

## Actions Speak Louder Than Words: Labour Board Holds That Employers Must Demonstrate by Conduct That They Do Not Condone Employee Misconduct

Generally, the Ontario *Employment Standards Act* ("ESA") requires employers to provide employees with notice of termination or termination pay in lieu of notice. However, a dismissed employee is disentitled to these minimum notice requirements if the employer can prove, on a balance of probabilities, that the employee is guilty of wilful misconduct that is not trivial and was not condoned by the employer.

While employers often focus on the severity of the employee's misconduct or on whether the employee possessed the requisite intent, *Shaker v Leon's Furniture Limited* ("Leons") and *Cancore Building Services Ltd. v William Merlos & Director of Employment Standards* ("Cancore"), two recent decisions of the Ontario Labour Relations Board ("OLRB"), make clear that in order to successfully rely on the disentitlement provision in the ESA, an employer must have cogent evidence that it did not condone the employee's wilful misconduct.

### Similar Employee Misconduct

In Leons, Ms. Hala Shaker ("Shaker"), an employee with 13 years of service, regularly came to work, swiped her time card to make it appear as though she was working, and left for an unauthorized "break".

In Cancore, Mr. William Merlos ("Merlos"), an employee with 23 years of service, allegedly falsified timesheets for his own benefit and the benefit of his staff by reporting that he and his staff worked 8 hours shifts when they had not.

Despite similar factual circumstances – both cases involve the dismissal of long service employees who breached company policy by engaging in time theft – only the employer in Leons successfully relied on the disentitlement provision. Why?

### Dissimilar Employer Follow-Through

In Leons, the employer became aware of Shaker's pattern of misconduct on January 3, 2012. That morning, Shaker was scheduled to start work at 9:00am. At approximately 9:30am, Shaker's supervisor saw her get out of her car and walk into work without swiping her time card. The supervisor reviewed company records and determined that Shaker clocked in at 8:55am and, contrary to company policy, had not sought prior authorization to leave the premises and had not clocked out before she left. Immediately thereafter, the supervisor initiated an investigation and, after a review of Shaker's time cards and surveillance footage for the one-month period preceding the incident, determined that on 14 of 18 shifts Shaker drove her car to the employee entrance, left her car running while she ran into the entrance, swiped her time card, drove away, and returned between 30 and 60 minutes later.

On the afternoon of January 3, 2012, management met with Shaker and advised her that her conduct was contrary to company policy and unacceptable. Following the meeting, Shaker wrote an insolent and aggressive email to management and became generally disruptive in the workplace. Shaker was then asked by both the Customer Care Manager and the Sales Manager to leave the premises; but, she refused. When the Area Supervisor informed Shaker that she was being suspended for the day for insubordination and was required to leave the premises, Shaker

still refused to leave. Thereafter, Shaker's employment was terminated for cause.

Conversely, in Cancore, the employer suspected that Merlos was engaging in time theft as early as 2002. Over the years, the employer visited job sites where Merlos and his staff were supposed to be working, found the sites deserted, and noted thereafter that Merlos credited he and his staff as having worked a full 8 hour shift. From 2002 through 2012, the employer issued numerous warning letters to Merlos, admonishing his behaviour and instructing him to abide by company policy by, among other things, only recording the actual hours employees worked on a job. In 2010, the employer rebuked Merlos for continuing to breach company policy and advised:

*William, you have ignored all warning letters we have issued you over the past 20 years. Do not ignore this one. It is the last one we will write. We have spent far too much time on the same issues with you over the years and can no longer afford the time to continue to do it. You have the choice to make changes or we will have no choice but to replace you.*

However, three weeks later, the employer issued another letter setting out concerns about the accurate recording and remittance of employee time sheets. On July 6, 2012, almost two years after the last-last warning letter, a student employee informed the employer that Merlos credited him for working hours he had not worked. The employer accepted the student's claim at face value and, without further investigation, terminated Merlos' employment for cause.

## The Consequences

In Leons, the OLRB took notice of the fact that as soon as the employer suspected that Shaker was breaking company policy, it conducted a diligent investigation and immediately informed Shaker that her behaviour was unacceptable. As Shaker's misbehaviour escalated, the employer progressively disciplined

her. The OLRB was, therefore, satisfied that the swiftness of the employer's disciplinary actions and the diligence with which it investigated Shaker's misconduct constituted ample evidence that Shaker's actions were serious, intentional, and not condoned.

In Cancore, the OLRB made clear that condoning misconduct does not mean that an employer expressly gives permission to the employee to engage in dishonest behaviour or that the employer expressly countenances poor performance. The OLRB confirmed that if an employee does not suffer any tangible consequences, other than being on the receiving end of a lot of written criticism, a reasonable person would conclude that the employer condoned the employee's misconduct. Consequently, to the extent that Merlos was an incompetent employee and engaging in time theft, the OLRB concluded that he was continuously getting away with it, so much so that he must reasonably have believed after twenty years that there were no tangible negative consequences to him if he continued to perform at a substandard level.

Therefore, by failing to diligently document and investigate the incidents in which Merlos was engaging in time theft and by failing to swiftly take progressive disciplinary actions, the employer in Cancore did not have sufficient evidence to establish that Merlos' actions were serious, intentional, and not condoned.

### Employer Take-Aways

The decisions in Leons and Cancore illustrate that when an employer suspects that an employee is breaching company policies, the employer should take the following three steps to demonstrate that the employer does not condone the misconduct and, when applicable, to provide the employer with an evidentiary foundation to support the employer's reliance on the disentitlement provision in the ESA:

1. **Act Swiftly.** Upon learning about an incident that may amount to misconduct, employers should act promptly and initiate an investigation with due dispatch. In order to do so, employers

should have clear policies about acceptable employee behaviour and should ensure they are familiar with those policies.

2. **Thoroughly and Diligently Investigate.** Employers should investigate the allegations of misconduct to determine whether there is a basis for the allegations. All relevant witnesses should be interviewed and relevant documents gathered. Employers should also give employees an opportunity to respond to the allegations against them.
3. **Discipline Appropriately.** Once a determination is made about the allegations of misconduct, employers should consider the appropriate penalty. If the allegation is not a serious incident of misconduct that would justify termination for cause, employers should progressively discipline the employee. Progressive disciplinary actions illustrate that the employer does not condone the employee's behaviour and provide a paper trail in support of an employer's case for termination if the employee's misconduct persists. If the allegations constitute willful misconduct, disobedience, or willful neglect of duty, the employer can dismiss the employee for just cause.

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#### [a cautionary note](#)

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