

DISCIPLINE FOR SAFETY INFRACTIONS... OR SUFFER THE CONSEQUENCES

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Imagine your consternation. Your corporation, renowned for its safety commitment and performance has regrettably experienced a fatal accident to a worker and is facing prosecution under provincial occupational health and safety laws. The corporation's thorough written health and safety system pertaining to the subject of the accident has been detailed in all respects to the court in an effort to establish the corporation's "due diligence." Yet several company supervisors, under cross-examination by the prosecution, have now admitted that they kept telling workers, and telling them, about particular safety rules relevant to the accident, but did not record this or engage in progressive discipline. One even admits that the department was aware that workers engaged in the unsafe practice that is now the subject of the prosecution, but supervisors never took steps to discipline. It now seems that your ironclad defence of "due diligence" is slipping away, along with the corporation's reputation for safety excellence, and that the corporation will be convicted and receive a significant penalty.

A favourite tactic of the prosecution in a case alleging violation of health and safety regulatory standards, is to seek responses from supervisors about whether unsafe practices resulted in progressive discipline, or any discipline at all. Too frequently, the response from management sounds something like, "Yes we told them, we kept reminding them, we told them until we were blue in the face. What more could we do?" The answer, in a word, is discipline.

WHAT IS THE PROBLEM WITH DISCIPLINE?

A tremendous amount of uncertainty, confusion, and in some cases, ambivalence, surrounds the topic of discipline for workplace health and safety infractions. If most corporations asked their front line personnel whether they discipline for safety violations, and if not, why not, their responses might sound like this: "I don't know how to discipline." "Other supervisors are not bothering to discipline, so why should I?" And possibly: "If I discipline, I am not going to be backed up by senior management, and when the union complains, the discipline is going to be removed."

Progressive discipline for health and safety infractions is not dramatically different from discipline for violation of other fundamental workplace rules. Yet a supervisor who might act quickly to impose progressive measures for lateness, absence or insubordination, becomes paralysed when faced with the prospect of imposing discipline for violation of a safety rule.

There may be many causes underlying this problem. Discipline for safety infractions may not have the support of senior management in the organization. In many cases, the message is not subtle but overt: the corporate culture is one which places greater importance on productivity than safety, and in that context supervisors are unlikely to commit much time to safety training, safety reminders or reinforcement activities, let alone discipline for infractions of rules.

In other workplaces, supervisors may lack the knowledge and tools to effectively enforce safety rules and requirements with discipline. Without proper training, supervisors do not intuitively understand such important issues for successful discipline as the impact of inconsistent practices across the workplace, failure to take notes and retain physical evidence at the time of the incident, and how to properly consider a range of aggravating and mitigating factors before deciding on a disciplinary response. Even safety managers with significant authority over health and safety matters and their implementation in the workplace often do not have proper training, tools or authority to effectively enforce safety rules with discipline.

It is crucial for companies to explore and begin to address some of these root causes of confusion and inaction on the part of front line personnel responsible for enforcing the company's health and safety system. Some key points to assist companies in removing barriers to discipline for health and safety infractions are listed in the sidebar "Effectively Integrating Discipline into Your Health and Safety System."

DISCIPLINE AS FUNDAMENTAL TO YOUR HEALTH AND SAFETY SYSTEM: COURT AND ARBITRAL EXPECTATIONS THAT MAY SURPRISE YOU

Why discipline? The need for discipline is front and centre in health and safety legislative requirements, and in decided court cases considering one of the few defences available for violation of those requirements, across Canada.

It is important to note that the language of health and safety statutory duties and responsibilities across Canada require that workplace participants such as supervisors and employers "ensure" or "require" that health and safety standards be met. In making decisions and in determining the components which will be expected of a "due diligence" defence, courts must be guided by governing statutory provisions. In the very first case which recognized that a Corporation or individual could potentially avoid conviction for violating regulatory standards such as health and safety requirements, with a defence of "due diligence", the Supreme Court of Canada in *Regina v. Sault Ste. Marie* ((1978) 85 D.L.R. (3rd) 161(S.C.C.)) set out two often-quoted expectations which must be present to establish the defence: (a) the party charged with the offence must have developed a "proper system to prevent the commission of the offence" and (b) must have taken "reasonable steps to ensure the effective operation of the system."

Since this time, enforcement of safety rules and policies has been repeatedly stressed as a key component of a "due diligence" defence to a charge of violating occupational health and safety standards, by courts across Canada. An organization may have spent significant time and resources in developing a system for a prevention of contraventions, including rules, policies, training, and monitoring. Yet even if all of the other elements of a due diligence defence can be made out, lack of ongoing enforcement of the system is treated as a lack of complete "due diligence" and the defence will fail on this ground.

In a recent prosecution case before the Ontario Court of Justice (Provincial Division) (*Regina v. Wilson's Truck Lines Limited*, unreported decision of Justice of the Peace McNish, May 22, 1998, available on quick-law at [1998] O.J. No. 3219) the court in considering whether a corporation had taken every precaution reasonable relating to procedures at a loading dock after a worker, working alone, was crushed between a vehicle and a concrete loading dock stated: "The dock supervisor agreed that there were no written warnings, dismissals or suspensions for breach of safety procedures. He also never told any workers if they were on the ground without a spotter, that they would be disciplined". The court concluded that admonitions, if any, were verbal, and "there was no discipline or action if any rules were breached... the supervisor admitted that there was no written censure, no firings, demotions or suspensions. The atmosphere was very laissez faire". The Company was convicted.

Some might ask at this point, what of positive reinforcers such as safety incentives or rewards, which are an important part of our program? While these may have their place, there cannot be complete reliance on positive inducements as the exclusive focus of a safety program. Too much focus on rewards for particular time periods with "no accidents" may arise from lack of appreciation that there is not necessarily any correlation between an accident "never happening before" and "due diligence". Incentives in the absence of a detailed and enforced health and safety system will never be sufficient evidence of "due diligence".

While many companies and their supervisors can accept that courts expect discipline as part of "due diligence", there remains a pervasive view that when they act on this premise, their efforts are quickly overruled by other decision-makers. Particularly for employers in unionized workplaces, there is a perception that the agenda of arbitrators is to remove discipline, wherever possible, even where discipline is for serious safety infractions. This is a myth that needs to be addressed squarely. Both courts and tribunals embrace the concept that an employer may progressively impose discipline against employees.

A few select comments from arbitrators considering union grievances of disciplinary responses in the safety context may assist in dispelling this myth. The attitudes expressed in these cases are seen consistently in cases decided across Canada, in arbitration decisions and in the few wrongful dismissal cases from non-union workplaces. In a Manitoba case involving *Dominion Malting Ltd.* (unreported decision of Arbitrator J. M. Chapman, November 21, 1995, available on quick-law at [1995] M.G.A.D. No. 73), the arbitrator stated: "The safety of the workplace at all times must be of paramount importance, both to the Employer and to the employees... The Employer, and each and every employee, without exception, must meticulously comply with every safety directive. That is an obligation imposed not only by the Employer, but certainly by the legislation...". In *Dominion*, the termination of a grievor for failure to follow lockout procedures was upheld, in circumstances where he had been suspended in the recent past for breaching lockout procedures, and where it was clearly established that he was trained and knowledgeable about these procedures.

In a construction industry grievance arbitration before the Ontario Labour Relations Board involving Ontario Hydro (unreported decision of Board Chair R.O. MacDowell, August 8, 1997, available on quick-law at [1997] O.L.R.D. No. 2888) following dismissal of a grievor for possession of marijuana at a nuclear facility, it was stated: "The employer is under a statutory obligation to maintain a safe workplace and to take reasonable steps to ensure that employees

are not exposed to preventable risks - whether such risks arise from dangerous machinery, noxious substances or unsafe work practices. One element in a prevention program is the imposition of discipline, to deter employees who might be disposed to break the rules - especially when employees know that the risk of detection is low and the employer's problems of proof can be significant... There is also much to be said for the company's submission that "zero tolerance" and the "certainty of discharge" are both necessary to effect general deterrence; and that the workplace safety regimen of this nuclear facility would be undermined if a drug-smoking construction worker were able to escape responsibility for his behaviour". The grievor, a relatively new employee with a clean record, had been caught taking marijuana to a remote location of the facility. He admitted to smoking the substance during working hours on numerous occasions over at least a four to six-week period. The arbitrator, after stating strongly that "The grievor acted with callous disregard for his own safety and for the safety of his fellow workers; he exposed the company to the prospect of serious criticism and commercial consequences..." upheld the grievor's discharge. This case is one of several which recognize that in certain industries, where the danger to employees and the public is significant, there must be an uncompromising safety standard applied by the employer.

The apparent irony of unions coming before them to argue that there should be no penalty for a safety infraction, when one of the mandates of unions is to seek improvements to workplace health and safety for its members, has not been lost on arbitrators. In a decision involving the Corporation of the City of Brampton ((1978) 19 L.A.C. (2d) 237) the arbitrator commented: "The general concern for safety in work environment is attested to by the vigorous campaign being conducted for safety legislation in which unions are more that disinterested parties. Given this concern and background, we find that the argument of the union that the grievor's discipline be completely eliminated has a hollow ring. It is our view that the company, the union and the employees should be vigilant in their observance of safety requirements."

As can be seen, court expectations of "due diligence" are echoed in expectations of "progressive discipline" which are applied by courts and arbitrators. However, only the court considering a wrongful dismissal action or a tribunal considering a grievance will be concerned about the impact on the individual employee and whether discipline was properly and fairly imposed after an assessment of all facts and circumstances. In contrast, a court dealing with a prosecution case and considerations of "due diligence" is never concerned with whether the discipline was fair, consistent, based on the facts, or even upheld by a court or a board of arbitration subsequently considering the issue.

Rather than becoming confused and overwhelmed by these two separate considerations, management must act to consider them together and balance them. On the one hand, discipline for safety infractions must occur and be sufficient to satisfy a court that discipline is integral to your health and safety system. On the other hand, discipline must not be so onerous or unfair that it violates important principles developed to protect individual employees, including the principles of progressive discipline.

MAKING DISCIPLINE WORK FOR YOUR HEALTH AND SAFETY SYSTEM AND YOUR WORKPLACE

With arbitrators and other decision-makers increasingly recognizing employer obligations under health and safety legislation and comments upholding the importance of disciplinary

sanctions becoming part of the landscape, why then, does it seem that so many disciplinary responses of employers are overruled? Most definitely, we all know of cases in which a disciplinary suspension was reduced or a discharge replaced with reinstatement. We may even have read of cases where the employer's response in a non-union context was ruled a "wrongful dismissal".

A number of principles have been established by decision-makers as preconditions to successful and appropriate discipline. All employers should ensure that their front-line personnel engaging in the disciplinary process are aware of these principles. The primary focus here is on the principles of "progressive discipline" applied by arbitrators in unionized workplaces, although in the non-union context there are similar expectations respecting progressive discipline and fair dealing.

Amongst the important principles applied (see sidebar "Key Aspects of the Disciplinary Process: A Reminder") is the expectation that the rule being enforced has come to the attention of the employee affected, through either training and orientation, posting of rules or safety reminders. If there is no sign off or documentation to establish that the affected employee knew or received the rule, the company is unable to realistically continue in its efforts to enforce the rule against the employee in arbitration. When supervisors on the sidelines hear that their efforts to suspend an employee for violation of a rule have been overruled and replaced with a warning, one of the most frequent reasons is that the employer cannot respond to a union challenge that there is no proof the employee knew the rule.

Rules must be consistently enforced. This includes constant enforcement, as well as consistency of treatment between all employees at the workplace. Lack of consistent application is another of the most frequent causes of an employer's disciplinary response being reduced. For example, in *Alcatel Telecommunications Cable (Winnipeg Plant)* (unreported arbitration decision of J.M. Chapman, July 4, 1996, Winnipeg, available on quick-law at [1996] M.G.A.D. No. 50) a worker received a one day suspension after placing his hands in moving equipment which had not been locked out and was not fully stopped. Evidence was called to suggest that other individuals who had committed serious infractions, such as forklift operators backing up carelessly, or running into power panels, or employees attending work under the influence of alcohol, had not been treated similarly seriously. The arbitrator stated strongly that the grievor "breached his duty to operate the machine in a safe and prudent manner... There is a moral, as well as a legal obligation, on employers and employees to maintain a safe workplace and to work in a safe and prudent manner... However, the evidence is undisputed that there is a progressive discipline policy and that other individuals who have committed safety breaches have had discipline imposed at the first step i.e. counselling. In this case, there was a one-day suspension imposed. I must accordingly consider whether there was discriminatory treatment against the grievor." Because of inconsistent application of the progressive discipline procedure, the suspension was reduced to a written warning. Interestingly, the arbitrator noted "I hasten to again add that I do not think the one day suspension was an unreasonable penalty and, as stated earlier, if it was not for the progressive discipline policy which had been followed on a different basis in the past, I would not have reduced the penalty". It was clear from the tone of this case that had the employer followed an approach of consistent and significant suspensions for all of this conduct, the arbitrator would have no difficulty in upholding these.

Aside from other important practical aspects of imposing discipline, including proof of the event (see sidebar), the final most important matter scrutinized by decision-makers is the employer's decision as to amount of discipline. The appropriate penalty in any given case will always be reviewed from the perspective of "progressive discipline"; that is, because discipline is to be corrective, not punitive, progressively more significant penalties are imposed, with more severe penalties following repeat occurrences. The only permitted exception may be for a safety infraction having significant potential consequences. For one-time violations of matters such as lock-out, or driving infractions where both worker and public safety may be jeopardized, "...some boards of arbitration have unanimously held that in safety matters, even in the case of long service employees, it is not unreasonable to by-pass the usual progressive discipline of giving warnings before suspensions and moving directly to suspensions for a first offence". Others have said: "...where the potential consequences of the breach are severe ... the employer has the right to bypass the normal progressive disciplinary response" (See *Alcatel*, above, at pages 12 and 13).

Decision makers also review a range of mitigating factors, including long service, a prior spotless disciplinary record, immediate apology and commitment to change behavior on the part of the employee, or low risk of potential injury as a result of the safety infraction. In a British Columbia arbitration case involving *Northwood Inc.* (Upper Fraser Division) (unreported arbitration decision of A.P. Devine, September 30, 1998, available on quick-law at [1998] B.C.A.A. No. 469), for example, discharge for an extremely serious infraction of failing to lock-out a conveyor taking logs to a saw before accessing the area, was reduced to a four month suspension. The contrite worker established that although he had been trained in procedures, this training left him unclear about the situation he had encountered, and he had panicked in attempting to respond.

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SIDEBAR

"KEY ASPECTS OF THE DISCIPLINARY PROCESS: A REMINDER"

- ❖ YOU MUST HAVE THE FACTS. Rational and proper decision-making can only be made after considering all of the facts and whether they indicate a basis for discipline. This must include gathering information from witnesses and the employee involved. No discipline can be justified if the facts forming the basis for discipline cannot be proven. Retain all evidence of any violation, including physical evidence (objects, damaged property, photographs, videos, sketches), and statements of witnesses and notes of supervisors made at the time of the events, for proof of the events.
- ❖ THERE MUST BE CAUSE OR JUST CAUSE TO DISCIPLINE. For cause to exist, the misconduct must be intentional, and the misconduct must involve violation of a recognized standard of conduct. (Set out in a collective agreement or employment contract, generally accepted rules of conduct, or published company rules or regulations). If a rule is established, but has not been brought to the attention of employees (or you cannot prove it), there is no cause for discipline. If a standard of conduct set out in a rule is unclear or too general, or sets standards which are unreasonable, the rule itself will be subject to challenge.
- ❖ THE APPROPRIATE PENALTY IS ORDINARILY BASED ON PROGRESSIVE DISCIPLINE. Discipline is to be corrective, and not intended as punishment, and is therefore imposed progressively. As repeat violations occur, the employee is warned at each step that future incidents will result in more serious discipline. Only a very serious violation can justify a significant suspension for first offence.
- ❖ DISCIPLINE DOES NOT HAVE TO BE RESTRICTED TO WARNINGS OR SUSPENSIONS ALONE. In the safety context in particular, discipline could (and in many cases should) involve re-training of the employee in rules and requirements, removal to other work pending re-training, or a disciplinary demotion to other work for a specified period of time.
- ❖ THE APPROPRIATE PENALTY MUST TAKE ACCOUNT OF AGGRAVATING FACTORS. These include: an infraction of a rule with serious consequences (primary focus of arbitrators is on potential danger as opposed to actual physical harm or accident); prior disciplinary response for a safety matter, particularly the same matter; refusal to acknowledge wrongdoing despite proof; short service with the company.
- ❖ THE APPROPRIATE PENALTY MUST TAKE ACCOUNT OF MITIGATING FACTORS. These include: prior clear disciplinary record; long service employee; immediate acknowledgement of wrongdoing and preparedness to be re-trained or to change behaviour.

SIDEBAR

"EFFECTIVELY INTEGRATING DISCIPLINE INTO YOUR HEALTH AND SAFETY SYSTEM"

- ❖ **MAKE IT POLICY.** Make your commitment to consistently enforcing rules and policies with discipline clear and up front in your corporate safety policy. Make this clear on safety procedures and rules which are distributed and posted.
- ❖ **MAKE IT A FUNDAMENTAL PERFORMANCE EXPECTATION FOR SUPERVISORS.** Ensure that supervisors are aware that performance reviews will include assessment of their effectiveness in enforcing crucial health and safety policies. This review should occur at least annually. This should not be confused with merely reviewing accident experience, which is not necessarily reflective of safety policy enforcement.
- ❖ **GIVE SUPERVISORS THE TOOLS AND AUTHORITY TO EFFECTIVELY ENFORCE RULES WITH DISCIPLINE.** Provisions of notebooks, pre-printed forms or draft letters for disciplinary reminders, warnings or suspension, and pre-printed forms for safety meetings can assist. Supervisors should also be given authority to send workers for re-training, or to demote workers not prepared to meet the safety requirements of the department.
- ❖ **PROVIDE TRAINING ON EFFECTIVE DISCIPLINE.** Supervisors cannot be expected to discipline in an effective and legally appropriate manner, without training, particularly where a union may challenge discipline under a collective agreement. Training will assist supervisors to overcome misconceptions about discipline and hesitancy to discipline. Training will prevent errors from being reversed by arbitrators.
- ❖ **GIVE SUPERVISORS TIME TO DEAL WITH REMINDERS AND DISCIPLINE.** Insist on weekly or monthly group safety meetings. At that meeting, the supervisor should be required to discuss any contraventions found in the preceding week, along with regular health and safety meeting topics.
- ❖ **MAKE SURE THAT SUPERVISORS DOCUMENT DISCIPLINE.** Require that they keep reports of group safety reminder meetings. Require that they keep notebooks and files of all individual safety reminders or warnings.
- ❖ **MAKE SURE SENIOR MANAGEMENT IS INVOLVED AND COMMITTED.** Particularly for provinces imposing personal obligations on officers and directors, senior management must support discipline, and receive information on steps taken to ensure that the corporation's program is enforced.