

Dishonesty is Not Always Grounds for Dismissal

The Supreme Court of Canada in the case of *McKinley v. BC Tel* determined that a single act of dishonesty by an employee may not necessarily constitute cause for dismissal. The Court decided that an employer must prove, on a balance of probabilities, that the employee was deceitful and that in the particular circumstances the dishonesty was sufficient to warrant summary dismissal.

In the *McKinley* case the employee suffered from high blood pressure as a result of hypertension, and had commenced a health related leave of absence. He subsequently advised his employer of his desire to return to work, but in a position of lesser responsibility. No alternate employment was ever offered to the employee and he was ultimately dismissed and offered a severance package in lieu of notice, which was rejected.

The employee brought an action for wrongful dismissal. The employer argued, among other things, that the employee's illness had frustrated the employment relationship and therefore the termination was justified. However, three days into the Trial the employer amended its pleadings and abandoned the defence of frustration. Instead, the employer argued that the employee had been dishonest about his medical condition, and consequently just cause existed for his dismissal. Specifically, it was alleged that the employee had deliberately withheld a medical opinion regarding a treatment option which may have enabled him to have returned to his former position without incurring any health risks.

At Trial, the Trial Judge instructed the jury that in order for just cause to exist, the impugned conduct must "undermine or seriously impair the trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship". Paris J. further stated that to justify summary dismissal, the jury would have to be satisfied that the employee was not only deceitful, "but that the dishonesty was of a degree that was incompatible with the employment relationship." The jury found in favour of the plaintiff, and awarded \$108,793 in general damages, \$1,233 in special damages, \$100,000 in aggravated damages, and \$6,091 in pension contributions, plus pre-judgement interest and costs.

On appeal, the Court of Appeal allowed the appeal and ordered a new trial. The Court concluded that the Trial Judge committed a reversible error by inviting the jury to consider the extent of the dishonesty alleged, and to determine whether it was of such a degree that it was incompatible with the employment relationship. According to the

Court, dishonesty within the employment contract is always cause, and such cause is not dependent upon the 'degree' of the dishonesty.

The Supreme Court set aside the Judgement of the Court of Appeal and restored the Trial decision. The Court explicitly rejected the 'absolute, unqualified rule' that an employer is entitled to dismiss an employee for a single act of dishonesty, however minor. Such an approach would result in the consequences of dishonesty remaining the same, irrespective of the severity of the dishonesty, and this could foster results that are both unreasonable and unjust. In addition, the Court recognized that termination on a ground 'as morally disreputable as dishonesty' may have overly harsh and far-reaching implications for employees, and for this reason an analysis of the circumstances surrounding the alleged dishonesty is necessary. The Court cautioned that even where such serious misconduct is alleged, an examination of the circumstances and nature of the conduct is still necessary in order to determine whether the dishonesty was sufficiently fraudulent to justify summary dismissal. As was stated by the Court:

“... 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.”

In order to comply with this test, the Court endorsed a two-fold analysis. The employer must first prove, on a balance of probabilities, that the conduct of the employee was deceitful. Once deceitful conduct has been established, the employer must demonstrate that the nature and degree of the dishonesty warranted dismissal.

The reasoning of the Supreme Court of Canada emphasizes that an employer must still demonstrate that summary dismissal is appropriate even where dishonesty can be established. The Supreme Court also suggested that an employer may be entitled to impose 'lesser sanctions for less serious types of misconduct', in certain circumstances. This comment may indicate greater judicial acceptance of disciplinary sanctions short of termination, such as unpaid suspensions, in the non-union workplace.

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