



McCarthy Tétrault *Advance*™
Building Capabilities for Growth



Just Cause for Termination

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Types of Terminations

- **Termination for Cause**
- **Termination Without Cause**



What Does It Take To Be Fired for Cause?

- Termination without notice is the “capital punishment” of the workplace
- The “contextual approach” requires that an employer look at:
 - the employee’s misconduct, and
 - that conduct within the context of the whole employment relationship

What Does It Take To Be Fired for Cause?

- Two key questions:
 - Can you prove it?
 - Is the conduct sufficient to justify terminating for cause, considering:
 - The employee's history
 - The type of conduct
 - The position of the employee
 - Whether the employee knew the conduct was wrong
 - Any mitigating circumstances
 - Conduct after the misconduct?

Investigation

- Avoid impulsive dismissals
- INVESTIGATE FIRST
- Gather pertinent information from documents and interviews
- Understand employee's legal entitlements if terminated without cause
- Surveillance?
- Administrative/Investigation Leave
- Employee Confidentiality
- Storing Evidence



Do You Have Cause?

- “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 summarily to dismiss the delinquent employee.”
 - *R. v. Arthurs* (Ontario)

Do You Have Cause?

- Misconduct must be serious
- Employer must be objectively expected not to be able to continue to employ the employee
- Lesser discipline will not be sufficient
- Tough to maintain
- Messaging is important



Alternatives to a Just Cause Termination

- Progressive discipline and/or corrective measures
- Termination without cause
- Accept resignation
 - Be Very Cautious

Special Case – Poor Performance

→ In order to show just cause for performance, an employer will need to show:

- Standards of performance were clearly communicated;
- Provided adequate training and support;
- Standards were reasonable;
- Warning was given;
- Reasonable time was given to correct performance; and
- Employee failed to meet the standards.



Special Case - Insubordination

- To show just cause for one incident of insubordination, an employer will need to show:
 - Serious, wilful and deliberate disobedience of an order;
 - Order was known to the employee;
 - Order was consistently enforced;
 - Order was within the scope of duties;
 - Employee was aware of penalty;
 - Order was lawful and reasonable; and
 - No reasonable excuse.

Failure to Cooperate in an Investigation

- *Obeng v. Canada Safeway Ltd.*, 2009 BCSC 8
 - Investigation of suspected theft by grocery store assistant manager
 - Failed to explain his actions when questioned
 - Just Cause?



Body Odor Problem

- *Bagnall v Calvin Klein Cosmetics*, 1994 ON SC
 - Fragrance demonstrator
 - Complaints of body odor
 - Disruptive behaviour
 - Just cause?



Exaggerating Incident

- *Scholer v Hart Drug Mart Ltd.*, 2012 BC PC
 - Cashier
 - Complains to manager of getting kicked in the butt by a co-worker – clear exaggeration of event
 - Just cause?



Refusal to Work During Vacation

- *Bigelow v T.C. Mobile Vessels Ltd.*, 2011 AB PC
 - Day supervisor
 - Approval of vacation request
 - Refuses to work during scheduled vacation
 - Just Cause?



Drinking on the Job

- *Ritchie v 830234 Ontario Inc.* 2009 ON SC
 - Warehouse manager
 - Drinks beer during inventory count
 - Fails to acknowledge safety concerns
 - Just cause?



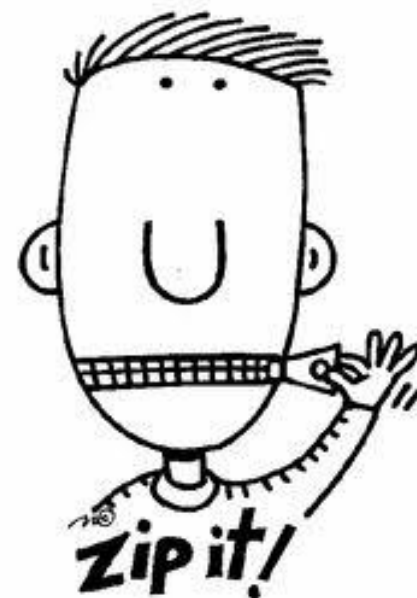
Office Relationship

- *Reichard v Kuntz*, 2011 ON SC
 - Purchasing manager
 - Affair with his subordinate
 - Non-fraternization policy with mandatory reporting of office relationships
 - Fails to report and repeatedly denies affair
 - Just cause?



Failure to Disclose that Fired from Last Job

- *Zadorozniak v. Community Futures Development Corp. of Nicola Valley*, 2005 BCSC 26
 - General Manager
 - Failed to disclose that left previous employer 10 years earlier due to forged receipt and affair with another manager's wife
 - Just Cause?



Is Addiction or Other Disability a “Get Out of Jail Free” Card?

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- Depends on relationship between disability and conduct
- Misconduct that rose to the level of a crime?
 - No discrimination if the disability played no part in the decision to dismiss and the employee suffered no greater impact than any another employee would have suffered for same conduct: *Gooding* decision (BCCA)
- Labour arbitrators use hybrid analysis
 - *Fraser Lake Sawmills* (BCLRB)

- Prepare written notice of termination
 - Succinct and specific reasons for dismissal
 - Payment of monies owed to employee
 - When benefits will terminate and conversion
- Meet with employee in private place, but with witness
 - Come to the point: give brief overview of reasons, and present letter
 - Keep notes
- Be careful with reference letters
- Neutral announcement

What if You Get it Wrong?

- Reasonable notice of termination
- Increased damages over and above notice of termination
 - Aggravated damages
 - Punitive damages

Small Group Discussion

→ Misconduct at the Office Party - Scenario



Questions and Answers





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