Terminating Employees for Insolence Game Plan



Employees are allowed to criticize their boss. But they must also show a level of respect, deference, and personal decency—especially when they put their criticism in writing. When their language or tone crosses these boundaries, whether composed in pen or keyboard, it becomes insolence justifying termination without notice. Exactly when does criticism of authority cross that line? Here's a 6-step Game Plan for HR directors to follow in determining whether there's just cause to fire an employee for insolent behaviour.

Step 1. Understand What Insolence Is

The starting point is to get a grasp of the legal context. Employment in Canada isn't at will the way it is in the U.S. When a company on this side of the border fires an employee, it must provide termination notice or wages in lieu of notice. And that often carries a hefty price tag, especially when the employee has been with the company for a long time. However, notice isn't required when termination is for just cause, a broad concept that includes any behaviour that permanently undermines the trust required for an employment relationship. Insolence is one form of such behaviour. It occurs when employees use insulting, abusive, threatening, violent, contemptuous, or unreasonably derisive language with their superiors.

Compliance Strategy: While it represents defiance of authority, insolence isn't the exact same thing as insubordination, that is, deliberate refusal to obey a lawful and reasonable order. But the concepts are similar. So, whatever principles you follow in terminating for insubordination may come into play when dealing with insolence.

Step 2. Use the *Foxco* Factors When Terminating for a Single Act of Insolence

The law governing termination for insolence comes not from statutes or regulations but court cases challenging a company's decision to fire employees for showing insolence to their boss. The leading case comes from a New Brunswick ruling called *Henry v Foxco Ltd*. (2004 NBCA 22 (CanLII) laying out 3 circumstances where it's justified to terminate for a single incident of insolence:

1. The employee and superior are no longer capable of maintaining a working relationship;

2. The incident undermines the superior's workplace credibility and ability to supervise or manage effectively; or
3. The incident causes the employer to suffer a material financial loss, loss of reputation, or serious prejudice of its business interests.

Compliance Strategy: Since this is the standard a court or arbitrator will rely on in a wrongful dismissal lawsuit and employers bear the burden of proving just cause, HR directors must ensure they can make a case under at least one of the *Foxco* factors before sending a pink slip to an employee for engaging in an act of insolence.

Step 3. Consider What the Employee Says

Whether criticizing the company or boss constitutes insolence depends on what employees actually say and the tone they use in saying. "Disrespectful" and "inflammatory" are the 2 adjectives most often used to describe criticism that crosses the line. Examples:

Threats of Violence: Threatening violence is an almost surefire bridge burner. For example, an Ontario teacher who felt he had been unjustly denied promotion sent threatening letters to the school board, including one expressing regret that the "Montreal Massacre" didn't happen at his workplace, which he described as "the Canadian epicenter for racial bigotry and tokenism." The gunman, the note continued, "should have lined you and your crony superintendents. . . up against the wall and shot all of you." The Canadian Supreme Court ruled that the board was justified in concluding that the teacher lacked the judgment to be in a classroom [*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC)].

Threats Against the Business: Threatening the company's business can also undermine an employment relationship, especially when the threats are credible. For example, an Alberta court found that a memo sent by an IT technician to the Chief Operating Officer threatening to delete an engineering company's precious computer files came "very close to [crossing] the line" of conduct that causes an employer to lose confidence and trust in an employee. But the court went on to rule that the company's failure to take measures to protect its database in response suggested that it didn't take the threat seriously and undermined its just cause argument [*Mothersele v. Gulf Canada Resources Ltd.*, 2003 ABQB 2].

Accusations: Attacking the personal character, integrity, or competence of a superior may rise to the level of insolence. For example, a Saskatchewan court ruled that a government agency had just cause to terminate an officer of Indigenous ancestry for accusing his manager of racism by declining to recommend him for promotion. Saying that he'd have a better chance of being promoted if he had "cut his own balls off" added to the abusive and contemptuous tone of his remarks [*Thomas v Saskatchewan Indian Gaming Authority Inc.* , 2021 SKCA 164 (CanLII)].

Use of Obscenity: Criticism of a superior or company tends to cross the line from legitimate to abusive when it's accompanied by obscenity. Thus, the "F-bomb" appears in many of the rulings upholding discipline for insolence. For example, an Ontario arbitrator dismissed a union grievance challenging a forklift driver's 3-day suspension for calling his supervisor "a f***ing idiot" [*Unifor Local 252 v Nestle Canada Inc.*, 2019 CanLII 871 (ON LA)]. Obscene language isn't always and automatically a deal breaker. But as a federal arbitrator explained, there's a big difference between "using an occasional 'F bomb' at the workplace" and calling a supervisor a "f***ing idiot" [*IBEW (System Council No. 11) v Canadian Pacific Kansas City Railway*, 2023 CanLII 73434 (CA LA)].

Dragging in Ethnicity, Family, Religion, etc.: Criticism becomes inflammatory when it

gets personal. So, things like ethnic slurs or insensitive references to a boss's alcoholic wife are typically deemed intolerable. Thus, a BC court ruled that sending the boss, an 80-year-old Jewish man who survived the Holocaust, a note comparing her work situation to "the unfortunate Jews impressed into working without pay" during the second world war "irretrievably destroyed any chance of a workable employment relationship" [*Wise v. Broadway Properties Ltd*., 2005 BCCA 546 (CanLII)].

Another example is the following note that justified firing of a railway employee: "[*Supervisor's name*] is avoided by most employees [because]: (1) Most employees have no respect for his knowledge. (2) He smells of body odour and very bad breath. (3) He is on a power trip and don't give him any ammunition to use on a fellow employee or hassle a train crew" [*Canadian National Railway Company*, [unreported] No. 3174, Arb. Picher, Dec. 15, 2000].

Step 4. Consider Where Employees Direct Their Criticism

Where criticism is directed may determine its destructive impact on the employment relationship.

Going Over Boss's Head: Courts have upheld firing an employee for criticizing the boss to the boss's superiors. Examples:

- OK for fish hatchery to fire employee for sending letter critical of management to 40 recipients, including the company president and board of directors in "the blind hope" of embarrassing management in the eyes of shareholders [*Chen v. Sable Fish Canada Inc*., 2010 BCSC 444 (CanLII)];
- OK to fire immigration official for emailing board note criticizing her boss [*Van Der Meij v. Victoria Immigrant and Refugee Centre Society,* 2008 BCSC 954 (CanLII)].

Posting Criticism Online: Companies can't punish employees for criticizing their boss in private, outside of work. But making critical remarks about the boss online isn't the same thing as griping with colleagues over a beer after work. Courts have repeatedly referred to internet postings as public communications even if made via a personal blog or on a social network site. Examples of online postings justifying termination for insolence:

- In her private blog, a nurse refers to her supervisor as Nurse Ratched from *One Flew Over the Cuckoo's Nest* [*Alberta v Alberta Union of Public Employees*, 2011 CanLII 95004 (AB GAA)];
- Posting derogatory comments about a supervisor on Facebook [*Discharge for Facebook posting grievance,* [2012] C.L.A.D. No. 85];
- Bad mouthing management on Facebook and telling people not to buy from the company [*Lougheed Imports Ltd. (West Coast Mazda) v. United Food and Commercial Workers International Union, Local 1518*, 2010 CanLII 62482 (BC LRB)].

Step 5. Consider Whether Criticism Is Written or Verbal

It's generally easier to prove just cause when criticism of management is in writing if, for no other reason, to take the he said/she said element out of the equation. Thus, for example, a BC employer's attempt to fire a real estate agent for bad-mouthing management failed due to lack of evidence showing precisely what the employee said [*Rittinger v. Nacel Properties Ltd*., 2007 BCPC 249 (CanLII)].

Writing a note is also a calculated act, whereas verbal communications tend to be more spontaneous and emotional. Thus, courts generally expect employers to cut

employees more slack for verbal outbursts, especially if they're in response to provocation. This is true even if the employee's conduct is abusive, violent, and profanity-laced. For example, the court in the *Henry v. Foxco Ltd*. case we cited above noted that: "Many things are said and done in the heat of the moment that, on reflection, are regretted," the court reasoned.

By the same token, verbal insolence can also be incendiary and damaging to a superior's effectiveness, especially when it's expressed publicly in front of the superior's other underlings. Thus, for example, a New Brunswick arbitrator upheld a 3-day suspension against a union shop steward who, at the height of the pandemic, confronted his manager during a general meeting introducing the company's new COVID-19 rules. "This is bulls***!", he snapped and stormed out of the meeting [*CUPE, Local 3226 and Kevin Cook v Town of Quispamsis,* 2021 CanLII 43139 (NB LA)].

Step 6. Consider the Entire Context

As with any other just cause dispute, courts look at the overall context to determine if termination is warranted for insolence, including:

Employee's Tenure and Record: The longer and better distinguished the service record, the harder it is to prove just cause.

First v. Repeated Offence: While the *Foxco Ltd*. case establishes a standard for single-incident termination, the general understanding is that it takes at least 2 incidents to fire an employee for insolence. In other words, insolent employees should generally get at least one warning before they're terminated. And employees need to be warned first.

Whether Employee Was Provoked: Provocation is more likely to be an excuse when the criticism is verbal. Criticism is more acceptable when management asks the employee for her opinion. For example, making statements critical of a superior to members of management wasn't insolence when made in response to direct questions. Being asked "why is the Kamloops station so f****d up?" is a pretty good indication that management wanted a candid opinion, the arbitrator explained [*Mau v. Canadian National Railway*, [2009] C.L.A.D. No. 215, July 20, 2009].

The Employee's Position in the Company: Those in positions of leadership and responsibility are generally expected to demonstrate a higher level of discretion and respect for authority and the company.

Remorse: As with other offences, taking responsibility and expressing remorse for insolent behaviour is a factor that can diminish the seriousness of the offence and the penalty it carries. Lack of remorse has the opposite effect.