

3 Ways that Failure to Enforce OHS Rules Hurts Your Company



The hidden costs of lax safety enforcement.

Workers who disobey safety rules are a danger to others and to themselves and must be disciplined. But disciplining workers for a safety violation or any other reason can be an unpleasant experience, especially if the offender is in a labour union. Consequently, supervisors may be tempted to 'let the offender off' with just a warning or not impose any discipline at all, particularly with first offences. But leniency can backfire. Here are 3 ways you harm your company's legal position when you don't mete out the discipline workers deserve for committing serious safety offences. (Go to the OHSI website for a Notice you can distribute to supervisors on the importance of discipline for safety offences.)

1. Leniency Undermines Future Enforcement

The experience of a Winnipeg company is a good example of what can happen when discipline is meted out inconsistently. The problems began when a worker operating a pairing machine opened the hood and stuck his hand inside while the machine was still in motion. This totally went against the worker's training and company safety rules banning opening the hood of a running machine to prevent parts from flying out and killing or dismembering somebody. Luckily, nobody got hurt in this incident. But the company suspended the worker for a day.

The company's progressive discipline policy provided for gradually harsher penalties on repeat offenders. The suspended worker was a first offender. But the company considered the offence so serious that it skipped over the first 3 stages of the discipline policy and suspended him. The worker claimed that the company didn't follow the progressive discipline policy and filed a grievance with the Manitoba labour board.

The arbitrator said that that a one-day suspension was an appropriate penalty for such a serious safety violation, even though it was only the worker's first offence. The worker had 'showed a lack of care and was negligent in opening the hood.' Workers have a 'moral, as well as a legal obligation, to work in a safe and prudent manner,' the arbitrator explained.

Even so, the arbitrator knocked the penalty down to a written warning. Although he felt that it was reasonable for employers to skip steps of their progressive

discipline policy when first offenders commit serious safety violations, the arbitrator noted that in this case the company had been inconsistent in its enforcement. Specifically, 2 other workers had committed serious safety violations. One was negligent in operating a forklift and the other showed up drunk for work. Each was a first offender. Each got counseling.

So, there was no precedent for suspending a worker for a first offence. 'I cannot disregard the undisputed evidence that' the company treated this worker differently, the arbitrator said [*Re Alcatel Telecommunications Cable (Winnipeg Plant)*], 1996 M.G.A.D. No. 50].

2. Leniency Undermines Your Due Diligence Defence

Having an OHS program and clear safety rules is essential to make out a due diligence defence if you're ever prosecuted. However, failure to enforce those rules totally cuts the legs out from under that defence. All it proves is that you were aware of the need for rules but didn't take the trouble to enforce them. This is particularly damning when there's a pattern of leniency, which sends the message that safety isn't really such a big deal at your company.

Example: A Nova Scotia arbitrator rejected a prime contractor's due diligence defence because it contractors and subcontractors routinely allowed workers to work from elevated surfaces without proper fall protection equipment. There's no way the prime contractor in charge of overall safety at the site could show it took reasonable steps to comply when it failed to ensure enforcement of its own fall protection rules [*Southwest Construction Management Limited (Re)*], [2016] NSLB 129 (CanLII), April 14, 2016

3. Leniency May Lead to Liability for Discrimination

Adding insult to injury, a track record of leniency also enables workers who feel the hammer to go on the offensive and claim discrimination on the basis of race, sex, religion, national origin, disability or other protected class(es) they belong to under the applicable human rights laws. While the fact that a minority worker got a tougher penalty than a white, male worker may be due to the fact that he/she committed a more egregious violation. However, the disparity in ethnicity, sex, etc., may look like a lot more than a coincidence in a human rights case.

And that's precisely what happened in the *Alcatel* case. The arbitrator suggested that inconsistent

punishment of workers who commit safety violations was evidence of discrimination: 'Arbitrators have generally been sensitive to the basic principle that similar cases must be treated in a like fashion,' the arbitrator reasoned. 'Accordingly, when an employee is able to prove that other employees who engaged in the same conduct for which he was disciplined were either not disciplined at all, or suffered much less severe disciplinary sanctions, arbitrators will find the employer to have discriminated against that employee.'