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Labour Law Update

Discipline for Employees Convicted or Acquitted of Criminal Offences: Courts Weigh In

Gregory F. McGinnis and Jeremy D. Schwartz

Can employers discipline or dismiss unionized employees who have been convicted or acquitted of a criminal offence? Two relatively recent court decisions have addressed this question and provided a partial answer.

First, the courts have made it clear that unions cannot challenge an employee's criminal conviction at grievance arbitration.

Second, even in cases where employees are acquitted on criminal charges, employers may still be able to rely on the misconduct or incident giving rise to the charges to discipline or dismiss them.

Unions Can't Challenge Convictions

On July 27, 1994, Glenn Oliver, an employee of the City of Toronto's Parks and Recreation Department, was arrested and charged with sexually assaulting a five-year-old boy.

Mr. Oliver led various programs for children and mentally disabled adults at a recreation centre operated by the City of Toronto. The boy had been a participant in one of the City's programs and was in Mr. Oliver's care at the time.

The City suspended Mr. Oliver during the criminal investigation and trial, and terminated his employment when he was convicted. Remarkably, the union grieved the termination and pursued the grievance to arbitration.

Equally remarkable, Arbitrator Douglas Stanley permitted the union to retry the issue of the employee's misconduct, determining that the criminal conviction only gave rise to a "presumption" that Mr. Oliver had sexually assaulted the boy under his care.

Because the City refused to force the young victim to endure another legal proceeding, the arbitrator – astonishingly – ruled that the union had successfully "rebutted the presumption" of wrongdoing, and ordered the City to reinstate the employee!

On an application for judicial review by the City, the Ontario Divisional Court quashed the Arbitrator's decision. The union appealed the court's decision, and the case finally reached the Supreme Court of Canada. On February

13, 2003, the Supreme Court denied the union's appeal. [1]

Its reasons: a criminal conviction requires proof of guilt "beyond a reasonable doubt", a higher standard of proof than the one used at grievance arbitration. Moreover, the Superior Courts have greater authority on criminal matters than a mere labour arbitrator.

For this reason, it was an "abuse of process" to allow the union to re-litigate Mr. Oliver's criminal conviction.

Unionized employers may therefore breathe a small sigh of relief. The Supreme Court of Canada has made it clear a criminal conviction may not be re-litigated at arbitration.

But what about acquittals?

Acquittals Don't Prevent Discipline or Dismissal

On July 13, 2003, an Ottawa bus driver crashed his bus into a stalled car at over 90 km/h, killing an 18-month old girl inside the vehicle, paralyzing her father and severely injuring her mother.

The police charged the bus driver with a number of offences, including criminal negligence causing death. He also had his license suspended.

The employer did its own separate investigation and terminated the employee for having his license suspended, and for gross negligence in the performance of his duties. The union representing the driver grieved.

At trial, the driver was acquitted of all criminal charges. Although the court found the employee had been in the accident with a stalled car, and that the accident was the cause of the girl's death and her parents' injuries, his actions were not a criminal offence.

At arbitration, the union tried to use the *City of Toronto* decision cited above, claiming that the employer could not challenge the employee's acquittal. Both the Arbitrator, and later, the Ontario Divisional Court disagreed, and upheld the termination.

"Employment Offences are Not Criminal Offences"

The Divisional Court ruled, "*An employment offence is not a criminal offence*."[2] In other words, even though the employee may not be criminally liable for his actions, they could still cost him his job.

Further, while the employee may not have been proved guilty "beyond a reasonable doubt", the employer could still take the position that the employee was guilty "on a balance of probabilities," a lower standard of proof.

Findings Still Unassailable After an Acquittal

The Divisional Court stated that, regardless of whether the employee was convicted or acquitted, employers could not challenge any factual findings of a criminal court, i.e. findings about what the employee did or did not do.

So if the court were to find, for example, that an employee was in a certain place at a certain time, neither the employer nor the union could question that fact.

In this case, the court made significant findings of fact with respect to the accident and the actions of the driver. Those findings were consistent with those the employer made during its independent investigation, and so the employer could properly rely on them at arbitration, despite the employee's acquittal.

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[1] *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77.

[2] *Amalgamated Transit Union, Local 279 v. Ottawa (OC Transpo)*, 2007 CanLII 41425 (ON. S.C.J. D.C.).

The bottom line from both these cases is that if a criminal court determines that something happened, no one will be permitted to re-litigate the issue in a labour arbitration hearing – fortunately, a commonsense result.

But as we all know, charges do not always result in convictions, or even trials, and the "wheels of justice" turn slowly. So what to do?

Don't Piggyback the Discipline

Obviously, not all conduct that results in criminal charges can result in discipline. Employers have to show a substantial interest in the accused employee's conduct, especially if the conduct is off-duty.

Whenever possible, employers should not "piggyback" discipline or termination onto a police investigation or the criminal charges.

By doing its own investigation and determining an appropriate penalty, it is more likely that an employer will see the discipline upheld than if it just waits to see what happens in a criminal case.

A conviction (or an acquittal with favourable factual findings) is certainly a bonus, but employers should not place their hopes in such an outcome.

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