



# What's New in HR Law

## Violation of COVID-19 Protocols Amount to Just Cause for Termination

February 26, 2021

### Bottom Line

Approaching the one-year mark of the COVID-19 pandemic, cases that deal with the termination of employees for reasons related to the pandemic are continuing to work their way through the courts and other adjudicative processes. However, in what amounts to good news for employers, several early arbitration awards have upheld the discharge of employees for violations of workplace protocols aimed at preventing the spread of COVID-19.

### The Carrier Award

In *LIUNA, Local 183 v Aecon Industrial*, 2020 CanLII 91950 (the “Carrier Award”), the grievor was a construction worker and had been working at the jobsite in question for five years at the time of his termination. On April 9, 2020, the grievor was scheduled to attend work, but began to experience symptoms commonly associated with COVID-19. The grievor phoned his foreman who instructed the grievor to stay home and wait to receive instructions from the company

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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nurse. The grievor called the employer twice that day to follow up and, both times, was advised to stay home and await further instructions. The grievor complied and stayed home from his shift on April 9th. The grievor's next scheduled shift was five days later on April 14, 2020. At that point the grievor's initial symptoms had resolved, but he had developed a runny nose, another common COVID-19 symptom. The grievor had still not been contacted by the company nurse.

Despite the fact that the worker had not yet been contacted by the company nurse, he reported for his scheduled shift on April 14, 2020. Before entering the jobsite, the grievor answered "no" to all the questions on the employer's pre-screening questionnaire, which included a question about whether the worker was experiencing any COVID-19 symptoms, and specifically included the symptom of "runny nose".

When it was later discovered that the grievor had not been cleared to return to work by the company nurse, a requirement made very clear, the employer terminated the grievor's employment for cause. At arbitration, the grievor sought to justify his decision to report to work by arguing that he thought the company had forgotten about him and that he would be subject to discipline for missing the scheduled shift on April 14th.

Arbitrator Carrier upheld the employer's decision to terminate the grievor's employment, citing three main reasons. First, the grievor ignored three direct requests to stay home from work until contacted by the company nurse. Second, the worker lied during the pre-entry screening process by reporting that he did not have any symptoms of COVID-19 and by failing to report that he had previously been instructed to stay home. Third, in ignoring the direction and lying during the pre-entry screening, the grievor knowingly created an exposure risk for his coworkers and put the health and safety of the workplace in jeopardy. In the circumstances, and taking into account the worker's short service and recent disciplinary history (which included other safety violations), Arbitrator Carrier upheld the employer's decision to discharge the grievor for just cause.

## **The Keller Award**

In *Garda Security Screening Inc. v IAM, District 140 (Shoker Grievance)*, [2020] OLA No. 162 (the "Keller Award"), the grievor was employed at Pearson International Airport. The employer informed all employees that they had to self-isolate whenever they took a COVID test and were awaiting the test results. On April 6, 2020, the grievor underwent a COVID test and reported to work the same day contrary to the employer's policy. The grievor then stayed home from work the following two days.

Six days later, on April 12, 2020, the grievor informed her employer that she had tested positive for COVID-19. During the subsequent investigation, the grievor initially lied about attending work on April 6, 2020. Subsequently, the grievor admitted to having worked on April 6th, but alleged that (i) she was unaware of the requirement to not attend work while awaiting the results of a COVID test and, (ii) she had attended work on April 6th because she did not feel sick at the time.

Arbitrator Keller concluded that the grievor had, in fact, been aware of the policy requiring employees to self-isolate and not attend work while awaiting the results of a COVID test. Arbitrator Keller also observed that the guidance from the Public Health Agency of Canada recommending that persons self-isolate while awaiting the results of a COVID test was widely known by the general public. As such, it was determined that the grievor's actions not only violated workplace policies, but also public health guidelines. The arbitrator observed that the grievor's lack of symptoms on April 6th was irrelevant and that the amount of contact the grievor had with coworkers and members of the public in the course of her work increased the severity of her actions. Ultimately, Arbitrator Keller upheld the discharge of the grievor and dismissed the grievance.

## **Check the Box**

The Carrier and Keller Awards provide helpful guidance for employers regarding what constitutes a proportionate disciplinary response to violations of workplace COVID-19 protocols. Given the potentially significant consequences that exposure to the COVID-19 virus can have on the health and safety of employees, the wellbeing of the public and the functioning of an employer's operations, both arbitrators recognized that a strong disciplinary response is warranted where an employee purposefully breaches an established, communicated and consistently enforced COVID-19-related safety protocol.

While the Carrier and Keller Awards provide helpful guidance, employers should still consider and continue to apply best practices prior to issuing employee discipline. Specifically, employers should:

- Investigate the circumstances surrounding any breach of a COVID-19 safety protocol before issuing any form of discipline. The investigation should focus on the nature of the infraction, why it occurred and any mitigating or aggravating circumstances that may exist.
- Ensure the discipline imposed is proportionate to the conduct at issue. Inadvertent deviations from a health and safety rule should be treated differently than purposeful and/or deceitful acts of non-compliance.
- Apply a consistent disciplinary approach to all situations in which employees violate workplace COVID-19 protocols. Arbitrators will inevitably look to how an employer treated other workers in similar circumstances when determining whether to uphold the discipline imposed by the employer.

## **Need more information?**

For more information regarding workplace management during the COVID-19 outbreak, contact [James Jennings](#) at 416-408-5503, or your regular lawyer at the firm.



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