

Just Cause for Discipline and Discharge

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Sources of Just Cause Standard

- CBA provisions
 - May use terms like “just cause,” “proper cause,” “justifiable cause,” or even simply “cause”
- May be implied from other contract terms (e.g., discipline, grievance, job security provisions)
- Even without explicit mention in CBA, arbitrators often apply just cause as, for example, a check on management rights set forth in the contract
- In public and federal sectors, statute and/or precedent may define just cause

Defining Just Cause



- Short version: Fair and reasonable under the circumstances
- Foundational questions
 - Did the misconduct (or unacceptable performance) actually occur?
 - If so, was the discipline imposed “reasonable” under the circumstances
- Reasonableness definition:
 - What a reasonable person, “mindful of the habits and customs” of the setting in the industry and of “the standards of justice and fair dealing prevalent in the community,” ought to have done under similar circumstances
 - Considering the above, determine whether the conduct of the disciplined employee was defensible, and the penalty imposed was just and not excessive
 - Arbitrators have considerable discretion in applying the standard

Burden of Proof

- Burden on the employer to demonstrate reason for discipline
- Possible reasons include:
 - Employee performance (past and ability to perform going forward)
 - Workplace conduct
 - Impact on employer's reasonable business needs
- Lesser standard may be implied for probationary employees or those in setting where public image is overwhelming factor



Tests of Just Cause

- The so-called “seven tests” were once the gold standard
- In more recent decades, the tests have evolved into guidelines as opposed to strict rules
- Arbitrators often disagree as to how the component elements are to be applied, including relative weight to be given to each test
- Most arbitrators these days do not apply the tests in a formulaic way or require all seven tests to be met

The “Seven Tests”

1. Notice: Employer gave forewarning such that employee should have known of rule or policy
2. Employer’s rule or policy was reasonable
3. There was a sufficient investigation of the alleged violation
4. Investigation was fair and objective
5. Investigation led to substantial evidence of the violation
6. Employer has applied rules and penalties fairly and consistently
7. The discipline was reasonable and proportionate considering the seriousness of the violation and the employee’s past record



The NERD Test

- **Notice:** Was the employee properly on notice of a sensible, justifiable rule or policy?
- **Evidence:** Did the employer provide sufficient factual support for its allegation(s) in the form of witness accounts and documentary evidence based on a fair and objective inquiry and investigation that allowed the employee a meaningful opportunity to be heard?
- **Reasonable:** Was the process and discipline administered by the employer fundamentally fair given the level of seriousness of the violation and consistent with previous penalties imposed in similar situations? [Did the punishment fit the crime?]
- **Discipline:** Was the discipline appropriate considering factors such as the employee's record, mitigating/aggravating circumstances, action or inaction by the employer, progressive discipline principles, and employee's potential for rehabilitation?



CBA Provisions on Just Cause may Trump Arbitrator Discretion

- Table of penalties
- Zero-tolerance policies
- Specific absenteeism provisions
- Other express limitations on arbitrator discretion
- Public sector may have other limitations or different standards



Major Misconduct

- “Cardinal” offenses include:
 - Theft
 - Fighting with supervisors
 - Falsification of records
- Insubordination
 - Employee refusal to carry out clear directive (“work now, grieve later”)
- Summary discharge without explicit advance warning may be possible when major misconduct is involved
- Serious misconduct often leads to application of fewer tests of just cause
- Note that there may be special consideration in pretext and mixed motive cases when anti-union or other discrimination is alleged



Other Types of Conduct Subject to Discipline

- Excessive absenteeism
 - Can be “no-fault” offense
 - Factors may include contractual provisions, intermittent/extended nature of the illness, cause of the problems, probability of correction
- Poor performance
 - Reasonable standards are required, with a reasonable opportunity to meet them, including training and counseling
 - Warnings should usually be given for shortcomings
 - Neglect of duty may not justify discharge for a single instance but serious neglect or multiple instances may
- Work rule violations (e.g., tardiness, record-keeping failure)
- For lesser offenses, corrective discipline usually applied, with more severe penalties for subsequent violations

Just Cause for Off-the-job Conduct Discipline

- Employer must show a nexus or impact on some business or reputation interest of its own
- Conduct that may result in job-related disqualification (e.g., loss of driver's license for employee required to operate motor vehicle on the job)
- Harm or threats to supervisors, co-workers, customers
- Public attacks on the employer (e.g., on social media)
- Arrest or conviction for serious crime
 - Suspension pending outcome of criminal proceeding is an alternative selected by some employers
- Off-duty behavior that causes coworkers to shun an employee



Case Scenarios

Discussion of hypothetical situations and underlying cases

Thank You!

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