School bus driver's suspension overturned for lack of evidence of misconduct

'It's [the employer's] burden to prove that there was just cause, so they better have the evidence'

By Jeffrey R. Smith

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“When it comes down to discipline and discharge, it's the employer that has the onus of proving that it had just cause.”

So says Oakville, Ont. employment lawyer Rishi Bandhu after an Ontario arbitrator overturned the 10-day suspension of a school bus driver following a complaint of unsafe driving that was made against him.

“[The employer] has to prove [misconduct] on a balance of probabilities and, in doing so, it needs to present solid, reliable evidence,” says Bandhu. “And in this case, it just didn't have it — the only evidence that it did have was hearsay.”

Northway Bus Lines is a company that provides school buses and drivers to a group of school boards in Ontario. Due to the nature of the service, safety is a top concern for Northway, particularly since the buses are clearly identified with the company’s name on them.

The worker joined Northway as a school bus driver in 2017 after a 30-year career as a police officer — first with military police and then with the RCMP.

Complaint from member of public

On June 2, 2022, a Northway dispatcher received a complaint from a member of the public about the way a school bus driver was driving.

According to the complaint, the individual was stopped at a red light when a school bus came up behind her car and gradually creeped closer to her back bumper. The bus eventually became so close, she could only see its front grill in her rear-view mirror, making her feel unsafe and worried that the bus was trying to “take her out.”

The individual moved her car forward, but the bus moved forward to stay close. This made the individual feel threatened. She thought about calling the police but decided to contact Northway.

Northway investigated the complaint and identified the worker as the driver of the bus. Later that day, the company’s director of safety and education met with the worker regarding another matter and told him about the complaint.

When the time and place of the incident was relayed to the worker, he remembered the car in question. He said that he didn't feel that he had done anything wrong and was trying to edge into the right-turn lane into the Northway yard — a maneuver he performed eight times per day, he said.

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Worker denied unsafe driving

The worker maintained that he had kept the rear tires of the car in front of him in sight, as the company trained its drivers — although he said he hadn't been specifically instructed about a "space cushion" — and he was more to one side of the car because he was edging into the right-turn lane. He mentioned that had no interaction with the driver.

The director said that the worker's actions didn't constitute defensive driving required of its employees, nor did they follow the training that the worker had received.

According to the director, at another meeting the next day for another reason, the worker said that he was an aggressive driver with his own vehicle and had been trained in aggressive driving as a police officer. However, he claimed that he knew the difference between that and driving a school bus, he always drove safely, and he had never received a ticket in 40 years of driving.

The branch manager reviewed the incident and determined that the worker had unsafely operated the school bus and jeopardized the reputations of both Northway and the group of school boards for which the company provided its services. She was worried that it would be hard to know if the worker operated the school bus defensively or aggressively and wanted to send a message as to what was expected.

10-day suspension

On June 14, Northway suspended the worker for 10 days without pay and issued a disciplinary letter outlining the complaint. The worker grieved the suspension.

The arbitrator found that Northway relied on the description of the incident provided by the driver of the car in front of the worker in its decision to discipline the worker. However, the worker disputed that account, leaving only hearsay evidence as to the worker's misconduct, which shouldn't be considered reliable, said the arbitrator.

Northway was right to take the complaint seriously, given the priority on safety, says Bandhu, but given the lack of concrete evidence and the role that management's opinions played in the decision to discipline, their approach to the problem went in the wrong direction.

"Certainly, it warranted a discussion and getting the employee's point of view and perspective," he says. "Maybe some refresher training or a revision to its standards of driving to specifically identify the type of conduct that would be unacceptable — that may have been a better step to go."

"Treat it as a training or teachable issue as opposed to a disciplinary issue that's going to cost tens of thousands of dollars and go all the way to arbitration," says Bandhu.

The arbitrator also found that while the worker admitted to edging into the right-hand lane, this was done regularly with no evidence that drivers were instructed not to do it.

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Worker had credibility, experience

Finally, the arbitrator found that Northway placed too much emphasis on the worker's statement that he drove his personal vehicle aggressively. There was nothing indicating that this meant he didn't leave a safe distance from other vehicles or that it wasn't possible to compartmentalize his personal driving with how he drove a school bus, said the arbitrator.

The worker's credibility and experience were other factors that Northway didn't seem to consider when weighing the account of the member of the public against the worker's denial of misconduct without any other evidence, says Bandhu.

"[The worker] is well-trained in driving, he's a mature person, he had a successful career as a police officer, so I think that might have given him a degree of credibility," he says. "When he said, 'I know the difference between driving my personal car aggressively and driving a school bus appropriately' — I think the arbitrator seemed to be sympathetic to that."

The arbitrator determined that Northway didn't prove that it had just cause for discipline. The company was ordered to rescind the 10-day suspension and compensate the worker for any lost pay.

When it comes to discipline for employee misconduct, it's important to remember that employers have the burden of proof, says Bandhu.

"We sometimes forget that, on both sides of the equation, when the other party has the onus we do too much, or when we have the onus, we do too little," he says. "In this case, [the employer] did too little, and they have to remember that it's their burden to prove that there was just cause, so they better have the evidence."

As for what evidence can be used to prove just cause, hearsay often isn't going to do it, particularly if the worker offers plausible deniability, says Bandhu.

"You've got to ensure that the evidence is going to be accepted by the court or the arbitrator, and there are certain rules of evidence that are simply not going to be allowed," he says. "And hearsay is one of them, particularly when that evidence is central to the main issue in the case."

See *USW, Local 2020-94 and 194-0712 Ontario Inc. (Vachon), Re*, 2022 CarswellOnt 12883.

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