

## **BRITISH COLUMBIA SUPREME COURT RULES EMPLOYEE CRITICAL OF MANAGEMENT PROPERLY DISMISSED FOR CAUSE**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

In the recent British Columbia Supreme Court decision in *Chen v Sable Fish Canada Inc.*,<sup>1</sup> Justice R. S. K. Wong ruled that an employee's critical comments of the company's management made in a letter to the board of directors, shareholders and others justified his dismissal with cause. This decision analyzes the difficult issue of determining when an employee's comments, whether verbal or written, that criticize his or her superiors will be regarded at law as sufficient cause for dismissal. As charities and not-for-profits may from time to time need to deal with employees who criticize the management of the organization, this bulletin will provide guidance as to when an employee may have "crossed the line", such that the employee may be terminated with cause.

### **B. THE DECISION**

The Plaintiff Yingyi Chen sued his former employer, Sable Fish Canada Inc. ("Sable Fish"), alleging wrongful dismissal. Sable Fish is in the aquaculture business, raising juvenile sablefish in a hatchery and fish farm for commercial sale. Mr. Chen was hired by Sable Fish in 2003 and worked there in various capacities until his dismissal on May 7, 2009.

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<sup>1</sup> 2010 BCSC 444, [2010] B.C.J. No. 575 available at <http://www.courts.gov.bc.ca/jdb-txt/SC/10/04/2010BCSC0444.htm>.

Mr. Chen had been reprimanded on several occasions for his alleged poor work performance, but he had survived job cuts in 2008. In the spring of 2009, Sable Fish was attempting to raise needed funds through a share offering to existing shareholders, which was known to all staff, including Mr. Chen.

On May 6, 2009, Mr. Chen sent what the court described as a “highly inflammatory and disrespectful” letter to forty recipients, including the company’s shareholders, that attacked Sable Fish and its management. The letter was reproduced in full in the judgment. Mr. Chen alleged financial mismanagement, favouritism and overall managerial incompetence. The letter implied that the company was “on the road towards failure.” The purported purpose of the letter sent by Mr. Chen was to offer for sale his share option of forty-five thousand shares in the company. The last paragraph of his letter stated: “By the way, remember that I need to sell my share option. Please pass on my message to any potential investors that my shares are for sale. Thank you.”

When the board found out about this letter the following day the company immediately terminated Mr. Chen. Also, after Mr. Chen commenced his wrongful dismissal lawsuit, the company launched a counterclaim against him for defamation.

For the reasons set out below, Mr. Chen’s wrongful dismissal action was dismissed. Likewise, the counterclaim against Mr. Chen for defamation was dismissed. While his comments in the letter were found to be defamatory, the court applied the legal defence in defamation actions known as “qualified privilege”. Qualified privilege applies where the defendant had an interest or duty to communicate the defamatory expression, and its recipients have a corresponding duty or interest to receive that communication, in this case a financial interest as shareholder.

### **C. ANALYSIS**

In arriving at its conclusion that the letter constituted cause for dismissal, the court applied the well known definition of “cause” found in *Port Arthur Shipbuilding Co. v. Arthurs*,<sup>2</sup> which stated:

“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employee’s business, or if he has been guilty of wilful disobedience to the employer’s

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<sup>2</sup> [1967] 2 O.R. 49 (C.A.), reversed on other grounds [1969] S.C.R. 85.

orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee."

As to the more specific question of when criticism of management will be considered as cause for dismissal, the court referred to the earlier British Columbia Supreme Court decision *Van Der Meij v. Victoria Immigrant and Refugee Centre Society*.<sup>3</sup> In that case, an employee went over the head of her immediate supervisor and sent a letter critical of the supervisor to the Society's board of directors. Analyzing whether such conduct amounted to cause, the court stated at paras. 60-61:

"[60] I accept as a general proposition that an employee should be entitled to criticize her superiors without fear of immediate dismissal. However, in some circumstances criticism can undermine the employment relationship and render it impossible for the employee and her manager to continue working together. When this occurs it is clear that the employee's conduct will constitute just cause for immediate dismissal.

[61] Where an employee's complaint or criticism about her manager is provoked by unreasonable conduct or where the complaints are reasonably justified on the facts the employer may dismiss the employee; however, the obligation to give proper notice or pay in lieu of notice remains. The manner in which the employee voices her criticism of her manager is also relevant. If the criticism is disrespectful in tone or language or is otherwise irreconcilable with continued employment then the employee's actions may give rise to cause for immediate dismissal regardless of whether the complaints are justified."

Applying those principles set out in *Van Der Meij*, Justice Wong found that Mr. Chen's statements in his letter were exaggerated, disrespectful and inflammatory. The judge noted that the plaintiff did not only go over the head of his immediate supervisor, but also the president, and even the board of directors. The judge further found that the letter was an attempt, in part, to embarrass both the management and the board of directors to the shareholders. In those circumstances, the court had no difficulty in finding that Mr. Chen's actions amounted to cause for termination.

#### D. CONCLUSION

Given that the management of the charity or not-for-profit may have been the target of the employee's critical comments, it is important that the decision to dismiss the employee be made carefully and objectively. Management must assess whether the comments are such that the employment relationship has

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<sup>3</sup> 2008 B.C.S.C. 954.

been so undermined that cause for dismissal exists. Given the financial consequences of defending a potential wrongful dismissal action, the situation may well require an independent legal assessment before any termination decision is made.