

10.9.3 Progressive Discipline

Most arbitrators accept that implicit in the concept of just cause for discharge is a requirement to take a progressive or corrective approach to discipline before resorting to the ultimate penalty of discharge. The principle of progressive discipline is based, generally, on the notion that it would be unjust to discharge an employee if the employer has not first attempted to correct the misconduct with a lesser penalty or penalties. It is also premised on the belief that discipline will better achieve its corrective purpose if penalties are imposed on a progressive basis, from less severe ones for the first offence to more severe ones for repeated and serious infractions. Adherence to progressive discipline should also avoid claims that the employee was surprised or lacked warning of the seriousness with which the employer regarded the misconduct. These principles and their rationale are explained in *Ocean Paving Ltd. and I.U.O.E., Local 721* (1997), 64 L.A.C. (4th) 82 (Cromwell).

Prior to the 1970s, arbitrators usually took the view that the rationale for applying a corrective or progressive approach to discipline did not apply to the most egregious forms of misconduct, such as theft or assault, and that summary discharge was in all such cases an appropriate disciplinary response. However, beginning with a number of ground-breaking awards in the mid-1970s, many arbitrators adopted the view that the norms of progressive discipline that focus on the grievor's rehabilitative potential should be also applied to very serious misconduct. *Galco Food Products Ltd. and Amalgamated Meat Cutters & Butchers Workmen of North America, Local P-1105* (1974), 7 L.A.C. (2d) 350 (D.M. Beatty) is one of the seminal decisions urging arbitrators to apply a corrective approach to discipline wherever possible.

New Dominion Stores and R.W.D.S.U., Local 414 (1997), 60 L.A.C. (4th) 308 (Beck) provides a more recent example of the application of progressive discipline to theft in the retail food industry. Despite a traditional presumption in favour of upholding discharge for theft in this sector, Arbitrator Beck adopted a corrective approach, reinstating the grievor with a lengthy suspension notwithstanding her failure to admit to stealing and to express remorse. On the other hand, the award of Arbitrator McPhillips in *Sarowa Investments Inc. and C.A.W., Local 3000* (2001), 94 L.A.C. (4th) 238 suggests that the presumption, which reflects the view that the employer's deterrence interest in such cases is preeminent, is not easily overcome.

In *Grand & Toy Ltd. and U.S.W.A., Local 9197*, [2001] O.L.A.A. No. 242 (QL), Arbitrator Craven applied the principles of progressive discipline to a case in which four employees were alleged to have committed time theft. In his opinion, employer policies dictating "zero tolerance" for certain forms of misconduct were inconsistent with the requirement for a progressive approach to discipline, and therefore with the just cause standard under the collective agreement.

The importance of applying a corrective approach to discipline has long been recognized by arbitrators when inadequate work performance is alleged as the basis for just cause for dismissal. In *North York General Hospital and Canadian Union of General Employees* (1973), 5 L.A.C. (2d) 45, Arbitrator Shime set out the reasons for this arbitral attitude. Arbitrator MacDowell's award in *Invista Canada and Kingston Independent Nylon Workers Union (Wollerman)*, [2004] O.L.A.A. No. 813 (QL) also addresses the application of progressive discipline to the discharge of a long-service employee for deteriorating work performance.