

SLAP DID NOT WARRANT DISMISSAL

The Superior Court recently released a decision that may be surprising to many. It held that an open hand slap by one employee to another did not warrant dismissal for cause.

Prior to the incident, Shakur, the offending employee, and a co-worker were engaging in some verbal jousting – variously described by witnesses later as "trash talk," "off-colour language," or acting like "two kids in a courtyard" – near the machine at which Shakur was working. Shakur had a clear disciplinary record up at that time. This behaviour was apparently more or less routine between Shakur and the co-worker, who was usually the instigator. Although these exchanges had never escalated into any physical contact, on this occasion Shakur responded to something that one employee witness described as a challenging or threatening remark made by the co-worker to Shakur with an open-handed slap to the co-worker's face. He later explained this as an attempt to have the co-worker cease his "trash talk" and stop being "in his face."

The incident was reported to the company's HR department. After an investigation by the HR director, the president, adamant that this type of behaviour would not be tolerated at the plant, instructed that Shakur be dismissed. The HR director subsequently handed Shakur a letter that terminated his employment for cause, citing the "General Plant Rules" contained in the Employee Handbook and stating that "it is the position of the Company that you were engaged in harassment contrary to both Company Policy and the *Human Rights Code* of Ontario." Shakur requested an opportunity to speak to the president, but this request was denied.

Shakur initiated a wrongful dismissal action in Ontario Superior Court, seeking damages of \$25,000 in lieu of notice, damages for mental distress in the amount of \$10,000 and punitive, aggravated and/or exemplary damages in the amount of \$10,000. He argued that dismissal was a disproportionate penalty in the circumstances, particularly in view of his previously clear disciplinary record. The employer replied that Shakur's immediate dismissal was justified based on heightened concerns with respect to workplace violence, as evidenced by the recent anti-violence amendments to the *Occupational Health and Safety Act* in Bill 168, and on Shakur's failure to offer an apology.

Ontario Superior Court Judge David Broad upheld the action and awarded four and a half months' pay in lieu of notice, holding that "it is difficult to see how Mr. Shakur's action, however improper, justified an outright dismissal."

Justice Broad noted that "[t]here was no evidence that Mr. Shakur had caused any previous disruption or trouble in the workplace, or was anything other than a conscientious worker," and referred to the evidence that he was provoked which, while it "did not justify" Shakur's action, "helps to explain it." He acknowledged that "[t]here is no question that workplace violence is a serious issue and that the recent amendments to the *OHS*A reinforce that," but emphasized that "the prevention of workplace violence is a shared responsibility placed on employers and employees." In this regard, he found that the failure of the employer to make known its policy and the consequences of a breach militated in the employee's favour.

Justice Broad stated:

"Although the Employee Handbook contained rules prohibiting "threatening, intimidating, or coercing fellow employees" and "fighting or attempting to injure another employee," the evidence is that Mitchell Plastics did nothing to train its employees with respect to the intent and purpose of the rules and the consequences of breaking them, beyond distributing the Handbook, and revisions to it, to its employees and leaving them to read it and interpret it for themselves."

Broad concluded:

"Within a contextual approach, it is difficult to see how Mr. Shakur's actions on August 17, 2007 could be viewed as evidencing an intention on his part to abandon or repudiate the employment relationship. Moreover, Mitchell Plastics could well have achieved its legitimate interest in sending the message to Mr. Shakur, and to the rest of the employees in the plant, that workplace violence would not be condoned, by the imposition of the type of progressive discipline measures specifically referred to in the Employee Handbook."

As for the employer's reliance on Shakur's lack of remorse, Broad held:

"I do not agree that a failure to apologize will, in all cases, or by itself, push the situation over the line into the area of just cause. The lack of apology must be weighed with all of the circumstances as part of a contextual analysis. In this case, the circumstances were not such that a lack of an apology evidenced a repudiation of the employment relationship, particularly when Mr. Shakur was not asked to apologize nor was he specifically offered the opportunity to apologize."

Comment

The outcome of this case turned on the judge's application of the contextual analysis and assessment of proportionality mandated by the Supreme Court of Canada. A Court must consider the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. In the present case, the judge determined that a single slap by an employee with a previously clear disciplinary record in response to a verbal provocation fell short of meeting this standard.

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