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Termination for Cause

For employers, the economics of a termination for cause have been and continue to be complicated but particularly where the employee subject to termination qualifies for WSI benefits.

When faced with taking an ultimate step, it is not only the individual's negative impact on the smooth and productive operation of the business that has to be considered. Employers can display an emotional component to the decision to terminate by their too-swift action without considering civil consequence or the significance of WSI benefit and penalty costs (or "costs be damned"). Others are reticent to take appropriate action at the appropriate time, confused as to the cost and penalty implications of the WSI component, allowing themselves to be held at ransom by disability. To add to the confusion, the WSI legislation, policy and cost implications have changed over the years.

More recently, there does appear to a return to the belief that, where the opportunities are fully equalized, injured workers can be held full accountable for their conduct, even while on modified work. If a termination for cause is warranted and handled correctly, the re-employment obligation becomes redundant and the terminated employee can be denied LOE benefit and LMR service support. Both the claim and the employment relationship can be closed.

Subject to any additional penalties that are expected to be implemented with the new ESRTW policies (that remain still outstanding as at the time of writing this article), there are two basic WSI related "costs" that must be take into account in evaluating when and if an employer should terminate a disabled worker for cause. The first is the cost of any re-employment penalty for failing to offer or maintain suitable employment or the essential duties of the pre-accident job, for the length of the obligation period. The second is the cost of benefits and LMR services that may continue following termination, be it just or unjust. These cost consequences can be substantial for both Schedule 1 and Schedule 2 employers. Determining if and how those cost categories can be avoided, has changed over time.

Some of the Tribunal decisions over the years provide good examples of the changes to the evaluation of the consequence of a termination for cause and by implication, provide some very valuable practical guidance that employers must heed before taking that final step.

Opportunity Equalized

On September 6, 1990 the term "just cause" was introduced into the Board's re-employment policy. The terminology was used to describe one circumstance where an employer could avoid a penalty upon terminating an injured worker while still under the

section 54 obligation. Beyond that, it was believed that injured worker's garnered some sort of "super-seniority", with priority of placement (and treatment) over their healthy co-workers.

"Super-seniority" was flatly rejected at the Tribunal, with reference to the reasoning by a very strong Panel of the Tribunal in Decision 605/91 (December 20, 1991), at page 48:

"… given the purpose of section 54b, this Panel believes it to be a reasonable reading of the section to see the intended employer's obligation to be one of employing injured workers in, as we have said, the ordinary course of employment - that is, in a way which does not discriminate against them on the basis of their injuries, but which also does not isolate them from the common employment obligations and risks to which non-injured workers are subject.

In the ordinary course of their employment, non-injured workers risk being terminated without just cause or being laid off in breach of terms in their collective bargaining agreements. In the heat of an operational moment, management from time to time may be expected to misread a situation or to interpret their or their employees' rights or obligations incorrectly.

These are risks which are a normal part of any employment situation. Non-injured workers must find their remedies for such errors or injustices in grievance arbitration, or in civil suits or in complaints under the Canada Labour Code (for workers under the Federal jurisdiction) and non-injured workers must as well. It is not, in our view, possible to infer from the section wording that the Legislature intended that injured workers should have the protection of those same remedies and, as well, the protection of a complaint under section 54b.

Subsequently, Panels of the Tribunal had criticized the limits of a just cause test and have applied a much broader principle to evaluate re-employment penalties that looks behind a termination to ensure that it was conducted without "anti-injured worker animus". The Tribunal's precedents have established a number of factors that would mitigate a termination for the purposes of determining whether a penalty was warranted (other than just cause). Fundamentally, a termination has had to be clearly for reasons that did not discriminate against the worker as a result of his or her disability. The termination was to be unrelated to the accident or accident disability and the disabled are subject to the same employment expectations as any other worker.

The Tribunal also initially felt that there were fundamental jurisdictional limits in rejecting a "just cause" test under the re-employment provisions. Again, in the Panel's discussion in Decision 605/91, continuing from the previous quotation:

….

Furthermore, to accept Replacement Officer Slinger's interpretation is to recognize a Board and Tribunal jurisdiction which will overlap and conflict with the long-established jurisdiction of the courts and of grievance arbitrators and Labour Canada arbitrators over the same issues. Such an interpretation creates the situation where different adjudicators would be routinely called upon to decide disputes between the same parties on the very same issues. This would arise with respect to lay-offs alleged to be in breach of seniority provisions of collective bargaining agreements as well as with respect to dismissals alleged to be without just cause.

Thus, if Officer Slinger is right, when an injured worker employed pursuant to section 54b is laid off in alleged breach of a seniority clause in a collective bargaining agreement, both this Tribunal and a grievance arbitrator could find themselves deciding in separate and unrelated proceedings the interpretation of that clause.

From time to time, the risk that such a situation presents of different adjudicators coming to different decisions on the same issue between the same parties on the same or similar evidence would be sure to materialize. One could expect to encounter bizarre results such as workers held by this tribunal to have been terminated without just cause being refused reinstatement by an arbitrator on the grounds that there was just cause, or the same seniority clause being given different interpretations by an arbitrator and the Tribunal in the same case, with both decisions, based on similar evidence, being final and binding, and neither decision challengeable on appeal.

….

In this Panel's opinion, it would take very clear statutory language to warrant a conclusion that the Legislature intended that both the Labour Canada arbitrator and this Tribunal should be required to decide the just cause issue.

….

Termination for reasons honestly but mistakenly interpreted by an employer as justifying termination is the potential lot of every worker. When it in fact happens to an injured worker it cannot be construed as constituting in and of itself discrimination against injured workers. It may, as we have said, be strong evidence of such discrimination, but it is the section 54b-related discrimination, and not the wrongful dismissal, which is prohibited by section 54b. It is, therefore, the possible section 54b discrimination, and not the potential lack of just cause for the dismissal, which is the issue in this case.

From this background, for many years, employers that terminated disabled workers for cause could avoid re-employment penalty, whether or not the cause was just, so long as the disabled worker was clearly treated no differently than any other employee in the same circumstances. You could make a mistake, but your motivation had to be pure.

All opportunities for employment being equal, the re-employment penalty became redundant but were disabled workers held accountable for their actions within the employment environment?

Available Employment

Whether or not a re-employment penalty was imposed, employers in the past also had to consider whether benefits could continue following a termination for cause. And whether benefits could flow to the worker after a termination for cause, did not depend necessarily on whether the termination was just, but the timing.

Post accident, when a worker was partially disabled and employable in suitable modified work, benefits prior to 1998 were assessed under section 37(2)(b):

"Where the worker does not return to work, a weekly payment in the same amount as would be payable if the worker were temporarily totally disabled, unless the worker,...

(ii) fails to accept or is not available for employment which is available and which in the opinion of the Board is suitable for the worker's capabilities."

On termination, is a worker unavailable, or is it the employment that is unavailable?

In Decision 518/96 (October 4, 1996) a worker was terminated for cause before modified work has been offered but at a point when they were considered partially disabled. On the day of accident, the worker slipped and fell 14 steps, injuring his head, left shoulder, buttocks, neck and his back. Before being offered modified work and approximately 1 week after the accident, the worker was asked to attend a meeting, during which his employment was terminated for unsatisfactory performance, effective immediately.

The employer's position was that suitable modified work was available, but had not been offered because the employment was terminated for cause.

Under the then, section 37(2)(b) and (3), the Panel accepted that a reasonable interpretation supported the loss of benefits where a partially disabled worker does not return to work as a result of his or her own conduct in refusing available work or not cooperating in efforts to return to work. While evidence was submitted at the hearing by the employer to establish that they did have a modified work program and that it was fully capable of accommodating disability and even significant restrictions, was that enough?

The opportunity to participate in the program and the opportunity for the Board to determine the suitability of any particular offer was not made to this worker.

The Panel also accepted that the employer did in fact, have reasonable grounds for the termination, based on conduct prior to the injury. They specifically did not go so far as to make any findings as to whether "just cause" was established (and presumably, the Panel would not have felt that they had jurisdictional authority to make such a determination). Rather, they found that there was "considerable and persuasive evidence" to support the employer's decision to terminate. But it just wasn't relevant.

The Panel concluded that suitable modified work had not been made "available" (at page 8):

"Although we have found that the termination of the worker's employment is not tainted by any compensation concerns, this does not change the fact that the suitable work was not available to the worker due to the termination of his employment".

Modified work may have been generally available, but had not been made available specifically to this injured worker and it had not been determined suitable to the individual disability and as such, the worker qualified for full benefits upon termination. Given that the termination occurred so soon after the accident and given the description of the extent of the worker's disability, in Schedule 1, this is a claim that likely would have "maxed out" under experience rating. In Schedule 2, the benefits costs doubled the cost of replacing the individual.

A different take on the concept of "availability" was offered in Decision 245/96 (January 17, 1997). It is not necessarily just the timing of events. The decision implies that if a termination was from the modified work program, whether it was a reasonable act may have an influence on the decision making process.

In this case, the injured worker was temporarily not available to accept a specific offer of suitable modified work. There was a history of discipline that would have been a precursor to the final termination. Prior to the accident, the worker had been involved in an assault, was charged criminally and was terminated by his employer, only to be reinstated after negotiations. After the accident, the worker was offered modified duties, suitable to his specific restrictions. He could not initially accept the offer, being required to attend court where he was found guilty of the assault and sentenced to a term in jail. He was then released with the assistance of his lawyer within days of the sentence.

The worker, knowing his court date, requested to use vacation time

until the legal problems were sorted out. The employer refused the vacation request and made the offer of suitable modified work. The employment was available. The worker was not available to accept the offer for a couple of days and the once released, arrived at work to make himself available. The employer terminated, for cause, for being "unavailable" to accept the employment.

The termination may have been lawful civilly, given that there was a history the preceded the accident, but was that enough once the worker was injured?

This Panel drew a distinction between a worker that was not cooperative in accepting suitable modified work and one that was not available, as a result of exigencies beyond his control and found (at page 10):

"While the employer was entitled to terminate the worker's employment, the termination was not due to a failure to co-operate on the worker's part."

On the day after his release, when the worker made himself available to accept modified work, showing that he was fully prepared to cooperate and return to work, he had met his obligations to support benefit payments during the period of partial disability. And on termination, even for cause, the employer was considered to have withdrawn the modified work offer and so suitable modified work was no longer made available.

All things being equal, should the worker receive benefits? It seemed that to some extent, a disabled worker had an economical advantage over their healthy brethren, but even so, they also had the disadvantage of their disability limiting their ability to find employment after the termination. Just? By implication, by drawing this distinction between "cooperation" and "availability" put employers in a position where they could terminate for cause if the cause directedly related to the behaviour while on modified work and in relation to the offer of modified work, but not necessarily with the foundation of past misbehaviour. Once disabled, it seemed worker's employment record would be wiped and they would start with a clean slate.

Employers, knowledgeable of the cost of WSI on termination were reticent to take action against long standing issues.

Was the Cause Just?

For a short period, the Tribunal was forced to actually evaluate "just cause", contrary to the original concerns with the duplication of proceeding and the potential for inconsistent results.

With the enactment of the WSIA, 1997, the Tribunal was bound to follow Board policy. At this point in time, we begin to see Panels forced to evaluate "just cause" under the Board's policy that had been historically rejected under section 54, so long as the accident occurred prior to January 1, 1998. (PN: the wording of Section 41 for accidents after January 1, 1998 differs and supports broader criteria for the evaluation of the re-employment penalty).

In Decision 2175/00 (November 21, 2000), the Panel did not address benefits, but the application of the re-employment penalty following the termination of a worker, the day following a compensable finger injury.

Once more, the worker was terminated before any offer of employment, so this acknowledged unsophisticated employer would not necessarily be aware that no matter the basis of the termination, benefits would still flow to the worker, though if they were small enough to be in "Map", there'd be no direct cost consequence on that basis. The re-employment penalty though, served as a direct charge to the employer.

The worker's representative had argued that the termination was both for "just cause" and was not motivated by "anti-injured worker animus". But the Panel was forced to place the "anti-injured worker animus" and the "just cause" tests in their historical legislative and policy context. While the language of section 41 in the WSIA, 1997 was consistent with the Tribunal's historic approach, because of the date of accident, the Board policy "just cause" test was applicable and the Panel was at that time, bound to follow Board policy.

The employer's evidence in summary was that there had been serious performance issues and that the employer had spoken with the worker extensively over time about those issues. The termination occurred after the accident but before the worker had been re-employed. On its face, the employer's motivation was not related to the compensable injury or accident but to the historical performance. If the "anti-injured worker animus" tested applied, the penalty may well have been avoided.

In applying the "just cause" test, the Tribunal Panel did not have to address any jurisdictional concerns about incorporating a civil standard. There is no suggestion in the decision that the worker challenged the termination in any other forum. The Board policy had also addressed the criteria and evaluation process and defined specifically what would be "just" cause for WSI purposes alone, in Policy Document 07-05-11. At page 14 of the decision, the Panel refers to the

specific policy criteria:

Just cause

Just cause must be related to the workers conduct or work performance. Just cause includes …

Serious misconduct with a negative impact on the employer, e.g., abusive behaviour towards customers, suppliers, fellow employees, chronic absenteeism or lateness, taking time off under false pretence,

Neglect of duty, e.g., poor work performance,

Conduct prejudicial to the employer's business, e.g. theft, vandalism, willful disobedience.

One incident

Failing to re -employ or terminating workers as a result of their conduct in one incident is a breach of the re-employment obligation unless it can be established that the incident was so serious that it was inconsistent with a continuing employment relationship. Examples include assaults, thefts, refusal to perform the worker's basic job functions without excuse, etc. Serious incidents do not include lateness, poor work performance, etc.

Ongoing problems

Failing to re -employ or terminating workers as a result of ongoing job performance, attendance, etc., are not breaches of the re-employment obligation if it can be demonstrated that …

The employer's performance expectations were reasonable, and

Workers were provided with effective warning about the consequences of not improving their behaviour, and

Workers were given an opportunity to improve their behaviour."(My emphasis)

This case provides some direction as to what would constitute "just" cause but the issue become one of documentation, providing warnings and giving opportunity to improve. On the facts, the Panel felt that the verbal discussions were not warnings, they were not evidenced by a written notice process to show that the worker was given adequate notice of the consequences of her poor performance. The process did not meet a reasonable "just cause" standard.

Importing Justice

More recently, Tribunal Panels, while not required to strictly evaluate the whether a termination for cause was truly "just", so do implicitly by reviewing whether worker's have been given every opportunity to "cooperate". Reading between the lines, whether the termination is truly "just' is very relevant, but then, are not all claims to be evaluated based on the true "merits and justice"?

In Decision 2660/07 (December 31, 2007), the injured worker suffered from a gradual onset of wrist, hand and forearm pain within months of beginning employment as a sander. He continued to do his regular job and delayed seeking medical attention or reporting difficulty, as it fairly typical of the "disablement" classification of injury. He finally sought medical attention and then advised his employer that he had "changed his mind" and wished to file a WSI claim. Implicit in the outline of the facts in the decision, is the suggestion that the worker had previously discussed the problem with his employer, before formally reporting it as a workplace injury.

But when the injured worker advised he wished to make a claim, he was told to wait, and was later that day, was called into a meeting to be fired for harassment.

The worker had written a poem to a female supervisor.

Again, based on the facts described in the decision, the poem would have been characterized as relatively innocent, through perhaps inappropriate in an employment situation. Apparently, the female supervisor had not objected to the worker at the time when she received it.

The worker filed a complaint with the Ministry of Labour, Employer Standards Branch for wrongful dismissal. An agreement reached and the termination documents were changed to show that he "quit" rather than was terminated for cause.

Again, this worker was terminated before he was offered any re-employment or provided even an FA form. The termination was converted in a manner that looks like the worker withdrew from the opportunity to accept employment.

In evaluating the events, the Vice-chair referred to a specific policy package (#183) and relevant policy document 19-02-02 and a statement of the specific approach described by the Board that should be used to evaluate the integrity of participation and cooperation in ESRTW. The document is quoted at page 5 of the decision:

"A key element in weighing the 'offer' of employment is the duties of the work to be performed and whether they are within the functional abilities of the worker. This is best evaluated when the employer, in discussion with the worker and possibly their union representative, compares the information on the Functional Abilities Form (FAF) with

the requirements of the job.

If the employer had a question about the medical precautions, an attempt should be made to speak with the treating physician or involve the WSIB. Small business employers may not be as knowledgeable or experienced with the process/forms and therefore it is expected they will have a greater reliance on WSIB staff for guidance.

Although preferable, it is not necessary that the offered work be presented in writing.

It is necessary that the worker be advised of the particular job available. When clarifying the return to work circumstances with the employer, decision-makers should also ensure a detailed job description of the work offered is documented in the claim file.

Decision-makers are encouraged to fully investigate the circumstances of the work 'offer'. The fact that an employer indicates a 'modified work' program exists is not sufficient grounds to accept an appropriate 'offer' has been made and that entitlement does not exist to LOE benefits.

There must be evidence of a worker's non-co-operation in the ESRTW process in order to justify non-payment of benefits. This requires that the worker be questioned and the information documented on the file. It is important to clarify when and how the worker was made aware of the work offer and why they refused to accept the job. Their reasons may be valid and/or require further clarification from the employer."

In quoting this description, the Panel seems to be suggesting that where the employer has not taken such extensive steps to implement their ESRTW program and provide truly suitable modified work to an individual, then there is again, no opportunity for the worker to cooperate…the job is not "available". But they Panel didn't actually say this. Rather, they focused on termination.

In evaluating this case, the Panel agreed with prior decisions the question of a worker's cooperation really goes to whether they have removed themselves by their actions, from the opportunity for employment (at page 7):

"…when workers are dismissed from suitable work at no wage loss for just cause, they effectively remove themselves from the workplace, and that a resulting loss of earnings is not compensable in the absence of other relevant circumstances because the loss did not result from the workplace accident."

With that analytical background, the Panel found that while the poem was not appropriate, Employment Standards established a settlement that reversed the termination. The loss of earnings was not solely due to a termination.

It is not clear from this decision, is whether the benefits were justified on two grounds or one, but the Panel was prepared to limit their review and accept a different jurisdictional body's conclusion that this was no a termination or one for just cause. What we can't tell is whether the Panel would have denied benefits if they Employment Standards had not been involved to change the characterization of the termination.

Other Panels have focused on both cooperation and whether the termination was just.

In Decision 1331/03 (August 27, 2003), the worker had some history of absenteeism and a suspension for insubordination, described by the worker's representative as an "anger management' problem. The termination in this case occurred, after the accident and while the worker was still considered partially disabled and after suitable modified work was offered and made available. The worker absented himself from the job for 3 days. Based on the written documentation, the Board had determined that the worker did not qualify for benefits, for failing to cooperate in ESRTW. The employer had terminated the employment on the grounds that he was absent without leave. The Union did not grieve the termination (perhaps in view of a greater history of misbehavior) and the worker's representative challenged the justice of the termination and the failure to represent by the Union.

In evaluating the issue, the Panel stating that they could appreciate the Board's decision based on the written evidence on the record, but with the benefit of actual testimony from the worker as to the events, the Panel overturned the decision. The worker has testified that he had called into work on the first day and had left a message with a co-worker to advice of his absence. He was actually absent for only 2 days. By the morning of the third day, the employer's representative had already contacted the Adjudicator to advise that the employer intended to terminate and the Adjudicator directed that further efforts be made to contact the worker.

Contrary to the Adjudicator's findings, the Panel made no explicit findings as to whether the termination was for "just" cause. Rather, explicitly, they accepted the worker's testimony and concluded that he had not failed to cooperate in ESRTW and as such, benefits could not be withdrawn on that basis.

Did the employer simply act too quickly? Was the historical record not relevant and did the worker effectively start with a clean slate once injured?

In Decision 2295/05 (December 22, 2005) the worker also was terminated from the modified work program and the issue was described as one of "cooperation".

In the course of his modified job, it was alleged that the worker was seen taking CDs, that they were not returned and this resulted in damage to a customer service relationship. Under the company policy, the action resulted in termination for cause. The worker was denied benefits and also denied access to LMR services.

The Vice-chair reversed the Board's decision and granted LMR but to achieve this result, they actually reviewed the basis of the termination as a matter of fact, and concluded that the evidence of the theft itself was flimsy and the worker "did not steal the CD in question". At page 47, the Vice-chair is clearly finding that the termination was not "just":

"I find that the worker's termination was not due to an employment situation for which he was responsible. Accordingly, I find that when he was terminated by the employer on July 30, 2002, he was a worker who had attempted ESRTW, who was permanently laid off from his job, who had a work-related injury which resulted in a permanent impairment and who had not received LMR services previously. In keeping with Operational Policy Manual Document No. 19-03-02, he was entitled to LMR services, and the LOE benefits associated with such entitlement, as of that date."

What is Just Cause?

More recently, there have been two Tribunal appeals that have faced the issue head on and denied benefits where termination was for just cause, but employers should be guided by the evidentiary standards employed.

In the first case, even if the worker began with a clean slate at the time of the injury, the employer took all appropriate steps during a modified work program to discipline and then ultimately fire a significantly disabled worker who by their actions, was not cooperative. And it is, at least in these cases, possible to discipline for failing to cooperate in ESRTW.

In Decision 2352/07 (September 2, 2008), the worker had been denied LOE benefits and LMR services following his termination for cause for his behaviour while on and about having to do the modified work that was offered. In effect, the termination was for the failure to cooperate in ESRTW.

The worker had fallen on ice and broke his ankle. Once he was provided an air cast, the FAF form authorized sedentary modified duties "at a desk job". Suitable employment was provided. The worker was transferred to a walking cast and then referred for physiotherapy. The FA form from the physiotherapist authorized greater capacity. He was provided new duties within a warehouse environment within the functional capacity.

While on modified work, the employee became problematic and the Adjudicator offered mediation but also with further knowledge of the worker's actions, also suggested the employer initiate disciplinary action. Detailed notes were submitted to the WSIB to outline the behavioural problems.

The worker left the job after having "a hissy fit". Further contact revealed the worker was verbally abusive to co-workers and his supervisor was on the verge of walking off the job. At the first disciplinary meeting, the worker's actions that were outlined, documented in a warning letter and placed on the worker's file: (at page 3):

"The employer advised the worker that they were unsatisfied with his job performance and attitude, the worker was refusing to perform jobs that were within his restrictions, not working accurately and efficiently, leaving his work area unannounced because he was agitated or upset, walking out when he was asked to perform a job he did not like, arguing, addressing others in ways that were discourteous and disrespectful, and using bad language…."

The employer subsequently reported to the Adjudicator that the worker as "angry and unbalanced" and at the meeting had *"started yelling and screaming and wouldn't let them get a word in edgewise"*.

The worker developed early reflex sympathetic dystrophy and disuse osteopenia. He was scheduled to see a specialist and though expected to come to work before his appointment, he did not show and *"went berserk and stormed out"* when the employer sought to speak with him about his absence without leave. This lead to a second disciplinary meeting on the issue. The documented agenda outlined reasonable expectations for conduct during the meeting:

"At all times you are required to address your manager and all co-workers in a courteous and respectful manner. Arguing and yelling is not acceptable. This issue was addressed in our letter of August 19, 2005. In meetings, you must allow your manager to speak. If you wish to respond you may, but you must allow others to finished speaking first."

The worker contacted the Adjudicator after the meeting, stating that he felt the employer was mocking him, that he had been doing work outside his restrictions and was told he should quit his job.

The employer objected to party of the claim which they felt was related to a home injury. The worker's supervisor was threatening to quit claiming he felt intimidated by the worker's behaviour. Co-workers were threatening to refuse to work with him.

The worker responded to two disciplinary letters, denying many of the allegations concerning his work and