

---

## **COURT RULES EMPLOYEE CANNOT CHANGE PLACE OF WORK WITHOUT EMPLOYER CONSENT**

---

*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

Changes in communications technology have and will continue to affect the way people work. Both employees and employers, including charities and not-for-profits, are re-examining the need to report to work at an office location on a daily basis, when so much can now be done remotely, through the use of smartphones, wireless internet connections and web conferencing.

In this changing work environment, conflicts may arise between employees, who feel they are able to work just as or more efficiently away from the office, and employers, who require a physical presence. This issue was at the forefront of a recent British Columbia Supreme Court decision, *Ernst v. Destiny Software Productions Inc.*<sup>1</sup> This Bulletin outlines this decision, which highlights the importance of addressing this issue before it becomes a problem, either through developing “place of work” policies and/or dealing with the issue in written employment contracts.

### **B. THE FACTS**

In March 2007 the plaintiff, Dean Ernst, was hired by Destiny Software Productions (“Destiny”), to market a music distribution software to major recording companies and labels. Mr. Ernst was given the title of vice-president and was Destiny’s highest paid executive.

---

\* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters’ Ottawa office and would like to thank Tanya L. Carlton, OCT, B.Sc. (Hons.), B.Ed., J.D., Student-At-Law, for her assistance in the preparation of this *Bulletin*.

<sup>1</sup> *Ernst v Destiny Software Productions Inc*, 2012 BCSC 542, available online at <http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc542/2012bcsc542.html>.

Destiny terminated Ernst without notice in November 2008, alleging that Ernst repudiated his employment contract when he moved to Mexico, from Alberta, without proper notice and against the wishes of the company. Ernst brought an action for damages against Destiny for wrongful dismissal.

Ernst claimed that his contract allowed him to work from home and did not require that his home be in Alberta, or even Canada, and that he did not require company permission to move. Ernst claimed that he was entitled to twelve months of severance pay in lieu of notice for termination without cause, a bonus and retroactive raise, and all of his stock options (with time to exercise those options after judgment was given).

Destiny sought a dismissal of Ernst's claim and counter claimed against him for damages representing Ernst's "negative vacation pay balance" and alleged non-return of company equipment.

## C. THE DECISION

### 1. Termination for Cause Upheld

The principles behind termination for cause were not in dispute in this case. 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 willful disobedience to the employer's orders in a matter of substance,"<sup>2</sup> an employer has the legal right to dismiss the employee. However, a careful analysis must be done to determine whether the employee's conduct was so severe that it warranted dismissal for cause.

A simple finding of misconduct – such as dishonesty – does not, according to the court, "give rise to just cause."<sup>3</sup> The behaviour must be looked at in context in order to determine whether or not the employment relationship could still exist. The behaviour, such as dishonesty, must be so severe that it violates an "essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employer's obligation to his or her employer."<sup>4</sup> The employee's conduct must be judged objectively, and the burden of proof to establish the violation is on the employer.<sup>5</sup> It is also important to note is that an employer need not know if good

---

<sup>2</sup> *Ernst* at 118.

<sup>3</sup> *Ernst* at 120.

<sup>4</sup> *Ernst* at 120.

<sup>5</sup> *Ernst* at 123-124.

grounds exist in fact at the time of dismissal; justification can be shown by “proof of facts learned after the dismissal, or on grounds differing from those alleged at the time.”<sup>6</sup> Condonation of an improper act by an employee can be an issue if an employer fails to take action in a reasonable time, but even so, an employer is allowed a reasonable amount of time to decide what they wish to do.

Mr. Ernst’s employment contract stated that it was anticipated that he would “initially” work from his own home. Also, it stated that if it was required that he and his family “relocate to Vancouver” then he would be reimbursed reasonable moving expenses. The judge found that this wording, along with potential salary increases relating to the cost of living in the province of his residence, was proof of Destiny’s intention Ernst only temporarily work from home. Destiny did not intend for Ernst to determine where he could work from and definitely did not intend him to work from outside Canada. With Ernst’s move to Mexico, and with his refusal to acknowledge Destiny’s protests, the court held that he fundamentally breached his employment contract. It was not up to Ernst to unilaterally decide whether “he could fulfill his duties and responsibilities satisfactorily from Mexico.”<sup>7</sup> In the result, the court held that Destiny was entitled to terminate Ernst for cause, without providing any notice or pay in lieu. Destiny’s counterclaim was dismissed

## D. CONCLUSION

This case is a good example of why employers need to make sure that the place of work for any employee is clearly set out in the contract or in employer policies that are communicated to the employees. Working from outside of the place of business is becoming more common these days, and employers need to adapt to these new changes. Employees who may wish to work from home, at their local coffee shops, or even in another city, province, or country need to know what will and will not be permitted.

---

<sup>6</sup> *Ernst* at 125. See also *Lake Ontario Portland Cement Co Ltd v Groner*, [1961] SCR 553 at pp 563-4.

<sup>7</sup> *Ernst* at 136.