

Case In Point

Arbitrator Upholds Discharge of Long Service Employee with Clean Record for Theft

Date: September 28, 2015

In a recent arbitration decision involving a case of petty theft in the workplace, an arbitrator provided very useful guidance on workplace theft and the mitigating factors an employer should take into account in determining the penalty.

The decision involved the discharge of an employee with 17 years of service and a clean disciplinary record for stealing from the company's cafeteria. The grievor engaged in three acts of premeditated petty theft within a four-day period. When confronted, he refused to admit wrongdoing, specifically denied the thefts and attempted to deflect responsibility by making several false accusations. Even after he became aware that his employment was going to be terminated, he continued to lie and deny the thefts.

Approximately one hour after he was terminated, the grievor confessed. He also admitted stealing items on multiple prior occasions. At the arbitration hearing, the union put great emphasis on the low value of the stolen goods; however, the arbitrator was not moved by this given the grievor's conduct and the surrounding circumstances. In particular, the arbitrator noted that while the value of items stolen was low, there was an established pattern of misconduct over a substantial period of time, and the thefts were simply "business as usual" for the grievor. The arbitrator accepted that he was genuinely remorseful (for both his misconduct and the consequences thereof); however, that was "too little, too late."

The arbitrator noted that the timely willingness to take responsibility and accept the consequences for an act of theft, and the demonstration of sincere remorse for the misconduct (as opposed to remorse for the consequences) would have been particularly important because these steps would be a "window to true character and offer clues to the extent to which the employee can truly be trusted again." Here, the grievor did not do this – his actions undermined the mutual trust that is fundamental to the employment relationship. Therefore, the arbitrator decided that there was ample cause to discipline the grievor, that it would be "inappropriate" to return him to the workplace, and that it was not just and reasonable to substitute a lesser penalty.

The arbitrator's comments regarding factors in favour of mitigating the employer's penalty are instructive. Some of the most salient comments are:

- Workplace-related theft is universally considered to be a serious employment offence which

merits a significant disciplinary response. Once theft is proved, discharge remains a *prima facie* appropriate penalty and the union bears the onus to demonstrate that a less severe penalty is just and reasonable.

- While relevant, the following will not, by themselves, be generally compelling:
 - an employee's age or personal circumstances that are not significantly distinguishable from those of any other discharged employee;
 - seniority; and
 - contrition at the hearing.
- The most significant factors are those which speak to the employee's character and "trust rehabilitation" potential:
 - whether the theft was premeditated, a single incident or a pattern of behaviour; and
 - the employee's reaction when confronted with the allegation.

The decision in this case is an important reminder of the critical role trust plays in any employment relationship. Accordingly, in determining whether the penalty imposed for such misconduct was appropriate, arbitrators will engage in a careful assessment of the surrounding circumstances, including the presence or absence of mitigating factors. Employers are therefore well advised to ensure that they approach each incident of theft, including an employee's post-theft conduct, with the same degree of attention.

This case was argued successfully by Hicks Morley lawyer Martin Addario.

[Messier-Dowty Inc v International Association of Machinists and Aerospace Workers, Local Lodge 905, 2015 CanLII 56078 \(ON LA\)](#)