

Off Duty Conduct: Are Criminal Charges against an Employee Grounds to Terminate for Cause?

What is an employer to do when it discovers that one of its employees has been arrested? This issue arose in the case of *Merritt v. Tigercat Industries*.

Merritt was sixty-seven (67) years old, and had been employed as a labourer at Tigercat Industries (“Tigercat”) since 1998 (with some interruptions in service due to lay-offs). He was arrested at one of the Tigercat’s facilities and charged with two (2) counts of sexual assault against minors. Upon Merritt’s return from a two (2) week leave of absence, he was reassigned to the Cambridge facility. One of the female employees at the Cambridge facility reported that she was very upset to see the employee in the plant because she had worked with Merritt in a previous workplace when she was a minor and that Merritt had made very inappropriate advances and sexual comments to her. The female employee told the employer that she did not wish to interact with Merritt. Tigercat relied on this information to dismiss Merritt for cause.

The Court found 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, there must be a justifiable connection between the off-duty conduct and the nature of employment. Notably, the Court held that a justifiable connection might be found if an employer can prove that:

- I. the conduct harms the employer’s reputation or product;
- II. the behaviour renders the employee unable to perform his duties in a satisfactory manner;
- III. the behaviour leads to refusal, reluctance or inability of the other employees to work with him;
- IV. the employee has been guilty of a serious breach of the Criminal Code, rendering his conduct injurious to the general reputation of the employer and its employees; or

- V. the conduct renders the employer unable to properly carry out its function of efficiently managing its work and efficiently directing its workforce.

In finding that no just cause existed, the Court awarded Merritt damages amounting to ten (10) months of pay in lieu of reasonable notice.

What does this mean for employers?

The knee-jerk reaction of any employer upon learning of a situation where an employee is criminally charged for a heinous crime involving children is understandably to terminate with cause. This case stands for the proposition that if an alleged crime – no matter how repugnant – involves off-duty conduct without involving other employees, and if an employee is not in a position where he or she would cause harm to the Company's reputation, than the employer may not be able to terminate for cause.