

Executive Employment

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Highlights

WRONGFUL DISMISSAL

Wallace update: have we got it right, yet?

The Supreme Court of Canada decision in *Wallace v. United Grain Growers* awarded an extension of the notice period when an employer acted in bad faith with respect to the manner in which an employee is discharged. The lower courts have interpreted and applied this decision in a manner which has increased the notice period in situations not contemplated by the decision. Further, the *Wallace* decision has resulted in a proliferation of claims for increased notice periods alleging employer "bad faith." Eric Durnford and Amy Bradbury examine the ongoing effect of the *Wallace* decision and discuss steps an employer can take to avoid a claim for extended notice. 458

JUST CAUSE

dishonesty: cause for summary dismissal?

Honesty, trust and fair dealing are implied in all employment relationships. However, there is no absolute rule that an employee's dishonesty provides just cause for dismissal. In *McKinley v. B.C. Tel*, the Supreme Court of Canada determined that proving an employee's lie is only the first step. More important is whether the dishonesty is serious enough to have broken down the employment relationship completely (justifying immediate dismissal), or if other lesser disciplinary sanction is more appropriate. Michael Coady and Koml Kandola review and assess the impact of the *McKinley* case. 463

JUST CAUSE

practical tips for the employer

The Supreme Court of Canada's judgment in *McKinley v. B.C. Tel* will undoubtedly affect employer practices when dealing with allegations of just cause in the workplace. Joe Conforti reviews the balancing required between an employee's right not to be unfairly dismissed on the one hand, and an employer's right to expect a high standard of honesty from its employees on the other hand, with a view to assessing the practical implications for employment contracts, discipline, investigations and damages. 466

LEGISLATION

legal ramifications of article 3118 of the CCQ

The possible conflict of laws related to section 3118 of the Civil Code of Quebec are assessed by Robert Bonhomme and Marc-Andre Robert. Despite the apparent right that parties to an employment contract have to choose their contract's governing law, the authors ask the question, "Is there a real choice?" in view of the mandatory protection provided to employees under Quebec law, pursuant to section 3118. 470

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JUST CAUSE

Dishonesty: Not Always Just Cause for Summary Dismissal

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The secret of life is honesty and fair dealing.
If you can fake that, you've got it made.

Groucho Marx

Introduction

An employment relationship is one built on mutual obligations.

An employee owes a duty to perform the required work competently, honestly and faithfully. Where there is employee misconduct inconsistent with the conditions of service, dismissal without notice or payment is justified for "just cause." That is:

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right to summarily dismiss the delinquent employee.¹

In turn, the employer's obligation is to provide the work and compensation as agreed. Where there is no fixed term of employment, it is presumed that the relationship will continue indefinitely and that the employee will not be dismissed without reasonable notice or payment in lieu of notice unless there is just cause. An employer also owes a positive duty of "fair dealing" in carrying out any dismissal. In the words of the Supreme Court of Canada:

¹ *R. v. Arthurs, Ex. Parte Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2nd) 342 at 348 (Ont. C.A.), rev'd 70 D.L.R. (2nd) 693 (S.C.C.) (per Schroeder J.A. dissenting).

[A]t a minimum, I believe that in the course of dismissal, employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or that is in bad faith by being, for example, untruthful, misleading or unduly sensitive.²

Honesty, trust and fair dealing are integral components of any employment relationship.

In a recent decision, *McKinley v. B.C. Tel.*³ the Supreme Court of Canada was faced with the issue of whether an employee's dishonesty, namely lying to his employer, always constitutes just cause disentitling the employee to severance. The Court framed the issue starkly:

[T]he question is whether any dishonesty in and of itself, suffices to warrant an employee's termination, or whether the nature and context of such dishonesty must be considered in assessing whether just cause for dismissal exists.⁴

Background

The facts as well as the lower courts' decisions in *McKinley v. B.C. Tel* are reviewed in the preceding article by Michael Coady and Komi Kandola. In summary, the case involved a long-service professional employee, Mr. McKinley, who was dismissed by his employer, B.C. Tel for dishonesty (characterized as "a lack of frankness"⁵ by the Trial Judge).

Supreme Court of Canada

Dishonesty: Contextual versus Absolutist Approach

On appeal to the Supreme Court of Canada, the Court faced a key issue: is there an absolute rule that dishonesty always constitutes just cause for summary dismissal, or rather, does the degree and context of the dishonesty make a difference?

The Court expressly rejected an absolute, unqualified rule that any dishonesty justifies dismissal for just cause. Such an approach

² *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at paragraph 98.

³ [2001] S.C.C. 38.

⁴ *Ibid.* at paragraph 1.

⁵ *Ibid.* at paragraph 16.

would entitle an employer to dismiss an employee for just cause for a single act of dishonesty, however minor. The Court finds this unfair, given that the consequences of dishonesty remain the same and would apply irrespective of whether the impugned behaviour is sufficiently serious to undermine the employment obligations and good faith inherent to the employment relationship.⁶

The Court noted that there are instances where dishonesty will almost certainly always merit summary dismissal. This is so where theft, misappropriation or serious fraud is found or where the employee acted intentionally so as to extract personal financial gain or profit at the employer's expense.⁷

In contrast, under the contextual approach, a finding of misconduct – even of dishonesty – would not in itself give rise to just cause; rather, the question is whether, in all of the circumstances, the employee's behaviour is "so grievous" that it is fundamentally incompatible with continued employment. For example, misconduct must be more serious to justify the dismissal of a more senior, longer-service employee who has made valuable past contributions to the company. Under the contextual approach, the existence of dishonesty is only the first step in the analysis: was there any deceit in fact? The more important step is determining whether the particular dishonesty is sufficiently serious so as to justify dismissal without notice or severance.⁸

Proportionality

Dismissal for just cause is a blunt instrument. Once just cause is determined, the employee is wholly disentitled to any severance and, of course, is out of a job. There is no halfway remedy.

Underlying the Court's contextual approach is the "principle of proportionality." That is, some misconduct although wrong, may not warrant outright dismissal; rather, "[a]n effective balance must be struck between the severity of an employee's misconduct and the sanction imposed."⁹

The Court recognizes that workplace dishonesty is unacceptable. However, the Court suggests a hierarchical approach, with only the most serious misconduct justifying dismissal for just cause, with other misconduct meriting "proportional" punishment:

This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures that an employer may take in these circumstances.¹⁰

According to the Court, this proportional approach to discipline emphasizes that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause but mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonesty, however minor, with just cause.

Application to Facts

In the result, the Court determined that it was proper for the trier of fact (here, the jury) to consider all of the circumstances surrounding Mr. McKinley's conduct with a view to determining whether the alleged dishonesty undermined his essential job obligations to B.C. Tel, his employer.

The Court further concluded that in the particular circumstances of this case, the jury could reasonably and judicially have found that Mr. McKinley did not engage in dishonest conduct of a degree incompatible with his continued employment relationship.

Finally, with respect to damages, the Court accepted that the jury acted in accordance with legal principles in increasing the reasonable notice period (from 22 to 26 months) based on the manner in which the employer conducted the dismissal. In this case, the evidence of bad faith or unfair dealing included the following factors: Mr. McKinley was dismissed while on short-term disability and while suffering from hypertension and depression; B.C. Tel chose to terminate rather than try to find him another position within the organization; B.C. Tel made it difficult for Mr. McKinley to obtain a

⁶ Ibid. at paragraph 55.

⁷ Ibid. at paragraphs 50-51.

⁸ Ibid. at paragraphs 48-49.

⁹ Ibid. at paragraph 53.

¹⁰ Ibid. at paragraph 52.

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copy of his long-term disability plan; during the negotiations after termination, B.C. Tel. reduced its severance offer. Note that, although increased notice was permitted on the basis of bad faith/unfair dealing, the Supreme Court of Canada determined that there was no basis for aggravated or punitive damages; the jury's award of \$100,000 in this regard was, therefore, overturned.

Practice Points

The Supreme Court of Canada has unre- servedly rejected the notion that dishonesty always justifies dismissal for just cause.

Employers have long put into context (or dealt with "proportionally") employee misconduct of other types. This will now apply to dishonesty as well. However, the Court's decision does highlight the need for careful analysis before, during and at the termination of the employment relationship so as to maintain the employer's obligations of fair dealing.

Now some points to consider in light of *McKinley v. B.C. Tel.*

Employment Contracts

Subject to employment standards legisla- tion (governing such items as compensation, minimum severance, etc.), parties are free to agree expressly on the terms that will govern their employment relationship. This can include provisions for termination of employ- ment, including the events that will trigger employment with or without payment of severance. If the particular relationship war- rants it, an employer and employee may agree contractually that any act of dishonesty consti- tutes just cause for termination without sever- ance. Although not having the same enforce- ability as the employment contract, employers are well-advised to develop and implement an "employee conduct" policy. The distribution of such a policy (e.g., in an employee manual) can outline expected standards of conduct, employer expectations and the consequences of any breach of the standards.

Discipline

Prior to *McKinley v. B.C. Tel.*, there was some doubt as to whether an employer could legally impose reasonable discipline such as a suspension, reduction of pay or demotion in the event of wrongdoing; previously, such a

drastic action could be viewed as an act of constructive dismissal entitling the employee to severance.¹¹ However, by expressly allow- ing alternative disciplinary measures for "less serious types of misconduct," the Supreme Court of Canada has greatly enhanced an employer's flexibility in monitoring its work- place so as to maintain established perfor- mance standards. Although the extent of the disciplinary remedies available are not yet clear (nor the seriousness of the misconduct for which the employee can be made subject to discipline), the Court seems to be inviting a case-by-case disciplinary approach akin to that now used in unionized settings.

Investigation

In making the decision to dismiss or to impose some lesser sanction, the employer should consider several factors:

- Was the lie/dishonesty intentional or was it an error in judgement? Was it a planned deception or "spur of the moment?"
- Did the employee recant the lie at his or her earliest opportunity or was the lie maintained? Did the employee apologize?
- Was the lie intended to save others from embarrassment or for personal benefit?
- What benefit did the employee receive from the lie? What was the detriment to the employer?
- Was the lie intended to conceal the employee's own wrongdoing? Did it hinder an investigation?
- Was the lie relied on by the employer or did it impact its workplace or business?
- Is the nature of employment one which places a higher obligation of trust on employees (lawyers, accountants, financial institution employees)?
- How long has the employee been em- ployed? Has he or she been a valuable contributor in the past? how does the dishonesty fit within the employee's prior disciplinary/performance record?
- What is the "corporate culture?" Are there employment policies or contract terms?

¹¹ See, e.g., *Haldane v. Shelbar Enterprises Limited* (1999), 46 O.R. (3d) 206 (C.A.).

Near Cause

"Near cause" or "moderated damages" is a legal principle where the employee is dismissed for reasons not serious enough to be just cause but where there has been some misconduct. Under this theory, the employer's obligation to provide reasonable notice of termination or severance is reduced from the amount otherwise owing to a "blameless" employee dismissed without any cause. It was thought that the Supreme Court of Canada had implicitly rejected this concept in *Dowling v. Halifax City*,¹² where it declined to accept any arguments on this issue. However, given the Court's stated objective for "proportionality" in *McKinley v. B.C. Tel*, the doctrine of "near cause" may still be available. Put another way, the employee's misconduct may not be sufficiently serious so as to disentitle him or her from all severance, but it may justify termination of employment with a lesser severance.

Bad Faith

The full extent of the damages available for "bad faith" dismissal has not yet been determined. It is important to note, though, that the Supreme Court of Canada continues to re-affirm the principle that employees must be treated fairly at the time of dismissal and that failure to do so may expose employers to additional sanctions in a wrongful dismissal lawsuit. It is unclear whether an employer's failure or refusal to consider alternative remedies less severe than dismissal in the case of dishonest or other misconduct can result in bad faith damages. Until this issue is resolved

then, a full investigation and good faith consideration of a full range of remedies by employers are recommended.

Conclusion

The Supreme Court of Canada continues to take a very activist approach protecting employees. *McKinley v. B.C. Tel* follows a line of recent decisions stressing that an employment relationship is typically one of unequal bargaining power, with the employee in a particularly vulnerable position at the time of dismissal. Recognizing, as the Court does, that the status of being employed provides a "sense of identity and self-worth" to employees, the Court's overriding objective is to minimize the power that an employer can wield over its employees.

Dismissal of an employee on a ground as morally disreputable as "dishonesty" is extremely harsh and has far-reaching impact on employees (for example, reputation, re-employment, self-worth). Consequently, dismissals based such an allegation should be reserved for the most serious of breaches and only where justified in the circumstances of the particular employment relationship.

Although issues remain to be resolved in applying the "contextual" approach to employee misconduct in general and dishonesty in particular, the Supreme Court of Canada message to employers in all of its recent employment decisions culminating in *McKinley v. B.C. Tel* is clear: treat employees fairly and with decency throughout the employment relationship, including dismissal.

¹² (1998), 158 D.L.R. (4th) 163 (S.C.C.).