Yes, You Can Fire Long-Time Employees for Safety Infractions

An employer issued a warning to a worker it had employed for 37 years for failing to be clean shaven as required for proper respirator fit. Several days later, it issued him another warning for failing to wear a hardhat, safety glasses and mask in the plant. It also reminded him to be clean shaven by his next shift. But the next day, he wasn't clean shaven and didn't wear his respirator. So the employer fired him. The union said termination was excessive in light of his long service with the company. But the arbitrator disagreed. The worker was insubordinate and didn't offer any explanation for his behaviour. His misconduct was wilful, despite clear warnings and ample opportunity to comply with safety rules. And he had a history of safety infractions. So the arbitrator concluded that the worker's lengthy employment was the *only* significant mitigating factor and wasn't enough to warrant reinstatement [*Tonolli Canada Ltd. v. United Steelworkers*].

THE PROBLEM

Employers can, and should, discipline workers for violating safety rules, including firing them when appropriate. If a terminated worker files a grievance or wrongful dismissal lawsuit, the arbitrator or court will consider various factors in determining whether discipline was warranted and, if so, whether termination was the appropriate discipline. One factor that may weigh in the worker's favour is the length of his employment. Arbitrators and courts tend to be more sympathetic to workers who've been employed by the same company for many years. But the *Tonolli* case is a good reminder that long-time employment isn't immunity and doesn't bar an employer from firing a worker for repeated safety infractions.

THE EXPLANATION

Most employers use a system of progressive discipline for dealing with workers who violate company policies, including safety rules. Under such a system, the response to a first offence may be a verbal or written warning. Discipline for subsequent infractions may escalate to suspensions and finally termination. If an employer wants to fire a worker for a safety infraction without notice or wages in lieu of notice, it must have "just cause", that is, the worker must have engaged in conduct that irreparably destroyed the confidence and trust on

which the employment relationship was based. When a worker has committed a series of minor safety infractions, an employer may be able to argue that these acts form a pattern of unsafe behaviour and thus justify the worker's termination on the grounds of "cumulative just cause".

Terminated workers may challenge their firing, often arguing that although they deserved discipline for their conduct, their behaviour didn't warrant dismissal. Courts and arbitrators hearing termination cases have to evaluate and balance many factors, one of which is the length of the worker's employment with the company. The idea is that workers who've been with an employer for many years will generally get more slack than newer employees. However, being a long-time employee doesn't excuse misconduct. And if that misconduct is serious enough, the employer will be justified in letting that worker go, regardless of how long he's been there.

In the *Tonolli* case, the employer had disciplined the worker over the course of about a year seven times for various safety and other infractions, including:

- Unsafely operating a loader, resulting in a collision that he failed to report;
- Not wearing required PPE;
- Attempting to strangle a co-worker; and
- Unsafe operation of a lift truck.

The penultimate discipline had been a 25-day suspension. The union acknowledged the worker's recent disciplinary record but argued that it was just one year out of a 37-year career. The arbitrator found that the number of incidents suggested that that his misconduct over that period wasn't an aberration or the result of a momentary lapse in judgement or attention. The arbitrator noted that the employer had been far more patient with the worker than most employers would have been but scoffed at the notion that its "legitimate and laudable approach to employee management" could reasonably have caused the worker to believe his employment was secure. The employer can't now be criticized for "its extensive efforts to salvage a long service employee". added the arbitrator.

Given the worker's disciplinary record and these last infractions, the arbitrator ultimately concluded that there was no reason to believe that, if reinstated, he'd return to the workplace as a safety conscious employee respectful of the employer's reasonable health and safety demands.

THE SOLUTION

Staying with the same employer for years and presumably being a good employee can result in getting a proverbial gold watch. But workers and employers shouldn't confuse long-time service with a free pass that excuses misconduct, especially safety infractions. You can give long-time employees some slack but ultimately *must* hold them responsible for their behaviour. Thus, the *Tonolli* case should reassure members of senior management that the company can legally terminate even employees of 30 or more years if their conduct demonstrates a complete disregard for workplace safety.

SHOW YOUR LAWYER

Tonolli Canada Ltd. v. United Steelworkers, [2013] CanLII 15108 (ON LA), March

2, 2013