

Ontario arbitrator upholds firing of long-term LCBO worker for safety violation

Worker 'failed to take any responsibility for his actions or acknowledge what he had done wrong'

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Jun 27, 2022

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“It is possible to terminate a long-service employee with a clean disciplinary record for safety violations, particularly if the employee refuses to take responsibility.”

So says Allyson Lee, a labour and employment lawyer with Sherrard Kuzz in Toronto, referring to an Ontario arbitrator upholding the termination of an LCBO worker with 20 years of service after he engaged in an altercation with a shoplifter.

The worker was a customer service representative (CSR) for the Liquor Control Board of Ontario (LCBO) with 20 years of service and no discipline.

The LCBO had a shop theft policy that required training and annual refresher training on dealing with shoplifting. The policy stated that employees could not leave the store to pursue a thief and try to retrieve stolen product, and doing so put employees, customers, and the community at risk. The policy also outlined the process of observing and reporting a shop theft incident. Employees were required to maintain a safe distance from suspects and never block them from leaving.

Employees witnessing a shop theft were required under the policy to complete an incident report before the end of their shift.

On Dec. 21, 2018, a colleague told the worker that she saw two men taking product from a shelf and putting it into a bag. The worker approached the men and asked if they needed any help. The men walked past him towards the front of the store – one was carrying a single bottle and the other a cloth bag full of bottles.

The worker followed them to observe and report under the shop theft policy. Video surveillance footage showed him putting his left arm over one suspect's shoulder and reaching towards the bag of bottles. He grabbed the bag and put his other hand on the suspect's back, holding his shirt. According to the worker, the suspect was falling over and he did this to hold him up. However, the suspect yanked the bag and told him to let go.

The worker grabbed the suspect's collar with a hand that was holding a box cutter that he had taken out of his pocket. The suspect stood up straight with the worker holding his arm over his shoulder and his other arm around to the suspect's front, with the box cutter near the suspect's neck.

The second suspect grabbed the first and started pulling him towards the store exit. The worker pulled the first suspect in the opposite direction. Eventually, he let go and the store security guard spoke to both suspects.

Afterwards, the worker showed the surveillance video to three other employees. He later said the incident happened because the store had accepted a late delivery, which resulted in the back door being open at night in an unsafe area and not enough staff up front.

The worker didn't file an incident report and the next day he came in early to tell his manager that he had stopped someone from falling and hurting themselves. He explained that there had been an altercation, and the manager told him to be more careful.

On Dec. 24, another employee told the manager that the worker had told him that he had stopped a theft and put a box cutter to the suspect's throat. The manager watched the surveillance video of the incident and asked the employee to write a statement. Other employees were also asked for written statements.

Prompt investigation of misconduct

The LCBO investigated by interviewing several employees and reviewing the video. Multiple employees agreed that the worker threatened the suspect and held the box cutter to the suspect's throat. They also reported that he boasted about the incident and didn't make an incident report because they were "all in it together."

In his interview, the worker said he knew the suspects were intoxicated and he wanted to keep the one with the bag from falling, and the first suspect threatened him. He acknowledged that he had the box cutter in his hand – he claimed he had been opening boxes – but the blade was retracted and he didn't have time to think about how to hold it. He also acknowledged the shop theft policy but said he grabbed the man as a reaction to him losing his balance.

The worker agreed that he told other employees about the incident, but he denied telling them to keep it secret. He apologized, maintaining that his intention was only to stop the man from falling and he would observe potential shoplifters from a distance in the future.

The LCBO's clear policy and prompt attention to the matter put it on solid ground for justifying the discipline it chose, says Lee.

"The employer investigated the matter promptly and kept excellent notes and documentation, including security tape footage and statements from other employees who witnessed the incident," she says. "The

employer also had a clear shoplifting policy, making it easy for the adjudicator to find [that the worker] should have known better than to engage with the shoplifter.”

Read more: A safety violation that was the product of insufficient training was [not just cause for dismissal](#), the BC Supreme Court found.

The LCBO terminated the worker’s employment for violating the shop theft policy and the union grieved, arguing that termination was excessive for an employee with 20 years of discipline-free service.

Credibility issues

The arbitrator had issues with the worker’s credibility, as his version of events was inconsistent with other witnesses. It was apparent that the worker didn’t tell his manager about the box cutter; otherwise, the manager’s initial response would have been different, and the LCBO only became aware of the box cutter when the other employees provided their accounts, said the arbitrator.

The arbitrator noted that in determining discipline for a safety violation, an essential factor is whether the employee has taken responsibility and understands the seriousness of their conduct. In this case, the worker maintained that he didn’t try to stop the theft and didn’t threaten the suspect with the box cutter, even in the face of witnesses who reported that he did, said the arbitrator.

The arbitrator found that even though the worker had 20 years of discipline-free service, there was a concern in returning him to the workplace. His failure to accept responsibility for his actions and his attempt to blame it on the LCBO for accepting a late delivery didn’t indicate that he wouldn’t commit similar misconduct in the future, the arbitrator said.

Lee agrees that the worker's failure to show remorse and accept responsibility was a key element in the arbitrator's decision and suggests that had the worker acknowledged his misconduct, the arbitrator may have overturned the termination.

"As the adjudicator noted, when an employee commits a safety violation, the most important factor in determining if they should be returned to work is whether that individual has taken responsibility for their actions, understands what they did wrong, and commits to not doing it again," says Lee. "Other [non-safety-related] policy violations would not have created the same danger for fellow employees, nor would [the worker's] failure to recognize the consequences of his conduct have been so dangerous."

Read more: [Workplace safety is more important than length of service](#), said an Ontario arbitrator who upheld the termination of a 37-year employee with previous safety breaches on his record.

The arbitrator upheld the termination, citing the importance of workplace safety and the need for confidence that employees won't endanger themselves and their co-workers.

Lee reiterates that the decision demonstrates that serious misconduct without remorse or acceptance of responsibility can justify termination of an employee with no prior discipline and a long period of service – particularly if safety is involved. In this case, the behaviour of the worker after serious misconduct likely contributed as much or more to the termination, she adds.

"[The worker] lied about what had occurred when he reported the incident to his superiors," says Lee.

"[He] failed to take any responsibility for his actions or acknowledge what he had done wrong, even during the grievance hearing."

See *OPSEU and Ontario (Liquor Control Board of Ontario) (Martinez), Re*, 2022 CarswellOnt 7323.

