

# Do Employees Have The Right To Be Heard When Being Terminated For Wilful Misconduct?



A common misconception within the employer-employee relationship is that employees always have a right to be heard before the employer terminates for wilful misconduct.

However, a recent decision from the Ontario Labour Relations Board (the “**Board**”) in *Max Aicher (North America) Limited v Richard Bell*, 2024 CanLII 78929 serves as a reminder that the *Employment Standards Act, 2000* (the “**Act**”) does **not** impose a duty of procedural fairness on the employer when the employee engages in wilful misconduct.

In this case, the employee deliberately sabotaged the employer’s production which resulted in a loss of \$50,000.00. When management became aware of the conduct, they sent the employee home while an investigation was conducted. As part of the investigation, the employer interviewed various employees with respect to the allegations of sabotage but did not provide the employee with an opportunity to defend himself in relation to the allegations before terminating his employment.

The employee filed a claim for termination pay and severance pay under the Act. The Employment Standards Officer (“**ESO**”) held that the employee was entitled to termination and severance pay because the employer failed to provide the employee with procedural fairness. The ESO held that the employee ought to have been given an opportunity to respond to the allegations of misconduct and to participate in the investigation. The employer filed an application for review with the Board where the Board concluded that there was no basis in law for the ESO’s decision.

The Board held that the employee’s conduct fell within the definition of wilful misconduct as set out in sections 2(1)3 and 9(1)6 of O. Reg. 288/01 of the Act which disentitled him from receiving termination and severance pay. It is noteworthy that the Board determined that there is nothing in the Act nor in the Regulations that imposes a duty of procedural fairness (including giving the employee the right to be heard) upon an employer who seeks to rely on an employee’s wilful misconduct, disobedience, or willful neglect of duty at the point of termination of employment. Therefore, the employer’s failure to provide the employee with the opportunity to provide an explanation prior to termination did not deprive the employer of the ability to rely upon the employee’s wilful misconduct as cause for termination without having to pay the employee termination or severance pay.

With respect to common law, the Board cited *Filion v. The Religious Hospitallers of St. Joseph of Cornwall*, 2016 ONSC 1008, where the Court held that the question of “procedural fairness” is not relevant to the issue of just cause. While it may be significant to other issues such as general damages flowing from the unfair manner in which the employee was treated by the employer when summarily dismissed, it cannot stand as a shield against just cause in existence prior to termination.

The Board also agreed with the employer’s additional argument that an employee could never be given the opportunity to answer charges based on after acquired cause because the employment relationship is ended before the cause is known. As such, the employer cannot owe a duty of procedural fairness even at common law when dealing with after acquired evidence.

### **Key take-aways for employers**

1. It is still important that employers ensure that a fulsome investigation is conducted before concluding that a termination for wilful misconduct is justified. Notwithstanding this decision of the Board, we recommend that the employee involved in the misconduct is interviewed as part of the investigation.
2. Procedural fairness cannot stand as a shield to a finding of wilful employment misconduct that was found to have occurred prior to termination.
3. Even under common law, procedural fairness cannot be an impediment for employers seeking to rely on an employee’s wilful misconduct when dealing with after acquired evidence.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

Author: [Paul Farruggio](#)

Torkin Manes LLP