated, found employee was the aggressor, and terminated him for cause
- Employee claimed wrongful dismissal



Phanlouvong v. Northfield (ONSC, 2014)

Findings:

- No just cause for termination!
- Employer failed to follow its own progressive discipline policy
 - Deterrence could have reasonably been achieved through alternatives, such as a warning or suspension

Takeaway:

- Even in cases of serious physical violence, the court will take a contextual and proportionate approach
- Apply progressive discipline



What is Just Cause? Non-Unionized Settings

- The court will consider (context, context):
 1. The nature and extent of the employee's misconduct;
 2. The surrounding circumstances; and
 3. Whether dismissal is appropriate and proportional



Employment Standards Act, 2000 – Ontario

- No notice or severance pay if the employee is guilty of:
 - **wilful misconduct**,
 - **disobedience**, or
 - **wilful neglect** of duty,that is not trivial and has not been **condoned** by the employer
- Deliberate vs. careless, thoughtless, or inadvertent conduct
- “Just cause” at common law may not get you out of *ESA* notice and severance:

“It is my opinion that the plaintiff demonstrated a sustained course of casual and careless conduct that was inconsistent with the continuation of his employment but I do not accept the defendant’s submission that his conduct was wilful.”

Justice Haines in *Oosterbosch v. FAG Aerospace*, 2011 ONSC 1538



- No notice or severance pay to an employee who is dismissed for just cause
 - *CLC* just cause standard is similar to the common law standard (i.e., the employee's misconduct is of such a nature that it justifies immediate termination)
- S. 240 of the *CLC*, allege dismissal was “unjust” if employee:
 - Has completed 12 consecutive months of continuous employment; and
 - Is not unionized

What is Just Cause?

Unionized Settings

- Necessary to support discipline, including discharge
- Must establish:
 - Just cause to impose discipline
 - Penalty appropriate in the circumstances
- Must consider aggravating and mitigating factors



Probationary Employees

- Easier to terminate unionized employees during the probationary period – the threshold for “cause” is much lower
 - The employer need only show:
 - Legitimate work-related reason(s) for the dismissal;
 - Decision was made in good faith and was not arbitrary or discriminatory; and
 - Employee was aware of the standard(s) expected
- Federal employers – first 12 months are critical



Process Matters

- Did you performance manage?
- Was progressive discipline consistently applied?
- Was previous misconduct in the employee or other employees condoned?
- Are you acting consistently?
- Did you conduct a prompt, thorough and fair investigation?
- Did you impose discipline/discharge on a timely basis?
- Did you document your process, reason for discipline/discharge?



Why Does Timing Matter?

- Delay may cause:
 - Disruption to the workplace
 - Difficulty in preserving evidence
 - Liability for delay in investigation
 - Contravention of workplace policies
 - Inability to establish just cause (especially for termination, if employee remained in the workplace)





When to Use Performance Management

What is Performance Management?

- A comprehensive, ongoing process of evaluation
- It requires:
 - Communicating expectations
 - Monitoring performance
 - Giving feedback
- May involve a performance improvement plan (PIP)
- A long process; requires patience



How Performance Management Works

- Identify problem(s) in **specific** terms
- Meet with employee to discuss; provide opportunity to explain
- Set out clear and defined expectations in writing, as well as the consequences for not meeting those expectations (i.e., termination)
- Discuss possible solutions (e.g., additional training, job shadowing)
- Document discussions, counselling and/or corrective action plan
- Escalate if no improvement
 - Next steps in performance management
 - Discipline (if culpable)



Your Turn:

Appropriate Performance Management?

Facts:

- Canada Border Services Agency employee grieved her termination for unsatisfactory performance, alleging it was done for discriminatory reasons
- Grievor had performance issues and was “rude” and “abrupt” throughout employment
- Grievor subject to an ongoing performance management process, including personal learning plan
- Did the Arbitrator conclude performance management was appropriate?



Lortie v. Deputy Head (CBSA) (FPSLREB, 2019)

Findings:

- Grievance dismissed:
 - The employer used the performance management process legitimately, *“to protect its program and the grievor’s continued employment”*
 - No bad faith, no reprisal
 - Provided with tools, training and mentoring to meet performance standards in reasonable period
 - It was the grievor who was reluctant to cooperate and was “belligerent”





Progressive Discipline

When to Manage vs. Discipline

- The distinction lies between non-culpable (innocent) and culpable (blameworthy) behaviour
- Employees who try to do the job but are unable: address through performance management
- Employees who simply do not follow the rules: address through the progressive discipline process



Why use Progressive Discipline?

- To correct employee behaviour
- To deter others from similar action
- To rehabilitate the employee
- To make termination more defensible
 - Courts and adjudicators want to see efforts were made to correct unwanted workplace behaviour
 - Generally required by arbitrators



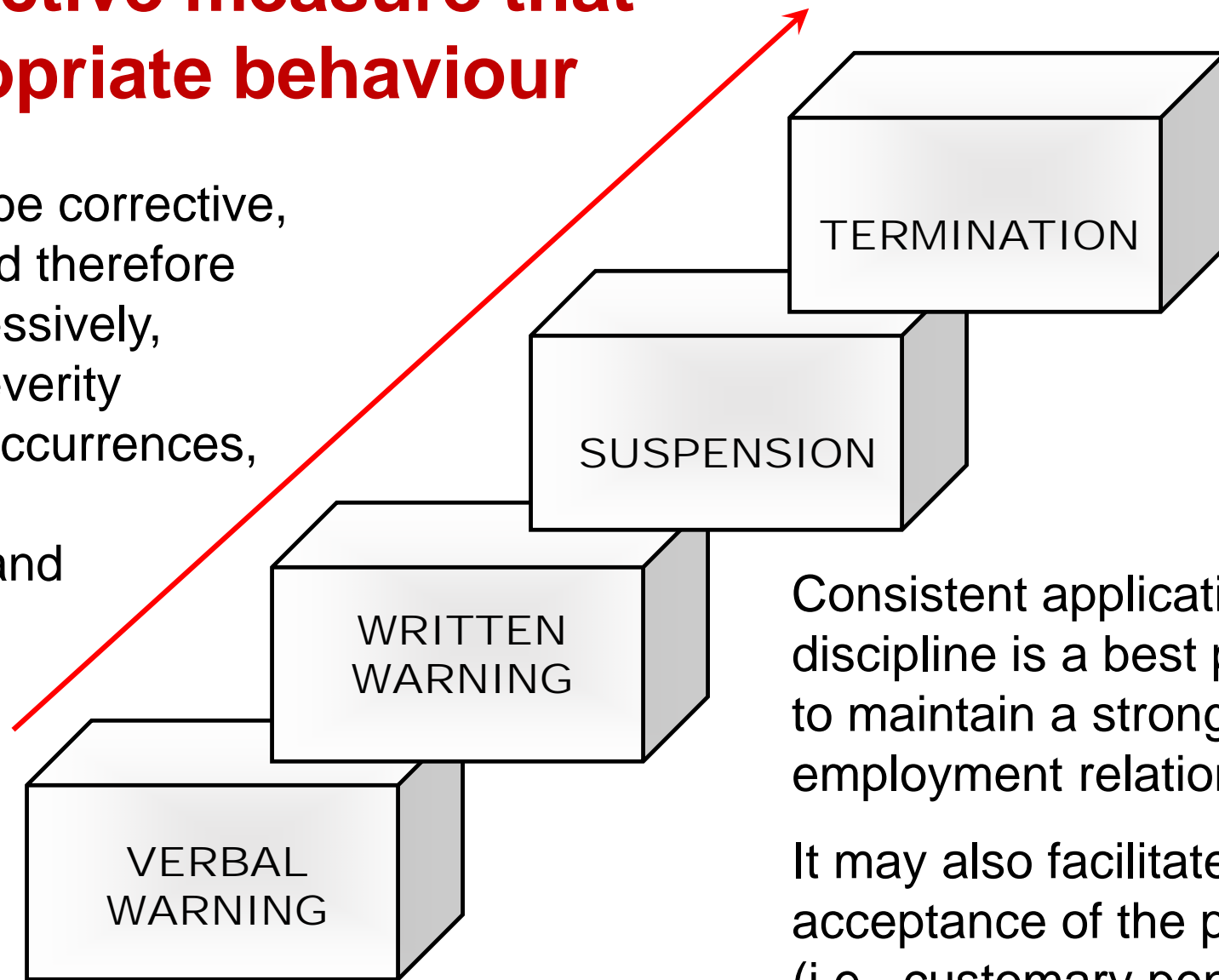
What is Progressive Discipline?

- Requires that the employer:
 - Bring its concerns and expectations to the employee
 - Give the employee a chance to correct their behaviour
 - Only impose discipline as a method of correcting behaviour, not as a form of punishment



Discipline: a corrective measure that addresses inappropriate behaviour

Discipline is to be corrective, not punitive, and therefore imposed progressively, increasing in severity depending on occurrences, circumstances and mitigating and aggravating factors.



Consistent application of discipline is a best practice to maintain a strong employment relationship.

It may also facilitate an easy acceptance of the penalty (i.e., customary penalty for similar behaviour).

Your Turn: Did the Employer Properly Apply Progressive Discipline?

Facts:

- Recall: Employer terminated “difficult” grievor when she left work after five hours and did not return the next day
- A specialist’s note supported her need for graduated hours
- Employer had not given warnings or applied progressive discipline because of its belief that to do so would have been futile given the employee’s demonstrated attitude (e.g., making unsubstantiated allegations of racism, using loaded language in emails, delayed responses to reasonable requests, etc.)
- Did the arbitrator uphold the discharge?



OPSEU, Local 529 v. Toronto Community Housing Corporation (Arbitrator Cummings, 2017)

- Arbitrator allowed employee's grievance, finding employer did not have just cause for dismissal due to failure to follow progressive discipline:
 - No previous discipline on record
 - No warnings given

“To uphold the discharge in such circumstances would be an unjustifiable rejection of the progressive discipline system, a cornerstone of Ontario’s labour relations regime. We do not know if Ms. Gordon would have changed her behaviour if she had received warnings because the employer never tried [...T]he employer is obliged to give warnings and escalate discipline if the behaviour does not improve before it is entitled to make the decision to terminate employment.”





Just Cause – Single Incident

Termination for a Single Incident of Misconduct

- There may be just cause for termination for a single act so severe that it amounts to a repudiation of the employment relationship
- Examples:
 - Single incidents of assault in the workplace (but, remember *Northfield*)
 - Conviction for serious criminal offence related to employee's duties
 - Serious theft or other dishonesty



Remember: Context, Context

- Each situation is considered by the court/arbitrator on a case-by-case basis
- Failing to establish just cause carries financial consequences (damages and/or reinstatement)
- Arbitrators will consider mitigating factors and may reduce the penalty imposed



Your Turn: Just Cause for Dismissal?

Facts:

- 61-year-old employee with 8 years' service and clean disciplinary record terminated for sexual harassment
- Female co-worker alleged grievor:
 - Came up behind her in lunch room and inappropriately touched her
 - Blocked her in an aisle and attempted to talk to her the next day
- Grievor said he did come up behind co-worker but did not touch her inappropriately; did not attempt to block her path the next day
- Just cause?



Re Metro Rideau Store v. UNIFOR Local 414 (Arbitrator Baxter, 2018)

Findings:

- Discharge upheld by arbitrator
- Sexual harassment did occur
- Sexual harassment is as serious as theft: “*gross misconduct of the vilest kind*”
- Discharge *prima facie* the appropriate penalty
- Key takeaway: Just cause for discharge is possible for a single incident of serious misconduct





Questions
