What is 'Just Cause' in 2009?

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A. INTRODUCTION

"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'."[2]

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.

While this philosophy emerged from the Supreme Court of Canada in 1987, it was the 2001 case of *McKinley v. BC Tel*[3] which settled the threshold question: Was any act of dishonesty in and of itself sufficient to warrant termination, or did it depend upon the nature and context of that dishonesty? Influenced considerably by this philosophy, it

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[2] *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.

[3] [2001] SCC 38 (hereinafter "*McKinley v. BC Tel*").

would appear from the reasons for judgment delivered by the Honorable Mr. Justice Iacobucci, the "contextual approach" to cause was embraced.

It would have been 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 held by the Court to be the incorrect approach to consideration of such matters.

The composition of the Supreme Court of 2009 is quite different than it was in 2001. 2008 saw some radical and unanticipated decisions come from the Supreme Court leading many practitioners to begin to refer to "a more employer friendly climate". Certainly, since the decision was released in the case of *Honda Canada v. Keays*[4], the risk to employers in asserting cause for termination has been, by and large, eliminated. The Court in the *Honda* case expressly said, as it commonly does, that it is not clarifying an existing doctrine, or carving out an exception to it, but rather, "rewriting" the Wallace doctrine[5]. To prove a quantifiable loss as a result of the employer's actions will be a difficult (if not impossible) task indeed.

All of this leads us to query if the next "just cause" case for which leave is sought to appeal to the Supreme Court of Canada will be granted. Will the Court seize the opportunity to redefine this doctrine, and the sanctity of the security of employment in

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[4] 2008 SCC 39.
[5] *Ibid* at par 117.

the lives of Canadians? Will it facilitate the termination of employees for poor performance without forcing employers to jump through hoops as if the employee were the ring master of the circus? Only time will tell.

For the time being, we will provide a refresher on the *McKinley* decision, provide an update on the cases in this area in the past year and review the trends in the past year.

B. *MCKINLEY V. BC TEL*[6] A REVIEW

Martin Richard McKinley had been employed by BC Tel for 17 years when he began to experience high blood pressure which required a leave of absence.

After a few months away from work, McKinley discussed with his superior the fact that he wished to return to work, but in a position with less responsibility. He was told that an attempt would be made to find him another suitable position; however, shortly thereafter he was terminated while still on medical leave.

McKinley commenced civil proceedings alleging wrongful dismissal and concurrently commenced the process of filing a complaint with the Canadian Human Rights Commission.

BC Tel defended the action on the basis that McKinley's medical condition frustrated the employment contract. During the trial, BC Tel discovered a letter written by McKinley

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[6] [2001] S.C.J. No. 40.

to one of his physicians. The letter acknowledged that at a prior medical appointment the physician had recommended a particular mediation as being the next method of treatment, and that the mediation should begin upon McKinley's return to work if his blood pressure remained high.

BC Tel took the position that McKinley had been dishonest in responding to inquiries concerning his medical condition. BC Tel amended its Defence during the trial to allege cause for McKinley's dismissal. Specifically, BC Tel alleged that McKinley withheld his physician's recommendation that medication be used and that it would enable him to return to work without health risks.

Accordingly the Court turned to the question of whether this single act of dishonesty, could be relied upon by BC Tel as grounds for his termination.

The trial was conducted by jury. McKinley was found to have been terminated without cause.

The Court of Appeal overturned the decision. It held that the question to be determined in considering the issue of just cause was not whether the dishonesty was of the degree to provide just cause for dismissal, as stated by the trial judge in the charge to the jury, but rather, whether there was any dishonesty "since as a matter of law, all dishonesty within an employment relationship provides just cause".[7]

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[7] *Ibid* at par. 22-24.

The Honourable Mr. Justice Iacobucci delivered the judgment on behalf of the Supreme Court of Canada on June 28, 2001. He considered the two then divergent lines of case law. The first held that the issue of whether dishonesty provides grounds for termination with cause must be determined by due consideration of the particular circumstances. The second considered only the question of whether employee dishonesty exists; a finding of dishonest lead to the inevitable conclusion that grounds for termination for just cause exist. Iacobucci J. noted that in the second line of case law the Courts were faced with very serious forms of dishonesty by the employee which was a fundamental consideration to determination of the correct approach. He distinguished those cases.

Instead, the Court adopted the "contextual approach" to the determination of whether just cause exists. Iacobucci J. wrote:

> "[W]hether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty 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."[8]

[8] *Ibid* at par. 48.

Fundamental to application of the "contextual approach", the Court held, is the principal of proportionality between the severity of the misconduct and the sanction. The Court recognized the importance of employment in the lives of individuals and therefore warned that care must be taken in permitting the termination of employment without notice.

Accordingly, it is necessary to examine each case on its own facts and circumstances, and consider the nature and seriousness of the dishonesty in order to determine whether or not just cause exists.

The Supreme Court of Canada concluded, following a complete review of the evidence, that McKinley appeared to believe that the medication referred to in the letter to his physician was a last resort, and not yet required. This interpretation was reinforced by the physician's notes in his file. Further, there was evidence that McKinley had been agreeable to trying the medication if it was necessary. There was no basis upon which to conclude that McKinley had been dishonest. The Court accordingly reinstated the jury verdict finding the dismissal to have been without cause.

The "contextual approach" was born. Henceforth, the contextual approach has been used for the determination of whether there is just cause for termination of a contract of employment in Canada.

C. THE CASE LAW IN 2008

When looking at the present state of just cause, it is clear that the recent cases are following certain core principles as have been enunciated by the Supreme Court of Canada in *McKinley v. B.C. Tel.*

Specifically, while emphasizing the importance of work to a sense of identity and self-worth as was articulated by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* and *Wallace v. United Grain Growers Ltd.*, the cases continue to consistently utilize the contextual analysis test. In striking the required balance, it is evident that the recent cases, as set out below, are focusing on the continued viability of the employment relationship with a view to determining whether the misconduct in question violates an essential condition of the employment contract, breaches the faith inherent to the relationship or is fundamentally inconsistent with the relationship continuing.

(a) NO CAUSE (ONTARIO)

(1) *Link v. Venture Steel Inc.*[9]

This case involved the termination for just cause of the 37 year old Vice-President of Sales of the defendant company after approximately 7 years of employment. The plaintiff employee commenced his duties as the General Sales Manager, of what was then a new venture, in the fall of 1996, and rose to the level of VP Sales during a period where sales of the company had increased from $18.5 million at that end of 1997, to $335

[9] [2008] O.J. No. 4849 (Ont. S.C.J.).

million by early 2005. At the time of termination in February, 2005, the plaintiff was earning $536,365.02 per annum.

The trial witnesses proffered by the employer testified to wide-sweeping and varied allegations of just cause. The allegations ranged from acts of conspiracy to defraud, fraudulent misrepresentations, taking secret profits and breach of fiduciary duties to drinking in excess, committing vulgar acts in front of staff, theft of carpet and substituting a lower grade quality steel in customers' orders. Most of the allegations were abandoned by the employer during argument after the completion of the evidence. Ultimately, the employer's cause allegation was based upon two transgressions; namely the theft of carpet worth approximately $4,200.00 and the substitution of the lower grade steel.

The Court noted that it has long been established that an employer may summarily dismiss an employee for just cause if the employee is guilty of a "repudiatory breach of the employment contract or had evidenced an intention to no longer be bound by the employment contract or a fulfillment of a term thereof".

The Court adopted the Supreme Court of Canada's statement in *McKinley v. B.C. Tel*; however, ultimately, the Court was not required to undergo a detailed analysis as it found that on the evidence, the employer was unable to prove the dishonest acts alleged and therefore no just cause for the termination could be supported.[10]

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[10] Given the plaintiff's senior position, his involvement in the establishment of the company and his significant compensation, he was awarded reasonable notice of 12 months.

(2) *Townsend v. North American Industrial Inc.* [11]

This case involved the termination of a 56 year old technician by reason of his failure to report to work, despite being requested to do so by his employer. The employer took the position that the employee's failure to attend work amounted to a decision to resign or justified a termination for just cause.

In applying the contextual approach from *McKinley v. B.C. Tel*, the Court noted that the technician was a long-time (8 year), highly competent and valued employee. Further, the Court noted that the employer was aware that the technician did have an intention to return to work after taking some time off as a consequence of his disappointment arising from the re-assignment of his position. The Court found there to be no cause for termination.[12]

(3) *Dawson v. FAG Bearings Ltd.* [13]

In this case, the 57 year old plaintiff employee had been employed for 14 years by the defendant employer when she was terminated for just cause due to unsatisfactory work performance.

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[11] [2008] O.J. No. 5193 (Ont. S.C.J.).
[12] The technician was awarded damages in lieu of notice of six months after partially mitigating his losses.
[13] [2008] O.J. No. 4305 (Ont. S.C.J.).

During the last year of her employment, after years of devoted service and good performance, the plaintiff had been assigned to a new position within the defendant's bearing manufacturing company.

Following her re-assignment, over a three month period, the employee began to experience quality control problems. The defendant terminated her employment after the fourth quality related incident, in accordance with its four step progressive discipline policy as set out in its employee handbook.

In finding that the plaintiff had been wrongfully dismissed, the Court found that first, there was no evidence that the verbal offer of employment made to the employee contained all or some of the terms set out in the employee handbook, although the handbook had been provided to her sometime between 9 – 12 months after commencing employment and she had been asked to review it. Further, the introduction to the handbook was not interpreted by the Court as stating that it formed part of the employment contract as it was expressed to contain "general rules and guidelines", subject to review and updating.

In respect to the operation of the progressive discipline policy itself, the Court found that it was administered inconsistently and unfairly. The employee had not been given notice that a suspension could result from the investigations of the final incident carried out by the employer, as was provided in the handbook, and no **independent** review of the decision to terminate was undertaken by management, or the Employees' Committee,

while the handbook stated that all suspensions and dismissals were "subject to" such a review.

The Court, relying on *McKinley v. B.C. Tel*, applied the contextual approach and stated that when dealing with long term employees, the misconduct must be more serious in order to justify dismissal with cause. Ultimately the Court held that an employee with such lengthy, devoted service was entitled to greater consideration when suddenly encountering performance problems in a new position, and noted that the employer did not make efforts to assist her, nor did the company consider returning her to her former position, even though the handbook specified that to be the normal procedure in those circumstances. It was found that her errors over that short period of time were not sufficient to constitute just cause.[14]

(4) *Beard v. Suite Collections Canada Inc.*[15]

The plaintiff employee, a manager of legal collections, was terminated for just cause after 3 years of employment at the age of 36. The employee had extensive responsibilities and reported directly to the President and Chief Executive Officer.

The defendant employer terminated the plaintiff for making racist and sexist slurs; ignoring business opportunities that would have generated business; engaging in sexual harassment of a subordinate employee by way of graphic, inappropriate emails in breach of the employer's email policy and by way of sexual advances; for breaching provisions

[14] The employee was awarded 10 months' notice.
[15] [2006] O.J. No. 5736 (Ont. S.C.J.).

of the *Tenant Protection Act*; and, for failing to attend to his duties by missing significant amounts of time from work and failing to communicate with subordinates. The plaintiff denied all of these allegations.

The trial Judge found that the employee had in fact made racial and sexist remarks; that he had failed to pursue at least one business opportunity; and that while the graphic emails were consensual in nature and thus did not constitute sexual harassment, they did constitute a clear breach of the company's email policy. The other allegations were found by the Court not to have been proven.

In determining whether just cause for termination existed by reason of the misconduct found, the Court relied upon *McKinley v. B.C. Tel*, and stated that the determination required an "assessment of the context of the alleged misconduct". The Court again emphasized that just cause for dismissal only exists where the conduct 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 obligation to his or her employer."

The Court further stated that in assessing the context, it was required to consider the particular facts and circumstances of each case; the nature and seriousness of the wrongdoing; and the proportionality of the misconduct to the dismissal in order to determine whether the employment relationship could be sustained.

In arriving at the conclusion that the plaintiff had been wrongfully dismissed, the Court noted that the employee had not been provided with a warning concerning his misconduct; there was no evidence that the email policy was enforced by the employer; and the employee was generally regarded as a diligent employee.[16]

The decision was upheld by the Ontario Divisional Court.[17]

(5) *Brien v. Niagara Motors Ltd.* [18]

The plaintiff employee was 51 years of age and had been employed for 23 years as a clerk and then office manager/ bookkeeper when her employment at a car dealership was terminated for just cause.

The employee had not been disciplined or warned prior to her termination, which was allegedly due to her being consistently late in submitting monthly reports to the manufacturer; being rude and moody with other staff and using profanities; and exhibiting unwillingness to work overtime to meet deadlines. It was also alleged that after her termination it was discovered that the employee had failed to register customer warranties; potentially resulting in significant liability for the employer.

Citing with approval the contextual approach as utilized by the Superior Court of Justice in *Geluch v. Rosedale Golf Assn.* (2004), 32 C.C.E.L. (3d) 177 (S.C.J.), and by the

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[16] The employee was awarded 3 months' pay in lieu of notice, less mitigation income earned during this period. No Wallace damages were awarded.
[17] [2008] O.J. No. 2799.
[18] [2008] O.J. No. 3246 (Ont S.C.J.).

Supreme Court of Canada in *McKinley v. B.C. Tel*, the Court stated that first, the employer was required to establish the employee's misconduct on a balance of probabilities, and second, the employer must establish that the nature or degree of misconduct justified dismissal.

The Court noted that the facts in each case are determinative and that the Court must examine the nature of the particular workplace, the employee's position, the nature and severity of the alleged misconduct and the employee's length of service.

The Court further noted that when dealing with allegations of poor performance, "gross incompetence" is required to justify a summary dismissal. Anything short of "gross incompetence" requires notice to the employee so that the employee is given a fair opportunity to remedy the alleged incompetence. In that instance, the employer has the onus of proving:

(i) that it has established reasonable, objective standards of performance;

(ii) that the employee has failed to meet those standards;

(iii) that the employee has had warning that he has failed to meet those standards and that his position will be in jeopardy if he continues to fail; and

(iv) that a reasonable amount of time has been provided for the employee to correct the situation.

Further, the Court will consider whether the employer has condoned the employee's level of performance.

In considering these factors, the Court found that the employer had failed to prove any of the allegations and that the employee was entitled to an award of damages.[19]

The decision was not appealed by the employer on any issues.

(6) *Puhl v. Katz Group Canada Ltd.*[20]

The employee had worked as chief executive officer and later Vice-Chair, for the defendant for over 7 years. Relatively new members of the management team believed recent poor performance of the defendant company to be as a result of the employee's management decisions. The employee was terminated for alleged failure to execute his duties, negligence, incompetence, misrepresentations, and breaches of fiduciary duty.

In particular, the company had been experiencing shortfalls in inventory counts resulting in substantial write-offs which had been a major contributor to the financial decline. The allegations had dramatically expanded by the time of trial.

The Court held that the appropriate means of assessing the plaintiff's execution of his job duties to be the application of the "business judgment rule". The Court adopted the language of the Supreme Court of Canada in *People's Department Stores v. Wise* and held the standard of care of a CEO, director or officer to be one of a reasonably informed individual:

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[19] Damages were awarded equivalent to 24 months, together with an award of 23 weeks for statutory severance pay; an additional 2 months for bad faith conduct; and damages for loss of overtime pay and taxable benefits; and vacation pay over the notice period, less mitigation income earned.
[20] [2008] O.J. No. 66 (Ont. S.C.J.).

> "The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision."[21]

The Court concluded that the actions which the company sought to impugn were entitled to the benefit of the business judgment rule. The Court found the plaintiff's conduct and business decisions to be reasonable and not in breach of any fiduciary duty. He acted with prudence and on a reasonably informed basis in his decision making. Accordingly, the Court held there to be no cause for his termination. The employee was entitled to payment of the balance of his contract term.

(b) NO CAUSE (OTHER PROVINCES)

(1) *Langan v. Kootenay Region Métis Assn*[22]

In this decision the British Columbia Supreme Court was called upon to determine whether the Kootenay Region Métis Association had just cause to terminate the employment of its Chief Administration Officer, 44 years of age, for just cause.

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[21] [2004] 3 S.C.R. 461 at par 67.
[22] [2008] B.C.J. No. 1641 (B.C.S.C.).

The plaintiff employee had been in the employ of the defendant employer for a period of 6 years. The employer had alleged that the plaintiff had engaged in various acts of misconduct including personal use of an unauthorized band pre-paid credit card; adding payments for work done for the office by her spouse to cheques to herself; payment of a courier expense to herself after her husband made the delivery; accounting/ administrative incompetence and administrative cost overruns.

The employer alleged that the cumulative effect of the above issues was sufficient evidence of a serious beach of the employment relationship such that it could not have survived and termination was justifiable.

The Court relied upon *McKinley v. B.C. Tel*, to hold that even where, as in the case in issue, there was alleged evidence of dishonesty discovered subsequent to a termination and it was of such a nature so as to be damning of a persons' character, it is still incumbent upon the Court to examine each case on its own particular facts and circumstances and consider the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with the continuance of the employment relationship.

The Court concluded that it was not satisfied that the employer had proven deceitful conduct on the part of the employee; at best the conduct amounted to "shortcuts in the shroud of expediency" or "issues as to competence". The Court suggested that the employer ought to have met with the employee to set out its concerns; ought to have taken into account the employee's long service and accomplishments; and should have

allowed an opportunity for the employee to respond rather than opting for a summary dismissal, which was found not to be justified.[23]

(2) *Poliquin v. Devon Canada Corp.*[24]

The defendant employer brought a summary judgment motion in response to the plaintiff's action for wrongful dismissal. The plaintiff employee, who had been employed with the defendant for 6 years, was terminated for just cause.

The employer alleged that the employee, who was a senior production foreman and had supervisory duties over other employees, had viewed and transmitted a large volume of pornographic and racist material on the internet, contrary to the employer's Code of Conduct and Corporate Policies manual. Further, the employer alleged that the employee had accepted free landscaping services from its suppliers or contractors in violation of company policy.

The employee had been cautioned in writing against accessing pornographic material in 2001 and had undertaken not to repeat such conduct.

The Court referred to *McKinley v. B.C. Tel*, to confirm that while summary dismissal can occur for a number of reasons, including dishonesty, conflict of interest and breach of a duty of fidelity, the context – "in the form of the nature of the acts, the circumstances surrounding its occurrence, and the employment relationship" had to be considered.

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[23] The Court awarded the employee 15 months notice, less mitigation income earned.
[24] [2008] A.J. No. 1227 (Alta. Q.B.).

While finding that the employee had in fact been guilty of the allegations, the Court also looked at the proportionality of the discipline imposed. Stating that there was only one instance of forwarding a racist email; that at least one of the suppliers providing free services was also a friend of the employee's; and that only two of the pornographic emails originated from the employee and they were relatively innocuous, the Court again relied upon *McKinley v. B.C. Tel*, and held that a termination for just cause was too severe.

The employee had been a good employee up to the time of his dismissal and there was no evidence of a negative impact of his conduct upon the employer's business or reputation, as well as no evidence of objections from other employees. Also, the other employees who had participated in the exchange of pornographic emails had not been disciplined.

The employer's summary judgment motion was dismissed. The issue of whether or not just cause existed was held to require a trial.

(3) *Gauthier v. Chinook Upholstery & Draperies Ltd.*[25]

The Court in this case concluded there to be no cause for termination where the plaintiff employee of 10 months was performing piece work in competition with her employer.

[25] [2008] A.J. No. 1313 (Alta. Prov. Ct.).

The work was found to be, at the request of her supervisor[26], and without the employee being aware that she was doing anything wrong. The employer also raised allegations of theft; however, no theft was proven at trial, and hence could not be considered in assessing cause.

(4) *Myers. v. Away We Grow Child Care Inc.* [27]

A daycare director, employed by the defendant centre for 6 months, was held not to have been terminated for cause when she failed to keep a copy of a criminal record check on a new daycare worker in that employee's file, or to note in the file that she had seen the record. Neither that, nor the failure to report to the Centre's Board of Directors comments received by the employee about criminal charges having been laid against the same worker made to her by a parent, were found to be dishonest, nor constitute cause on any other basis.

(5) *Pires v. Vectis Technologies Inc.* [28]

The plaintiff had been employed as Engineering Manager for one year in a small company which was in its early stages of starting up. The employee was initially terminated without cause; subsequently, the employer alleged after-acquired cause.

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[26] The supervisor had also sued for wrongful dismissal; however, the case was settled before trial.
[27] [2008] S.J. No. 174 (Sask. Prov. Ct.).
[28] [2008] B.C.J. No. 1288 (B.C.S.C.).

The employee had lunch with one of the potential investors in the company during which time the two discussed the potential investor's plans to squeeze the present owner in terms of the offer to be made. The potential investor was trying to use the employee in order to secure acceptance of the terms of his offer to the owner. He was promised a key role in the company. Two days later, the employee told the owner of the lunch meeting and the discussions. However, later discussions also took place in which the employee and the investor discussed the owner's strengths and weaknesses as a manager.

Notwithstanding a worsening financial position of the company, the employer was unable to come to a deal with the potential investor.

The employee was terminated, along with many others as the company ran out of money to pay salaries. While one week of pay in lieu of notice was given at the time, the employer later alleged cause, namely breach of trust and a fundamental breach of the employment contract.

The Court refused to accept that criticisms of management abilities constituted a breach of his obligations to the company. Further, the evidence was concluded to fall far short of anything which caused the potential investor to withdraw his proposal, the company simply ran out of time, money and options. No cause for termination was found to exist.

D. CAUSE (ONTARIO)

There were no reported decisions in Ontario in the past year at the time of writing in which the Court held there to be cause for termination of the employee's employment.

E. CAUSE (OTHER PROVINCES)

(1) *Zenkewich v. Horizon Computer Solutions Inc.*[29]

The plaintiff employee worked for the defendant company as a sales representative for 4½ years before being terminated for just cause for allegedly actively applying for and accepting manufacturers' commissions on 10 – 12 occasions over a period of one year. This was alleged to be contrary to the defendant's internal policy, created and circulated 3½ years after his employment commenced. The employee acknowledged the conduct, but said the employer was well aware of it, and received part of the benefit of the commissions.

Upon being confronted, the employee readily admitted to having applied for the commissions and asserted that it was his intention to distribute the commissions among the other sales representatives as the policy required. The employer did not believe his assertions.

Up to the date of termination, the plaintiff was considered to have been a good employee. However, the employer took the position that the employee's conduct was dishonest and amounted to a violation of trust justifying immediate termination for just cause.

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[29] [2008] S.J. No. 668 (Sask. Prov. Ct.).

The Court accepted that to support a termination for just cause, the employer was required to prove conduct that was "clearly inconsistent with [the] express or implied conditions of service".

Further, the Court relied upon *McKinley v. B.C. Tel*, to state that misconduct must be analyzed in the circumstances of each case using the contextual analysis approach; including looking at the nature and extent of the misconduct; the surrounding circumstances, including the employee's age, employment history, seniority, role and responsibilities as well as the employer's business, relevant employment policies and practices, the employee's position within the organization and the degree of trust placed in the employee; and proportionality, in terms of whether the employment relationship could be sustained.

The Court ultimately found that the employee knowingly failed to comply with the policy; although he was not secretive about his receipt of the commissions. Further, the Court found no intent to defraud his sales colleagues of their share of the commissions. Notwithstanding those findings however, the Court concluded that the employer had just cause for termination.

The Court determined that the employee's misconduct, considered as a whole, was incompatible with his employment relationship and could not be reconciled with his employment obligations, given his employer's core value of integrity.

The Court found integrity to be a fundamental term of the employment contract and that the employee had repudiated same. The Court relied upon a 1993 decision of the Ontario Court of Justice General Division and a 1986 decision of the British Columbia Supreme Court in support of its determination on the issue of fidelity and integrity and dismissed the action without costs.

(2) *Backman v. Maritime Paper Products Ltd.* [30]

The plaintiff employee was terminated for just cause after admitting to have viewed internet pornography on his work computer. The employee had been employed for 14 years in the position of Structural Design Supervisor and had responsibility over two other skilled employees.

The evidence disclosed that the employee had surfed inappropriate pornographic websites for a total of 13 hours over a period of 10 days in October, 2006 and was terminated on November 9, 2006 once the company discovered his misconduct. Four years prior to his termination the employee had acknowledged in writing receipt of the "Acceptable Use Policy" of the employer.

The employee had received written warnings to cease his access to such sites on two prior occasions, 4 years and 3½ years prior to his termination respectively. The last warning stated that any further infraction would result in his termination. In March and

[30] [2008] N.B.J. No. 249 (N.B.Q.B.).

April, 2005, after the last written warning, the employee accessed the sites again but his misconduct did not prevent him from receiving a salary increase in October, 2005. The employee alleged that his misconduct had been condoned and that the employer was estopped from terminating him without a further warning.

The Court held that the employee's conduct constituted sexual harassment, and that any condonation or estoppel by the employer with respect to the employee's misconduct could not defeat the employer's legal obligation to prevent sexual harassment in the workplace.

The Court further stated that a detailed consideration of the facts of the case was necessary to determine whether the employee's misconduct "was serious and incompatible with his duties" as a manager, or whether the actions were "clearly inconsistent with the proper discharge of the employee's duties that reasonably indicates a risk of injury to the employer's interest through continued employment".

The Court held that the employee's repeated viewing of internet pornography was a serious matter and constituted a pattern of behavior that destroyed the trust relationship with his employer.

The Court upheld the termination for just cause and dismissed the action with costs.

(3) *Van Der Meij v. Victoria Immigrant and Refugee Centre Society*[31]

The Court in this case found there to be cause for termination where an employee of nine years sent an email to the Board of Directors of the organization for which she was employed about her supervisor on issues she had never before discussed with him. It was find that the email was disrespectful, pejorative and unnecessarily inflammatory such as to constitute a fundamental breach of trust in the relationship between the employee and her supervisor.

The employer alleged that an email sent by the plaintiff, who had been employed for nine years as the settlement coordinator amounted to a resignation. In the alternative, it was argued that the email amounted to such insubordination, breach of trust, loss of confidence and insolence as to constitute grounds for termination.

The employee was acknowledged to have been good at her job and hardworking. It was not contested that she dedicated herself wholeheartedly to the welfare of the organization's clients and the enhancement of their work. Until the email, there was no doubt in her abilities. There was never before occasion to impose a disciplinary warning for any misconduct and she had always been respectful to her supervisor.

The Court concluded that in the absence of clear and unequivocal evidence, it could not concluded that there had been a resignation. However, the Court went on to conclude

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[31] [2008] B.C.J. No. 1374 (B.C.S.C.).

that the email constituted grounds for immediate termination for cause. C.J. Bruce J. wrote:

> "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."

Having regard to the tone and language of the letter, as well as the fact it was sent to the board of directors, without first giving her supervisor the opportunity to deal with the problems raised, and make an effort to salvage the working relationship, there was a fundamental breach of trust such as to justify cause for termination. The Court made no direct reference to the decision in *McKinley*.

(4) *Lindsay v. Peace Hills Trust*[32]

The employee was employed as the administrative supervisor, a management position, at a branch of the defendant trust company for a period of six years. She was terminated, and the trust company relied upon after-acquired cause, namely, the discovery that the employee had been covering overdrafts on behalf of a relative, to ensure that the person

[32] [2008] N.B.J. No. 357 (N.B.Q.B.).

did not show up on a branch report as being overdrawn. This affected the relative's credit-rating.

The Court held the depositing by the employee of money of her own into the relative's trust account to constitute just cause for the termination of her employment. The Court arrived at this conclusion based upon the finding that the employee acted in a conflict of interest and her conduct constituted a fundamental breach of her employment contract. No reference appears in the case to the *McKinley* decision.

F. CONCLUSION

No big shifts, dramatic pronouncements, nor real surprises in the past year. What we do see however 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 also see some suggestion that progressive discipline may be of assistance, or perhaps required, in cases where gross incompetence is not present in order to establish cause, even in cases where employers rely upon violations of company policy as grounds for termination.

While progressive discipline may be the yardstick for non-managerial staff, the business judgment rule will be the measure for directors, officers and senior management in determining whether cause exists.

Will these measures lead to any findings of termination for cause in Ontario in 2009? Will the Supreme Court of Canada re-write *McKinley* doctrine? Only time will tell.