

Just Cause Terminations: Can Employers Ever Successfully Terminate for Cause?

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November 17, 2015



Overview

- Most Common Grounds for “Just Cause”
- Investigating and Documenting Employee Misconduct
- Performance Management
- Terminating for Conduct Outside the Workplace
- Special Considerations for Unionized Employers
- Communicating Just Cause Terminations



Most Common Grounds for Just Cause Termination

A Review of the Basic Principles

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What is Just Cause?

- What is termination for Just Cause?



- Termination without cause and constructive dismissal treated as EMPLOYER breach of contract
- Termination for just cause treated as EMPLOYEE breach of contract

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What is Just Cause?

- Definitions



- Statutory Just Cause

- Ontario's *Employment Standards Act, 2000*
- Federal sector's *Canada Labour Code, Part III*

- Common Law Just Cause

- Employee's act amounts to "repudiation of the employment relationship"

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Challenges Facing Employers

- Courts and adjudicators hold employers to very high standard
- Difficult to know with certainty whether threshold met
- Can take time to build case
- Most allegations of cause are challenged
- Cost of litigation significant
- Potential for punitive damages if cause is not made out

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Keys to Success

- Patience
- Process
- Clear expectations
- Consistency
- Proportionality
- Good faith treatment at time of termination



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Potential Grounds for Just Cause Termination

Misconduct

- Theft / dishonesty
- Violence
- Harassment
- Health and Safety Violation
- Significant Policy Violation
- Illegal Conduct

Poor Performance

- Regularly falling below established workplace standards
- Repeated culpable absenteeism / tardiness

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Termination
What constitutes “just cause”

Mitigating factors

- Long service
- Clean record
- Condonation
- Remorse

Aggravating factors

- Disciplinary history
- Deliberate
- Serious incident
- Dishonest conduct by employee in trust position

Just cause ?

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Case Study: Barton v. RONA

- Barton was Assistant Manager of a RONA store in Barrie; responsible for 140 employees
- Computer training to take place at non-wheelchair accessible training centre located on 2nd floor of building
- Employees and management wanted to accommodate employee in wheelchair to allow him to participate

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Labour, Employment and Human Rights Group Seminar
(Fasken Martineau Institute)

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Barton v. RONA

- Employees decided to use an order picker truck to lift employee and wheelchair on a skid to 2nd floor
- Employee drove wheelchair onto skid via portable ramp; skid then lifted wheelchair and employee onto 2nd floor
- Wheelchair not tied down



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Barton v. RONA

- After learning about it, Barton did not stop employees from unsafe operation and allowed employee and wheelchair to be lifted up and down during lunch break and at end of day
- RONA had clear safety policy which prohibited this type of activities; signed off by all employees



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Barton v. RONA

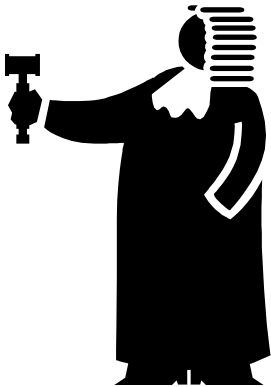
YOU
ARE
FIRED

- RONA investigated incident, then terminated Barton and the co-worker who operated lift truck for gross safety violation
- RONA also demoted Store Manager for 3 months and imposed a final warning letter

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Barton v. RONA

- Court held that Barton committed an “error in judgment”; termination was disproportionate response even though it was for legitimate business reasons
- Court considered: employee’s previous good performance, clear disciplinary record
- Court said RONA should have disciplined Barton instead of terminating his employment
- Barton awarded 10 months’ pay (~ \$55,000)

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Employee Misconduct

Investigating and Documenting Misconduct

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The Challenge



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Investigations: Step-by-Step

Receive the incident report / complaint

Conduct the investigation

Document the investigation

Plan, Plan, Plan

And the decision is...

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Gathering Evidence

Documents

- Personnel files
- Time cards
- Email
- Electronic files
- Medical files
- Expense files
- Project files
- Acknowledgements of policy / training

Other means?

- Property – desk and lockers
- Workers' compensation files
- Criminal records / transcripts
- Drug and alcohol tests
- Cameras / video
- Personal / vehicle search
- Social media
- Text messages

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Should the Police be Involved?

Case-by-case basis

Risks

- Threatening criminal proceedings
 - S. 346 Criminal Code
- Failure to make full disclosure to the police
- Relinquish control of the investigation and ability to resolve matter discreetly

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Other Challenges

What if the interviewee wants a...

- Lawyer?
- Union representative?
- Family or friend?

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Use of the Results of the Investigation

To consider: Disclosure or non-disclosure of the investigation report?

To determine whether to discipline and at what level

To explain the Company's position to the Union in the grievance procedure (if applicable)

To defend the Company's position in arbitration / wrongful dismissal proceedings

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After the Investigation: Maintaining the File

Gather any/all related notes, documents, etc. and place in the file

- Do **not** destroy anything

Keep sealed and apart from employee file



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Case Study: *Cavic v. Costco Wholesale Canada*

- Employee worked for Costco for 19 years
- Employed as Night Floor Merchandise Supervisor; responsible for 25 employees
- Employee falsified receipts and made benefits claims on behalf of non-existent daughter totaling \$200
- Also falsified receipt to make expenses incurred by to appear to have been incurred by her son
- Employee lied when questioned by insurance company

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Cavic v. Costco Wholesale Canada

- Employee claimed that she tried to have the false daughter removed from plan but insurance company failed to act; so made claims to get its attention
- Costco terminated employee for breach of trust

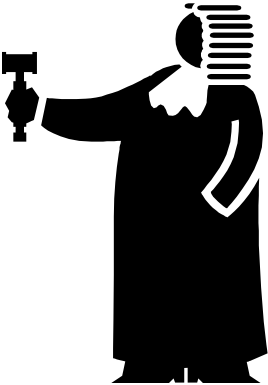


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Cavic v. Costco Wholesale Canada

- Court upheld termination for cause
- Court considered employee's action a breach of trust; took into account her dishonesty during investigation

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Performance Management

Key Strategies to Establish Just Cause for Poor Performance

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Culpable v. Non-Culpable Conduct

The diagram consists of two overlapping circles. The left circle is labeled 'Culpable conduct:' and lists four items: Dishonest behaviour (e.g., theft, abuse of sick leave), Insubordination, Tardiness or AWOL, and Serious breach of key policy, e.g., sexual harassment. The right circle is labeled 'Non-culpable' and lists three items: Non-blameworthy conduct, Absenteeism due to medical condition, and Drug / alcohol dependency. The overlapping area in the center is shaded a darker orange.

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Progressive Discipline – The Theory

Workplace discipline should be corrective, not punitive

- Oral
- Written warning
- Suspension

Enforced standards should be clear and consistent

Moderate discipline should clarify expectations

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Coaching & Discipline

Proportionality

- Between behaviour and sanction

Consistency

- Between incidents
- Between employees
- Across department / organization / locations

Consideration of all relevant facts

- Aggravating factors
- Mitigating factors

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Progressive Discipline – The Theory

...employees are entitled to a 2nd chance

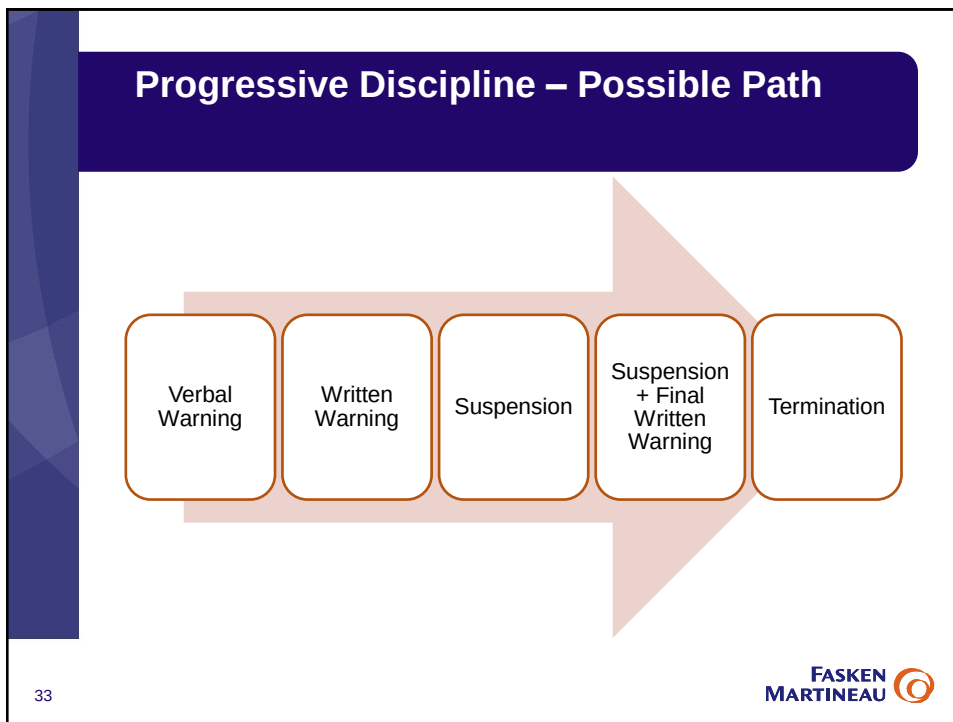
...and a 3rd

...and a 4th

...and...

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Progressive Discipline

Final warning

- What are the appropriate circumstances to issue a final warning?
- Problems with multiple final warnings
- “Any further misconduct” vs. further misconduct of a particular nature
- Alternative: escalating warnings (caution re: timing, templates)

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Case Study: *Gordon v. Altus Group Limited*

- Employee terminated for cause for:
 - Derogatory comments regarding senior personnel
 - Use of profanity
 - Continued employment of an employee who had been charged with fraud
- Court held that there was no cause
 - Profanity also used by other employees
 - Failure to apply employer's own progressive discipline policy
 - Employer was not harmed by the employee who had been charged with fraud, who was only employed for 3 weeks in any event

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Gordon v. Altus Group Limited

- Court held that employer failed to perform honestly the employment contract
 - ... *Altus* wanted to end the employment contract without paying out the contracted severance funds. In other words, they decided to be cheap and then conjured up a cause for firing in order to save money.
- Court awarded:
 - Damages of approx. \$169,000 or 10 months' pay, in accordance with terms of written employment agreement
 - Punitive damages of \$100,000

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Terminating for Off-Duty Conduct

Considerations and Pitfalls

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Recent High Profile Cases

BUSINESS

RIM drops drunk executives from diverted Air Canada flight

Pair may have had to drive across the country to get closer to home after court hearings.

TRENDING

[Trans-Pacific Partnership: Full text](#) | [Liberal cabinet](#) | [Trudeau](#) | [Metrojet](#)

Hydro One employee fired over sexual harassment of a reporter has been rehired

News / Canada

CBC fires Jian Ghomeshi over sex allegations

Ousted host of Q denies claims by three women of unwanted sexual violence and threatens to sue broadcaster for \$50 million.

ANADY | November 2, 2015 5:08 PM ET
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General Principles

- Employees are entitled to do as they wish outside of work hours
- However, employers may be able to terminate for off-duty conduct where there is a sufficient nexus between the conduct and the employment relationship
- High threshold – even illegal activities may not be grounds for termination for just cause

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Relevant Factors

- Workplace policies preventing conduct
- Nature of the employer's business and reputation in the community (i.e. potential for negative impact on reputation)
- Employee's position and nature of responsibilities
- Nature of the misconduct
- Prior disciplinary record

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Taylor-Baptiste v. Ontario Public Service Employees Union

- President of local union branch created a blog to discuss workplace issues
- Posted sexist and offensive comments on the blog about a manager
- The manager brought a claim to the Human Rights Tribunal, alleging harassment "with respect to employment"
- **Ontario Court of Appeal held:**
 - Blog postings can form part of or an extension of the workplace and the postings were sexist and offensive however, these particular blog posts did not amount to harassment "in the workplace" contrary to the *Human Rights Code*
 - The comments were also protected under the Charter (freedom of expression and freedom of association)
 - Not a "blanket exemption" protecting all forms of union speech from the requirements of the *Code*

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Canada Post Facebook Termination

- Employee was postal clerk with 31 years’ service
- Employee disliked the management style and disagreed with operational decisions of supervisor and manager
- Employee made series of disparaging wall posts on her Facebook wall; her profile had no privacy restrictions and was accessible by all
- Canada Post terminated her employment for her Facebook postings

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Canada Post Facebook Termination

“Up and drinking again. 3 nights of freedom from postal hell. DIE BITCH DIE. I’m playing with the Voo Doo doll. If I wasn’t drunk I would take it to the driveway and run the bitch over”

“I just am making my G man voo doo doll now. So far I have Catch STD Lose office keys. Computer virus. Dog (his status symbal) runs away. Catches Swine Flu. Girl friend dumps him. Feel free to give me ideas”

“Is lovin my indefinite suspension”

“Hell called. They want the Devil back. Sorry, she’s busy enforcing productivity @ [Midtown]”

“I’m Texting in Sick, my idiot supervisor is 24”

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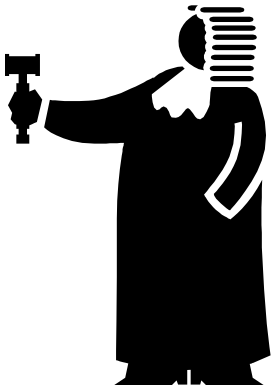
Canada Post Facebook Termination

- Employee claimed that supervisor and manager not meant to see postings; did not understand Facebook privacy settings
- Employee claimed that she was drunk when she made some of the nastiest postings
- Employee claimed that her posts were “provoked” by management, and complained about management reading her Facebook posts as invasion of her privacy

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You be the Judge!



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Canada Post Facebook Termination

- Termination upheld
- Facebook postings, blogs, emails can result in discipline
- Employee’s posting offensive, abusive, threatening, highly personal
- Even at hearing, employee showed no real remorse and failed to take full responsibility but made poor excuses and blamed management for her misconduct

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Just Cause Termination in the Unionized Context

Special Considerations

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Checklist for Imposing Discipline

Review with employee

- Review the documentation with the employee in appropriate surroundings, ie. In an office without interference
- In the presence of a shop steward, if required by the collective agreement
- Clearly identify exceptions to progressive discipline

Employee sign off

- Obtain employee's acceptance / agreement to the facts and commitment to improve
- Give employee a copy of the discipline notice and warning

Document

- Document the interview, warning/ discipline, the employee's commitment and the fact that the documentation will be placed on the employee's file

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The Approach of Arbitrators

Step 1: Proof

The employer must prove an employment offence was committed
...by the grievor

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The Approach of Arbitrators

Step 2: Assess penalty

Seriousness of the particular offence

Premeditated, impulsive or provoked act

Disciplinary record / progressive discipline

Consistency in employer’s approach to discipline

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The Approach of Arbitrators

Step 3:

Mitigating factors applied by arbitrator to substitute different penalty:

- Age
- Service
- Disciplinary record
- Remorse
- Medical explanation
- Family, financial problems
- Drug / alcohol dependency

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Arbitration: Authority of an Arbitrator

Arbitrator has authority to substitute any other penalty for termination or discipline

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For Example:

Reinstatement with back pay

Reinstatement (no back pay)

Suspension

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Arbitrator has NO authority to change the collective agreement

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Communicating Just Cause Terminations

The “DOs and DON'Ts” of Communicating Just Cause Terminations

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The DON'Ts



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Communicating Just Cause Terminations

- Take notes
- Provide written termination letter that sets out the grounds relied upon
- Without prejudice severance package?
- Involving security?
- Friday afternoon?
- Employment insurance considerations?

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