

HR Compliance Briefing: How to Tell the Difference Between a Proper & Improper Work Refusal

written by vickyp | January 27, 2020



What's At Stake

The right to refuse dangerous work is an important safety protection for employees. But it creates a dilemma for employers. Disciplining employees for properly exercising their refusal rights is illegal; but allowing employees to abuse their refusal rights, e.g., as an excuse to avoid an unpleasant but not unsafe task, can grind production to a halt. To resolve this dilemma employers must be able to tell the difference between a proper and improper refusal.

Unfortunately, the OHS laws provide only vague definitions requiring “reasonable” fear of danger. To apply this principle to real-life situations, you need to look at how courts, labour boards and arbitrators (which, for simplicity sake, we’ll refer to collectively as “courts”) have decided this question in actual cases. Knowing where courts draw the line in right-to-refuse cases can help you decide how to handle refusals by your own employees. We’ll break down some key cases in which refusals were found improper that you can refer to when faced with a refusal.

What the Law Says

The OHS laws of every province give employees the right to refuse dangerous work without suffering discrimination or reprisal. But work refusals are also intended to be a measure of last resort and strict limits apply.

1. Employee Must Have Refusal Rights

Not all employees have refusal rights. While rules vary by jurisdiction, refusal rights don’t cover employees that perform significant public functions, e.g., police, firefighting or emergency medical response. Nor do refusal rights pertain to dangers that are a normal part of the job. Thus, for example, a roofer can’t refuse work because she’s afraid of heights.

2. Employee Must Follow Proper Refusal Procedures

Simply walking off the job is unacceptable. The employee must also follow the proper refusal procedures starting with notifying their supervisor or manager that they’re

engaging in a work refusal, explaining the grounds for the refusal and making themselves available while the employer does an initial investigation to determine whether a danger exists. And if the investigation finds no danger or corrective actions are taken, employees must either return to work or, if they're still dissatisfied, follow the proper procedures to continue the refusal and have a government OHS inspector investigate.

3. Refusal Must Be Sincere

Employees may only refuse work they sincerely believe constitutes a danger to themselves or others.

4. Refusal Must Be Reasonable

Even a sincere belief isn't necessarily enough. In all but 2 provinces (Saskatchewan and Quebec), the belief must also be reasonable based on what's called an objective standard. In other words, the condition or situation must be one that a reasonable third person in the worker's situation would consider dangerous.

How Refusal Rules Are Applied in Actual Cases

While the rules are fairly straightforward, applying them in actual cases is anything but. Although each case is different, the rulings form patterns revealing the factors that determine the validity of a refusal.

Factor 1: Ulterior Motives

One of the first things a court looks at is whether employees had an ulterior motive in bringing the refusal. Examples:

Preference in Tools: Being more comfortable using one tool over another isn't a valid reason to refuse work. Example: Ontario Labour Relations Board rules against factory worker who refused to operate a forklift to avoid endangering other workers, noting that there weren't many workers on the floor and that the worker's real motive was his preference to use a "clamp truck" rather than a forklift. [*Burlington Carpet Mills Canada Ltd.*].

Personal Comfort: Employees can't refuse work just because it's uncomfortable. But in some situations, what looks like mere discomfort may be an actual health or safety hazard. Example: Cleaning worker's refusal to wear bow tie around her neck as part of company uniform is justified because it aggravated her thyroid condition [*Re: Raposo and Hurley Corp*].

Convenience: An employee can't bring a refusal to avoid work that interferes with personal convenience or lifestyle choices. Example: OK to fire transit worker for refusing to complete 13-hour shifts on the grounds of fatigue when worker voluntarily to do 3 13-hour shifts rather than 4 10-hour shifts so he wouldn't have to work weekends [*Toronto Transit Comm'n. Wheel Trans Dept.*].

Factor 2: Employee's Attitude & Behaviour

An employee's attitude, behaviour and credibility have an enormous influence in refusal cases.

Employee Has Political Agenda: Employees can't use refusals to advance an agenda or make a point, even if it's safety related. Example: Federal arbitrator nixes longshore worker's refusal because gangways "didn't meet Code." The worker was a

union rep and JHSC member fed up with what he perceived as the company's foot dragging in implementing gangway safety measures and brought the refusal not out of immediate concern for safety but to advance his "hidden agenda" [*Jordan v. Neptune Bulk Terminals (Canada) Ltd.*].

Employee Uses Refusal to Vent: Courts consider the entire context and look for behaviour suggesting that the worker is abusing his refusal rights to air some other grievance. Example: PEI board finds loading dock workers' refusal to work outdoors in wet clothes as insubordination noting that temperature indoors was exactly the same 4.5° C and that the workers had been complaining for days about the relocation of the parking lot and that the refusal was just another form of protest [*Cavendish Farms Ltd. v. U.F.C.W., Local 1252*].

Refusal Is Personal: Courts look for signs of previously existing bad blood suggesting that employees are using the refusal to get back at somebody with whom they have a personal conflict. This is especially true if the refusal comes immediately after a confrontation. Example: Right after his supervisor throws him out of the lunchroom, a worker refuses to operate a crane but the Ontario court doesn't buy it saying that the timing of the incident was the key and that the concern over absence of hand signals was bogus because there was nobody else on the floor at the time [*Inco Metals Co.*].

Employee Refuses Reasonable Safety Measures: Refusing to avail oneself of reasonable measures to taken by an employer to address an employee's safety concerns casts a refusal in dubious light. Example: City worker's concern about a weed-eater that had burned him once before was legitimate but the refusal still failed because the worker deliberately refused training in safe use of the machine and wouldn't wear protective equipment while operating it [*City of Ottawa*].

Factor 3: Employer's Response to Refusal

Instantly concluding that there's no danger and ordering the employee back to work without investigating is a cardinal sin that will cause a court to rule against an employer regardless of the merits of the refusal. Example: Board sides with employee who refused orders to drive through a picket line because of the threat of violence from strikers because the employer didn't investigate the situation before imposing discipline [*Re: Canada Post Corp. and L.C.U.C. (Charters)*].

Courts will also look at how the investigation was carried out and whether an employer took reasonable measures to address the employee's safety concerns.

Example: Finding that second-hand smoke poses no immediate danger to employee is justified where employer followed proper air sampling procedures in response to the complaint [*Boeing Canada/DeHavilland Division*].

Example: Continuing refusal due to proper heating and washrooms at site is unwarranted when employer offered to provide the refusing employees warm clothing and access to washroom facilities [*Re: Dominion Chain Co.*].