

Employment and labour seminar

Just cause dismissal

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Legal context

- **Two ways for an employer to terminate employment in Canada:**
 - For just cause – serious misconduct
 - Without just cause (i.e. with a severance package)
- In certain provinces (e.g. Quebec, Nova Scotia), employees also have protection against “unjust dismissal” after certain length of service.

Considerations

- **If employment is terminated for just cause, there are two questions:**
 - Did the conduct give the employer the right to impose *some form of discipline*?
 - If yes, was the discipline selected by the employer appropriate in the circumstances?
- Applicable policies and the handbook should be reviewed when considering these questions, but the policies and handbook are not determinative.
- Consult employment legal counsel.

Just cause

- What is just cause?
- 2001 Supreme Court of Canada decision:
McKinley v. BC Tel
- *McKinley* adopted the “contextual approach.”

The contextual approach

- The Supreme Court of Canada concluded that:
 - The proper approach is to recognize that only some forms of dishonesty constitute cause.
 - The Court must consider the specific form of dishonesty in the context of each case.
 - Essentially, the test is whether the employee's misconduct gave rise to a **fundamental** breakdown in the employment relationship.

The contextual approach (continued)

- Examine each case in light of its particular circumstances.
- Consider the nature and seriousness of the misconduct.
- Ultimate question: Does the misconduct go to the heart of the employment relationship?

The contextual approach: application

- Although the contextual approach arose from a case involving an employee's dishonesty, courts have since applied it to virtually all forms of employee misconduct, including:
 - Insubordination
 - Poor performance after repeated warnings
 - Sexual harassment
 - Workplace violence

Recent case law

Menard v. The Centre for International Governance Innovation, 2019 ONSC 858

- **Facts:**
- Employee used peer-to-peer software to download large amounts of copyrighted material onto the employer's laptop without paying for the copyrighted material.
- Employee's employment was terminated and the parties were unable to agree on a severance package.
- Employee brought an action against the employer for damages for wrongful dismissal.

Recent case law

Menard v. The Centre for International Governance Innovation, 2019 ONSC 858

- **Court conclusion:** The employer had no just cause for dismissal.
- **Why?**
 - While the employee's activity violated some of the employer's internal policies, the employee lacked nefarious intent and did not hide his downloads.
 - The employer failed to establish that the downloaded material adversely affected the employer's interests.
 - The employee's misconduct was not incompatible with a continuation of the employment relationship.

Recent case law

Cuconato v. Parker Auto Care Ltd., 2018 ONSC 2803

- **Facts:**
- Employee was told by his manager that he was seen making sexually explicit gestures behind a female customer's back.
- Employee was warned that if he refused to admit to making the sexual gestures, he would have to resign or be fired.
- Employee initially denied allegations but later conceded that the gesture was sexual in nature.

Recent case law

Cuconato v. Parker Auto Care Ltd., 2018 ONSC 2803

- **Court conclusion:** The employer had no just cause for dismissal.
- **Why?**
 - The employee's misconduct did not strike at the heart of the employment relationship.
 - The employee's denial of the allegations could not be characterized as persistent.
 - The employee's misconduct appeared to be an isolated event.
 - The employer did not suffer from a reputational or operational loss because of the employee's misconduct.

Recent case law

Kingston Health Sciences Centre v Canadian Union of Public Employees, Local 1974, 2018 CanLII 53203

- **Facts:**

- Grievor sent emails to several doctors discussing her conflicts with co-workers in disrespectful terms.
- After a five-day suspension, the grievor was warned that her employment would be terminated immediately if she continued to display inappropriate behaviour.
- Grievor's failure to address patient referrals and her interruption of managers during meetings resulted in termination of her employment.

Recent case law

Kingston Health Sciences Centre v Canadian Union of Public Employees, Local 1974, 2018 CanLII 53203

- **Court conclusion:** The employer established just cause for dismissal.
- **Why?**
 - The grievor's inappropriate behaviour towards doctors was not an "isolated" event but part of a trend.
 - There was no evidence that the grievor was singled out or provoked.
 - The grievor's failure to address patient referrals had serious consequences on the clinic's obligations to their patients.
 - The employer clearly warned the grievor that continued misconduct would result in "immediate termination."

Recent case law

BFG Canada Ltd. and UNIFOR, Local 1285, 2018

CarswellOnt 9553

- **Facts:**

- Grievor physically assaulted a coworker on the production floor.
- Coworker kicked grievor, claiming it was in self-defence.
- Employer has a zero tolerance policy for violence in the workplace.
- In a criminal case, grievor plead guilty to criminal assault while her coworker was not charged.
- Employer dismissed grievor and suspended coworker for two days.

Recent case law

BFG Canada Ltd. and UNIFOR, Local 1285, 2018

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- **Conclusion:** The employer established just cause for dismissal.
- **Why?**
 - No evidence to suggest that the grievor was sufficiently provoked to justify a physical confrontation.
 - Arbitrator concluded that the grievor was the aggressor in confrontation.
 - Arbitrator was unable to conclude that the grievor showed sufficient rehabilitative potential.

Not-so-recent case law

Oosterbosch v. FAG Aerospace Inc., 2011 ONSC 1538

- **Facts:**
- Employee sued for common law pay in lieu of notice and statutory termination and severance pay.
- Employer alleged just cause based on poor performance.
- **Court conclusion:** the employer established just cause for dismissal.
- **Why?**
 - “In my view the persistence of the plaintiff’s misconduct notwithstanding on-going coaching sessions and warnings constitutes a repudiation of the employment relationship.”
 - Therefore no pay in lieu of notice at common law.

Not-so-recent case law

Oosterbosch v. FAG Aerospace Inc., 2011 ONSC 1538

- **Does statutory termination and severance pay apply?**
- **Court conclusion: Yes.**
 - No pay in lieu of notice at common law, BUT the employee received \$7,904 of *ESA* termination pay and \$17,127 of *ESA* severance pay.
- **Why?**
 - “I would not, however, characterize his offending behaviour as ‘wilful misconduct, disobedience or wilful neglect of duty’ that would disentitle him to receipt of termination and severance payments under the provisions of the *Employment Standards Act, 2000*.”

At the point of termination: considerations

- Once the termination decision has been made, consider the following:
 - Will just cause for termination be alleged?
 - What **would** the severance package look like?
 - Is there an employment contract?
 - What other payments are owed to the employee?
 - Who will deliver the news?
 - Where will the meeting take place?
 - Any pending records/legal holds? Key evidence needs to be retained, even if proceed without cause.
 - Knowledge transfer

At the point of termination: considerations

- **Cont'd...**
- What will the employee be told as to the reason for termination?
- What, if any, company equipment does the employee have, and how will it be returned (smartphone, vehicle)?
- Does the employee have remote network access, and if so, how is it de-activated?
- How will the employee collect his/her personal belongings?
- How will the news be communicated to the workplace?

Questions?

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