

Focus on Canadian Employment and Equality Rights

Not So Fast! Physical Assault of Another Employee Not Necessarily Just Cause for Termination, Says Ontario Superior Court

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In *Shakur v. Mitchell Plastics* (2012 ONSC 1008), the Superior Court of Ontario issued a strong reminder to employers to take a measured and contextual approach to discipline — even when the misconduct is an act of violence.

Facts

Mr. Shakur was employed for approximately six years as a machine operator. He was terminated for cause following a physical altercation with another employee, Mr. Kelley.

The incident started with “verbal jousting” in which Messrs. Shakur and Kelley exchanged “trash talk,” “off-colour” and “salty” language. The incident culminated with Mr. Shakur slapping Mr. Kelley on the face with an open hand.

Mr. Shakur’s employment was terminated for cause on the grounds he violated the Employee Handbook’s prohibition against “threatening, intimidating or coercing fellow employees” and “fighting or attempting to injure another employee.” Prior to this slapping incident, Mr. Shakur had no disciplinary record, and no history of violence. Mr. Shakur showed no remorse nor did he apologize to Mr. Kelley.

Mr. Shakur claimed wrongful dismissal and sought damages equivalent to approximately nine months’ notice. The employer took the position that physical assault is a serious act of misconduct warranting termination for cause and, absent cause, Mr. Shakur’s entitlement to notice was limited to the minimum amount under the *Employment Standards Act, 2000*.

The Superior Court found against the employer on both positions. While the act of slapping was misconduct, the Court held, it did not merit termination for cause. Quoting from the Supreme Court of Canada’s decision in *McKinley v. BC Tel*, the Superior Court accepted “an employee’s misconduct does not inherently justify dismissal without notice unless it is ‘so grievous’ that it intimates the employee’s abandonment of the intention to remain part of the employment relationship.” Slapping Mr. Kelley, the Court found, did not demonstrate Mr. Shakur’s intent to abandon or repudiate the employment relationship.

Furthermore, although the Employee Handbook contained policies against workplace violence and harassment, the employer had failed to train employees on the intent and purpose of the rules and to advise employees of the consequences of breaking those policies. Finally, the employer could have fulfilled its obligation to protect against workplace violence and harassment through progressive discipline, instead of immediately opting for dismissal.

As to the employer's second position, the Superior Court held the employment contract did not restrict Mr. Shakur's reasonable notice entitlement. When Mr. Shakur received his job offer, he was not informed it was a condition that he sign an employment contract, nor was he advised of the contract's terms. Additionally, Mr. Shakur signed the contract on his second day of work, without consideration or the opportunity to review it in advance. The Court therefore awarded Mr. Shakur 4.5 months' common law reasonable notice.

Lessons for Employers

This case presents several important lessons for employers:

- **Not every act of misconduct, even assault, will justify termination with cause.** Qualitatively evaluate all of the circumstances to determine, to the extent possible, whether the employee intended to abandon the employment relationship.
- **In some cases of serious misconduct, progressive discipline is preferable to dismissal.** This will of course depend on several factors including the employee's discipline history, the nature of the misconduct, and the message the employer wishes to send to other employees.
- **Merely distributing a policy to employees may not be sufficient.** An employer must educate employees on the purpose and intent of the policies. Consider training employees on your policies and requiring each employee to sign a document confirming their understanding of the policies and the consequences of a breach.
- **A well-drafted enforceable employment contract can be an invaluable tool for an employer.** Provide a prospective employee the opportunity to review the employment agreement and independent legal advice on its terms. Most importantly, ensure the contract is signed before the new employee commences work.

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