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DRINKING AND DRIVING EMPLOYEE LOSES JOB

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A. INTRODUCTION

The dangers of drinking and driving are well known. When an employee drinks and drives on the job, it also becomes a workplace issue. Not only does drinking and driving present a hazard to the employee and those around him, it is also a significant liability issue for an employer, including charities and not-for-profits, especially if a work vehicle is being operated. The recent decision of the Ontario Superior Court of Justice, *Dziecielski v. Lighting Dimensions Inc.*, 2012 ONSC 1877,[1] has confirmed that an employee may be dismissed for drinking and driving even if the employee had no prior disciplinary issues. This Charity Law Bulletin discusses this decision, and analyzes how it may affect Ontario employers.

B. THE FACTS

Jaroslaw Dziecielski was a high school graduate with two years of university studies who worked for a small privately held business in Toronto that produced fabricated materials and fixtures for the automotive industry. Mr. Dziecielski began his employment as a labourer, and after twenty-three years moved up to the position of the Vice-President responsible for quality control and standards compliance.

On April 23, 2007, Mr. Dziecielski travelled to visit a client in Alliston, Ontario. On his way back from his client call, Mr. Dziecielski decided to detour off his route back to work and stopped for lunch north of Toronto, at which time he consumed four beers. After lunch, Mr. Dziecielski returned back to the city, and on his way was involved in a single-vehicle accident in which he was severely injured and the company car

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[1] *Dziecielski v Lighting Dimensions Inc*, 2012 ONSC 1877.

he was driving (without permission) was destroyed. Mr. Dziecielski was charged with numerous criminal offences relating to drunk driving and one month later pled guilty to one charge under the *Criminal Code*.

Mr. Dziecielski attempted to return to work five days after the accident, but agreed with his employer that it was too early to do so because of his injuries. Subsequently, on May 23, 2007, before he even pled to the above charge, Mr. Dziecielski's employer wrote and informed him that his employment was terminated with cause. The reasons for his dismissal were that Mr. Dziecielski had driven the company vehicle without authorization, had caused extensive damage to the vehicle and had pending criminal charges for being under the influence of alcohol or drugs. Furthermore, Mr. Dziecielski had breached the provisions of the Employee Handbook that indicated that "any consumption of alcohol off of the premises while conducting business is prohibited and could result in termination of employment" and that indicated "consuming alcohol on the job was a violation of a "Major" rule and could result in termination."[2] Mr. Dziecielski was aware of the Employee Handbook provisions and had acknowledged his agreement to them when he signed the Handbook in 1998. Mr. Dziecielski was a model employee, had a clean record of discipline, no complaints about his performance and "no concern about the use of alcohol or unsafe conduct generally."[3]

Mr. Dziecielski commenced a lawsuit for wrongful dismissal, claiming punitive, aggravated and exemplary damages, and compensation based on a twenty-four month period of reasonable notice. His employer in response alleged cause and alternatively that the employee failed to adequately mitigate his losses. In its decision, the Court assessed whether Mr. Dziecielski's dismissal was proportional to his misconduct and whether the punishment was too harsh in relation to the misconduct. The Court found that the employer had waited a sufficient amount of time before dismissal, had a full appreciation of all of the facts and circumstances, that Mr. Dziecielski was guilty of serious misconduct in the course of employment, and that his conduct was prejudicial to the employer's business. As a result, the Court dismissed Mr. Dziecielski's claim for wrongful dismissal and awarded the employer $28,898.83 in partial indemnity costs.

C. THE LAW

There is no obligation on an employer to conduct a formal investigation before dismissing an employee for cause. However, the employer must "have regard to all the facts necessary for a full and fair understanding

[2] *Supra* note 1 at 17.
[3] *Ibid* at 43.

of what occurred."[4] Although an employee may not have a right to a certain procedure, they still have the right to expect that their employer will use all relevant facts and considerations before making their decision. Single, isolated events do not generally give sufficient cause to dismiss long term employees, especially those with clean service records; however, if the event is "particularly egregious" an employer can justify termination for cause.[5]

Intoxication at work, however, is not necessarily an automatic justification for termination. The nature of the work and the circumstances around the situation must first be analyzed before "just cause" will be allowed. The relationship between the conduct and the essential features of the work will need to be determined before an employer can reach a decision to dismiss for cause. For example, an employer would have just cause to immediately terminate a pilot who is intoxicated whereas that would not be the case with an intoxicated employee whose job involves socializing with clients.[6]

D. JUSTIFYING DISMISSAL

In order to determine whether an employee's misconduct justifies a dismissal, the following factors will be analyzed by a court:

- whether the employee was guilty of serious misconduct;
- whether the employee's impugned behaviour or act was merely conduct with which the employer disagreed, or "trifling causes", rather than transgressions or misconduct which any reasonable person could not overlook;
- whether the employee's misconduct was inconsistent with or prejudicial to the employer's business, and therefore in breach of an implied term of the employment agreement;
- whether the employee's misconduct was in breach of an express provision of the employment agreement; and
- whether the misconduct merely reflects the employee's poor judgment or inadvertence.[7]

[4] *Supra* note 1 at 35.
[5] *Ibid* at 36.
[6] *Ibid* at 37.
[7] *Supra* note 1 at 39.

In the case where criminal conduct has occurred, the court will also look at the following:

- whether the employee was culpable for the alleged criminal conduct, or misconduct of a criminal nature;
- whether the conduct was prejudicial to the employer's legitimate business interests;
- whether the conduct was in breach of the implied duty of fidelity, or fiduciary duty, or an express condition of employment, and therefore in breach of the employment agreement;
- whether there is evidence of actual harm or evidence substantiating potential harm to the employer. [8]

E. CONCLUSION

For employers, including charities and not-for-profits, the *Dziecielski* decision indicates that civil courts will take drinking and driving on the job seriously. In addition to criminal prosecution, employees who drink and drive on the job are at risk of losing their jobs. For charities and not-for-profits whose employees drive either their own or a corporate vehicle on the job, this decision highlights the importance of having policies in place which promote safe driving practices and that prohibit any alcohol or drug use while on the job. The consequences of non-compliance, up to and including termination, should also be clearly stated in the employer policies.

[8] *Ibid.*