

# After-Acquired Cause Not Established After Breach Of Code Of Conduct



In January 2024, the Ontario Superior Court of Justice ruled in *Ratz-Cheung v. BMO Nesbitt Burns Inc.*, 2024 ONSC 161 (“*Ratz-Cheung*”), that the employer had not established just cause for dismissal after asserting after-acquired cause. The Court found that the employee breached the employer’s Code of Conduct but viewed the employee’s misconduct as a lapse in judgment not warranting dismissal without notice. The Court stated that the clients’ confidential information was not misused and accepted the employee’s view that she may have been treated unfairly. The employee was awarded 24 months’ notice and damages for lost commissions.

## **Background**

The employee, Birgit Ratz-Cheung (“Ms. Ratz-Cheung”), was an investment advisor at the Defendant employer, BMO Nesbitt Burns Inc. (“BMO”). Ms. Ratz-Cheung worked at BMO from May 30, 1994 to February 20, 2018, for a total of approximately 24 years. While the employee had no written employment contract with BMO, she was bound by BMO’s Code of Conduct, which included confidentiality provisions. While Ms. Ratz-Cheung was working at BMO, the investment advisor industry was a male-dominated industry, with few women.

Ms. Ratz-Cheung’s employment was terminated without cause. At the time of her dismissal on February 20, 2018, Ms. Ratz-Cheung was 54 years old. Subsequently, Ms. Ratz-Cheung commenced an action for wrongful dismissal.

During the examination for discovery of Ms. Ratz-Cheung, the Defendant learned for the first time that she had copied thousands of e-mails onto a USB device a few months prior to her termination. The emails contained confidential client information. The Defendant subsequently amended its Statement of Defence to allege after-acquired cause and asserted that Ms. Ratz-Cheung had no entitlement to reasonable notice or pay in lieu of notice, in defence to the wrongful dismissal action.

## **Decision and Findings**

The Court ruled that BMO did not establish just cause in dismissing Ms. Ratz-Cheung.

The Court's findings include:

- The copying of the information and the storing of the information outside of BMO, in Ms. Ratz-Cheung's home, constituted a breach of the Code of Conduct. The Court stated that the copying of confidential information onto a USB device, which was then kept in Ms. Ratz-Cheung's home office, did not protect the security of the information, and put the information at risk, even if it was a limited one. Moreover, it was admitted that the e-mails contained confidential client information, and the total number of e-mails that were copied was very significant.
- Ratz-Cheung did not copy documents that she was not entitled to access. The e-mails that were copied were her own e-mails, which contained information that she was entitled to access and use while working at BMO.
- Ratz-Cheung did not disclose the documents or the information they contained to anyone, except for BMO in the context of the litigation.
- Ratz-Cheung did not use the e-mails prior to litigation. Ms. Ratz-Cheung's focus in relation to the e-mails that were copied was not confidential client information, but her exchanges with her assistants with respect to tasks that had been assigned. The Court found that there was only one instance of copying and the USB device subsequently remained stored in Ms. Ratz-Cheung's home office, unused and unaccessed, until the litigation.
- At the time the e-mails were copied onto the USB device, Ms. Ratz-Cheung was 54 years old, and she had been an employee of BMO for more than 23 years. As an investment advisor, she was entrusted with dealing with highly confidential client information. BMO had a Code of Conduct containing provisions to protect confidential information, which Ms. Ratz-Cheung had to review every year. The Court noted that there was no evidence of any prior breach of the Code of Conduct on the part of Ms. Ratz-Cheung.
- There was at least an air of reality to Ms. Ratz-Cheung's view that she may not have been treated fairly by BMO in relation to the criticisms raised regarding the manner in which she was communicating with her assistants, and that such criticisms were potentially sexist (e.g., an assertive woman being perceived and treated differently than an assertive man).
- Although Ms. Ratz-Cheung did not comply with the Code of Conduct, the Court concluded that dismissal was not a proportional response to the breach and the surrounding circumstances. The Court stated that the breach was not sufficiently serious to give rise to a breakdown in the employment relationship.
- The misconduct was a lapse in judgment on the part of Ms. Ratz-Cheung, in the context of a difficult year for her personally and in a situation where she thought that she was not being treated fairly. The Court stated that this lapse in judgment was not of a nature and degree to warrant dismissal without notice, especially since Ms. Ratz-Cheung did not disclose or use the information before the litigation, and the information in question was information to which she had legitimate access.

In conclusion, the Court found that after-acquired cause was not established, and that Ms. Ratz-Cheung was dismissed without cause.

## **Key Takeaways**

This decision affirms that dismissing an employee for just cause is a very high bar to meet. When assessing if there is after-acquired cause for dismissal, the courts will consider the misconduct in question and all relevant factors are considered. If it is determined that the misconduct is not sufficiently serious to give rise to a breakdown in the employment relationship, then after-acquired cause cannot be established.

Even when there is a breach of an employer's Code of Conduct, it is not always a straightforward conclusion to establish just cause. This case demonstrates that issues of dismissal with just cause are complex, and courts will consider the surrounding circumstances, and decide whether dismissal is a proportional response.

Whether you are an employer that is considering dismissing an employee for just cause/after-acquired cause, or if you are an employee who was dismissed for just cause, it is advisable to seek advice from an employment lawyer to help you navigate this area of the law.

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

Author: [Rudy Ticzon](#)

Koskie Minsky LLP