ISSUE 19 - JULY 2012

WL UPDATE

WHITTEN & LUBLIN
Employment Lawyers

POISON PENS AND PETULANT EMPLOYEES

Are employees entitled to criticize their employers without fear of discipline or dismissal? When will that criticism cross the line? What must employers tolerate before an employee's statements justify their dismissal for cause? Two recent British Columbia decisions provide a helpful framework.

In Grewal v. Khalsa Credit Union, the relationship between the CEO and a union branch manager, Grewal, became openly strained. Grewal was a long-service employee with two demotions on record and the CEO had previously expressed significant concerns with various aspects of her work.

When some irregularities appeared regarding the renewal of Grewal's personal mortgage, the CEO launched an investigation. But, before Grewal could be interviewed, she left the workplace on a ten month leave of absence.

Grewal eventually returned to work and participated in an interview, but before disciplinary action could be taken, she served the CEO with a lawyer's letter copying the Board of Directors and the Deputy Superintendent. The letter accused the CEO of bad faith conduct regarding his allegedly baseless concerns about Grewal's personal mortgage and past performance issues. The letter demanded not only an apology from the CEO, but also an agreement that he would abstain from any similar behaviour in the future. Further, Grewal insisted that the apology be circulated to the Board of Directors and the Deputy Superintendent.

Eventually, Grewal left and sued for wrongful dismissal damages. After examining the context, the court concluded that an investigation into Grewal's conduct was warranted and that her demand letter was disrespectful, inflammatory, and a deliberate effort to permanently damage the CEO's reputation. The court determined the letter "permanently undermined the employment relationship" and determined her conduct constituted cause.

However, just a few months earlier, the same British Columbia court considered Rodrigues v. Shendon. In that case, a long-service store manager received a letter from management indicating that her performance and conduct were unacceptable. She was put on probation pending an improvement in her attitude.

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Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

OUR NEWS

David Whitten was a featured speaker on terminations at Canadian Payroll Association's 30th Annual Conference held in Ottawa.
He also gave his opinion on age discrimination in the Canadian Employment Law Today
David Whitten also appeared on CBC Radio One speaking about Proposed changes to EI and repercussions for severance calculations.

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Daniel Lublin successfully defended his client in a considerable summary judgment motion where a former employee was sued for breach of contract and violating fiduciary duties. The case confirms that complex legal actions are not best for early adjudication through use of the summary judgment mechanism. Read the full decision here.

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In Jiwan v. Monex Express POS Solutions, Ellen Low, on behalf of the defendant employer, successfully argued that a plaintiff should not be able to plead a without prejudice offer to settle made and rejected prior to the commencement of a wrongful dismissal action against an employer. Master Short's conclusion in favour of the employer, striking the decidedly privileged offer to settle from the statement of claim, confirms this argument. Read the full decision here.
Ellen Low was interviewed by Canadian Lawyer Magazine regarding the pros and cons of practicing human rights law.

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On receipt of the letter Rodrigues became incensed. She showed the letter to colleagues and vocally complained about its contents to her staff calling the author an "idiot" or a "moron". She went so far as to show the letter to customers. In response to this tirade, the employer fired Rodrigues for cause. Yet, unlike Grewal, the court awarded Rodrigues 16 months' notice. Why? Both were long-service employees. One sent a letter and the other received a letter.

Yet in both cases, the court was required to examine the employee's conduct in context to determine whether a just cause dismissal was a proportionate response.

In Grewal, the court determined that her past conduct did not amount to cause in and of itself, but that the letter "tip[ped] the balance". Further, Grewal held a position of trust and responsibility which required the confidence of her superiors to perform. The letter however, "permanently undermined the employment relationship and made it impossible" for the parties to continue working together. Looking at the totality of the circumstances, the letter constituted just cause.

Similarly, in Rodrigues, the court concluded that the plaintiff's past conduct did not in and of itself amount to cause; however, unlike Grewal the court determined that Rodrigues' reaction to the probationary letter did not "tip the balance". Neither her prior conduct, nor reaction to the letter, could justify a cause dismissal.

The court took the position that Rodrigues' employer had condoned her past conduct and that her reaction to the letter did not amount to cause. In fact, her reaction was exactly the type of conduct the probationary letter was meant to correct. Yet, by terminating Rodrigues for cause, the employer denied her an opportunity to improve. As a result, Rodrigues was entitled to reasonable notice of her termination.

It may seem inconsistent that on one hand an employee can be fired for cause for demanding an apology and prohibition on further investigations, yet on the other hand an employee can call her manager an "idiot" and still be entitled to notice. However, these cases highlight the importance of considering the employee conduct in context before drawing a conclusion on cause.

Specifically, employers will need to weigh the following factors when determining if a termination for cause can be supported:

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Aaron Rousseau contributed an article for Certified Management Accountant of Ontario's Monthly Newsletter, Leading Indicator, where he explained the basic principles of the law of dismissal before identifying and explaining three key strategies for minimizing the cost of terminations before, during, and after the fact.

UPCOMING EVENTS

Aaron Rousseau will be speaking about what employers must do to prevent harassment in the workplace, what their legal obligations are and how courts are dealing with harassment complaints at an upcoming seminar organized by The Human Resources Professionals Association (HRPA).

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Daniel Chodos will be speaking on the subject of Advanced Terminations: Getting it Right at the upcoming conference organized by The Human Resources Professionals Association (HRPA).

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- The employee's past disciplinary record;
- Any mitigating circumstances that would reduce the impact of the misconduct;
- The employee's past contributions to the company;
- The employee's length of service;
- Whether the conduct, considered objectively, was intended to harm the employer or vitiates past positive contributions;
- Whether the conduct was willful or intentional;
- Whether the conduct fundamentally undermines the trust necessary to continue the employment relationship (i.e. dishonesty); and
- Whether discipline short of termination would suffice.

LAW BLOG

Signing a release without legal consultation?

Know your rights: Health and Safety regulations take a more prominent role in the workplace

Signing a contract after your new job has already begun

"Working-from-home" - can it be done from anywhere you like?

Myths and facts of the workplace

Read more...

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