When should an employer terminate for cause?

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By:

An employment relationship is a relationship built upon mutual trust. Courts and tribunals have long held that when an employee violates that trust, the employer is justified in ending the relationship, for cause, and without notice.

Cause can be found directly in an employee's failure to perform his/her duties, misconduct related to the employment, or even conduct outside of work hours wholly unrelated to the employment. The Supreme Court of Canada describes the test as whether the employee's "behaviour was such that the employment relationship could no longer viably subsist."[1]

The difficulty for employers is that it is not possible to create a list of specific conduct that justifies a for cause termination. Each case has to be viewed on its own unique merits.

A review of some recent decisions illustrates this difficulty.

- An employee was alleged to have been driving inappropriately in the employer's facility, resulting in a collision with a piece of equipment. The individual operating the equipment only narrowly escaped injury. A "final written warning" was issued. Three months later, the employee was alleged to have backed a company truck into a customer's vehicle. The employee denied the second incident entirely. He was terminated for cause based on his "wilful and unsafe actions." The Ontario Labour Relations Board found the "for cause" termination was not

justified. It held that both of the incidents were, at worst, the result of carelessness, not "being bad on purpose" and did not meet the standard of wilful misconduct necessary to justify termination of employment without notice.[2]

- Conversely, a British Columbia Employment Standards Tribunal upheld the dismissal of three long term employees of a retail store for engaging in a scheme to collect parking reimbursements from their employer to which they were not entitled. The employees would collect discarded parking receipts from the store's parking lot, and submit them to the employer for reimbursement. The Tribunal agreed the conduct was fraudulent and "undermined the employment relationship" and that termination for cause was justified. [3]

- The for cause dismissal of a restaurant server for taking a relatively short unauthorized break was upheld by the British Columbia Labour Relations Board. The employee claimed to need a washroom break, but video evidence indicated she did not use the washroom. The Board found the conduct was "dishonest". The employee had a lengthy disciplinary record showing repeated, knowing, violations of the established break policy.[4]

- An employee was terminated by his employer following his conviction for possession of child pornography. He was sentenced to 60 days jail, to be served intermittently on weekends. The sentence did not require him to miss any scheduled shifts with his employer. His employment was terminated for cause, on the basis that his conviction violated the employer's Code of Conduct. The employee grieved his termination through his union. The arbitrator found for the employer. An appeal brought before the Court of Queen's Bench was dismissed on the basis that "the conduct of the Grievor has the potential to harm [the employer's] reputation" if he remained employed.[5]

- Similarly, an employee who maintained an account on the social media dating network "Grindr", agreed to meet what he believed to be a 13 year old boy. Instead, he met an activist seeking to publicly humiliate child predators. The encounter was videotaped and posted publicly. On the videotape, the employee audibly identified his employer. The incident did not occur during working hours and was unrelated to the employee's job duties. When the employer learned of the videotape, the employer gave the employee an opportunity to provide evidence that videotape was inaccurate. The employee could not do so and was subsequently fired for damaging the "reputation" of the employer. A grievance was filed, but the employee's union withdrew the grievance before it was heard. The Ontario Labour Relations Board rejected the employee's complaint that the union breached its duty of fair representation, finding that both the employer and the union had given the employee an opportunity to explain the conduct, but absent such explanation, the grievance withdrawal was justified. [6]

- An employee of a federally regulated, not-for-profit agency inadvertently disclosed a confidential membership list to a member of the agency's council. She did so under the mistaken belief the council member was entitled to see the list. Subsequently, she had family members assist her in preparing mail outs to members (again disclosing otherwise confidential membership information to her husband and daughter). In both cases, the disclosure of confidential information was an express violation of the employee's employment contract and a confidentiality agreement, both of which provided that any breach would be cause for termination. An adjudicator appointed under the *Canada Labour Code* found the employee's conduct did not amount to cause, holding that a lesser form of discipline would have been appropriate.[7]

As the above review demonstrates, long and protracted legal battles can ensue when an employee's employment is terminated for cause. Even if the employer is successful in defending its termination decision, it has incurred an expense that might have been avoidable, as well as committing significant internal and administrative time and resources to the legal process.

Accordingly, the decision to assert cause for termination should be approached as any other business decision would be. The employer should examine whether the cost of asserting cause will exceed the benefit.

The primary benefit of a "for cause" termination is that no notice or pay in lieu is owed to the terminated employee. Immediate termination for cause also sends a strong message to other employees that the misconduct will not be tolerated.

However, there are reasons – even if the basis for asserting cause seems unassailable – to consider other options including terminating without cause, a suspension, or a formal warning.

1. A terminated employee has to be replaced. There is a cost associated with finding and training a replacement.

2. It may be possible to terminate on a without cause basis and avoid any risk of an adverse legal finding. A strong, enforceable employment contract containing a termination clause restricting notice for a “without cause” dismissal provides economic certainty.

3. Offering even a small payment over statutory minimums allows the employer to secure a full and final release of any and all claims the employee might otherwise have. The certainty of a signed full and final release is often well worth the cost.

That said, caution should be exercised before deciding not to assert cause at the time of termination. Not doing so at the time of termination may preclude the employer from asserting cause if a settlement is not reached.

Before deciding on the approach, employers should consult with their legal advisor on the strength of the asserted cause, as well as the statutory and likely common law severance entitlements the employee might otherwise be awarded by a Court if the employer is not able to successfully prove it had cause for termination.

[1] *McKinley v B.C. Tel,* [2001] 2 SCR 161, 2001 SCC 38 (CanLII), at 29.
[2] 2018 CanLII 44825 (ON LRB).
[3] 2018 BCEST 48.
[4] 2018 CanLII 67296 (BC LA).
[5] 2018 SKQB 68 (CanLII).
[6] 2018 CanLII 64844 (ON LRB).
[7] 2018 CanLII 59839 (NB LA).