

JUST CAUSE...or JUST BECAUSE?

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INTRODUCTION

In Canada, if an Employer wishes to end an employee's employment, the Employer has two choices; to terminate the employment "for cause" or "not for cause". The Supreme Court of Canada has rejected the concept of "near cause" (*Dowling v. Halifax (City)*).¹

The evidentiary threshold required to sustain a "for cause" termination of employment is high. The test was outlined by the Supreme Court of Canada in *F.H. v. McDougall* this way:

"...evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test."² [Emphasis added]

Courts will also consider the context in which the dismissal occurred, and will examine the nature and circumstances of the situation leading to the dismissal. The Supreme Court of Canada outlined this in *McKinley v. BC Tel*:

...a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists...This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice.

...Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed...

¹ *Dowling v. Halifax (City)*, [1998] S.C.J. No. 1

² *F.H. v. McDougall*, 2008 SCC 53

...Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as “dishonesty” might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee’s conduct can be labelled “dishonest” would further unjustly augment the power employers wield within the employment relationship.

...I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.”³ [Emphasis added]

The above approach was summarized by the Court of Appeal of Ontario in *Dowling v. Ontario (Workplace Safety and Insurance Board)* thus:

“Following *McKinley*, it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct. [Emphasis added]

...Application of the standard consists of:

1. determining the nature and extent of the misconduct;
2. considering the surrounding circumstances; and
3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).”⁴

The purpose of this paper is to provide a comprehensive review of the reported wrongful dismissal actions in Canada in 2014 and 2015, to date. The cases are divided into year, and then subdivided into those where just cause was found, and those where the Courts concluded the evidence fell short of providing the Employer with cause for dismissal.

³ *McKinley v. BC Tel*, [2001] 2 SCR 161, 2001 SCC 38

⁴ *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692

2015 JUST CAUSE CASES

PART A - JUST CAUSE NOT FOUND

1. *Partridge v Botony Dental Corp*⁵

The plaintiff's action was for wrongful dismissal and breach of her human rights. The defendant alleged that it had grounds to terminate the plaintiff's employment for just cause, and counterclaimed for damages for loss of revenue and decreased value of the business.

The plaintiff was 39 years of age and was employed by the defendant for approximately seven years. The plaintiff was initially hired as a dental hygienist but spent the last four years of her employment in the position of office manager. During the plaintiff's tenure with the defendant, she was on maternity leave twice; first from June 2007 to July 2008, and then from June 2010 to July 2011. As the office manager, the plaintiff enjoyed a flexible work schedule that allowed her to tend to her childcare needs.

As a dental hygienist, the plaintiff worked from 10:00 a.m. to 6:00 p.m., Tuesday to Friday and her hourly rate was \$35.00. However, she was only paid for the time spent on patient care, and was required to take unpaid lunch breaks. In her capacity as officer manager, she continued to work the same days per week but from 9:00 a.m. to 5:00 p.m., and worked through her lunch hours. The plaintiff earned \$41.00 per hour for her work as an office manager, and in 2009 she made an annual salary of \$70,100.00.

The plaintiff's evidence at trial was that while she was off work on her second maternity leave, the defendant told her that upon returning to work, she would assume the role of a dental hygienist and not her previous position as the office manager, although that position was still available. The plaintiff's hours for the first week back were scheduled to be 8:00 a.m. to 3:00 p.m. Tuesday, Wednesday, and Friday and 9:00 a.m. to 3:00 p.m. on Thursday.

The plaintiff reminded the defendant of her statutory right pursuant to section 53 of the *Employment Standards Act, 2000* to be reinstated to her former position. As a result of the employee demanding that she be reinstated to her former position of office manager, the defendant changed the plaintiff's hours of work, knowing that would cause a conflict with the plaintiff's childcare responsibilities. The employee was terminated for cause shortly after the end of her second maternity leave.

The defendant argued that it was in fact the plaintiff that requested to be returned to her position as a dental hygienist and demanded that the clinic open at 8:00 a.m. instead of 10:00 a.m. As a result of the defendant refusing to agree to the plaintiff's demands, the plaintiff started to harass management and other employees. It was therefore alleged by the defendant that the plaintiff's conduct constituted cause for dismissal. Also, the defendant claimed that the plaintiff was attempting to set up a competitive business and solicit its employees to join her new enterprise.

⁵, 2015 ONSC 343 ("*Partridge*")

Just Cause Principles

- In conducting its contextual analysis, as per *McKinley v. BCTel*, 2001 SCC 38, the Court stated that:

[b]ecause employees owe a general duty of loyalty and fidelity to their employers, dishonest conduct may amount to just cause in circumstances where such conduct is seriously prejudicial to the employer's interests or reputation, or where the conduct reveals such an untrustworthy character that the employer is not bound to continue the employee in a position of responsibility or trust: E. Mole and M. Stendon, *The Wrongful Dismissal Handbook*, 3rd ed. (Markham: LexisNexis Canada, 2004), at p. 147.

- The misuse or misappropriation of confidential information has been found to amount to a justifiable basis for a termination for cause; however the following factors were affirmed by the Court as useful indicia of whether said information is in fact confidential:
 1. the extent to which the information is known outside of the owner's business;
 2. the extent to which it is known by employees and others involved in the owner's business;
 3. the extent of measures taken by the owner to guard the secrecy of the information;
 4. the value of the information to the owner and its competitors;
 5. the amount of money or effort expended by the owner in developing the information; and
 6. the ease or difficulty with which the information could be properly acquired or duplicated by others.⁶
- Where a former employee not subject to a non-competition covenant is free to compete against a former Employer, subject to any other duties that may exist to the former Employer, the situation is not as clear where the employee is still employed by the Employer. The Court noted the following passage on the subject from the British Columbia Court of Appeal:

Difficulties have arisen in determining the exact point at which planning and preparation by an employee who is still employed to set up himself or herself in competition with the employer will violate his or her implied duty of fidelity...After all, if it is lawful for an employee to engage in post-termination competition with an employer, it hardly makes sense to hold it unlawful to plan the form that such competition will take. In more recent decisions on point, the courts have held that merely planning to establish a competing business does not *ipso facto* violate the duty, unless it is clear that the employee has already determined to abuse the employer's confidential information or trade secrets in his or her future business or has already begun to canvass the employer's customers or entice fellow employees to join him or her in the new business. [*Corporate Classic Caterers v. Dynapro Systems Inc.* (1988), 1997 CanLII 4408 (BC SC), 1997 CanLII 4408 (B.C.S.C.), 33 C.C.E.L. (2d) 58 (B.C.S.C.); *Leith v. Rosen Fuels Ltd.* (1984), 5 C.C.E.L. 184 (Ont. H.C.J.), esp. at 195].⁷

⁶ *Ibid* at para 29.

⁷ *Ibid* at para 30.

- An employee may also be terminated for just cause where there are issues of insolence or insubordination. ““Insolence” has been defined as the use of insulting, abusive, threatening or unreasonably violent words, and insubordination as rebellion or refusal to follow a proper direction...Again, context is significant; just cause will only be made out where the employee’s conduct is incompatible with the continuance of the employment relationship...Examples are words or conduct that is prejudicial to the employer’s business, seriously undermines management’s authority, or destroys harmonious relations between the parties.”⁸
- “The Ontario Court of Appeal’s decision in *Dowling v. Ontario*...provides guidance to Courts faced with the question of whether “just cause” exists in a particular case.

Following McKinley, it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional - dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.

Application of the standard consists of:

1. determining the nature and extent of the misconduct;
2. considering the surrounding circumstances; and,
3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

The first step is largely self-explanatory but it bears noting that an employer is entitled to rely on after discovered wrongdoing, so long as the later discovered acts occurred pre-termination...

The second step, in my view, is intended to be a consideration of the employee within the employment relationship. Thus, the particular circumstances of both the employee and the employer must be considered. In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee.

The third step is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship. This requires a consideration of the proved dishonest acts, within the employment context, to determine whether the misconduct

⁸ *Ibid* at para 32.

is sufficiently serious that it would give rise to a breakdown in the employment relationship.”⁹

In its analysis, the Court concluded that it preferred the evidence of the plaintiff, where it conflicted with that of the defendant, and held that the “evidence is clear that the return of [the plaintiff] to hygiene work was unilaterally imposed by [the defendant], without warning or prior explanation.”¹⁰

The plaintiff was awarded 12 months’ pay in lieu of notice and \$20,000.00 for discrimination based on family status accommodation under the *Ontario Human Rights Code*.

2. *Armstong v Lendon*¹¹

The plaintiff was employed by the defendant as a legal secretary for 26 years. On September 4, 2012, the defendant advised the plaintiff that he would be retiring on December 31, 2012, thus providing her with four months’ working notice, and that her employment would be terminated. The defendant provided the plaintiff with a glowing letter of reference, which described the plaintiff as, *inter alia*, possessing “thorough competence”.

The defendant testified that he was not aware that the plaintiff had a right to common law notice, and believed that the four months’ working notice that he provided had satisfied his obligations under the *Employment Standards Act, 2000*. In this regard, Justice Sproat later noted that he found it “improbable...that [the defendant] was unaware that the plaintiff, a 26 year employee had any rights beyond an eight week statutory entitlement. That long service employees have a significant entitlement would be known to any intelligent person who read or watched the news.”¹²

In June 2013, the plaintiff asserted her right to additional notice and the defendant, for the first time, claimed just cause for the plaintiff’s dismissal. In support of the defendant’s position, he alleged that:

- a) prior to 2008 the plaintiff was thoroughly competent;
- b) in 2011 the plaintiff had an unprecedented outburst at work wherein she demanded a bonus and wage increase, which he felt compelled to give to her;
- c) the plaintiff called in sick on several occasions, including a period when four deals were closing;
- d) instead of terminating the plaintiff, he felt that it would be less stressful for him, the defendant, if he simply retired;
- e) finally he provided the letter of reference because he believed that with proper psychological or other assistance the plaintiff could recover from her issues and perform at the level she once did; and
- f) the plaintiff had a public outburst in front of clients when she learned about the defendant’s retirement.

⁹ *Ibid* at para 34.

¹⁰ *Ibid* at para 45.

¹¹ *Armstong v Lendon*, 2015 ONSC 3004, 2015 CarswellOnt 7605 [“*Armstong*”]

¹² *Ibid* at para 7.

Justice Sproat summarized the defendant's allegations against the plaintiff as a "combination of insolence, incompetence, absenteeism and of conduct otherwise incompatible with continued employment."¹³ Turning to the analysis in *McKinley*, Justice Sproat noted that:

- a) A contextual approach must be taken to determine whether conduct constitutes just cause for dismissal.
- b) The focus is on whether the conduct has given rise to a breakdown in the employment relationship.
- c) Conduct which would constitute just cause for a short term junior employee will not for a long term employee in a more senior position.
- d) There must be proportionality between the misconduct and the sanction imposed by the Employer.

Justice Sprout categorically rejected the defendant's evidence, and noted that the defendant's version of events, if true, would fall far short of just cause. "An emotional demand for a raise and a threat to quit..., [a]n angry outburst on learning that you are being terminated on less than four months' notice after 26 years of service, considered with the totality of the evidence, does not amount to just cause."¹⁴ The Court went on to reason that the defendant himself had categorized the plaintiff as exhibiting uncharacteristic behaviour and having a psychological problem. "The defendant himself viewed the plaintiff as having a psychological problem. However, "[i]mproper conduct which is not deliberate, but is a manifestation of a psychological problem, is unlikely to constitute just cause on the *McKinley* analysis."¹⁵

Furthermore, the defendant had an obligation to act in the moment when he believed that the plaintiff's conduct was sufficient to warrant termination for just cause. Relying on the 1889 decision in *McIntyre v. Hockin*, the Court reaffirmed that an Employer cannot rely upon past conduct, after the passage of a considerable amount of time, to terminate an employee for cause.¹⁶

The plaintiff was awarded wrongful dismissal damages for 21 months, and, notwithstanding the absence of any medical evidence, aggravated damages of \$7,500.00 for the humiliation, embarrassment, loss of self-esteem, and damage to her dignity and reputation.

3. *Johnson v Marine Roofing Repair & Maintenance Service (2003) Ltd*¹⁷

The plaintiff was 65 years old and had been employed by the defendant for 24 years, as a manager, when he was terminated for cause. The basis of the defendant's allegations for cause were that the plaintiff was dishonest in filling out his time cards, and by submitting expenses unrelated to his work.

In September 2011, the owner of defendant company, Mr. Moses, passed away after operating the business since its inception in the 1980s. Up until one year prior to the proprietor's passing,

¹³ *Ibid* at para 8.

¹⁴ *Ibid* at para 9.

¹⁵ *Ibid* at para 11.

¹⁶ *Ibid* at para 13.

¹⁷ *Johnson v Marine Roofing Repair & Maintenance Service (2003) Ltd*, 2015 BCSC 472, 2015 CarswellBC 787

the plaintiff reported directly to him and then after that the plaintiff began reporting to a Mr. Godfrey, who in turn reported to a Management Committee, composed of himself and two relatives of the deceased owner.

Approximately one month after the passing of Mr. Moses, in September 2011, the termination of the plaintiff's employment was discussed at a Management Committee meeting.

Expenses

In February 2012, the plaintiff submitted an expense claim for gas charges. However, the defendant believed the quantum of the expense to be a result of the plaintiff purchasing gas instead of propane for his crew. Mr. Godfrey undertook to discuss the matter with the plaintiff, noting that there might be "other repercussions". This discussion never occurred. Rather, in June 2012, the defendant sent the plaintiff a memo advising him that his expenses were excessive, considering what the cost would be if he ran the company trucks on propane, and accordingly he would not be reimbursed.

The plaintiff's explanation, which the Court found to be credible, was that he did not want to or have the time to use propane in the truck.

The Court considered as significant the failure to raise the issue in a timely manner, when the plaintiff's memory was still fresh, as well as the failure to raise it with him at the termination meeting. In addition, the expense system was informal and bound to result in honest error, as it permitted the plaintiff to purchase gas for other employees and then seek reimbursement. Accordingly, the Court concluded that the defendant had not demonstrated dishonest conduct with respect to the expenses.

Time Cards

Employees of the defendant, including the plaintiff, were paid on an hourly basis and logged their time manually on a daily time card. In logging their time, employees were to identify on their time card the work order number of the project or task they had worked on during that given shift. The plaintiff, as a manager, also made use of a general administrative code. The purpose of the coding system was so that the defendant could more accurately attribute time worked to specific client files. The defendant was of the opinion that the plaintiff was not logging sufficient time to specific jobs and requested that he do better in this regard.

The defendant maintained a practice of working from home in the morning and then stopping by work sites on his way into the office. Around August 2011, the defendant asked the plaintiff to alter his schedule by coming directly to the office for 7L00 a.m.; the plaintiff, for the most part, disregarded this directive and continued his existing practice.

Mr. Godfrey happened to take notice of the plaintiff's time card and that he had logged 10.5 hours of work the day the plaintiff returned from vacation. Suspicious, the defendant began reviewing security tapes and noting the plaintiff's arrival and departure times each day and compared that to his time sheets for approximately a one month period. On account of the discrepancies found, the plaintiff was terminated. The discrepancies discussed with the plaintiff were:

- a) that he submitted two time cards for the same date with different hours recorded on them. The plaintiff did not have an explanation but stated he recorded his time every day from start to finish; and
- b) that he was presented with the time card spreadsheet and asked to explain the discrepancies. The plaintiff responded that he sometimes worked from home or on his way to and from work. He then offered to work out a deal to repay hours to the defendant.

The plaintiff was provided with a termination letter on the spot alleging cause and noting that such an allegation would likely disentitle him to severance payments. However, the defendant was prepared to offer the plaintiff a severance package and to indicate that his termination was “without cause” if he signed a Release. The offer was based on eight weeks of salary.

Following *McKinley*, “[a]n employee's dishonesty, may, depending on its seriousness, be a cause for dismissal. The ultimate question is whether the dishonesty goes to the core of the employment relationship.”¹⁸

On a balance of probabilities, the Court found that the defendant had not met its burden of showing that the plaintiff had been dishonest in the entering of his time cards. The overage on average was about 1.4 hours per day with the discrepancy being a little as .72 hours in a day. The plaintiff had in fact made errors in his record keeping but in large part those errors were not detrimental and often unintentional and a result of the plaintiff not having access to the defendant’s time system when working from home, the defendant not properly recording working performed at certain client sites, and handing in multiple time cards for a given day because he simply forgot that he had already submitted his hours.

Accordingly, the Court found that the plaintiff had been wrongfully dismissed and awarded him 24 months’ pay in lieu of notice and \$10,000.00 for aggravated damages.

4. *George v Cowichan Tribes*¹⁹

The plaintiff was a long service employee, terminated allegedly for cause. The defendant conceded that the plaintiff, during her years of service, was an exemplary employee with an unblemished discipline record. Although it never impacted her work, the plaintiff admitted at trial that she was an alcoholic and described herself as a functioning alcoholic.

One evening after work, the plaintiff was at a local pub drinking and got into a verbal altercation with another patron at the bar, also an employee, who was romantically involved with the father of the plaintiff’s grandchildren.

The following day, the plaintiff reported the incident to her supervisor, acknowledging that she knew a complaint would likely be filed against her. The plaintiff’s manager advised her to provide her with a written account of what happened at the bar. A complaint was in fact filed

¹⁸ *Ibid* at para 34.

¹⁹ *George v Cowichan Tribes*, 2015 BCSC 513, 2015 CarswellBC 875

against the plaintiff and investigation was conducted, which resulted in the plaintiff's termination of employment for cause.

In concluding that the plaintiff was wrongfully dismissed, the Court recognized not only the longstanding principle that work is an integral part of a person's life, but also that the principles articulated in *McKinley* reflect the concept of proportionality, which "directs the court to strike an appropriate balance between the alleged misconduct and the proposed sanction."²⁰ Dismissal should only be resorted to where the employee's conduct effectively destroys the employment relationship. The Court went on to note that:

The requirement for proportionality and balance protects the interests of both employees and employers. From the employee perspective, it tempers the power imbalance that often exists in an employment relationship and provides employees with some assurance that their employment cannot be terminated at the whim of an employer. At the same time, it recognizes that the financial well-being of employers can be harmed through the misconduct of employees and it acknowledges the right of employers to take appropriate action to address such misconduct.²¹

Accordingly, case law supports that Employers must, as part of the contextual analysis, consider the suitability of alternative disciplinary measures to dismissal.

The Court's analysis and conclusion is aptly summarized as follows:

"It is clear that this was an isolated incident, away from work, about a family matter, and was wholly out of character for [the plaintiff]. Applying the contextual approach mandated by the Supreme Court and considering the need for proportionality, [the plaintiff's] conduct was not such as to render continuation of the employment relationship impossible thus justifying summary dismissal.

What was called for in this case was precisely the approach that [the plaintiff's supervisor] identified in her evidence. She testified that when [the plaintiff] told her what had happened, she considered the need to strike a balance between ensuring that proper steps were taken so as not to minimize the issue, while at the same time keeping in mind that she was dealing with a valued senior manager for whom she had a great deal of respect and who had no previous performance issues."²²

The plaintiff was awarded 20 months' pay in lieu of notice and \$35,000.00 in aggravated damages.

²⁰ *Ibid* at para 113.

²¹ *Ibid* at para 114.

²² *Ibid* at paras 193 -194

PART B – JUST CAUSE FOUND

5. *Steel v Coast Capital Savings Credit Union*²³

The appellant appealed the trial judge's finding that she had been dismissed for just cause.

The appellant had been employed with the respondent for 21 years when she was terminated for accessing a confidential document contrary to internal policies and procedures. The appellant was part of the respondent's internal Helpdesk team and had unfettered access to the respondent's computer systems, which included access to the emails and files of all employees. However, employees, including the appellant, were forbidden from accessing anyone else's email or files without permission and Helpdesk employees were to follow a detailed protocol in assisting other employees with their computers.

The trial judge found that the appellant had deliberately and without authorization accessed another employee's personal file for her own purpose. The appellant's breach was discovered when the employee attempted to open her file and could not because the appellant was accessing the file from her own computer. The appellant was subsequently terminated for cause.

Recounting principles from *McKinley*, the Court noted that Courts are to apply a contextual analysis to determine if employee misconduct amounts to just cause for dismissal. "Following *McKinley*, a single act of dishonesty as a matter of law no longer gives an employer an absolute right to dismiss its employee."²⁴ In applying a contextual analysis, *McKinley* requires Courts to consider the totality of the circumstance in which the alleged misconduct occurred and focus their analysis on balancing the nature and severity of the misconduct in relation to impact on the employment relationship. Courts may, but are not required to, consider the length and nature of the employee's service as a mitigating effect of the misconduct on the employment relationship.²⁵

Misconduct "going to the core of the employment relationship" includes behaviour that "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."²⁶ The trial judge found that the appellant's conduct had risen to this level; thereby breaching the faith inherent to the work relationship and irrevocably breaking down same. In that regard, the appellate Court upheld the trial judge's findings and stated:

In my view, the trial judge did not err in principle in applying the *McKinley* analysis. As the above-cited passage illustrates, she applied a contextual approach and considered whether the nature of the misconduct, which the appellant admitted was the result of a deliberate choice, was reconcilable with a continuing employment relationship. The trial judge expressly referenced para. 48 of *McKinley*, which set out the applicable test, at paras. 22 and 27 of her reasons.

²³ *Steel v Coast Capital Savings Credit Union*, 2015 BCCA 127, 2015 CarswellBC 710

²⁴ *Ibid* at para 27.

²⁵ *Ibid* at para 28.

²⁶ *Ibid* at para 30.

The trial judge was aware of the length of the appellant's service, which she noted at para. 3 of her reasons, and the seriousness of the transgression, all of which she considered in the circumstances of the employment relationship and the respondent's clear policy on privacy-related matters. The record established that accessing confidential documents only in accordance with the privacy policy of the respondent was a fundamental obligation of a Helpdesk employee. It was open to the trial judge to find that this fundamental obligation placed the appellant in a position of substantial trust, and made the continuing existence of that trust fundamental to the viability of the employment relationship. In addition, it was open to the trial judge to find that, in the circumstances of the case before her, breach of the confidentiality policy and failure to follow Helpdesk protocols resulted in a fundamental breakdown of the employment relationship.²⁷

6. *Agostino v Gary Bean Securities Ltd*²⁸

The appellant appealed the trial judge's finding that he had been terminated for cause.

The appellant was employed by the respondent for approximately four years as an investment adviser when he was terminated for cause. In support of the respondent's allegations of cause it relied on the fact that the appellant made numerous errors, under-margined accounts, and was the subject of various client complaints which lead the respondent to question the appellant's integrity. Some of the client complaints included serious allegations of the appellant selling client shares without their knowledge or consent.

While the trial judge noted that dishonesty, in and of itself, does not automatically warrant a termination for cause, it was also noted that in *Korman v. Midland Walwayn Capital Inc* (1999), 132 Man R. (2d) 283 (Man QB) it was held that "[h]onesty is absolutely fundamental to the employment of a financial adviser..."²⁹

In its review of this case, the Ontario Court of Appeal noted that:

"[t]here is no legal principle requiring progressive discipline in every case. The trial judge considered whether progressive discipline was appropriate in these circumstances and determined that it was not given his conclusion that the appellant's dishonesty went to the heart of the employment relationship (see paras. 86-91). We agree with his conclusion."

The appeal was denied.

7. *Bellehumeur v Windsor Factory Supply Ltd*³⁰

The appellant suffered from various "disabilities", which were reported to the respondent, and for which the respondent was found to have provided reasonable accommodation. The appellant was terminated for cause after he made "violent threats towards another employee when he left

²⁷ *Ibid* at paras 33 and 34.

²⁸ *Agostino v Gary Bean Securities Ltd*, 2015 ONCA 49, 2015 CarswellOnt 792

²⁹ *Ibid* at para 86.

³⁰ *Bellehumeur v Windsor Factory Supply Ltd*, 2015 ONCA 473, 2015 CarswellOnt 9460

the place of employment after being disciplined.”³¹ The appellant alleged that his violent conduct towards the employee was a result of his mental disability.

The trial judge concluded, as upheld by the Ontario Court of Appeal, that the respondent was not made aware of the appellant’s mental disability and had no indication of the existence of such until after the appellant had been terminated. Accordingly, the Court found that the appellant’s disability was not a factor in the termination of his employment; rather he was terminated because he made violent treats against his co-worker.

The trial judge concluded there was no duty to accommodate for an unknown disability here and the employee’s conduct was serious enough to amount to just cause for dismissal. The trial judge followed the analysis in the *McKinley* and *Dowling* and concluded in the particular circumstances of this case, the employment relationship could no longer exist.

8. *Roe v British Columbia Ferry Services Ltd*³²

The appellant was a manager of the respondent’s ferry terminal for five years when he was terminated for cause. The trial judge found that the appellant was wrongfully dismissed and characterized his misconduct as insignificant. The British Columbia Court of Appeal disagreed.

The appellant was terminated after an internal investigation revealed that he had, on more than one occasion, provided complimentary food and beverage vouchers to his daughter’s sports team without prior authorization to do so, contrary to the respondent’s policy. The defendant saw the plaintiff’s conduct as being “dishonest” and a deliberate act of misappropriating company property for his financial and reputational benefit.

The Court of Appeal concluded, *inter alia*, that the appellant held a position of trust and that the standard of integrity and honesty were essential conditions of his employment and had been clearly set by the respondent. The appellant knew his conduct was not permissible and he acted in a premeditated manner, which suggests his behaviour was deceptive, and he had, at least once before, acted in a similar manner.

“On appeal, the central issue was whether the [appellant’s] assumed conduct, objectively viewed by a reasonable employer, in all of the circumstances (including the nature of the workplace, the nature of [appellant’s] position and responsibilities, and the standards set by the Employer in [the appellant’s] employment contract), could be found to be “bordering on trifling” or “relatively minor”, and therefore not rising to the level of undermining the obligations of good faith that are inherent in and essential to the employment relationship.”³³

The Court of Appeal found that the trial judge’s finding that, given the quantum of the vouchers, the appellant’s actions were bordering on trifling and did not amount to just cause for dismissal, was indicative of the fact that the trial judge had not applied the contextual approach, mandated by *McKinley*. The Court went on to state that the correct approach:

³¹ *Ibid* at paras 1 and 2.

³² *Roe v British Columbia Ferry Services Ltd*, 2015 BCCA 1, 2015 CarswellBC 3

³³ *ibid* at para 35.

...would have required consideration of: (i) the high standard of conduct expected of [the appellant] given the responsibilities and trust attached to his senior management position; (ii) the essential conditions (characterized as “core values”) of integrity and honesty in his employment contract, including the requirement in the Code “to act in an honest and ethical manner at all times” (emphasis added); and (iii) his deliberate concealment of his actions which he later acknowledged to have been wrong and unethical. It was in this context the judge had to consider whether [the appellant] assumed misconduct justified his dismissal. In my respectful view, it was the judge’s failure to apply this contextual approach that appears to have led him to commit a palpable and overriding error.³⁴

The Court of Appeal, in reaching its conclusion highlighted the significance of viewing an employee’s misconduct, no matter how insignificant it may appear on the surface, in the full context of their employment, including their employment contract, the responsibilities and level of trust associated with their role, and the Employer’s policies and procedures.

9. *Ogden v Canadian Imperial Bank of Commerce*³⁵

In this case the appellant was employed as a financial advisor with the respondent. The appellant without authorization of the respondent, and contrary to its policies, accepted an overseas wire transfer from a client into her personal bank account and then transferred the funds the next day into the client’s account in order to permit the client to close a transaction. The respondent later discovered the comingling of funds, investigated the matter, and terminated the appellant’s employment for cause.

In 2010, after a series of misconduct, for which the appellant was disciplined, she received a final written warning for approving her assistant’s mortgage application after the assistant had entered the data into the system herself. However, in terminating the appellant for cause with respect to the subsequent wire transfer, the respondent did not rely on this “final warning letter” for cumulative cause defence.

The appellant successfully argued at trial that she had been wrongfully dismissed because this single error in judgment was not sufficient to justify the respondent’s termination of her employment for cause.

The Court of Appeal found that the trial judge had misconstrued the respondent’s defence, believing that their position was that the basis for the appellant’s termination was “cumulative cause”, with the wire transfer being the preverbal “straw that broke the camel’s back”. Therefore the Court found that an error of law had occurred and the trial judge’s decision was without merit.

The Court relied upon the decision in *Poliquin v. Devon Canada Corp*, which described two types of cumulative misconduct. The first is obvious; the Court is entitled to take into account the cumulative effect of an employee’s misconduct. The second is somewhat more nuanced.

³⁴ *Ibid* at para 36.

³⁵ *Ogden v Canadian Imperial Bank of Commerce*, 2015 BCCA 175, 2015 CarswekkBC 1070

...

The second aspect of cumulative misconduct is less obvious, but equally important. Does the impugned conduct share some common element? For example, does the misconduct demonstrate that the employer has serious reason to conclude that the employee is gravely deficient in some quality needed to do the core of his or her job? Unsuitability for the basic job is a significant criterion for summary dismissal. Here, the common thread running through Poliquin's misconduct as a senior supervisor may, at the very least, be characterized as exceptionally bad judgment, including an unwillingness to obey and enforce Devon's Code of Conduct, which violated essential conditions of the employment contract and breached the trust required in that relationship.³⁶

Relying on the contextual approach called for in *McKinley*, the Court held that the second aspect of the cumulative misconduct was relevant in this matter. Accordingly, the appellant's past conduct was relevant insofar as it was illustrative of the fact that she was aware of the intended consequences for breaches of conduct similar to that of the unauthorized wire transfer. Therefore, the respondent was poised to use the appellant's past conduct to illustrate her state of mind at the time with respect to deciding if the isolated event of the wire transfer, alone, justified her termination for cause.

The Court noted the trial judge's conclusion of indicia that in fact the respondent's position had been misconstrued. The trial judge stated:

On a cumulative cause analysis, [the plaintiff] is entitled to time to improve her performance after the issuance of a final warning. The fact that there was no misconduct since [the plaintiff's] final warning is fatal to [the defendant's] argument that [she] was terminated on the basis of cumulative cause.³⁷

The Court of Appeal went on to reason, with respect to the lower Court's finding, that:

Regardless of whether or not the timing of the final warning letter reduced its relevance when considering [the respondent's] justification for terminating [the appellant's] employment, the phrasing of this paragraph, including the judge's reference to "time to improve her performance", shows that the judge was considering the issues at trial through the plaintiff's prism of "cumulative cause". [The appellant] would only need time to "improve her performance" if this was a case of a series of incidents that were individually insufficient to justify termination with cause. That is not what [the respondent] argued.³⁸

³⁶ *Ibid* at para 27.

³⁷ *Ibid* at para 43.

³⁸ *Ibid* at para 44.

2014 JUST CAUSE CASES

PART A - JUST CAUSE NOT FOUND

1. *Carter v. 1657593 Ontario Inc.*³⁹

Mr. Carter was dismissed from his position as senior shift manager of the restaurant at the Olde Angel Inn after he informed the Inn that he had purchased half interest in a bar across town as a silent partner. He assured the Inn that this investment would not interfere with his duties at the Inn's restaurant. However, the Inn was ultimately concerned that Mr. Carter's attentions on his new venture would detract from the performance of his duties at the Inn's restaurant, that he would use his industry connections from his work at the restaurant to get bulk deals for his bar, and that he would steal customers from the restaurant.

Mr. Carter brought a wrongful dismissal action against the Inn which was successful. The Court concluded that there was no conflict of interest. Mr. Carter had affirmed to the Inn that he planned to continue to give the Inn his full time and attention. The new bar was not competitive with the Inn's restaurant. It catered to a different demographic. Even if Mr. Carter had planned to use the same supplier contacts, and those suppliers provided him a discount, this would not have affected the Inn's business.

Moonlighting in itself does not necessarily create a conflict of interest; however, if the second venture ultimately detracts from the employee's job, this may breach the employee's duty of loyalty to the Employer. The Employer in this case was perhaps reasonably concerned that Mr. Carter's attentions to his new venture would interfere with his full time duties with the Inn, or that Mr. Carter might steer customers to his new business. Had that been the case, the Inn may have been better seated to end Mr. Carter's employment. However, the evidence ultimately did not support those concerns.

This Decision is also interesting with respect to mitigation. The Inn argued that Mr. Carter failed to successfully mitigate his damages when he turned down a full time job in favour of a part time job that would allow him to invest his remaining time at his bar. Mr. Carter was hoping to get the bar to the point that he could draw money as a shareholder. While this investment proved fruitless (the bar never got there, and Mr. Carter ultimately sold his share), the Court found that his decision at the time was reasonable, given the relatively low pay of the full time job offer.

2. *Phanlouvong v. Northfield Metal Products (1994) Ltd.*⁴⁰

Mr. Phanlouvong, a labourer with 16 years of services with Northfield, was dismissed for cause following the investigation of a violent incident in which he gave a co-worker a bloody nose. Mr. Phanlouvong claimed that the co-worker had made racist comments in the past, and was always criticizing Mr. Phanlouvong's work performance. Mr. Phanlouvong brought an action against Northfield and the co-worker seeking damages for wrongful dismissal, as well as a declaration

³⁹ *Carter v. 1657593 Ontario Inc.*, 2014 ONSC 6761

⁴⁰ *Phanlouvong v. Northfield Metal Products (1994) Ltd.*, 2014 ONSC 6585

that his human rights were violated, and damages for negligence, assault and battery, infliction of mental distress, and aggravated and punitive damages.

While his claim failed in all other respects, Mr. Phanlouvang's claim in wrongful dismissal against Northfield was successful. The Court noted that while Mr. Phanlouvang was the aggressor in the incident, the co-worker willingly participated. While Northfield's policies listed "fighting" as conduct that could result in disciplinary measures, summary dismissal was too severe. Northfield's Disciplinary Policy outlined a progressive discipline approach. Management did not consider any alternatives to termination, and failed to take into account Mr. Phanlouvang's clear disciplinary record over his 16 years of service.

That such a violent and intentional act was not found to rise to the level of just cause is concerning. Notably, Northfield raised as a justification for Mr. Phanlouvang's termination that his conduct amounted to a breach of duty under the *Occupational Health and Safety Act*. However, the Court addressed that argument as follows:

The fact that Mr. Phanlouvang's conduct may have constituted a breach of s. 28(2)(c) of the Occupational Health and Safety Act, which provides that no worker shall "engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct" does not override the need to adopt a contextual and proportional approach in determining whether the employer has made out a defence of just cause. The fact that an employee may have committed a technical breach of the Act by engaging in, for example, "unnecessary running" or "boisterous conduct" would not justify summary dismissal. Arguably, all or most of the conduct prohibited by Northfield's Workplace Violence Policy would breach s. 28(2)(c), yet would still qualify under the policy and prevention program for the application of progressive discipline.⁴¹

In light of the Court's reference to Northfield's "progressive discipline approach", Employers would be wise to express in their Disciplinary Policy that, depending on the severity, any one instance of misconduct may lead to discipline up to and including termination for cause.

3. *Simpson v. Global Warranty Management Corp.*⁴²

Mr. Simpson was laid off by Global with the reason of a shortage of work identified on his ROE. He was paid only his *Employment Standards Act* entitlements. When Mr. Simpson brought an action for more, Global claimed just cause, asserting that after a corporate review spurred by recent downturn of the economy, it was concluded that Mr. Simpson's performance was below the expected standards. However, if the Court found that there was no cause, Global sought to rely on the termination provision in the written employment contract, which said:

As discussed previously with you, the Employer also has a specific severance policy, (sic) In this regard, unless an employee is terminated for cause, an employee's employment may be terminated at the sole discretion of the Employer and for any reason whatsoever upon providing the employee with one (1) week's notice or pay in lieu

⁴¹ *Ibid* at para.70.

⁴² *Simpson v. Global Warranty Management Corp.*, 2014 ONSC 724

thereof, subject to any additional notice, pay in lieu thereof or severance that may be required to meet the minimum requirements of the Employment Standards Act, R.S.O. 1990, c.E 14, as amended from time to time.⁴³

Mr. Simpson argued that having argued cause, Global was no longer permitted to rely on the written employment contract.

The Court found that there was no cause to dismiss Mr. Simpson, noting that “[t]he employer must demonstrate more than mere dissatisfaction with the employee.”⁴⁴ However, Global was entitled to rely on the termination provision in the written employment contract, despite arguing just cause. As Mr. Simpson had already been paid his minimum entitlements pursuant to the *Employment Standards Act*, the Court found that he was not entitled to damages.

It is unsurprising that no cause was found. When an employee is failing to meet performance expectations, it is incumbent on the Employer to raise its concerns, giving the employee the opportunity to improve, before dismissing for cause. If Global was displeased with Mr. Simpson prior to his layoff, it did not make this adequately known to Mr. Simpson, and effectively condoned his performance.

However, despite no cause being found, Global escaped liability through the terms of the written employment contract. This case really reinforces to Employers the value of having a good termination clause in a written employment contract. Note, however, that interestingly, there was no argument with respect to the validity of the termination provision in Mr. Simpson’s contract. The provision, as quoted in the Decision, does not address benefits continuation over the statutory notice period. Mr. Simpson may have found success had he challenged the provision (See *Miller v. A.B.M. Canada Inc.*⁴⁵)

4. *Dennis v. Ontario Lottery and Gaming Corp.*⁴⁶

Ms. Dennis, a security manager with 13 years of service at OLGC, was let go without cause, accepting an exit package in exchange for signing a Release.

While employed, Ms. Dennis had been a voluntary member of the Social Committee, charged with arranging Wonderland tickets for employees. After settlement, but before Ms. Dennis received the proceeds of the settlement, OLGC discovered that there was a cash shortfall of around \$1,000.00 with respect to the Wonderland ticket proceeds. The settlement was held in abeyance pending an investigation, with the investigation concluding that Ms. Dennis had admitted to taking the money. Ms. Dennis asserted that she “borrowed” the money to assist herself out of debt after being the victim of an email scam. Criminal charges were brought, but dropped when Ms. Dennis repaid the full amount. However, OLGC maintained that as she had admitted to stealing the money, this constituted after-acquired cause. As such, OLGC refused to pay the agreed exit package. Ms. Dennis brought this action to enforce the exit package.

⁴³ *Ibid* at para 8.

⁴⁴ *Ibid* at para 48.

⁴⁵ *Miller v. A.B.M. Canada Inc.*, 2014 ONSC 4062

⁴⁶ *Dennis v. Ontario Lottery and Gaming Corp.*, 2014 ONSC 3882

The Court found that termination for cause was disproportionate; noting Ms. Dennis' role with respect to the Wonderland ticket funds was voluntary, and not an essential condition of her employment. Further, OLG had concluded that Ms. Dennis had admitted to theft, when really she only admitted to borrowing the money. She had always intended to repay the money before it was due to Wonderland. Ms. Dennis might not have understood that "borrowing" the money was criminal conduct. The Court also noted that OLG was not the financial victim, but rather, Wonderland was. Finally, the Court noted that OLG had already agreed to pay the settlement funds, and had received consideration for doing so, through Ms. Dennis' execution of a Release.

The Court was clearly very sympathetic to Ms. Dennis. While maintaining the fund was not one of her essential duties, the Social Committee was connected to her employment, and she stole a relatively large sum of money, returning the funds only upon being caught. Her conduct was especially alarming in the context of her position as security manager with OLG. This case demonstrates a very high bar for just cause.

5. *Fernandes v. Peel Educational & Tutorial*⁴⁷

Mr. Fernandes had a nine year positive employment history as a high school teacher. However, during his tenth year, the School noticed a problem with respect to his marking. The School undertook an investigation which led to Mr. Fernandes' termination for cause, with the School alleging that Mr. Fernandes had admitted to fabricating marks, which constituted academic fraud. Mr. Fernandes brought an action for wrongful dismissal.

The Court specifically found that Mr. Fernandes had submitted incorrect marks and submitted them late, lied to the School and to the Court about how students' presentations were marked, and admitted to falsifying marks on the students' records. In spite of all of this, the Court ruled that the School did not have just cause to dismiss him.

The Court noted that the School knowingly released the falsified marks without commenting on their accuracy, confirming that these false interim marks were not as serious an issue as the School portrayed. The Court found "academic fraud" to be a "very dramatic way of describing a few students who were marked on presentations that they had not yet given...the presentation made up only one part of the overall mark."⁴⁸ Further, considering his long history as a well-regarded teacher, the Court found that Mr. Fernandes' abrupt change in performance should have lead the School to inquire what the problem was, and make efforts to assist him, rather than simply ending his employment without notice. In light of these mitigating factors, Mr. Fernandes' conduct did not warrant termination. Rather, the School could have provided an appropriate reprimand and warning that further similar conduct would lead to his termination.

If an Employer is going to rely on the seriousness of an employee's conduct to justify dismissal, the Employer must take the conduct seriously itself. The School shot itself in the foot when it released the falsified marks. This case also emphasizes an Employer's duty, when it sees a good

⁴⁷ *Fernandes v. Peel Educational & Tutorial*, 2014 ONSC 6506

⁴⁸ *Ibid* at para 180.

employee suddenly floundering, to make suitable inquiries and efforts to assist the employee, before making a change to their employment.

PART B - JUST CAUSE FOUND

6. *Van den Boogaard v. Vancouver Pile Driving Ltd.*⁴⁹

Mr. Van den Boogaard was let go for business reasons from his position of project manager at Vancouver, a large marine general contractor, after two years of service. He was provided four weeks' pay in lieu of notice, and brought an action for greater damages.

While employed, Mr. Van den Boogaard had been responsible for workplace safety, including enforcing the Drug Free Workplace Policy. Post termination, Vancouver discovered that Mr. Van den Boogaard had, among other things, sent text messages soliciting drugs from a subordinate. Vancouver defended the wrongful dismissal action alleging after-acquired cause. Mr. Van den Boogaard admitted to using the company cell phone to solicit drugs from a subordinate, and further admitted that it was possible he consumed drugs with the subordinate after work.

The trial judge found that Mr. Van den Boogaard's admitted conduct was incompatible with his duties as a project manager and that his solicitation of drugs from an employee under his supervision was misconduct that went to the heart of the employment relationship and created a conflict of interest. The Court of Appeal upheld the trial judge's dismissal of the action, clarifying that "[r]egardless of whether dismissal for after-acquired cause or for cause is being argued, the issue is whether the employer can establish that, at the time of dismissal, there were facts sufficient in law to warrant a dismissal. If an employer knew of the misconduct and had expressly or implicitly condoned it, then claims of after-acquired cause will be defeated."⁵⁰

The British Columbia Court of Appeal helpfully reminds Employers that when they see misconduct, they should address it. If an Employer has an inkling that something is going on and does nothing, this will weaken their just cause case.

7. *Chopra v. Easy Plastic Containers Ltd.*⁵¹

Mr. Chopra, a labourer/shift supervisor with eight years of service, was dismissed for cause, with Easy Plastic relying on a number of cumulative incidents. During the three years prior to his termination, he had received six written warnings, and a three day suspension. During the same time period, Mr. Chopra made several safety complaints to the Ministry of Labour, leading to several site visits, none of which found a legitimate safety concern.

Chopra received his first written warning after he knowingly allowed an unauthorized person to enter a restricted workshop and use restricted equipment. He received the second written warning after allowing three employees to leave work for an hour without punching their time cards. His

⁴⁹ *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168

⁵⁰ *Ibid* at para 34.

⁵¹ *Chopra v. Easy Plastic Containers Ltd.*, 2014 ONSC 3666

third written warning came when, in his capacity as shift supervisor, he approved a skid of product with missing labels. He received the fourth written warning when he fell asleep during a shift. His fifth written warning occurred when he incorrectly adjusted a machine, leading to two hours of production needing to be destroyed. He received his sixth written warning, along with a three day suspension, when he refused to wear a face mask, as was required for safety reasons.

Mr. Chopra claimed that the discipline he received from his superiors relating to these instances constituted harassment. Soon after the face mask incident, a co-worker advised Easy Plastic that Mr. Chopra had solicited his assistance in bringing harassment complaints against his superiors. The co-worker had refused, as he had seen no such harassment. Subsequently, three other co-workers reported to management that Mr. Chopra had told them that the Ministry of Labour Representative was a “rat” who was being paid off by Easy Plastic. This was the last straw, and Easy Plastic concluded it was necessary to let Mr. Chopra go for cause, in light of its many unsuccessful attempts to modify his conduct.

Mr. Chopra’s wrongful dismissal action was unsuccessful. His termination was found to be justified in light of the ample and documented warnings to Mr. Chopra that his conduct must be corrected, and the ample opportunity provided to Mr. Chopra to do so. The Court concluded that with these many instances of documented attempts by Easy Plastic to rectify Mr. Chopra’s behaviour, there were “sufficient bricks...to constitute a just cause wall.”⁵²

This case helpfully outlines the process that an Employer can undertake to build a solid just cause case. While the constant documentation may seem tedious, it is the only way to show that the Employer has given the employee the proper opportunity to succeed. When it comes to discipline, if it isn’t documented, it didn’t happen.

8. *Balzer v. Federated Co-Operatives Ltd.*⁵³

Mr. Balzer was employed by Federated as a propane coordinator. His job involved the delivery of propane to Federated’s customers, including coordinating the installation of tanks and equipment, maintaining equipment, and deliveries. Federated trained Mr. Balzer with respect to safety procedures, including what to do in the event of a propane leak.

While loading a truck with propane for delivery, Mr. Balzer went into the office to take a call. On his return to the truck, he forgot that the hoses were still connected to the storage tank, and he started to drive, making it about five feet before hearing a sound, and realizing what had happened. When he exited the truck, he could see propane was leaking from the tank. However, rather than call the Fire Department, as required by Federated’s procedures, he attempted to fix the problem himself, unsuccessfully. After an internal investigation, Federated dismissed Mr. Balzer for cause, for failing to observe safety regulations. Mr. Balzer claimed that he had inhaled propane, which had affected his judgement.

The Court found that Mr. Balzer’s dismissal was justified. There was no objective evidence that his poor judgement was the result of propane inhalation, and he did not exhibit the usual

⁵² *Ibid* at para 99.

⁵³ *Balzer v. Federated Co-Operatives Ltd.*, 2014 SKQB 32

symptoms of inhalation at the time. Mr. Balzer's actions in response to the propane leak were contrary to the safety procedures on which he had received training. The Court noted:

Mr. Balzer was the person in Buffalo Narrows on whom Federated relied for safe operation of its business of propane distribution. Mr. Balzer did not meet any of the expectations that were placed upon him to perform in the event of a propane escape emergency. Mr. Balzer agrees his performance was very substandard, and the only explanation he can offer for that substandard performance is one that the Court does not accept. There is nothing in the evidence that suggests Federated should trust him to behave differently or more appropriately with respect to any future propane emergency event in which he is directly involved. Mr. Balzer did not offer any evidence to suggest it could. Federated's inability to trust Mr. Balzer going forward to behave appropriately in an emergency situation was sufficient to sever the employment relationship.⁵⁴

In any safety-sensitive workplace, it is imperative that the Employer have safety policies and procedures in place, train its employees with respect to those policies, and enforce those policies. As a result of having and enforcing such policies, Federated was not only able to successfully defend this wrongful dismissal action, but would also lower its risk of liability arising from an employee injuring him/herself or someone else on the job.

9. *Hoang v. Mann Engineering Ltd.*⁵⁵

Mr. Hoang was hired in October 2010 as the Chief Financial Officer of Mann. This was a fixed term 13 month contract during which time Mr. Hoang was to assist in raising capital for a development project.

Mann noticed issues with Mr. Hoang's work performance right away. On more than one occasion, Mr. Hoang was directed to pursue an opportunity, and he simply did not do it. He was expressly ordered to renew an agreement with a business partner, but failed to do so, losing that partner's business for Mann. When given the task of finalizing a deal that was already agreed in principle, he changed the terms of the deal at the last minute, making an error that caused significant losses to Mann. On top of these issues, Mr. Hoang was consistently rude to his colleagues and superiors, despite frequent attempts by Mann to correct this behaviour. This culminated in a series of emails from Mr. Hoang to the Vice President that included abusive language. That same day, Mann received a complaint from a salesperson about poor treatment from Mr. Hoang. Mann instructed Mr. Hoang to apologize to the salesperson, and he refused. Mr. Hoang was also inappropriate in emails to clients. After eight months of trying to work with Mr. Hoang, Mann concluded it was necessary to end his employment for cause. Mr. Hoang brought an action in wrongful dismissal.

The Court agreed with Mann that there was just cause to end Mr. Hoang's employment. Mann's witnesses were clear and credible, whereas Mr. Hoang's evidence was self-serving and often contradictory. The Court affirmed at paragraph 53 the factors relevant to determining whether insubordination justifies summary dismissal:

⁵⁴ *Ibid* at para 72.

⁵⁵ *Hoang v. Mann Engineering Ltd.*, 2014 ONSC 3762

- Did the employee refuse to obey the lawful orders of the Employer?
- Was the refusal intentional?
- Was the insubordination serious?
- Did the single act of insubordination repudiate the employment contract?

In this case, there were repeated acts of willful insubordination, many of which caused significant losses to the Employer. In addition, there was verbal abuse towards superiors, and a refusal to apologize for misconduct. While generally sympathetic to employees, the Court does not look well on employees who do not own up to or appreciate their poor behaviour.

10. *Ruder v. 1049077 Ontario Ltd (c.o.b. Crowntech Aluminum & Glass)*⁵⁶

Mr. Ruder was fired for poor work performance and brought a wrongful dismissal action. The parties negotiated and signed off on a monetary settlement that included incremental payments. After making the first payment pursuant to the settlement, Crowntech discovered that while still employed, Mr. Ruder had used his paid time, as well as Crowntech's computer, to do side work for a competitor, as well as directly for some of Crowntech's clients. Upon this discovery, Crowntech repudiated the settlement, advising Mr. Ruder that no further settlement funds would be paid. Mr. Ruder brought a motion to enforce the settlement.

The Court confirmed that “[a]s a matter of public policy, a settlement ought to be enforced unless enforcement would create a real risk of clear injustice.”⁵⁷ However, in this case, the Court found that this test was met, noting at paragraph 8 that:

- Crowntech would undoubtedly never have entered into the settlement had it known about Mr. Ruder's business dealings with competitors and clients;
- Crowntech learned about those dealings almost immediately after the settlement was signed; and
- the evidence of the business dealings was not easily discoverable prior to the signing of the settlement, because it had only afterwards come to Crowntech's attention by way of a whistleblower. Mr. Ruder had deleted most of the relevant files, so a routine computer inspection would not reveal any cause for concern. A forensic examination of the computer was required.

On the whole, there were grounds to believe that Mr. Ruder did business on the side, using Crowntech's resources, when he should have been devoting himself to Crowntech, and then sued Crowntech after covering his tracks. The Court found that in these circumstances, enforcing the settlement created a real risk of injustice to Crowntech. Mr. Ruder's motion was dismissed.

This case can be contrasted with the earlier discussed *Dennis v. Ontario Lottery and Gaming Corp.*, where the Court concluded that a termination settlement should be enforced, despite newly acquired evidence that the employee had taken money from a social fund related to the

⁵⁶ *Ruder v. 1049077 Ontario Ltd (c.o.b. Crowntech Aluminum & Glass)*, 2014 ONSC 4389

⁵⁷ *Ibid* at para 6.

workplace. In that case, Ms. Dennis's one instance of misconduct was found to be less serious in light of the fact that her oversight over the fund in question was not one of her employment duties. The Court also noted in that case that the Employer was not the victim of her misconduct. Mr. Ruder's misconduct, on the other hand, was pervasive, directly tied to his job functions, and most certainly caused harm to the Employer.

As well as helpfully confirming to Employers that, while rare, after-acquired cause cases can be successful, this case also serves as a strong warning to Employers to have a Workplace Computer Policy that specifically prohibits personal use of the Employer's facilities, and advises employees of the Employer's right to access or monitor the use of its computer systems at any time. Crowntech might have caught on to Mr. Ruder's "extra-curricular" activities much sooner had it been monitoring its systems.

CONCLUSION

*"Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, but 'the manner in which employment can be terminated is equally important'."*⁵⁸

It is this philosophy which has woven itself into the tapestry of the law of termination for cause. It is essentially the commandment held most sacred and forms the long measuring stick upon which all conduct is judged.

It would be diametrically opposed to the belief in the central importance of one's employment in life to fail to afford reasonable protection to that aspect in the lives of the citizens of Canada. Summary termination, without consideration of the magnitude of the infraction, not surprisingly was and continues to be held by the Court to be the incorrect approach to consideration of such matters.

The past year and a half have seen no major shifts, dramatic pronouncements, nor real surprises. What we do see is the continuation of the high threshold to be met for termination for just cause and adherence to the contextual approach laid out in *McKinley v. B.C. Tel.* We continue to be told of the value of progressive discipline and timely communication of issues as well as the importance of clearly written employment agreements on matters such as conflict of interest and company policy relied upon as grounds for termination.

The Supreme Court of Canada has not seized any opportunity to review the *McKinley* doctrine yet. Will the Court seize the opportunity to redefine this doctrine, and the sanctity of the security of employment in the lives of Canadians at some point soon? Stay tuned...

⁵⁸ Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 (S.C.C.) per. Dickson C.J. (in dissent) at p. 368, cited with approval SCC in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.) at p. 1002, *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701, and *McKinley v. BC Tel* [2001] SCC 38 by Iacobucci J. at p. 53.