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Overtime class actions given green light

Supreme Court of Canada will hear claims by Scotiabank and CIBC employees

| BY RONALD MINKEN |

ON MARCH 21, 2013, the Supreme Court of Canada ruled for the first time that employee class actions for pay for "off the clock" overtime work can proceed under the Class Proceedings Act of Ontario.

In *Fulawka v. Bank of Nova Scotia* and *Fresco v. Canadian Imperial Bank of Commerce*, the employees relied on the Canada Labour Code, which requires employers to pay, at minimum, 1.5 times an employee's normal hourly rate for overtime hours that an employee is "required or permitted" to work.

EMPLOYMENT STANDARDS

In *Fulawka*, the employee alleged that Scotiabank's policies and practices for compensating overtime work performed by employees — members of the putative class she was representing — constituted both a breach of class members' contracts of employment and a breach of Scotiabank's obligation to act in good faith. On behalf of class members, the suit sought general and special damages totaling $350 million, as well as declaratory and injunctive relief. The Ontario Court of Appeal agreed to certify the class action.

In *Fresco*, the action was started by a CIBC employee "on behalf of some 31,000 customer service employees" of CIBC, alleging that "CIBC breached its contractual and statutory duties to pay class members for overtime work that they are routinely required or permitted to perform in order to complete the common duties of their positions."

In both cases the employees "allege that the overtime policies of the defendant banks conflict with private law duties owed by the banks to the employees who comprise the proposed classes. The overtime policies required class members to obtain prior approval from a manager in order to be compensated for overtime work that they were required or permitted to perform. Such a pre-approval requirement, the plaintiffs assert, is contrary to the dictates of s. 174 of the Code, which, they submit, informs the private law duties owed to the class members."

Section 174 of the Code states:

"When an employee is required or permitted to work in excess of the standard hours of work, the employee shall … be paid for the overtime at a rate of wages not less than one-and-one-half times his regular rate of wages."

The employees in these cases claimed Scotiabank and CIBC used the "pre-approval requirement in their overtime polices to avoid their obligation under the code to pay for overtime work that was 'required or permitted' by the employer." In addition, they further stated "Scotiabank and CIBC failed to implement proper record-keeping systems for recording the

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In This Issue

Language barrier casts doubt on worker's resignation

AN ONTARIO company didn't properly confirm if an employee who couldn't speak English resigned, an arbitrator has ruled.

Irondina Nunes, 62, was hired by Quality Meat Packers in Toronto to cut and pack back ribs, in October 1999. Nunes didn't understand English and only spoke Portuguese, so her hiring and orientation was handled by the HR supervisor, who spoke Portuguese and verbally translated all necessary forms for Nunes.

Nunes was considered a good employee and her employment continued without event until 2010, when she began suffering pain and swelling in her feet. She discussed it with her foreman, but she didn't have to take any time off until June 11, 2011, when she asked to leave work two hours early. Her request was granted.

Nunes continued to have problems

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Have a question for our experts? Email jeffrey.r.smith@thomsonreuters.com.

DISCIPLINE: Employee's failure to report misconduct of another

Question: Can an employee's failure to report another employee's misconduct constitute misconduct justifying discipline itself? Are you aware of cases where an employee has been dismissed for remaining silent regarding serious misconduct by a co-worker?

Answer: The simple answer to the question is that yes, failing to report someone else's misconduct can constitute misconduct warranting discipline or even dismissal itself. Such conduct can be considered to be an act of dishonesty, by omission, and can also be a breach of policy.

Of course, we all know that even if an employee is guilty of misconduct, the employer must adopt a contextual approach and consider all relevant factors in order to assess the appropriate level of discipline. Part of this assessment is to include the need for proportionality.

One example of an employee being dismissed for cause due to their failure to report misconduct of a colleague is *Houlihan v. McEvoy*. Merrilyn Houlihan was the business manager and had been employed with the organization for two decades. However, she was also aware of thefts committed against the company, but failed to report them since doing so would have implicated a friend of hers. The court considered all of the circumstances and found the silence Houlihan engaged in upon learning of the theft constituted dishonesty and a failure in her obligations and duties to the employer. This was sufficiently egregious so as to warrant immediate dismissal and the Houlihan's claim was therefore dismissed.

JUST CAUSE: Cumulative mistakes justifying dismissal

Question: Our organization follows a progressive discipline plan and one employee has received several verbal and written warnings for mistakes. Each mistake on its own is relatively minor, but it's apparent the employee is not going to improve and his mistakes are cumulatively costing the company. Is there a threshold where a number of minor infractions can amount to just cause for dismissal?

Answer: It is always advisable to have a discipline policy in place. Progressive discipline can take many forms, but I always recommend employers not lock themselves into a strict sequence of disciplinary steps without reserving any discretion to take circumstances into account. An example of this would be a policy that provides that any first offence will result in a verbal warning, a second offence will result in a written warning, and so on. In that context, the employer can find itself in the situation where an employee is guilty of particularly serious misconduct, but the employer is bound by the wording of its own policy to impose nothing more than a verbal warning. If they attempt to take a stronger position, the employee may complain that the employer has not followed the policy it drafted.

Conversely, just cause can be established "brick by brick," as the late Justice Randall Echlin of the Ontario Superior Court of Justice explained in *Daley v. Depco International Inc.*, in cases where the individual instances of misconduct are insufficient, in and of themselves, to warrant dismissal. In that case, Daley was disciplined for nine different incidents, ultimately resulting in his dismissal for cause. The offences included carelessness, suspected alcohol impairment, unreported absences, and altercations with colleagues. The employer sought to rely on all nine incidents to justify the termination. In his decision, Justice Echlin found that while each of the incidents, on their own, might not be sufficient to prove just cause, the series of incidents, viewed as a whole, amounted to "enough bricks to constitute a just cause wall." In reaching this decision, Justice Echlin explicitly referred to the Supreme Court decision in *McKinley v. BC Tel* and the requirement that a contextual approach be used, taking into account all of the relevant circumstances. CELT

For more information see:

- *Houlihan v. McEvoy*, 2002 CarswellBC 20 (B.C. S.C.).
- *Daley v. Depco International Inc.*, 2004 CarswellOnt 2574 (Ont. S.C.J.).
- *McKinley v. BC Tel*, 2001 CarswellBC 1335 (S.C.C.).

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Finding the right words

Wording of termination provisions in employment contracts can go a long way towards determining if they're enforceable

| BY NIKOLAY CHSHERBININ |

WORDS are the voice of contracts. That voice guides a court during interpretation of a termination provision in an employment contract. A lesson from a recent case, *Stevens v. Sifton Properties Lid.*, suggests if the termination clause contains no explicit reference to continuation of benefits during the period of statutory notice, it will be struck as unenforceable. Thereby, exposing employers to the golden smelter of the reasonable notice doctrine, when calculating the dismissed employee's entitlements.

EMPLOYMENT CONTRACTS

Deborah Stevens began employment as an associate golf professional at the Riverband Golf Community in May 2007. In December 2007, she assumed the position of head golf professional, which was governed by an employment letter. The letter set out the termination provision as follows: "The corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario."

On Oct. 19, 2010, the Stevens' employment was terminated without cause, effective immediately. At the time of termination, the employer paid her a sum representing three weeks' pay in lieu of notice and continued her group benefits for three weeks.

Notwithstanding the employer's voluntary provision of benefits, Stevens sued for wrongful dismissal. She successfully argued the termination provision was null and void because it did not contemplate the provision of benefits during the notice period, contrary to ss. 61(1)(b) and 5(1) of the Employments Standards Act, 2000 (ESA). The former section compels employers to continue benefits during the period of notice, while the latter forbids them from contracting out of this employment standard.

Relying on the wording in the termination provision, the employer argued that while the provision did not refer to benefits expressly, it addressed the employee's entitlement to benefits implicitly, because it stated: "you agree to accept the…payment in lieu of notice and/or severance pay…in satisfaction of all claims and demands…which may arise out of status or common law with respect to termination of your employment…."

The employee has rights to benefits continuation 'out of statute' and the termination provision purported to take those away upon mere payment in lieu of notice or severance pay.

Justice I.F. Leach of the Ontario Superior Court of Justice disagreed, stating the employee has rights to benefits continuation arising "out of statute" and the termination provision, on its face, purported to take those away upon mere payment of the required payment in lieu of notice or severance pay.

For Justice Leach, the failing of the termination provisions was that they attempted to "draw the circle" of employee rights and entitlement on termination with a catch-all specificity that resulted in impermissible exclusion and denial of the benefits continuation rights mandated by the ESA. In coming to this conclusion, Justice Leach relied heavily on Justice Wailan Low's analysis in *Wright v. Young & Rubicam Group of Cos.*, a case that bears close affinity on facts to Stevens.

In *Wright*, Justice Low did not accept the defendant's position that the impugned termination provision did not exclude benefits during the statutory notice, even though it stated: "this payment will be inclusive of all notice, statutory, contractual and other entitlements." She observed that the termination provision did not contemplate the question of benefits, which are implicitly to continue for the statutory notice period in accordance with paragraph 61(1)(b) of ESA. She went on to explain the termination clause provided for payment of base salary only. If such payment is to be treated as inclusive of all entitlements to compensation, it means there will be no compensation flowing to the employee with regards to the benefits, which are an integral part of compensation.

Possibility of employment standards violation enough to void provision

The *Stevens* and *Wright* decisions illustrate that the court will void the termination provision whenever there is a possibility that an employment contract provides an employee with less than to what she would be entitled under the applicable employment standards legislation. Their rationale finds support in *Slepenkova v. Ivanov*, which stands for the proposition that the termination provision will be void and unenforceable if it "potentially" violates employment standards. The *Stevens* and *Wright* decisions also reinforce an important point that if the interpretation of the words of the termination provision suggests an alternate reasonable meaning, the courts would interpret it as an ambiguity, discarding it favour of an employee, pursuant to application of the contra

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CASE IN POINT: WRONGFUL DISMISSAL

Flight advisors fired, reinstated after abandoning posts

NAV Canada employees left on lunch breaks without backup following meeting about reduced staffing to cover breaks

BACKGROUND

Flying blind

WHAT IS the bar for just cause for dismissal? This is a question employers have wrestled with endlessly. A common thread through much of Canadian employment law is that it's usually difficult for an employer to show just cause. This can be true even in professions where a high level of trust and good judgment is required.

Employee of an organization such as NAV Canada have a lot of responsibility and trust placed in them to ensure the skies are as safe as they can be for air travellers. If an employee calls into question that trust and judgment, one might assume dismissal is warranted. But as is usually the case, one shouldn't assume anything and the context of the circumstances could mean a differ result.

| BY JEFFREY R. SMITH |

TWO NAV Canada flight service specialists who left their posts unattended for a half-hour lunch break were guilty of serious misconduct that warranted suspensions but not dismissal, an arbitrator has ruled.

Jeffrey Hicks and Justin Wiebe were stationed at NAV Canada's Kenora Flight Service Station in Kenora, Ont. Their positions as flight service specialists involved providing advisory information to aircraft in the area, such as weather, traffic, runway activity and other information that could impact flight safety. They did not control aircraft movement as air traffic controllers do, but the information they provided was important to flight safety as pilots made their decisions to land or take off based on the information received from flight service specialists.

Both men worked 12-hour shifts — Hicks at the desk focused on the Kenora/Norway House area and Wiebe the Red Lake, Ont., area. The desks were about five metres apart and normally during the day shift a third "floater/weather" employee was on duty who could fill in at each desk when someone needed to take a break, such as the half-hour lunch to which they were entitled.

During one employee's break, two flights were ready for departure. During the other's a plane landed without the safety information he normally provided. Several sources contacted the manager to inform him of the lack of coverage.

On May 17, 2011, the site manager convened a staff meeting to discuss summer staffing levels. Staff were asked for input on how to handle shifts if the floater/weather position wasn't filled and there was a vacancy from illness or vacation. Hicks asked how breaks would be covered in such a situation and the manager referred to procedures in the manual of operations, saying "do what you have to do." This wasn't well received by Hicks and other employees.

The manager also informed the employees he would be taking the regular floater/weather employee to a meeting the next day (May 18), leaving Hicks and Wiebe on their own for their entire 12-hour shift.

Took lunch breaks without backup

On May 18, Hicks and Wiebe worked their shifts at each of their desks. At 11:36 a.m., Hicks broadcast off and took a lunch break for 25 minutes. During his break, a flight landed at the Kenora airport without Hicks available to provide any information. At 12:18 p.m., shortly after Hicks returned, Wiebe took a 35-minute lunch break, leaving his desk. When each employee went on his break, he neglected to put his station on speaker setting so he or the other employee could hear any broadcast warning while he was away. This violated NAV Canada's core duty of emergency services.

During Wiebe's break, several sources contacted the manager at his meeting to inform him the Red Lake desk wasn't providing any coverage. As it turned out, there were two flights ready for departure at Red Lake waiting for information. The manager contacted Hicks and asked him to get Wiebe back to his post immediately. Hicks later admitted to hearing chatter coming from Wiebe's headset but he made no effort to check it out, even

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CASE IN POINT: WRONGFUL DISMISSAL

Employees couldn't explain themselves before dismissal

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though he wasn't busy at his own station.

Hicks and Wiebe continued to work at their jobs for several days while NAV Canada investigated and held a disciplinary hearing on May 30. NAV Canada determined both men vacated their positions and left their stations unattended for a significant period of time, which showed "a serious lack of judgment and a disregard of the company's operational procedures, code of conduct and company mission statement." In addition, neither of them apologized or expressed remorse for their actions or the safety risk they caused. The manager said he "remained perplexed as to how they could have exhibited such an extraordinary lack of common sense less than 24 hours after the staff meeting." Hicks' and Wiebe's employment was terminated effective June 8, 2011.

Hicks felt he was denied an opportunity to participate in the disciplinary meeting, resulting in him being unable to apologize. He claimed the manager told him "we had a script" to follow. The day after his termination, he sent a letter of regret to NAV Canada requesting his dismissal be reconsidered. He said there was a misunderstanding of the procedures required for vacating a position and he used his best judgment in finding the right time to take a break when there was no anticipated air traffic — he hadn't received an estimate on the aircraft that did arrive during his break. Hicks also pointed out he had received a letter of commendation in 2004 and he had been a good employee.

Hicks later sent a letter of apology to a NAV Canada executive expressing regret that his actions caused a breach of trust. He also acknowledged he should have arranged with Wiebe for constant coverage of their stations, or at least switched the speakers on during their breaks.

Wiebe also wrote a letter of apology after his termination, admitting his actions "fell well short of the required standard of service" for the Kenora Flight Service Station. He said he had learned his lesson and he was capable of regaining NAV Canada's trust. He agreed he should have arranged with Hicks to keep constant coverage on both desks or called the manager to ask how to handle his break.

The employees 'seriously hobbled the employment relationship' but had good employment records over many years.

The arbitrator noted the collective agreement between NAV Canada and the union stipulated that "generally, discipline is intended to correct undesirable behaviour or conduct and, where appropriate, shall be progressive in nature." Therefore, misconduct would have to be very serious to skip progressive discipline and jump right to dismissal.

Misconduct was willful but not serious enough for dismissal

The arbitrator also pointed to NAV Canada's manual of operations for air traffic services, which outlined procedures for vacating a position, including combining positions to ensure continuous provision of services. Given both Hicks and Wiebe were "fully trained and seasoned professionals," it was unlikely they both forgot to follow a mandatory procedure and more likely their actions were intentional, said the arbitrator.

"There is significant evidence to support a determination that (Hicks and Wiebe's) actions of May 18, 2011, were a willful, purposeful and complicit protest against management's evident plan for the future to not always protect the floater/weather position as it had in the past," said the arbitrator.

The arbitrator found there were mitigating factors that should be considered when determining if dismissal was warranted. Both employees had been employed with NAV Canada for almost 10 years with a good record and this appeared to be "an isolated incident over the course of their employment history."

However, the arbitrator also found there was an element of premeditation to their misconduct. Again, it was unlikely they would both forget to follow procedure in turning their speakers on or ask the other to monitor their station while away from the desk. It was likely their actions were a reaction to the meeting from the previous day when they weren't given a satisfactory answer on covering breaks without a floater/weather position coupled with the manager making them shorthanded by taking staff with him to the meeting.

The arbitrator found the manager had a role in the situation, as his "questionable lack of direction" at the meeting caused disenchantment among the staff and his use of a "script" in the disciplinary interviews didn't give Hicks and Wiebe a chance to defend themselves. Both men eventually apologized for their actions after their dismissal, but they might have done so earlier had they been given the chance, said the arbitrator.

The arbitrator found misconduct of Hicks and Wiebe "seriously hobbled the employment relationship," but when put in light of their service to NAV Canada, it wasn't enough to abandon the principle of progressive discipline. NAV Canada was ordered to reinstate both men with lengthy suspensions — time served to the date of the hearing (six months) for Hicks and 120 days for Wiebe — with Hicks' longer suspension reflecting him being the first to abandon his post and purposely ignoring chatter from Wiebe's headset.

For more information see:

- *NAV Canada and CAW, Local 2245 (Hicks), Re*, 2011 CarswellNat 6560 (Can. Arb.).

Ruling suggests cases raise issue of national or public importance

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overtime hours worked by class members."

The Supreme Court Act requires "public importance" to exist for an appeal to be successful, so the Supreme Court's ruling on these class actions suggests they raise an issue of "national or public importance," perhaps because the employers are federally regulated under the Canada Labour Code.

As to the merits of these actions, we will have to watch how the cases unfold and, despite the national or public importance of the issue, whether the policies and practices of the banks stand up under judicial scrutiny or falter at what may be considered a great win in light of the current controversy over the banks employee practices.

Impact of decision on employers

Even though the Supreme Court of Canada has not determined the merits of the actions and has merely permitted them to proceed as class actions, employers are now more vulnerable to individual and class action claims for overtime. It is critical for employers to have policies in place indicating in what circumstances, if any, overtime will be paid. Extreme care should be exercised to ensure policies strictly comply with the overtime provisions of the legislation the employers are governed by. Strict adherence to these policies is also required, failing which employee claims for payment for overtime work could succeed.

Impact of decision on employees

Employees should not conclude by this ruling that there is merit to all claims by employees for overtime pay, nor that their claims would necessarily receive certification as a class action. Limitation periods exist that may limit claims to two years from the last overtime worked. If the last overtime worked was two years ago, that otherwise valid claim may be lost. Perhaps these two decisions are a signal of the court's willingness to provide more protection to employees in circumstances of compensation for overtime work.

For more information see:

- *Fulawka v. Bank of Nova Scotia*, 2013 CarswellOnt 3152 (S.C.C.).
- *Fresco v. Canadian Imperial Bank of Commerce*, 2013 CarswellOnt 3154 (S.C.C.).

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Minimum standards must be maintained throughout term

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proferentum doctrine.

In *Wright*, Justice Low opined: "there is, in my view, no particular difficulty in fashioning a termination clause that does not violate…the minimum standards imposed by the (ESA)…." In *Stevens*, Justice Leach granted a summary judgment, stating: " employers should be provided with incentive to ensure that their employment contracts comply with all aspects of the employment standards legislation, including provision of adequate notice…and benefit continuation."

Taken together, these pronouncements serve as a loud message to employers: "Your employment contracts will be invariably struck down if they fail to satisfy the minimum employment standards at any point in an employment relationship." Notably, if the termination provision is silent about the benefits, an employer's voluntary provision of benefits during the statutory notice is of no consequence to its liability, because it would not alter the fact that the employment contract was void ab initio for violating the ESA.

Lesson for employers

For employers, these decisions underscore the importance of precise and explicit language in employment contracts, especially when drafting termination provisions. Properly drafted severance clauses may substantially reduce employers' liability for damages and shield them from the dismissed employee's lawyers' creative arguments.

For more information see:

- *Stevens v. Sifton Properties Ltd.*, 2012 CarswellOnt 16792 (Ont. S.C.J.).
- *Wright v. Young & Rubicam Group of Cos.*, 2011 CarswellOnt 10754 (Ont. S.C.J.).
- *Slepenkova v. Ivanov*, 2009 CarswellOnt 3749 (Ont. C.A.).

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MORE CASES

COMPILED BY JEFFREY R. SMITH

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with her feet over the next week, but worked through them until June 17, when she asked to leave halfway through her shift to see her doctor.

After the weekend, on June 20, Nunes called the HR supervisor and told her she couldn't work due to the pain in her feet. Nunes claimed she said she needed time off, but the HR supervisor thought she wanted to quit, so she told her to fill out a resignation form.

On June 21, Nunes came into the Quality office and the HR supervisor thought Nunes told her she was having problems with her feet and she wanted to stop working. Since Nunes didn't ask for accommodation or disability benefits, the HR supervisor determined Nunes wanted to resign and completed the form for her, citing resignation for medical reasons. She didn't give Nunes a copy of the form.

The HR supervisor asked Nunes for the key to her locker and access card. Nunes cleaned out her locker and left. Quality posted her job on June 28.

Nunes didn't read her record of employment — which stated she quit — because it was in English. Her husband eventually read it and called Quality to say she didn't intend to quit. Nunes assumed she had to clear out her locker and return her materials because she was unsure of when she would return to work. She said she didn't ask for sick leave because "I am not a sick person."

Nunes' calls went unanswered by Quality and her husband contacted the union, which filed a grievance.

The arbitrator found the situation could most likely be attributed to a misunderstanding between Nunes and the HR supervisor, exacerbated by the language barrier. Quality was aware of the problems Nunes had been having with her feet. When she said she wanted to stop working because of her feet, the arbitrator said it would "be a relatively exceptional conclusion" to think she was quitting her job rather than requesting time off.

The arbitrator found there was no subjective intention by Nunes to quit, as the meeting with the HR supervisor was ambiguous and Nunes didn't understand what was happening. Nunes said she didn't know she may have been entitled to accommodation or benefits, which is why she didn't ask for them. She also didn't understand the reason for clearing out her locker and turning over her security key. She was simply following the HR supervisor's requests.

The arbitrator also found Nunes' actions after the dismissal show she didn't mean to quit. Though some time passed before her husband called Quality to clear things up, it was because she couldn't read her record of employment and was under a mistaken impression caused by the language barrier, said the arbitrator. Once she understood what was happening, she made efforts to clarify that she hadn't quit.

Quality was ordered to reinstate Nunes and to determine if she was entitled to disability benefits while she suffered from foot pain and was unable to work. See *Quality Meat Packers Ltd. and UFCW-Can, Local 175 (Nunes), Re*, 2013 CarswellOnt 3605 (Ont. Arb. Bd.).

SICK LEAVE: Horseplay on truck serious but not worthy of firing

A BRITISH COLUMBIA employer has been ordered by an arbitrator to reinstate a worker who was dismissed for a serious safety violation.

Darcy McVeigh, 24, worked for Teck Coal, a mining company based in Vancouver. McVeigh drove large haul trucks carrying mining materials and also trained new employees.

On May 4, 2010, McVeigh was riding in a haul truck while a new employee he was training was driving. They were driving with two other haul trucks behind them at about 15 to 25 kph. They came upon a grader coming from the other direction and McVeigh saw a friend in the grader. In "spur-of-the-moment" decision, McVeigh undid his seatbelt, opened the passenger-side door of the haul truck and stepped onto the deck outside the cab with one foot. While holding onto the door frame, McVeigh tossed an apple core across the road towards the grader. The core missed and McVeigh got back inside.

The driver of the truck directly behind them saw the incident and reported it to the foreman, who called a meeting with McVeigh. McVeigh admitted his actions, though he disputed the other driver's claim that he leaned in front of the windshield. He claimed he remained on the passenger side of the cab with one foot still inside.

Teck was concerned about the incident, as safety was a high priority for the company. Employees received safety orientation when they started, and Teck emphasized safety in regular crew meetings, training programs and its "courageous safety leadership" program.

Teck began an investigation and interviewed McVeigh. McVeigh acknowledged what he did, but said he didn't think it was serious and he "did it for a chuckle." He couldn't explain why he did it, it was a spontaneous action. The company found his conduct violated its safety policies and the safety of him and the trainee. When asked if he had anything to add, McVeigh said no.

Other employees who saw the incident were interviewed and they corroborated the story. Teck felt McVeigh's behaviour was a "blatant violation of policy" and since he was entrusted to do training, it was even more serious. It also felt McVeigh didn't show much remorse and didn't seem to grasp the seriousness of the situation. McVeigh had less than two years of service, so Teck decided to terminate his employment, despite a good record up to that point, as of May 5, 2010.

A month later, the union told Teck McVeigh now understood the seriousness of his actions and asked for reinstatement.

The arbitrator found McVeigh took a risk, as haul trucks were large pieces of equipment that presented a dangerous situation and could intimidate trainees. McVeigh's duty was to set a safety example and he failed.

However, the company's zero tolerance for horseplay and safety violations didn't mean dismissal was the only

Auto shop applies quick fix for absenteeism

THIS INSTALMENT of You Make the Call features an employee who was fired for too many absences from work.

North Perimeter Service Centre was an automotive shop providing maintenance and repair service for heavy and light duty vehicles in Winnipeg. It hired an apprentice heavy duty diesel engine mechanic in November 2008.

In late 2011, the mechanic took three months off for parental leave, returning on Jan. 9, 2012. Soon, North Perimeter became concerned with his attendance. The mechanic had been absent about 10 times before his parental leave, but

How would you handle this case? Read the facts and see if the judge agrees

North Perimeter felt his attendance became "a lot worse" after he returned.

On Jan. 28, 2012, the mechanic asked to leave one hour early because his wife was called into work and needed him to look after their children. His supervisor granted the request. On Feb. 11, his infant son was ill, his wife had already left for work and the babysitter wasn't prepared. The mechanic called his supervisor and the supervisor told him he could stay home to care for the child.

Two days later, the mechanic showed up for his scheduled shift and was asked to meet with the operations manager. The manager told him he wasn't happy about the mechanic's absence two days earlier. He didn't want to terminate the mechanic's employment but he claimed other staff members had become disenchanted with the mechanic's attendance and the company had lost work due to his absence — there were only four mechanics in the shop and most of its business relied on a few major clients.

On Feb. 17, the mechanic received his final paycheque and he called North Perimeter's payroll clerk to find out if he would be receiving pay in lieu of notice. The operations manager called to tell him there would be no wages in lieu of notice because he had been fired for cause — absences detrimentally affecting the company's operations and customer relationships.

You make the call

- ☑ Did North Perimeter have just cause to dismiss the mechanic for excessive absenteeism?
  OR
- ☑ Did the employer owe the mechanic notice of dismissal?

IF YOU SAID the mechanic was owed reasonable notice of dismissal, you're right. The labour board noted notice of termination provisions in the Manitoba Employment Standards Code did not provide for job security and employers were not prohibited from terminating an employee for any reason not excluded by law. However, if it wasn't going to provide reasonable notice, the employer had to prove it had just cause for dismissal, which would come from the employee failing to perform according to the employment agreement and thus repudiating it. It was possible for absenteeism to constitute just cause, depending on the circumstances, said the board.

However, the board found the mechanic had been absent, at most, 10 times between the beginning of his employment and his parental leave. After he came back, he was only absent once and left early once, both with his supervisor's approval, to take care of his children. Though the business had a small staff and its business was vulnerable to absences, the board found these absences weren't excessive absenteeism and were not just cause for dismissal, particularly since the mechanic was up front and honest about the reasons.

"(The mechanic's) absences were limited, condoned by the employer, and the employee was honest at all times regarding the reason for requesting to be absent," said the board. "Furthermore, the absences of the employee are not indicative of neglect of duty, disobedience, or conduct that was incompatible with his employment duties."

The board also found the mechanic wasn't warned that his absences were a problem and could lead to discipline or termination, nor did North Perimeter have any policies respecting absenteeism that could give the mechanic an idea of what was acceptable.

The board ruled termination was excessive and ordered North Perimeter to pay the mechanic four weeks' wages in lieu of notice, equal to $2,960, plus one day's wages for costs. See *North Perimeter Service Centre Inc. and H.(J.), Re*, 2013 CarswellMan 97 (Man. Lab. Bd.).

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