

"Unreasonable and unjust": SCC says not just any dishonest conduct by employee is cause for dismissal

Employee dishonesty is not, in and of itself, cause for dismissal, according to the Supreme Court of Canada. To know whether it is, the Court states, one must assess the context surrounding the alleged dishonest conduct.

The issue arose in the case of *McKinley v. BC Tel* (June 28, 2001). McKinley, a chartered accountant, had taken a leave of absence from work due to health problems after 16 years of service. He expressed an interest in returning to work in a less stressful position, but alternative employment was never offered by the employer. Eventually, the employer terminated McKinley, who rejected the accompanying offer of severance and commenced a wrongful dismissal action.

DISHONESTY ALLEGED

At first, the employer resisted McKinley's claim by saying that it had offered him a compensation package, and had used its best efforts to locate an alternative position for him. However, three days into the trial, the employer changed its defence to one alleging that McKinley had lied about his medical condition and the treatments available for it.

The allegation was made after the employer discovered a letter McKinley had written to one of his physicians. In the letter, McKinley referred to an earlier recommendation made by the physician that McKinley should take a certain medication upon returning to work. Based on this letter, the employer claimed that McKinley had deliberately withheld the fact that his physician had indicated that he could safely return to work if he went on this medication. McKinley denied that he had lied.

TRIAL JUDGE: WHAT DEGREE OF DISHONESTY?

In his charge to the jury, the trial judge stated that in order to find that there was cause for dismissal, the jury must find (a) that McKinley had in fact been dishonest, and (b) that "the dishonesty was of a degree that was incompatible with the employment relationship". The judge also put the question of aggravated damages before the jury, as well as "*Wallace*" damages for bad faith by the employer in the act of dismissal (see "[Fairly, reasonably and decently](#)": Employers obliged to deal in good faith with dismissed employees, Supreme Court rules"). However, the judge held that there was insufficient evidence to place the issue of punitive damages before the jury.

The jury found in favour of McKinley, awarding him over \$100,000 in general damages and \$100,000 in aggravated damages. As juries do not provide reasons, there was no indication whether it found no dishonesty on McKinley's part, or that he had been dishonest but not to

a degree sufficient to constitute cause.

COURT OF APPEAL: DISHONESTY ALWAYS CAUSE FOR DISMISSAL

The British Columbia Court of Appeal held that the trial judge had erred in inviting the jury to consider the extent of the dishonesty alleged and to determine whether this degree merited dismissal. According to the Court, "dishonesty within the contract of employment, as is the case alleged here, is cause and that cause is not founded on the basis of the 'degree' of the dishonesty".

Accordingly, the jury should have been instructed that, if it found dishonesty as alleged by the employer, as a matter of law, it must conclude that there was cause for dismissal. The Court did not substitute a finding of cause, but did order a new trial.

SUPREME COURT: A BREAKDOWN IN THE EMPLOYMENT RELATIONSHIP

The main issue before the Supreme Court of Canada was whether the trial judge had erred in instructing the jury that, to find cause, it must not only find that McKinley had lied, but also that the dishonesty was of a degree that undermined the employment relationship. A unanimous Court held that the trial judge had not erred.

Reviewing the jurisprudence, the Court noted that there were two distinct lines of cases: one which held that the circumstances of the dishonesty must be considered in order to know whether cause existed, and another which seemed to indicate that any degree of dishonesty constituted cause.

Upon closer examination, however, the Court observed that the divergence was more apparent than real. In each of the cases in which it was held that dishonesty *per se* was cause for dismissal, the courts were dealing with forms of dishonesty that "bordered on theft, misappropriation, forgery or a fraudulent sham". The fact that this line of case law always concerned very serious forms of employee dishonesty, the Court stated, was instructive for determining the proper analytical approach to McKinley's case.

That approach, the Court held, was that only some forms of dishonesty constituted cause and that it is proper to consider the specific form of dishonesty in the context of each case:

"I am of the view that whether 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."

COURT OF APPEAL'S RULE LEADS TO "UNREASONABLE AND UNJUST" RESULTS

Lesser forms of discipline for less serious infractions are permissible, the Court noted, based upon the principle of proportionality between the severity of the misconduct and the sanction imposed. In support of this proposition, the Court referred to its earlier decisions in which the importance of work to a person's identity and self-worth was asserted. The integral nature of work to the lives and identities of individuals in our society, coupled with the unequal bargaining power between employers and employees, meant that great caution should be observed before adopting the view espoused by the B.C. Court of Appeal:

"I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. ... Such an approach could foster results that are both unreasonable and unjust. 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."

Having enunciated these policy reasons for declining to follow the approach of the Court of Appeal, the Court concluded that the trial judge had not erred in instructing the jury to consider whether McKinley's dishonesty, if any, justified his dismissal.

WALLACE DAMAGES JUSTIFIED, BUT NOT AGGRAVATED DAMAGES

The trial judge had also put the question of extended, or "*Wallace*", damages before the jury. Pointing to evidence that McKinley had been dismissed while on short-term disability and suffering from depression, and that the employer had refused to find him another position in the company, the trial judge had told the jury that if they believed this conduct amounted to bad faith or unfair dealing, they could extend the notice period.

The Court upheld this part of the judge's instructions to the jury, but not the part concerning aggravated damages. Aggravated damages are awarded for an actionable wrong that is both separate from the breach of contract involved in wrongful dismissal, but that arises from the dismissal itself.

The judge had instructed the jury that there had been *some* evidence of deliberate infliction of mental distress, and on this basis, allowed the jury to consider this issue. The jury awarded \$100,000 to McKinley under this category of damages.

The Court held that the judge had erred in placing this issue before the jury, in that there was insufficient evidence of the employer having acted deliberately to inflict harm on McKinley. Accordingly, this part of the award was set aside.

In Our View

McKinley is consistent with other recent decisions of the Supreme Court of Canada that have manifested a desire to mitigate what the Court views as a power imbalance in favour of employers in common law employment relationships. It is also in line with the general trend in the jurisprudence to avoid rigid, automatic responses to categories of misconduct in favour of a contextual approach that examines each situation on its facts.

It is important to note that the Court also expressed support for lesser sanctions for misconduct that falls short of cause. This would seem to indicate that an employer who purports to discipline an employee for dishonest conduct that would not merit dismissal will not be vulnerable to a claim of constructive dismissal by the disciplined employee. In this connection see *Haldane v. Shelbar* (see "[Court of Appeal opens door to suspension of non-union employees](#)") and *O'Dwyer v. Dominion Soil Investigation Inc.* (see "[Court says](#)

demotion of problem employee is not constructive dismissal").

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