

NON - CULPABLE DISCHARGE

in the Unionized Workplace

A Brief Summary of the Legal Framework and Case Law on
Non-Culpable Discharge in the Unionized Workplace

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Industrial, Wood and Allied Workers of Canada, CLC
- April 2001

BACKGROUND

In most cases of discipline or discharge an arbitrator is required to consider the following questions (from the landmark BC case - **Wm. Scott & Co. Ltd [1977] 1 C.L.R.B.R. 1:**)

(A)rbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

The logic of this is clear in cases where discipline is used as a penalty and discharge is the ultimate penalty. In such cases (ie, insubordination, fighting, smoking on the job, etc.), the Company is asserting that an employee has willfully broken a work rule and there is "*just cause*" for discipline or discharge.

However, many times a Company is trying to discharge a worker for reasons that are not his fault. This is called **non-culpable** discharge. One might wonder how an employer can discharge a worker for something that is not his fault, but the principle of non-culpable discharge gives the Company the right to do this, at least in some limited circumstances.

THE PRINCIPLE

The most common example of non-culpable discharge is excessive absenteeism for injury or illness - often referred to as **innocent** or **blameless** absenteeism. This is distinguished from being "AWOL" or being accused of abuse of sick leave which are considered **culpable** - meaning the Company has "just cause" to discipline the employee. The reasons behind the absences in a non-culpable discharge are irrelevant, even though they are legitimate. For example, excessive absenteeism resulting from repeated bouts of the flu, injury at work, off-duty accidents, complicated medical conditions that require hospitalization and even alcoholism and drug dependency can all be treated as blameless, or non-culpable reasons for dismissal.

As a first reaction you would think an employer would be prohibited from firing one of its employees simply for being sick a lot. However, arbitrators have ruled that **after a certain point** the employer is entitled to do this. The following excerpt expresses the general principle of non-culpable discharge:

The first basic principle is that innocent absenteeism cannot be grounds for discipline, in the sense of punishment for blameworthy conduct. It is obviously unfair to punish somebody for conduct which is beyond his control and thus not his fault.

However...If an employee cannot report for work for reasons that are not his fault, he imposes losses on an employer that are also not at fault. To a certain extent, these kinds of losses due to innocent absenteeism must be borne by the employer. However, after a certain stage is reached,

the accommodation of the legitimate interests of both employer and employee requires a power of justifiable termination in the former.

*See **Massey-Ferguson Ltd. & U.A.W. (1969) 20 L.A.C. 370** (Weiler)*

This means if the employee is not to blame he should not be penalized. However, at some point, the Company is entitled to fire an employee who cannot regularly and properly perform his job even though the reason is not his fault. Simply put, the employee is not living up to his half of the deal (ie, performing work) so the employer is entitled to terminate his employment.

The point at which non-culpable discharge can be invoked is determined by the facts of each particular case or, as stated by Arbitrator Munroe in his oft-quoted decision *in **Raven Lumber Ltd. and I.W.A., Local 1-363 [1986], 23 L.A.C. (3d) 357***, “what is just in one case may not be just in another.” (see Arbitration Case #2 below)

THE LIMITATIONS

To establish a non-culpable discharge the Company has the onus to prove the following points are true.

- 1) That there has been undue absenteeism (or alcohol-related work problems, etc.) in the grievor's past record compared with some "reasonable standard". The Company must provide clear-cut proof that the grievor has a substantially and unduly higher rate of absenteeism than the average level in the operation.
- 2) That the grievor is incapable of regular attendance (work performance) in the future. The likelihood of future attendance, where it is based on a record of absence for medical reasons, is a matter of medical opinion.

Some arbitrators have also held that in addition to the above test, the Company cannot terminate an employee for innocent reasons without first clearly warning him that his job is in jeopardy. It should be noted that in the above two-part test, simply providing evidence of poor attendance in the past will not be sufficient to uphold discharge (for most arbitrators).

Where the Company is unable to meet the preconditions for non-culpable discharge, the award of an arbitrator is quite often "conditional reinstatement" (ie, a probationary period for purposes of proving improved attendance or a "last-chance" settlement).

Also, where there is clear evidence that the cause (or causes) of the worker's illness or incapacity have been or are on their way to being removed, the grievor's prospects for future employment will outweigh any evidence of past absenteeism and he will be reinstated. However, the Supreme Court decision in ***Québec Cartier v. Québec [1995] 2 S.C.R. 1095***, has somewhat limited the use of what is called "*post-discharge evidence*" (or subsequent-event evidence) of recovery or improvement.

THE EFFECT OF QUÉBEC CARTIER ON NON-CULPABLE DISCHARGE

In *Quebec Cartier, supra* the Supreme Court found that, as a general rule an arbitrator should make his or her determination on whether a dismissal is just and reasonable at the time the employee was dismissed. The Court said:

...an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented.

Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable. In these circumstances, an arbitrator would be exceeding his jurisdiction if he relied on subsequent-event evidence as grounds for annulling the dismissal...[par. 13].

Many employers rely on **Quebec Cartier** as standing for the proposition that post-discharge evidence (e.g., evidence that a grievor has successfully received treatment for drug/alcohol dependency) is not admissible. However, there are a series of arbitrations, particularly in BC, where arbitrators have relied on post-discharge evidence, even after consideration of the restrictions applied by the Supreme Court's decision.

For example, in **Brewer's Distributor Ltd. and Distillery Workers Union, Local 300 (Lawrence), [1998] 76 L.A.C. (4 th)** Arbitrator Munroe commented:

The effect of Quebec Cartier is to place tight constraints on the use of to which subsequent-event evidence may be put in the adjudication of just cause issues. The decision does not say that subsequent-event evidence is always irrelevant. But what it does say is that such evidence will only be legally relevant “if it helps shed light on the reasonableness and appropriateness of the dismissal under review at the time it was implemented. [at page 25].

He went on to find a “direct link” between the grievor’s misconduct and the disease of alcoholism at the time of the discharge.

In another recent case, Arbitrator Burke adopted Munroe’s reasoning in **Brewer's Distributing, supra**, as well as his pre-Quebec Cartier decision in **Raven Lumber, supra**, in determining Union’s post-discharge medical evidence was admissible.

At page 187, she stated:

In this case, the Employer quite rightly points out the Grievor was dismissed for a culpable offence (smoking marijuana on the job). It says the Union now seeks to turn this into a non-culpable termination. As I understand it, the Union is arguing that the “culpable” incident must be looked at in the context of the medical evidence in order to determine whether it is “non-culpable” and, in effect, a manifestation of the Grievor’s illness. To rephrase, the Union says it is evidence relevant to the circumstances existing at the time of dismissal as it explains the conduct of the Grievor...

Although a diagnosis of drug dependence did not exist, the case is remarkably similar to Brewer's Distributor, supra, in which the arbitrator allowed the evidence of alcohol dependency in to shed light on the reasonableness of the Employer’s decision. It is not unlike a situation where evidence is adduced to draw a particular situation is not what it appeared to be based on “expert” or “medical” evidence. In my view, this is relevant to whether the Grievor was properly discharged in the first place.

Fraser Lake Sawmill and I.W.A. Canada, Local 1-424 [2000] 90 L.A.C. [4th] 177 (Burke)

THE DUTY TO ACCOMMODATE & NON-CULPABLE DISCHARGE

The “**duty to accommodate**” requires employers and unions to accommodate individuals protected under Human Rights legislation up to undue hardship. This means that, for example, a worker with a disability, who cannot do a particular job, must be considered for alternate and/or modified work before termination can be considered.

Although many issues that fall under the duty to accommodate overlap with absenteeism, lateness or poor work performance, the emergence of this Human Rights issue in grievance arbitration has not precluded findings in favour of employers disciplining on non-culpable grounds.

Elements of both non-culpable discharge and the duty to accommodate under Human Rights legislation can come into play and the outcome will likely have a lot to do with the sincerity with which the Company and Grievor approach the problem.

In a 1996 case involving **Fording Coal Limited**, Arbitrator Dorsey commented in the relationship between the duty to accommodate and the Company's right to dismiss for medical absenteeism:

The Employer was correct in its assessment that there was no likelihood that the Wilcox would regularly attend at work in the future. His physical condition had not changed from what it was during the two years that he was absent prior to the call to return...

The union submits that the employer had a duty under the Human Rights Act to accommodate Mr. Wilcox.

Little attention has been given to meshing the employer's duty to accommodate with the test that the employer must meet to justify non-culpable dismissal for innocent absenteeism that has rendered the employment relationship no longer viable...

If the reasonable likelihood of regular attendance is absent regardless of the other accommodations that may be made, the accommodation is an undue hardship and not required (at page 37).

The decision in Fording Coal was challenged by the Union and the **BC Labour Relations Board** overturned the decision, noting:

Arbitrator Dorsey did not engage upon or inquiry to ascertain whether this Employer could accommodate the anticipated irregular attendances of Wilcox, regardless of the position he may fill with the Employer. Rather, the arbitrator concluded that "if the reasonable likelihood of regular attendance is absent... the accommodation is an undue hardship and not required." In our view such a blanket statement is inconsistent with the jurisprudence whether or not accommodation of irregular attendance is an undue hardship to an employer must be decided on the evidence.

Fording Coal & U.S.W.A., BCLRB No. B64/97

This decision was then challenged by the Company, but the Board declined to rule on the merits because it lacked jurisdiction.

However, other arbitrators have issued decisions similar to Dorsey which have gone unchallenged and, until a definitive decision by the LRB or Courts, non-culpable discharge remains a fact of life, even where the duty to accommodate applies.

For example, one Ontario arbitrator determined:

If a disabled employee is unable to perform the essential core duties of his/her position or an available position, regardless of whatever attempts might be made at accommodation that is the end of the matter.

Ontario English Catholic Teachers Association (1996), 61 L.A.C. (4 th) 109 (Burkett), at page 121

In Pasteur Merieux Connaught Canada [1998], 75 L.A.C. (4 th) 235 (Knopf), the arbitrator stated:

There is nothing in the Human Rights Code that prohibits an employer from terminating an employee on the basis of innocent absenteeism. The Code prohibits discrimination, it does not prevent a termination...(at page 254).

There will undoubtedly be more decisions and appeals in this area and, despite the citations above, some arbitrators seem to be leaning toward the BC Labour Board's approach to dealing with the duty to accommodate and the principle of non-culpable discharge.

ARBITRATION CASES

There have been many non-culpable discharge arbitrations between certified companies and I.W.A. Locals. The following are merely a cross-section to give an idea of the main principles and how arbitrators have applied them, with citation and references to the *I.W.A. Arbitration Index*.

(a) General:

- 1) **Discharge (Non-culpable) - Innocent Absenteeism** - The Company is entitled to discharge a worker for blameless absenteeism. To do this, it must show a record of excessive absenteeism and "clear & convincing" evidence that the grievor will be unable to attend work regularly in the future. The questions in the *Wm. Scott case* are not relevant in non-culpable discharge.

In this case, the grievor had an awful record of absenteeism (45% over 4 years) and the arbitrator held that this record allowed him to assume that the grievor would be unlikely to attend work regularly in the future.

IWA #396 - MacMillan Bloedel Limited, Can. White Pine & Local 1-217 (Bird) June 2, 1982

- 2) **Discharge (Non-culpable) - Alcoholism** - Alcoholism is a disease and is not, by itself, justification for discharge. The arbitrator must ask: (1) Has the alcoholism adversely affected the employee's performance of the job? (2) If so, is there a reasonable chance that he will be able to fulfil his job requirements in the future?

In this case, the controversial question was at what point should the arbitrator make the assessment for the future. Over 7 or 8 years the grievor had seen at least 16 professional counsellors and been in over 11 treatment programs, almost all of which were facilitated by time-off and weekly indemnity. After he was fired, but before the hearing the grievor showed remarkable improvement.

Arbitrator Munroe found that "*what is just in one case may not be just in another*". Because the Company (i) treated alcoholism as an illness; (ii) gave the employee time to tackle his problem; and, (iii) took all reasonable steps to assist him; the arbitrator did not consider the improvements of the grievor after discharge. Had the Company not done those three things, he would have assessed the grievor's future by considering his situation "up-to-the-minute". The grievance was dismissed.

IWA #522 - Raven Lumber Ltd. & Local 1-363 (Munroe) March 3, 1986

- 3) **Discharge (Non-culpable) - Alcoholism** - Alcoholism is an illness that does not, by itself, call for dismissal. Only where it directly affects job performance or leaves the worker unable to honour his employment commitments can he be fired.

In this case, the grievor would not recognize and deal with his alcohol problem, making him unable to fulfil his commitment to his employer.

IWA #537 - J. Borer Trucking Ltd. & 1-71 (Vickers) February 16, 1987

- 4) **Discharge (Non-culpable) - Innocent Absenteeism - Alcoholism** - The employer discharged an employee after 4 instances of lateness and absenteeism, all closely related to the grievor's alcohol problem. *"This case represents a not unusual example of the mixture of culpable and non-culpable considerations. The warning letters all take a disciplinary approach to the problem. The parties are agreed, however, that alcoholism is a disease which calls for non-culpable considerations."*

The arbitrator considered the case and determined that discharge was excessive in the circumstances and a 2-week suspension should be substituted, but, due to his alcohol problem, the employee was not ready to return to work. The award required him to complete a residential program or similar treatment before going back to work and ordered the Company to pay compensation equivalent to Weekly Indemnity for the period between the date he began counselling to the hearing date. Upon his return to work, his employment would depend on his ability to continue to deal with his alcohol problem.

IWA #635 - Westview Towing Ltd. & Local 1-85 (Kelleher) July 30, 1991

- 5) **Discharge (non-culpable) - Innocent Absenteeism** - There was no doubt that the grievor had a record of excessive absenteeism. The question that remained was whether the Company could establish that he was unlikely to be able to attend work on a regular basis in the future. The Union relied on a medical opinion that the grievor was *"completely fit to return to work."* The Company argued that the appropriate time to make the assessment about future attendance is at the time of discharge, which was prior to the medical opinion that the Union was relying on.

The arbitrator did consider the post-discharge medical opinion, however, he upheld the discharge on the basis that, *"the evidence does not suggest any watershed event resulting in the curing of the grievor's medical conditions,"* an allergy to dust and an incurable bowel syndrome. In other words, the evidence showed his medical conditions remained and his past record proved his inability to live with and work through them.

IWA #700 - Mill & Timber Products & Local 1-3567 (Kinzie) October 25, 1993

- 6) **Discharge (non-culpable) - Innocent Absenteeism** - The grievor was discharged for excessive "innocent" absenteeism due to problems in his hands and wrists. In his analysis, the arbitrator determined that in order for an employer to discharge for innocent absenteeism, it must show "excessive" absenteeism - meaning over the reasonable limits. The evidence must also show the absences have *"irreparably or fundamentally breached"* the employment relationship.

In making this determination: *"Considerations include the length of time the grievor has been employed, the history of absences during employment, and the history of the current culminating absence. As well, some regard should be had to the second question, the likelihood of a return to work in the future."*

The arbitrator ruled that the grievor had a *"traumatic work-related injury"* and his absence was *"consistent with recovery from trauma rather than prolonged persistent inability to do work."* The grievor was fully reinstated and no conditions were attached to his return to work.

IWA #S154 - Atco Lumber Limited & Local 1-405 (Devine) May 26, 1995

(b) Last Chance Agreements:

- 7) **Discharge (Non-culpable) - Absenteeism - Last Chance Agreement** - The grievor, a short-term employee, was discharged on September 9, 1996. He had previously been reinstated by last-chance agreement in April of 1996. In July 1996, the grievor suffered a hernia, which led to a prolonged absence. The company did not terminate until September to preserve the grievor's weekly indemnity benefits.

The arbitrator noted this was "*not a simple non-culpable discharge*" due to the last-chance agreement which he noted was "*a marker which would thereafter guide the course of the grievor's future employment.*" The arbitrator held that the agreement was a "*good deal*" for the grievor and found that it acted to "*preclude the predictive analysis normally required*" in a non-culpable case.

Despite the fact the latest illness was unrelated to his previous alcoholism and drug abuse, the arbitrator dismissed the grievance.

IWA #807 - MacMillan Bloedel Limited & Local 1-217 [1997], 61 L.A.C. (4 th) 38 (Blasina)
- *This decision was upheld on appeal in BCLRB Letter Decision No. B297/97.*

- 8) **Post-Termination Evidence - Last Chance Agreement** - The grievor was terminated for cause when he failed to comply with the terms of a last-chance agreement. The grounds for his termination was his discharge from a residential drug and alcohol rehab program prior to completion of his stay. He subsequently completed treatment at another facility.

The arbitrator found that the parties viewed the letter of understanding as a last-chance agreement, but noted it was unlike many last-chance agreements in that it was directed solely at accommodation provided to the grievor and did not set standards for future attendance. Rather, it stated, "subsequent discipline for poor performance or attendance would be subject to the normal requirements of just cause."

The arbitrator found that "*Where the Human Rights Code has no application, there are strong policy reasons for upholding the terms of Last Chance Agreements*" and that arbitrators should exercise "*restraint in upsetting the parties' Agreement.*" However, he also noted that arbitrators have jurisdiction to do so.

The arbitrator held that the grievor's failure to complete the first rehab program was culpable conduct worthy of discipline, however, the grievor's willingness to pursue rehabilitation elsewhere showed he remained "ready, willing and able" to participate in his own rehabilitation.

The arbitrator concluded that it would not have been undue hardship for the employer to suspend the grievor for an additional period in order for him to pursue rehab in an alternate program. He reinstated the grievor subject to numerous conditions and, failure to fulfil the conditions would amount to immediate discharge.

IWA # - Norbord Industries Inc. & Local 1-2995 [1997], 67 L.A.C. (4 th) 205 (J.D. Carrier)

c) Access to Benefits

- 9) **Discharge (non-culpable) - Weekly Indemnity** - On March 17, 1979 the grievor was the victim of a serious beating which left him close to death. As a result he was absent almost 41 months between that date and his discharge for non-culpable absenteeism in 1987. He returned to work following an arbitrator's consent award, but shortly after was back on Weekly Indemnity due to pain in his back and leg.

Both parties agreed he was no longer capable of fulfilling his employment obligations, however, the Union said the Company could not discharge him while he was collecting W.I. benefits.

The arbitrator ruled, "*I accept the arbitral jurisprudence and conclude that employers are entitled to dismiss employees who are unable to return to active employment provided they are not deprived of continued access to negotiated benefits.*"

IWA #N226 - Fletcher Challenge Canada Limited & Local 1-425 (Vickers) Dec. 20, 1989

- 10) **Disability Benefits - Innocent Incapacity** - The arbitrator held that where the parties have negotiated benefits specifically for injured workers, it would be inconsistent with those rights to permit dismissal based on non-culpable absenteeism where this would deprive the employee of right to receive benefits.

However, while the employee may receive these benefits while on leave, the leave itself does not preclude termination on non-culpable grounds. Because the grievor would still be entitled to collect benefits, the grievance was dismissed.

IWA #843 - Hayes Forest Services Ltd. & Local 2171 (Bruce) March 31, 1998

- 11) **Disability Benefits - Non-culpable Absenteeism** - The grievor remained covered under the group life insurance provision of the agreement and was also entitled to pension coverage, but, as a result of his discharge lost the benefit of medical coverage, extended health benefits and dental.

The arbitrator held that, notwithstanding the work-related disability of the grievor, the employer could discharge him for non-culpable reasons when he is no longer receiving "*negotiated benefits which accrue specifically because of injury or illness.*" Dental and EHB do not fall into this category and the grievor was not entitled to LTD. The grievance was dismissed.

IWA #822 - Mill & Timber Products Ltd. & Local 1-357 (Vickers) March 21, 1991

d) Innocent Incapacity (Incompetence)

- 12) **Discharge (non-culpable) - Incompetence** - There are well accepted standards to be met in order to dismiss an employee for lack of performance. Edith Cavell Private Hospital & HEU (1982) 6 LAC (3d) 229 outlines the criteria a company must meet to dismiss an employee for non-culpable non-performance (incompetence).

- The Company must define a performance level;
- The Company must establish that it told the employee of the standard;

- (c) The Company must show that it gave reasonable supervision and training and gave the employee a chance to meet the standard;
- (d) The Company must show that the employee cannot meet the standard and that reasonable effort was made to find a job the employee could do.
- (e) The Company must disclose that reasonable warnings were given to the employee that he could be fired for failure to meet the standard of performance.

In this case, the Company did not meet the above criteria and the grievor was reinstated.

IWA #604 - Newcon Logging Ltd. & Local 1-85 (Kelleher) Sept. 5, 1989

- 13) **Non-culpable Demotion** - The grievor was placed, in order of seniority, into the position of Chipper Feeder Operator. Over a three-month period, the grievor had a number of problems and the employer was able to show the grievor was unable to co-ordinate the skills required by the position. The grievor suffered from mental problems and disorientation due to a previous accident.

The arbitrator held that the non-culpable demotion of the grievor was properly imposed based on the position being beyond his competence.

IWA #470 - Doman Forest Products Ltd. & Local 1-357 (Vickers) December 8, 1984

e) Automatic Loss of Seniority

- 14) **Prolonged Absence - Loss of Seniority** - The grievor, a long-term employee, was unable to work due to medical illness and ended up on Long Term Disability. The company did not terminate her, but considered the grievor to have forfeited her seniority under a clause of the agreement as she had been absent more than 24 months after her seniority ceased being accumulated (18 months). The union grieved and the arbitrator held:

When the forty-two month period... has expired the employee concerned no longer has seniority... the grievor retains the rights of an employee entitled to Long Term Disability. She also retains rights in respect of the accumulation of pension service credits and the benefit of her life insurance policy... her specific entitlement, to particular benefits may only be determined by an examination of the terms of the benefit plans themselves.

IWA #E100 - MacMillan Bathurst Inc. & Local 2-337 (Picher) July 24, 1990