

# HILL ADVISORY

## NEWSLETTER

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*Contact Sheri Swain, [sswain@hilladvisory.com](mailto:sswain@hilladvisory.com)*

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### ENVIRONMENT IS NO DEFENSE

#### **How swearing in the workplace is unacceptable anywhere**

The Employer operates Government controlled liquor distribution. Shane is a long service employee of the Employer and had worked for them for 30 years. Londa is the Store Manager and Shane has had issues with her from the start. Caroline was hired for a short term over the holiday season.

The case concerns the dismissal of Shane for behaviour contrary to the Standards of Conduct. More specifically, it is alleged that Shane engaged in conversations with co-workers during which he made defamatory and demeaning remarks against the store manager. Shane had engaged in similar behaviour in the past and had been disciplined for it. On this occasion, Shane was fired and he filed a grievance.

The events occurred in late December. The most significant incident is alleged to have occurred on December 24th. On that day, Caroline was on till and became involved in a dispute with a customer. Londa came over to help and asked Caroline to step away. On her way to the back of the store, Caroline stopped to 'vent' with Shane. During the conversation Caroline said Shane made remarks directed at Londa as well as another employee, Edina. In particular, he called Edina a "f\*\*\*ing bulldog" and Londa a "f\*\*\*ing b\*\*ch". Customers were in the area when the comments were made.

Caroline talked to Londa about the conversation and shared the names Shane had called her. Caroline took notes of their conversation and asked Caroline to forward her an email with the information. Shane had a history of calling Londa the same name and worse names in the store.

Shane denied making any comments like the ones reported. He did admit he used the 'F' word and was sure he had used the terms 'incompetent', 'b\*\*ch' and had said Londa was 'in over her head.' He felt Londa was a 'b\*\*ch' because of the way she 'baited' and 'bullied' him.

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2010*

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## Employer Position

The Employer argued that Shane's conduct in challenging Londa's managerial decisions, belittling her by use of various derogatory names was tantamount to harassment. They asserted that Shane was unable or unwilling to change his behaviour and had no insight, remorse or apology. They argued the termination was justified and required to protect other employees from a poisoned work environment.

With respect to the specific allegation of Shane's comments on December 24th, the Employer argued that evidence showed Shane had used the terms in the workplace, and that he generally used profanity without hesitation. They also referred to his admission he called Londa other names.

The Employer stated Shane's disciplinary history supported a conclusion that discharge was an appropriate sanction. Shane had received a one-day suspension in 1993, followed by increasingly severe discipline, including a two-day suspension in July 2005 and a three-day suspension in November 2005. The discipline was for either inappropriate actions towards co-workers or management.

The Employer argued Shane's conduct was not a momentary aberration but a continuation of his previous conduct that had attracted discipline in the past, despite clear direction from the Employer that such conduct was not acceptable.

Further, Shane's contempt carried through to his testimony at the hearing. Rather than accept responsibility for his actions Shane said he believed that he was entitled to continue with his behaviour if he feels he has been demeaned in the workplace.

## Union Position

The Union acknowledged that Shane's conduct did give rise to just cause for some form of discipline but argued that discharge was an excessive penalty.

They pointed to the letter of termination, and the Employer's investigation, focussed on a specific incident and no allegation against Shane regarding comments made about a co-worker.

The Union disagreed with the Employer's characterization of Shane's comments as disrespectful and inappropriate, since at that specific location many employees routinely used such language. They argued there was a 'culture of swearing' at the workplace.

The Union argued the 1993 discipline was stale, given that Shane worked for another twelve years without discipline. They also argued that the other discipline involved situations that did not include abusive conduct, but rather a dispute with another manager.

They argued that although Londa stated Shane made offensive comments in front of co-workers and customers, there was no evidence of customer complaints and no reference in the termination letter to comments having been made in front of customers.

The Union contended that Caroline - a junior, seasonal employee lied about the events. They referred to a difference in where she said the conversation occurred and inconsistencies in Londa's notes and Caroline's email. They also argued that although Caroline said she was shocked by Shane's comments and wanted to get away from him, she accepted a ride home from him even though she had other options.

The Union argued that the employment relationship could be restored and that Shane should be reinstated.

## Decision

The arbitrator looked at the conflicting evidence from Caroline and Shane. He felt that Shane's version of events was more credible and he based that decision on the conflict between Caroline stating she was uncomfortable around Shane, yet asking him for a ride home when there were other options that she had used before. The arbitrator also referred to the inconsistency with Londa's notes and Caroline's email.

The arbitrator ruled that he was unable to accept Caroline's evidence with respect to the events of December 24th. Specifically that the evidence was not compelling to find Shane had made the comments in the store and in front of customers.

He turned to the other aspects of Shane's conduct, some of which were undisputed, that justified a disciplinary response. Shane had admitted to calling Londa a 'b\*\*ch' and making derogatory remarks about her managerial skills. These comments were made in the workplace.

The arbitrator was aware that other employees made similar comments, and addressed the Union's contention of a 'culture of swearing.' It was noted that many of the employee's did use profane language. However, the arbitrator ruled that there was no doubt the Employer considered that type of behaviour to be inappropriate. He ruled that Shane's comments would certainly be considered offensive had they been said directly to Londa and that they had clear and unequivocal meaning. He noted Shane's comments were cutting, crude and inappropriate.

The arbitrator ruled the employment relationship was not irreparable and reinstated Shane with a 30 day suspension and two conditions.