

Termination of Employment of Unionized Employee with 20 Years of Service in Response to Xenophobic and Racist Comments Upheld in Alberta

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A recent arbitral decision, *Federated Co-operatives Limited v Miscellaneous Employees, Teamsters Local Union No. 987 of Alberta (FCL)*, 2022 CanLII 78226, illustrates the factors that employers must consider when reviewing the appropriate disciplinary response to employees who make racist and xenophobic comments in the workplace. As outlined in detail below, the arbitrator in *FCL* upheld the termination of a unionized employee in Alberta with almost 20 years of service in response to his use of anti-Asian and anti-Muslim language in the workplace.

The Facts

The employer, the Federated Co-operatives Limited (the Company), operated a large warehouse in Calgary, Alberta. The Company experienced a COVID-19 outbreak at one of its facilities in the summer of 2020, which prompted the Company to institute a mandatory masking policy (the Masking Policy) for those employees working in its warehouse. The Company called a meeting on July 8, 2020, to advise its employees of the Masking Policy, which was to take immediate effect.

Mr. Evans (the Grievor) was asked to attend the meeting and represent the Union in his capacity as temporary Chief Shop Steward. During the meeting, the Grievor made a number of racist and xenophobic remarks in response to the Masking Policy, including that masks were an “Asian thing;” that wearing masks was not a common practice in North America; that the Masking Policy infringed upon his rights; that he “was not a Muslim”; and that he was shocked to see people wearing masks in what he referred to as “Western civilization.”

Management immediately addressed the Grievor’s comments in the meeting and confirmed the purpose of the Masking Policy (i.e., to improve health and safety and prevent transmission of the virus). They further confirmed that the Masking Policy had nothing to do with race, religion, country of origin, ideology, or political values (“western” or otherwise).

After the meeting, the Grievor was provided with a mask. He wrote in uppercase letters on his mask “I AM NOT A MUSLIM” and wore it for approximately 1 hour and 45 minutes while performing his duties. One of the Grievor’s co-workers warned him that the words on his mask were inappropriate and, soon

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thereafter, a supervisor told him his actions were unacceptable and would not be tolerated by the Company. Notwithstanding the caution from his co-worker and warning from his supervisor, the Grievor continued to wear the mask until one of the ear loops broke and the mask had to be replaced.

During the Company's investigation of the incident, the Grievor indicated that the words he wrote on his mask represented "a statement of fact" and that he wrote the words because he believed that masks were a "political and philosophical tool used to subvert the masses;" an infringement of his rights and freedoms; and objectionable to those "who hold dear western values." When asked about how his comments and actions might affect others in the workplace, the Grievor indicated that the way other people may have felt was out of his control. In short, the Grievor failed take responsibility for his actions or acknowledge the harmful impact they may have had on other employees.

After the investigation was complete, the Grievor's employment was terminated for just cause. The Union filed a grievance seeking reinstatement on the basis that the termination was a disproportionate response to the Grievor's actions.

The Decision

The arbitrator found in favour of the Company; the grievance was dismissed and the termination was upheld.

The arbitrator rejected the Union's position that the Grievor's actions could properly be characterized as a single incident of poor judgement and held that the Grievor had made a conscious decision to write "I AM NOT A MUSLIM" on his mask and then wear it for the next hour and 45 minutes, despite his problematic views being addressed in the meeting where the Company announced its Masking Policy and after having received two additional warnings from his co-worker and his supervisor about the words he wrote on the mask. The arbitrator found that the Grievor made a series of decisions that constituted "deliberate, intentional, defiant and offensive act[s] of misconduct" that violated the Company's Discrimination and Harassment Policy. The arbitrator specifically considered the social context in which the Grievor acted, including the rise of incidents of violence, harassment, and discrimination against Asian and Muslim people in Canada (and particularly during the COVID-19 pandemic); the Company's policies; the training the Grievor received from the Company regarding its expectations concerning proper conduct in the workplace; and the diverse nature of the Company's workforce.

Takeaways for Employers

This is a welcome decision for employers committed to meeting their legal obligations under occupational health and safety and human rights legislation, and for employers that are committed to creating a more

diverse, safe, and inclusive workplace through the implementation of appropriate policies and training.

This decision exemplifies the importance of ensuring appropriate policies are in place and that employees responsible for implementing and enforcing anti-harassment and anti-discrimination policies on behalf of the employer are properly trained. It is worth noting that the Grievor had received training on the employer's policies regarding harassment and discrimination and, further, had been promptly and clearly cautioned on multiple occasions. The Grievor's refusal to heed such cautions contributed significantly to the arbitrator's decision to uphold the termination.

The decision also provides employers with a reminder that they can and should consider the context in which any act of misconduct occurs when assessing appropriate disciplinary action. In this case, the Grievor's anti-Muslim and anti-Asian comments occurred at a time of increased incidents of racism and xenophobia against historically marginalized communities and were made in a diverse workplace.

Dismissed employees will often take the position that applying a contextual approach to assessing disciplinary action means only that potentially mitigating factors (such as length of service or a history of strong performance) should be considered. However, a contextual approach to determining whether termination was justified demands that the judge or arbitrator review all of the relevant context, including potentially aggravating factors such as the larger social or political environment in which the misconduct occurred.

Terminating any employee for just cause is often challenging for employers, especially in unionized workplaces. This decision is a good example of the extent to which a judge or arbitrator will examine not only the misconduct that led to termination but also the environment in which it occurred and the steps the employer took to communicate its standards and expectations to its employees – both before the alleged misconduct occurred and in its response to the incident.

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