Discipline for Safety Infractions & ‘Zero Tolerance’

By Jamie Jurczak, Taylor McCaffrey LLP

One of the key ways for employers to demonstrate compliance with safety laws and due diligence is to implement safety rules in the workplace and ensure they’re enforced. And with the goal of injury prevention also in mind, many employers in safety sensitive environments have a penchant for developing ‘zero tolerance’ approaches to safety issues. However, zero tolerance doesn’t mean automatic termination in the face of a breach of a safety rule. Rather, employers must recognize that even a zero tolerance approach requires the imposition of an appropriate form of progressive discipline based upon a full and complete investigation of the facts giving rise to this particular safety infraction and consideration of various mitigating factors.

It’s not uncommon to find that management has terminated or severely disciplined a worker for a breach of a cardinal safety rule without due consideration of the principles of mitigation. Indeed, many managers, supervisors and foreman don’t have a full appreciation of exactly what mitigating factors ought to be considered and how to apply those principles in cases of safety violations where a zero tolerance approach has been put in place. As a result, more and more grievances are filed because unions believe the

employer has misapplied the zero tolerance policy and failed to consider mitigating factors.

Enforcement of Zero Tolerance Policies

In determining whether a zero tolerance policy can be enforced in a grievance filed by the union, an employer will first need to demonstrate that it had serious grounds for concern giving rise to the policy, such as frequent injuries, a serious safety risk or repeated dangerous conduct that needed to be stopped. The employer will also have to demonstrate that:

- The zero tolerance policy was clearly communicated within the workplace;
- Workers were trained on the policy and management's expectations; and
- Workers were warned of the seriousness of committing the prohibited behaviour.

It's important to remember that even if the employer is able to prove the above, the arbitrator hearing the grievance isn't bound by zero tolerance policies. Even in those workplaces where there's a clear safety nexus to the zero tolerance policy, the presence of such a policy hasn't stopped arbitrators from considering mitigating factors that might lessen a worker's penalty.

Mitigating Factors

Many cases have outlined the various mitigating factors to be taken into account when considering the appropriateness and types of discipline. A well respected arbitrator, the late Mr. Harry Arthurs, listed mitigating factors that can be used as guidelines when considering the substitution of a lesser penalty for termination in the seminal case of *Canadian Broadcasting Corp. v. CUPE (Sgrignuoli Grievance)*, [1979] C.L.A.D. No. 12, June 25, 1979:

1. *Bona fide* confusion or mistake by the worker as to whether he was entitled to do the act complained of;
2. The worker's inability, due to drunkenness or emotional problems, to appreciate the wrongfulness of his act;
3. The impulsive or non-premeditated nature of the act;
4. The degree of the harm done;
5. The worker's frank acknowledgement of his misconduct;
6. The existence of a sympathetic, personal motive for dishonesty, such as family need rather than hardened criminality;
7. The worker's past record;
8. The worker's future prospects for likely good behaviour; and
9. The worker's personal circumstances, such as age, seniority, etc.

But Arbitrator Arthurs also explained that these factors, while helpful, aren't the equivalent of a mathematical equation. Instead, they're general considerations that are relevant to the worker's future prospects for acceptable behaviour, which is the essence of a corrective approach to discipline.

A Comparison of Two Cases

There are numerous cases dealing with discipline for safety violations in the face of zero tolerance policies that show how the factors articulated by Arbitrator Arthurs are considered. Here's a look at two cases from Manitoba'both determined by the same arbitrator'that demonstrate how the various principles regarding the enforcement of zero tolerance policies and mitigating factors can be applied differently.

In *Maple Leaf Fresh Foods v. U.F.C.W., Local 832 (Centeno Grievance)*, [2010] M.G.A.D. No. 14, April 22, 2010, a temporary foreign worker engaged in horseplay by placing meat on a co-worker's shoulder and then removed his glove to take out his cell phone. He placed the glove on the conveyor belt,

which then found its way into a combo bin. No product was contaminated or worker injured. However, his actions constituted three separate breaches of the employer's zero tolerance throwing/wasting product policy, the penalty for which was discharge absent 'exceptional circumstances.' In reliance on this policy, the employer terminated the worker.

The zero tolerance policy at the time had been implemented in light of previous grievances filed by the union involving instances of workers' throwing meat, which posed a serious safety risk to people and compromised food safety. The workers in those cases were reinstated largely due to the employer's inconsistency in applying the existing policy. As a result, the employer and union agreed that, in the absence of 'exceptional circumstance,' the throwing/wasting of product would result in termination.

The union acknowledged that this worker's actions warranted discipline. There was no question that the worker was aware of the policy and that the employer response to violations of it was termination. And the employer proved that there were problems with meat throwing and wasting of product, and that this kind of behaviour could pose a health and safety risk. The only question was whether there were exceptional circumstances or mitigating factors in this particular worker's case.

The employer argued that a strong deterrence message needed to be sent to workers that such conduct wouldn't be tolerated. It also noted that if 'exceptional circumstances' were found to exist, therefore mitigating termination, then its rules would be rendered irrelevant.

The union argued that the agreement providing for termination but for 'exceptional circumstances' didn't mean that the arbitrator couldn't consider mitigation. There must still be a case-by-case analysis under the agreed upon policy, including an assessment of any mitigating factors. The union pointed to

the following as mitigating factors in this case:

- The worker, although a short-term employee, was a good worker, who just did a stupid thing;
- There was no pre-mediation;
- His action, placing meat on a co-worker's shoulder, wasn't as serious as throwing meat'a serious safety issue;
- No product was contaminated and no one was hurt, so the harm was minimal;
- He was sincere in his remorse; and
- Although the worker was 35-years-old and so attractive to a prospective employer, his age was cancelled out by his foreign worker status. Thus, the loss of his job would have a greater effect upon him because of his foreign status and limited employment opportunities.

In assessing the circumstances surrounding the worker's behaviour, Arbitrator Simpson considered his short service, discipline free record and remorse, as well as the fact that his employment prospects were limited due to his immigration status. Based on these mitigating factors, the arbitrator wasn't convinced that the worker would repeat such behaviour in the future and found that he could continue to be a good worker if afforded another opportunity. Finally, the arbitrator disagreed with the argument that termination was the only way to sustain the zero tolerance policy agreed to by the parties. In his view, a penalty short of termination could suffice to enforce the policy and provide the appropriate deterrent.

In the second case, *McCain Foods v. U.F.C.W. , Local No. 832 (Anderson Grievance)*, [2013] M.G.A.D. No. 6, June 6, 2013, Arbitrator Simpson was again asked to consider discipline for violation of a zero tolerance policy, in this case, one on lock out/ tag out ('LO/TO').

The employer implemented the policy due to frequent injuries

and deaths as a result of LO/TO violations. Under the policy, ‘crossing the plane,’ that is, putting a body part past the point of a machine where it becomes dangerous, was considered a LO/TO violation. Due to worker feedback, the policy was modified for the packaging department, where it wasn’t practical to have full LO/TO for the bagging machines. A decision was made to have workers use the interlock mechanism on the machines instead, which was an alternate method of LO/TO without the delays encountered with traditional LO/TO.

Workers were trained on the policy. A subsequent memo noted that a LO/TO offence would start as terminable, but there may be circumstances that wouldn’t lead to termination. Workers had to sign off that they had read the memo. In addition, the employer provided a LO/TO reference guide that listed the procedures that were to be followed depending on the situation (either interlock or full LO/TO). Workers had to complete training, and signoff that they were trained and that they had received and read the guide.

A worker in the packaging department had received a considerable amount of training on LO/TO and knew the proper LO/TO and interlock procedures. One night, a bag became stuck in the bagging machine he was operating. He tried to dislodge the bag by reaching up into the jaws of the machine. His hand got stuck in the machine and he sustained a puncture injury and a slight break to the tips of two fingers. The worker was suspended pending an investigation of the incident.

During the employer’s investigation, it determined that the worker had crossed the plane of the bagging machine without engaging the interlock’a violation of the zero tolerance LO/TO policy. The employer met with the worker to hear his explanation of the incident and determine if there were any mitigating circumstances, such as training gaps, that would make a lesser penalty more appropriate. Concluding that there were no mitigating circumstances, the employer fired the worker. The union filed a grievance on his behalf.

The employer argued that the worker had been trained on safety issues, including the LO/TO policy, and made a deliberate choice to put his hand into the machine without activating the interlock as required. Although there was an accepted practice that workers could tap the bottom of a bag to free it without crossing the plane, the worker went far beyond the plane when he stuck his hand into the jaws of the machine. He'd put himself into a position where he could have suffered a much greater injury. So termination was warranted and reasonable given the safety implications of his actions, argued the employer.

The union argued that zero tolerance for LO/TO violations was a new policy that hadn't been properly communicated to workers. In particular, the employer hadn't clearly communicated to workers that crossing the plane and failing to engage an interlock mechanism were considered LO/TO offences with the same severe consequences as failing to use a physical lock or tag. It also argued that the worker's actions were a momentary aberration and that he'd come forward and been truthful.

Arbitrator Simpson dismissed the grievance. In a manufacturing/processing/production facility, he said that safety is paramount and employers have a legal and moral obligation to maintain a safe workplace. However, he also commented 'that the important thing is that zero tolerance is not applied automatically, i.e. termination being the automatic response once it is determined there has been a violation. Each situation must be individually assessed.'

Here, the employer's move to zero tolerance changed the consequences of LO/TO violations, but didn't amount to a new policy. The previous policy and procedure both noted that due to the potential severity of LO/TO violations, the employer could take disciplinary action outside the steps of progressive discipline, up to and including discharge. The move to zero tolerance was to enhance safety, not make LO/TO

violations more readily disciplined.

After the incident, the worker wasn’t automatically terminated. He was suspended pending an investigation during which he had a chance to explain himself and provide additional information. The arbitrator found that the employer wasn’t simply ‘going through the motions’ to get to termination.

The worker had received significant training on LO/TO, interlock, crossing the plane and general safety practices. He’d signed off on related materials and completed a test at the end of his initial training for the packaging department. He was aware of the purpose of LO/TO and the potential serious consequences of crossing the plane. He was injured due his failure to follow his training. And he knew or ought to have known that violating the LO/TO policy would result in termination.

In terms of mitigating factors, the arbitrator didn’t find many. The worker was a short-term employee. His violation of the zero tolerance policy was deliberate and serious, resulting in injury which could have been worse. And although he did come forward after the incident occurred, he changed his story at the hearing, claiming that he hadn’t intentionally put his hand in the jaws, but while reaching up to free the bag, his legs buckled and his hand became trapped. In short, the arbitrator found that terminating the worker was reasonable because he didn’t take full responsibility for his actions and there was a serious question of his future prospects for good behaviour.

Bottom Line

The term zero tolerance is really a misnomer, as mitigating factors will always still need to be considered to determine whether terminating a worker for a safety violation is appropriate. What labeling a policy as ‘zero tolerance’ is

really saying to workers is that the safety rule is so important that if it's violated, it will have more serious disciplinary consequences than violations of other safety rules. By reviewing how Arbitrator Simpson decided each of these cases, employers, managers and anyone responsible for discipline of violations of zero tolerance policies will better understand the mitigating factors that must be considered in order to properly discipline and enforce a zero tolerance approach to safety. The most important thing to remember: the implementation of zero tolerance safety rules isn't unreasonable, but they do have to be applied reasonably.

Jamie Jurczak is a partner at Taylor McCaffrey LLP. Jamie's preferred area of practice is occupational health and safety. She's experienced in defending employers charged under provincial and federal OHS legislation and is well versed in assisting clients in responding to serious workplace incidents, addressing administrative appeals of regulatory orders and performing regulatory compliance reviews and audits. She frequently speaks at conferences and seminars on various topics relating to OHS legal liability and due diligence. You can contact her at 204.988.0393 or jjurczak@tmlawyers.com.