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JUST CAUSE FOR EMPLOYEE DISMISSAL: WHAT EMPLOYERS NEED TO KNOW

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A. INTRODUCTION

Non-profit corporations and charities recognize that their employees are a vital resource, without whom, the organization could not function. While the majority of employment relationships do not end with a dismissal of an employee for cause, some unfortunately do. This Bulletin examines the meaning of "just cause," provides examples of some of the commonly arising reasons for dismissal with cause, and provides guidance to employers to avoid for wrongful dismissal lawsuits in instances where dismissal for cause is contemplated.

B. WHAT IS "JUST CAUSE"?

The law in Canada provides that an employer may immediately dismiss an employee for "just cause." In cases for dismissal for just cause, the employer is not required to pay the employee either statutory termination or severance pay under the relevant employment standards legislation, or common law pay in lieu of notice of the dismissal.[1]

For an employer to dismiss an employee without any statutory or common law notice, the law requires that the employee must have done something contrary to the employment contract which has had the effect of undermining the entire employment relationship, such that there has been a fundamental breach of the

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[1] For a discussion of the damages that may be claimed by wrongfully dismissed employees see Barry W. Kwasniewski, "The Ins and Outs of Wrongful Dismissal" in *Charity Law Bulletin* No. 153 (January 20, 2009), at http://www.carters.ca/pub/bulletin/charity/2009/chylb153.htm.

contract. The Supreme Court of Canada in *McKinley v. BC Tel*[2] has stated that just cause will exist where the employee violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or whose conduct is fundamentally inconsistent with the employee's obligations to his or her employer.

In 1967, the Ontario Court of Appeal set out the following definition of just cause at *R. v Arthurs*[3], which continues to be referred to today:

> "If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee."

The onus (or responsibility) of proving cause for dismissal of an employee lies with the employer. Employers should be aware that there is no middle ground or "near cause." If the employer cannot prove just cause on the balance of probabilities, the employee will be deemed to be wrongfully dismissed and the employer will be responsible to pay monetary damages arising from the dismissal.

There are certain categories of conduct which have been recognized by courts to constitute cause for an employee's dismissal without notice. These categories include:

- dishonesty (fraud and theft being examples);
- insolence and insubordination;
- breach of trust and/or the duty of fidelity;
- conflict of interest;
- chronic absenteeism or lateness;
- sexual harassment;
- serious incompetence;
- intoxication at the workplace; and
- fraudulent misrepresentation as to qualifications/credentials

While the above is not an exhaustive list of the reasons for a termination with cause, it should be remembered that any of these reasons must be of such a degree that the employment relationship is

[2] *McKinley v. BC Tel* [2001] 2 S.C.R. 161.
[3] *R. v. Arthurs*, [1967] 2 O.R. 49 (C.A.) at p. 55.

completely undermined in accordance with the principles set out in *McKinley*. Furthermore, if an employer is considering termination for reasons such as intoxication or drug use at work, it must be careful not to be in breach of the applicable human rights legislation, as alcohol or drug addiction may be considered to be an illness that would trigger the duty to accommodate.

In each case where dismissal with cause is being considered, the employer needs to assess:

1) whether the employee misconduct can be proven; and
2) whether the nature and degree of misconduct is of sufficient severity to cause an irreparable breakdown in the employment relationship, either by violating an essential condition of the employment contract, or destroying the employer's inherent faith in the employee.

There arise certain situations where there is no doubt the employee must be dismissed with cause, prime examples being flagrant instances of fraud or theft from the employer. However, many situations are not so clear and there is unfortunately no hard and fast method of determining what will constitute just cause. Two categories of alleged employee misconduct frequently result in wrongful dismissal claims, those being:

1) insolence and insubordination; and
2) incompetence or poor performance.

These categories are discussed in further detail.

C. INSOLENCE OR INSUBORDINATION

"Insolence" has been defined by the courts as an employee's derisive, abusive or contemptuous language generally directed at a superior. Insubordination is defined as an intentional refusal to obey an employer's lawful and reasonable order. In order to successfully establish just cause for dismissal for insubordination, the employer must prove the following:

1) the order must be clear and specific;
2) the order must be both reasonable and lawful;
3) the order must be within the scope of the employee's duties and responsibilities;

4) the act of disobedience must be intentional; and

5) the order is question must be serious or important in nature.

With respect to insolence, the conduct must be of a sufficiently severe character that it essentially destroys the employment relationship. For example, in *Wise v Broadway Properties Ltd*.[4] the employee was a caretaker of an apartment block owned by his employer. The employee was dissatisfied with his compensation and in a letter to the employer compared him to a Nazi in his dealings with employees. The employer was a Jewish man in his eighties and was deeply offended by the comparison and dismissed the employee. The dismissal was upheld at trial and by the British Columbia Court of Appeal.

However, in less graphic situations, with respect to both insolence and insubordination, courts are often of the view that two or more instances of misconduct are required for cause. The court will examine the gravity of the offence and may also excuse the employee if he or she had been provoked. Finally the court will review the employee's past history with the employer and will be more likely to forgive the misconduct if that employee had an otherwise good employment record.

D. SERIOUS INCOMPETENCE

Incompetence is defined as an inability to perform basic work functions as required by the employer. To justify the dismissal of an employee with cause on the basis of incompetence, the level of incompetence must "fall below an objective standard of reasonable competence."[5]

Therefore, to establish cause for dismissal for lack of competence, the employer must show more than mere dissatisfaction with the employee's performance.

The Manitoba Court of Queens bench decision in *Boulet v. Federated Co-operative Ltd.*[6] has become a leading Canadian authority concerning the factors courts will consider in assessing whether an employer had just cause to terminate based on incompetence or poor performance. The leading principles as established in *Boulet* are:

[4] W*ise v Broadway Properties Ltd.,* 2005 B.C.C.A. 546 (B.C.C.A.).
[5] *Matheson v. Matheson International Trucks Ltd.*[1984] O.J. No. 306 (H.C.J).
[6] *Boulet v. Federated Co-operative Ltd.* (2001), 157 Man. R. (2d) 256, 2001 MBQB 174, affd 285 W.A.C. 9. 170 Man. R. (2d) 9, 2002 MBCA 114.

1) The performance of an employee, especially in a management position, must be gauged against an objective standard;

2) The employer must establish: the level of the job performance required; that he standard was communicated to the employee; that suitable instruction or supervision was give to enable to employee to meet the standard; the employee was incapable of meeting the standard, and the employee was warned that failure to meet the standard would result in dismissal;

3) Where the employee's performance is grossly deficient and the likelihood of discharge should be obvious to the employee, warnings and reasonable notice are not required;

4) While the standard of incompetence to warrant discharge for cause is severe, the threshold of incompetence necessary to warrant dismissal for cause is significantly lower where dismissal is preceded by many warnings indicating unsatisfactory performance;

5) In considering whether an employer has provided adequate warning to an employee, where the dismissal is for repeated instances of inadequate work performance, the employer must show: it has established a reasonable objective standard of performance; the employee has failed to meet those standards; the employee has had warnings that he or she has failed to meet those standards and the employee's position will be in jeopardy if he or she continues to fail to meet them; and the employee has been given reasonable time to correct the situation;

6) An employer who has condoned an inadequate level of performance by his employee may not later rely on any condoned behaviour as ground for dismissal;

7) Condoned behaviour is relevant if the employee fails to respond after appropriate warnings. Condonation is always subject to the implied condition that the employee will be of good behaviour and will attempt to improve.

Any employer considering dismissing an employee with cause for incompetence and poor performance should carefully consider these factors prior to making a final decision.

E. PROGRESSIVE DISCIPLINE AND THE EMPLOYER'S DUTY TO WARN

The concept of progressive discipline has existed in unionized settings for many years. The purpose of progressive discipline is to give employees the opportunity to "learn from their mistakes" before more severe penalties, such as dismissal, are imposed.

Given the difficulties faced by employers in proving cause in certain situations, it would be advisable for employers to consider implementing the practice of progressive discipline prior to imposing the ultimate penalty of dismissal with cause. Employers may be able to save themselves from large damage awards and legal fees by maintaining and adhering to disciplinary procedures which would typically include the following four step sequence:

- verbal reprimand;
- written reprimand;
- suspension without pay; and, finally
- termination.

The implementation of a progressive discipline program will assist the employer in proving that it has done all it reasonably could to rehabilitate the employee prior to taking the final step of dismissal. The reasons for the discipline and the punishments meted out to the employee should be carefully recorded on the employee's personnel file. In the event of a wrongful dismissal action, such evidence will be invaluable to prove that the employer acted properly.

Further, prior to taking the step of dismissing an employee for cause, there are numerous situations where it would be appropriate to issue a warning to the employee that dismissal will result if the improper behaviour is repeated or, in the case of incompetence, the level of performance is not met. There are numerous judicial decisions which have emphasized that the employee had been wrongfully dismissed for cause because the employer failed to adequately warn the employee that the conduct complained of was inappropriate and could result in dismissal.

F. CONCLUSION

Given the serious effects on an employee's career and livelihood that a dismissal for cause may entail, courts in Canada impose an onus on the employer to prove the existence of cause. Given that onus of proof, and the potential cost to the employer of "getting it wrong," prudent employers should review employees' performance regularly, pointing out and documenting deficiencies, and provide employees with opportunities to improve.

Most importantly, employers need to make sure that employees, whose conduct is considered to be improper, be provided a warning in writing stating that they have failed to meet the employer's reasonable objective standards of performance or appropriate standards of behaviour, as the case may be. The warnings should provide clear notice that the employee's position will be in jeopardy if the standards are not met, or if the inappropriate behaviour should continue. In the absence of such steps being taken by the employer, the task of proving to a court that the dismissal for cause was correct will be an uphill battle. The costs of implementing these protective measures are not high, but the costs of ignoring them may be substantial.

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