

# Do Two LOTO Violations in Three Months Justify Firing?



## SITUATION

A millwright working five months for an employer violates lockout/tagout (LOTO) procedures while changing a flow valve by disconnecting and taping electrical wires instead of shutting off the electrical power. The wires come untaped, touch together and cause sparks and an electrical short. No one is injured and no damage occurs. The millwright admits the violation but claims he skipped the LOTO procedure so the work could be done quickly to keep production on schedule. He apologizes, saying that he understands proper procedure and that LOTO is one of the employer's cardinal rules. The millwright also promises the violation won't happen again, adding that he'd followed proper procedure on more than 300 prior occasions. But the employer fires him for the violation because he had a one-day suspension for a prior LOTO violation just three months earlier. And at the time of the prior suspension, he was warned future violations could result in further discipline, including dismissal. The millwright files a grievance.

## QUESTION

**Did the employer properly fire the millwright?**

- A. Yes, because he'd violated a cardinal rule, which always warrants automatic termination,
- B. Yes, because he'd been employed for less than one year, so just cause wasn't needed.
- C. No, because there was evidence he could be a safe worker.
- D. No, because the next step in progressive discipline must be a longer suspension.

## ANSWER

**C. The evidence indicated the millwright was remorseful, understood and had previously followed LOTO procedure and could be a safe worker in the future.**

## EXPLANATION

This hypothetical is based on a decision in which an Ontario arbitrator reinstated a fired millwright because he was aware of the LOTO procedures, had been trained on and followed proper procedure in 300-400 other instances and said it wouldn't happen again. Despite the prior violation of these procedures, the arbitrator explained that the millwright's motive for violating LOTO wasn't selfish but out of a desire to help the employer by getting the work done more quickly so production could stay on schedule. Thus, the millwright had simply exercised bad judgment in an effort to expedite the work. Additionally, the arbitrator noted that no one was injured, no damage was caused and there was no evidence of production loss. The arbitrator concluded that because the violation posed a low safety risk, dismissal was unreasonable, even with the prior violation. So the arbitrator reinstated the millwright, suspended him without pay for six months and ordered him to get additional LOTO training. The arbitrator warned the millwright that a future violation within a year *would* be just cause for termination.

## WHY THE WRONG ANSWERS ARE WRONG

**A is wrong** because even violating a *cardinal* rule doesn't automatically justify termination. When imposing discipline, the offense and all the circumstances, including but not only the nature of the rule broken, should be considered. Many workplaces have so called 'cardinal rules,' that is, safety rules that are so important that violations of them are taken very seriously. And it's appropriate to treat violations of cardinal rules more harshly than those of other violations. But an employer still can't automatically fire a worker simply because he violated a cardinal rule and without consideration of the circumstances of the infraction. So although the LOTO procedure the millwright violated was a cardinal rule, that fact alone doesn't justify his firing.

**Insider Says:** For more information on proper discipline, go to the Discipline & Reprisals Compliance Centre.

**B is wrong** because an employer must have just cause or provide notice or compensation in lieu of notice to terminate a worker regardless of whether the worker was employed for 20 years or less than one year. The length of employment is relevant as to the amount of notice (or amount of compensation in lieu of notice) required. It could also be a mitigating circumstance if, say, a worker had been employed for 20 years without any prior infractions. In this case, because the LOTO violation didn't rise to the level of just cause for termination, the millwright was entitled to some notice or compensation in lieu of notice.

**D is wrong** because employers aren't required to blindly adhere to prescribed steps in progressive discipline in all cases. Instead, the circumstances can justify skipping some steps in progressive discipline if the violation is serious enough. For example, serious safety violations that create a significant danger to the worker or others, such as using a welding torch right next to a clearly labelled container of flammable substance, can warrant immediate termination regardless of the worker's prior disciplinary record. But here, the millwright didn't commit a serious safety violation as no harm was done and no one was injured. So instead of firing him, the employer should've followed progressive discipline and imposed a second suspension.

## **SHOW YOUR LAWYER**

*Dufferin Concrete v. Teamsters Local No. 230*, [2013] CanLII 61486 (ON LA), Oct. 1, 2013