# Serious safety violation not cause for termination

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In the 2011 decision of *Plester v. Polyone Canada Inc.*, an Ontario Court held that an employer did not have just cause to terminate a senior employee who committed a serious safety violation and subsequently failed to report it, in violation of company policy.

John Plester was a line supervisor at Polyone Canada Inc. (Polyone), a company that manufactured plastic pellets using a complex and potentially dangerous process. Polyone had a strong health and safety culture, and emphasized what it termed the "Cardinal Rules" related to health and safety which employees were required to follow. One such rule was a requirement that machines being worked on by employees be locked out in order to avoid the possibility that the machine could start up accidentally and cause injury. Another Cardinal Rule was that employees were strictly required to report any safety violations, even minor incidents.

Mr. Plester violated both rules when he attempted to fix a machine that was not working properly during an afternoon shift. Not only did he forget to lock out the machine prior to cleaning it out, but he also did not report the violation, because he claimed he was embarrassed by his mistake. Mr. Plester's version of events indicated that he had forgotten to lock out the machine due to being distracted by other employees who were talking to each other rather than helping, and that when he realized the error he had made by not locking out the machine, he was embarrassed and unable to face what he had done. The other employees' version of events was that Mr. Plester had been aggressive and arrogant in his response to being told he should have locked out the machine. The judge accepted Mr. Plester's version of events, and the parties did not dispute that Mr. Plester had failed to report the incident.

Superior Court Decision

Justice Wein of the Ontario Superior Court found, that despite the seriousness of Mr. Plester's actions, Polyone did not have just cause to terminate his employment. She applied the test set out by the Supreme Court of Canada in *McKinley v. B.C. Tel*, and considered the seriousness of the misconduct, the surrounding circumstances and the proportionality between the employee's misconduct and the employer's response.

*Seriousness of the Misconduct*

The judge found that the safety violation, and subsequent failure to report, were very serious. She also found that the failure to report the incident was aggravated by the fact that Mr. Plester was a supervisor, which increased "the danger of inculcating a sense of complacency and isolation from the rules properly set down by management."

*Surrounding Circumstances*

In considering the surrounding circumstances, Justice Wein found that the threat of a culture that did not emphasize safety was problematic for both the employees and the employer. She found that Mr. Plester, as a supervisor, had to be seen "to be unambiguously supportive of enforcing the rules" in order to ensure that other employees did not become complacent about safety. She found that his failure to report the violation compounded the seriousness of the initial violation.

*Proportionality*

In considering the proportionality of the employer's response, Justice Wein considered how the company had treated similar Cardinal Rule violations in the past. Although more junior employees had been terminated for Cardinal Rule violations, Justice Wein found that the employer's response in this case was out of line with other sanctions levied by the company for similar incidents in the past, and thus not a proportionate response. For example, in a previous incident during which another employee had not locked out a machine prior to working on it had been spoken to about it by his co-workers, and had "shrugged and walked away," there had been no consequences to the employee despite his failure to report the incident.

Justice Wein concluded that Mr. Plester's conduct, including his deliberate failure to report, were serious violations, however, his conduct did not meet the high standard of "willful misconduct" required in order to disentitle him to notice under the *Employment Standards Act,2000*. Thus, Mr. Plester was entitled to pay in lieu of notice of termination. The judge found that the notice period to which Mr. Plester was entitled at common law was 14 months—slightly less than one month for every year of service.

Our Views

In a previous post, we discussed a case, *Reichard v. Kuntz Electroplating Inc.*, where a court found that an employer was justified in terminating a supervisory level employee for cause after the employee had repeatedly violated company policy and failed to disclose the same to the employer. Perhaps this case can be distinguished from *Reichard* in that, here the employee had an otherwise clean safety record and the violation appeared to be a one-time occurrence. Likely of more significance was the fact that others who had committed similar acts were treated more leniently.

These cases together illustrate the fine line between a for-cause termination and a without cause termination and that, in order to be successful in terminating an employee for cause as a result of a policy violation, policies must be applied consistently over time and across all employees