Discipline and Dismissal: Legal Framework

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INTRODUCTION

Collective agreements protect employees from termination or other forms of discipline, except in certain limited circumstances. Termination can arise as a disciplinary penalty for misconduct, or in some non-disciplinary scenarios, such as performance or innocent absenteeism. This brochure summarizes an employee's rights in regards to different kinds of dismissal.

LEGAL SOURCES

i) Canada Post Collective Agreement

The collective agreement with Canada Post provides employees with several rights when it comes to being either disciplined or discharged.

The principles governing all forms of discipline within this bargaining unit are set out in article 20.01 as follows:

> No disciplinary measure in the form of a notice of discipline, suspension or discharge or in any other form shall be imposed on any employee without just, reasonable and sufficient cause and without her receiving beforehand or at the same time a written notice showing the grounds on which a disciplinary measure is imposed.

Accordingly, this language requires the employer to justify that termination is the only appropriate sanction for an employee's misconduct.

ii) Purolator Collective Agreement

The collective agreement with Purolator does not contain a similar provision, but the principle from the Canada Post collective agreement applies in a similar way.

In addition to the collective agreement itself, termination is subject to the legal principles as developed by courts and arbitrators.

TERMINATION FOR DISCIPLINARY REASONS

An employer may discipline employees for a wide variety of reasons, but in all cases the employer must show that the conduct is worthy of discipline and that the disciplinary measure imposed is justifiable.

Disciplinary actions against an employee, including termination, can be reviewed through the grievance procedure to ensure that any penalties applied are reasonable.

Arbitrators apply the following three-part test to determine whether discipline or termination is reasonable in the circumstances:

> 1) Has the employee given just and reasonable cause for some form of discipline by the Employer?
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> 2) If so, was the Employer's decision to dismiss the employee (or to impose another disciplinary measure) an excessive response when considering all of the circumstances of the case?

3) If yes, what alternative measures should be substituted as just and equitable?[2]

If the arbitrator concludes that the discipline was unjustified, the disciplinary measure may be revoked or substituted with a lesser penalty. Employees are generally entitled to progressive discipline, meaning that instead of being terminated for a single incident, lesser penalties are applied instead, allowing that employee to correct their behavior.

There are a wide variety of grounds for which an employee can be disciplined by their employer. Some of the more common types of discipline-worthy conduct include:

- Theft
- Dishonesty
- Insubordination
- Aggressive Behaviour
- Absenteeism

If the arbitrator finds conduct that was deserving of discipline, the arbitrator then considers the reasonableness of the penalty and will consider numerous factors, including:

- The seriousness of the offence;
- The employee's previous disciplinary record;
  The employee's length of service;
- Whether the offence was an isolated incident in the employee's employment history;
- Any provocation;
- Whether the offence was committed on the spur of the moment as a result of a temporary lapse of judgment, or whether it was premeditated;
- Whether the penalty imposed has created a special economic hardship for the employee in the light of the particular circumstances;
- Evidence that the company rules of conduct have not been uniformly enforced;
- Any other circumstances the arbitrator considers relevant, such as an apology, or if rules governing the misconduct were issued after an employee was disciplined.[3]

Based on these factors, an arbitrator will determine if the dismissal is justifiable or if a lesser penalty should be substituted, such as a warning, suspension, or other penalty that will allow the employee to correct their behavior.

Each disciplinary case turns on the type of disciplinable offence alleged and on the employee's employment history and other mitigating factors as listed above.

Termination for a Single Incident

As noted above, employees are generally entitled to progressive discipline. However, for serious misconduct, employers may impose termination for a single incident. In assessing such a disciplinary penalty, the arbitrator will consider whether the misconduct is so serious that, considering all other factors, a continued employment relationship is impossible.

[2] *Wm. Scott & Co. Ltd and Canadian Food and Allied Workers Union Local P-162*¸ [1977] 1 Can LRBR (BCLRB).
[3] Donald JM Brown and & David Beatty, *Canadian Labour Arbitration Vol 1*, loose-leaf (Toronto: Thomson Reuters) at 7-172.

Examples of the kind of serious misconduct that could result in termination for one incident include violence or threats of violence;[4] theft;[5] or fraud.

Off-Duty Misconduct

An employee's off-duty conduct will rarely have consequences on their employment. However, the employer may be able to terminate or discipline employees for misconduct occurring outside the workplace if the employer can show that its "legitimate business interests are affected in some way."[6] To justify disciplinary sanctions against an employee for their off-duty conduct, an employer must demonstrate how that conduct "detrimentally affects its reputation, renders the employee unable properly to discharge his or her employment obligations, causes other employees to refuse to or be reluctant to work with that person, or inhibits the employer's ability to efficiently manage and direct the production process."[7]

For example, employees who are convicted of crimes outside of work may be discharged for bringing reputational harm to their employer. An employer is permitted to wait until the conclusion of any criminal investigation into an employee before determining if there is cause for discipline, but can also suspend an employee pending the investigation's results.[8] The latter situation arises where the charges laid against the employee "give rise to a legitimate fear for the safety of other employees, or of property, or of substantial adverse effects upon business."[9]

NON-DISCIPLINARY TERMINATIONS

An employee may be terminated for non-disciplinary reasons, such as incapacity to perform one's job, innocent absenteeism, and failure to meet the requirements of a performance management plan. This type of dismissal can also be challenged through arbitration, however in these cases, arbitrators apply a different test.

Performance

If employees are unable to perform their jobs or perform their jobs poorly over a sustained period of time, they may become vulnerable to non-culpable terminations, demotion, transfer, or be ordered to undergo additional training.[10] Such actions are not considered disciplinary and therefore employers must meet a different threshold to terminate employees in this situation.[11]

To dismiss an employee for non-culpable poor job performance, an employer must satisfy the following requirements:

(a) The employer must have defined the level of job performance required.
(b) The employer must establish that the standard was communicated to the employee.

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[4] *Canadian Pacific Railway and Teamsters Canada Rail Conference* 2015 CarswellNat 7571, 125 CLAS230, 266 (4th) 442 [*Canadian Pacific*].
[5] *Canada Post Corporation v Canadian Postmasters and Assistants Association*, 2014 CanLII 76773 (ON LA) [*Canada Post*] at pages 21-22.
[6] *Supra,* note 3 at 7-33.
[7] *Ibid*, at 7-34.
[8] *Canada Post Corp v CUPW* 2014 CarswellNat 5379, 121 CLAS 228, 249 LAC (4th) 201 at para 56.
[9] *Ibid,* at para 59.
[10] *Supra,* note 3 at 7-127.
[11] *Ibid*.

(c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.
(d) The employer must establish an inability on the part of the employee to meet the requisite standard, to an extent that renders the employee incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee.
(e) The employer must disclose that reasonable warnings were provided to the employee and that a failure to meet the standard, could result in dismissal.[12]

In some cases, the employer will demonstrate that it has met these requirements by placing an employee on a Performance Improvement Program (PIP) and demonstrating that the objectives in the program have not been achieved. PIPs are governed by the legal requirements above. Among other things, the PIP must include reasonable objectives and must provide the employee the appropriate resources and, if necessary, additional coaching to achieve those objectives. If an employee is placed on a PIP, or receives a negative performance evaluation with which they disagree, they should grieve that decision through their union.[13]

According to Canada Post, the first, and fundamental, step in the Performance Management process is setting objectives for its employees. Employees should meet with their team leader (i.e., the person who is responsible to guide the work) to discuss what the objectives will be for the year; this conversation can be had at any point during the year. Further, a good performance objective should follow "SMART", which means the objectives need to be specific, measurable, achievable, realistic and timely according to Canada Post Performance Management Guidelines. For further information, please refer to the Performance Management section of the Canada Post Intranet.

Even in cases where poor performance is established, the employer is required to consider alternate measures before terminating the employee. These measures might include a demotion, transfer, or some other non-disciplinary suspension of services.[14] Termination should generally be reserved as a last resort and it should be clear to the employee what standards they had to reach and how they failed to reach those standards.

An employee may also be subject to non-disciplinary termination if that employee no longer meets the necessary requirements of the position. For example, the employee may lose the necessary professional license, security clearance, or other qualification to perform the job.

Incapacity

A disability may also render an employee incapable of meeting the requirements of the job. In those circumstances, the employer must satisfy the duty to accommodate before dismissing an employee. The employer’s duty to accommodate requires employers, unions and employees to work together to find proper accommodation, up to the point of undue hardship. If you want to read more on the employer’s duty to accommodate, please ask your union representative for UPCE’s Duty to Accommodate Brochure.

[12] *CUPE Local 2348 v Winnipeg Regional Health Authority – Midwives*, 2014 CanLII 22979 (MB LA) at page 9.
[13] See, for example, *Canada Post Corporation v Association of Postal Officials of Canada*, 2011 (CanLII) 77403 (AB GAA).
[14] *Supra*, note 3 at 7-127.

It has also been recognized by arbitrators that if employees received disability benefits granted under the collective agreement, that the employer cannot terminate the employee if that termination would result in the loss of access to negotiated benefits.[15]

Innocent Absenteeism

Employees who regularly miss work for non-culpable reasons, such as illness, may be subject to termination. Even if the reason for the absence is not the fault of the employee, the employer is entitled to terminate an employee who cannot regularly and properly perform their job. To do so, the employer must show that the employee's poor attendance record is unlikely to improve,[16] that the employer has warned the employee about the absenteeism and has provided the employee an opportunity to correct the behavior. Further, the employer must provide clear evidence that the employee has a substantially and unduly higher rate of absenteeism than the average level and that the employee is incapable of regular attendance in the future. What is considered a high rate of absenteeism depends on the facts of each particular case. The employer may be required to show on an objective standard, how an employee's record of absenteeism is worse than other employees.[17] The employer must also show that all employees have been subject to the same consistent standard. In these circumstances, the employer might also have to satisfy the duty to accommodate an employee before termination.

Employers may offer "last chance agreements", which form part of their efforts to satisfy the duty to accommodate, but this is not guaranteed, and the employer does not have an obligation to offer such agreements. These agreements typically set out what standard of attendance must be maintained to remain employed.

CONSTRUCTIVE DISMISSAL DOES NOT APPLY

"Constructive dismissal" comes from the non-unionized employment context and generally has no application in the unionized workplace. Constructive dismissal occurs when the employer unilaterally changes an employee's terms and conditions of employment so significantly that the employer is effectively acting as though it is no longer bound by the employment contract. When this occurs, the employee may treat the change in their employment situation as if they had been fired without cause.

Constructive dismissal is almost always inapplicable in a unionized workplace, and any unilateral change to an employee's working conditions can be challenged through the grievance and arbitration process. The remedy, if a violation of the collective agreement is found, is to rectify the breach and, if necessary, compensate the employee.

Constructive dismissal has been found to apply in rare circumstances where the collective agreement does not cover the "parameters of the dispute."[18] An example of the "very unusual circumstances" giving rise to a possible constructive dismissal is if an employer closes the business, but keeps one or two long-service employees employed with no tasks, in order to avoid having to pay those employees severance.

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[15] *Pharma Plus Drugmarts LTd v UFCW, Local 175* 2013 CanLII 34835 (ON LA) at page 31.
[16] *Supa,* note 3 at 7-232.19.
[17] *Ibid*.
[18] *Cadbury Adams Canada Inc v UFCW, Local 175* 2008 CarswellOnt 6426 at para 14-15.

Generally, it is very unlikely that a change to working conditions will be found to constitute constructive dismissal. An employee who experiences a change thought to be improper, such as a reassignment, a failure to accommodate, or a toxic work environment, should consult a union representative about challenging the change through the grievance and arbitration process.

PROCEDURAL ISSUES

Union Representation

Union members have the right to have a union representative present at all stages of the disciplinary process. Union representatives can counsel a union member and also direct the employer's attention to matters it might otherwise fail to consider.[19] The employer must notify your UPCE Local representative within 48 hours of delivering you the notice.[20]

The collective agreement with Canada Post specifies when a union representative must be notified of disciplinary action:

> 20.05 **Notice of Disciplinary Interview**
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> The Corporation must advise an employee and the Local of the Alliance twenty-four (24) hours in advance of a disciplinary interview or disciplinary counseling session and indicate the purpose of the meeting, including whether it involves the employee's personal file. The supervisor must remind the employee of her right to have an Alliance steward or authorized representative of the Alliance accompany her. If the employee fails to appear for the interview, or does not explain her inability to do so, the Corporation and the Alliance representative may proceed with the hearing.

If the employer prevents the employee from having their union representative present for disciplinary meetings, any resulting discipline may be modified by an arbitrator. The arbitrator will consider how the employer might have acted if the union had input into the employer's decision.[21]

Any time any disciplinary action is taken against an employee, a written notice will be placed in the employee file for 1 year. If no further disciplinary action is recorded during that year, or 2 years since the disciplinary action was taken, the notice will be removed.[22]

The Purolator collective agreement also contains procedural requirements for discipline. Articles 13.09 and 13.12 set out some basic requirements. These include how long a notice of disciplinary action can remain on an employee's file (1 year), that employees can request the presence of union stewards for disciplinary meetings, and the time limits to impose disciplinary measures.

It is important that employees arrange to have union representatives accompany them to any disciplinary meetings to ensure that their rights are adequately protected.

Grievance Procedure

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[19] *Supra*, note 3 at 7-13.
[20] Collective Agreement between the Canada Post Corporation and the Public Service Alliance of Canada, article 20.02.
[21] *Revera Retirement (Rayoak Place) v United Steelworkers, Local 1800* 2012 CanLII 24018 (ON LA) at page 31.
[22] *Supra,* note 20, article 20.06.

Before presenting a grievance, an employee should discuss their complaint with both their immediate supervisor and with a union representative. Employees have the right to be accompanied by a union representative during a discussion with their supervisor relating to a complaint. If the employee and the supervisor are unable to resolve the issue, an authorized representative of the union may then proceed to present a grievance.

If a grievance relating to the application or alleged violation of the collective agreement is presented to Canada Post or Purolator and has not been dealt with to the satisfaction of the union, the union may refer that grievance to arbitration.

CONCLUSION

Unionized employees have a right not to be terminated from their employment except in certain, limited circumstances. Whether the termination is for disciplinary or non-disciplinary reasons, the employer must follow the proper procedures and meet the legal requirements to dismiss the employee. All terminations are subject to challenge through the grievance and arbitration process.

It is important for employees to involve their union representative early in the process, whether they are being subject to a disciplinary or non-disciplinary procedure. The union representative will counsel the employee regarding their rights and options, and advocate on your behalf to the employer.