

OFF-DUTY MISCONDUCT: CRIMINAL CHARGES ALONE ARE NOT JUST CAUSE FOR DISMISSAL

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Employers have a management right to impose reasonable rules to govern conduct in the workplace and to discipline and discharge employees who break those rules. When an employee is guilty of serious workplace misconduct, the law also recognizes the employer's right to dismiss the employee for just cause. But what about off-duty conduct? Does unsavoury off-duty conduct amount to just cause for dismissal? What if the off-duty conduct involves serious criminal charges?

In [Merritt v Tigercat Industries](#), the Ontario Superior Court of Justice considered these questions and found that criminal charges for off-duty conduct alone are not grounds to dismiss an employee for just cause. Consequently, the employer was ordered to pay wrongful dismissal damages equal to 10 months' wages, in the amount of almost \$42,000.00.

The Facts

Keith Merritt was 67 years of age and was employed by Tigercat Industries Inc. as a general labourer. Tigercat has production facilities in several Ontario municipalities, including Paris and Cambridge.

In February 2015, Mr. Merritt was arrested at Tigercat's Paris facility and was charged with two counts of sexual assault against minors. Tigercat met with Mr. Merritt the following day, but Mr. Merritt refused to discuss the criminal charges, simply advising that the alleged events did not occur in the workplace and did not involve any Tigercat employees. Mr. Merritt was asked to resign, but refused. Instead, Mr. Merritt agreed to take a two week leave of absence.

Upon his return, Mr. Merritt was reassigned to the Cambridge facility. A female Tigercat employee raised concerns about working in close proximity with Mr. Merritt. The employee told Tigercat that Mr. Merritt was a distant relative and that she used to visit Mr. Merritt with her family. The female employee alleged that she stopped visiting Mr. Merritt because he made inappropriate sexual comments and advances toward her.

Tigercat met with Mr. Merritt and raised concern that a female Tigercat employee was involved in the criminal charges. Mr. Merritt again responded by saying that no Tigercat employees were involved in the criminal

charges. Without conducting any further internal investigations, Tigercat dismissed Mr. Merritt for just cause. Mr. Merritt sued Tigercat for wrongful dismissal.

The Law

The Court confirmed that criminal charges for off-duty conduct alone do not constitute just cause for dismissal. In order for off-duty conduct to constitute just cause for dismissal, there must be a justifiable connection between the off-duty conduct and the employer or the nature of employment.

The Court also confirmed that the onus is on the employer to show that:

- the conduct of the employee harms the employer's reputation or product;
- the employee's behaviour renders the employee unable to perform his duties satisfactory;
- the employee's behaviour leads to refusal, reluctance or inability of the other employees to work with him;
- the employee has been guilty of a serious breach of the *Criminal Code*, which renders his conduct injurious to the general reputation of the employer and its employees; and
- continuing to employ the employee will cause difficulty in the way the employer properly carries out the function of efficiently managing its work and efficiently directing its work force.

The Findings

The Court found as follows:

- Tigercat did not or would suffer reputational harm as Mr. Merritt was a general labourer, not an executive, supervisor, or manager.
- Mr. Merritt was capable of performing his duties as evidenced by the fact that Tigercat reassigned him to perform his duties at the Cambridge location.
- No employees of Tigercat were involved in the criminal charges. If a Tigercat employee was reluctant to work in close proximity with Mr. Merritt for reasons unrelated to the criminal charges, Tigercat had a duty to accommodate both employees.
- Mr. Merritt had not been found guilty of a criminal offense as the criminal trial had not yet occurred. Accordingly, Mr. Merritt was entitled to the presumption of innocence.
- Tigercat's reassignment of Mr. Merritt following his two week leave of absence demonstrated that Tigercat's continued employment of Mr. Merritt did not inhibit Tigercat's ability to manage its work and workforce.

Lessons for Employers

This decision highlights for employers the importance of conducting a proper investigation of an employee's alleged off-duty misconduct before undertaking disciplinary action or dismissing the employee. Taking the necessary precautions, documenting the investigation, and providing the employee with the requisite due process will increase the employer's prospects of having a dismissal upheld by an adjudicator.

Upon completion of a proper investigation, employers should make a determination as to whether the employee's off duty misconduct warrants discipline and, if so, what measure of discipline is appropriate in the circumstances. Employers should ensure that the disciplinary action undertaken is principled and consistent with the employer's policies, including Codes of Conduct and off-duty misconduct policies.

Finally, employers should recall that most employees in Canada can be dismissed at any time so long as they are provided with sufficient notice or pay in lieu of notice. As a result, an employer who does not approve of an employee's off duty conduct (so long as the disapproval does not relate to grounds protected by Human Rights legislation) may dismiss the employee as a result of off-duty misconduct on a without cause basis.

by Stefanie Di Francesco

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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