

An Employee's "F-bombs" And Threats To Hit Their Employer: Are These Wilful Misconduct?



Bottom Line

In [2551965 Ontario Ltd. v. Warkentin](#), the Ontario Superior Court of Justice (the "Court") identifies zero tolerance for abusive and threatening comments in professional workplaces. The decision also delineates when employee misconduct may meet the common law "just cause" standard versus the statutory "wilful misconduct" standard for termination.

Overview

When terminating employees for misconduct, Ontario employers must assess the misconduct against two standards to determine the employee's entitlements upon termination:

1. At common law, misconduct amounting to just cause for termination disentitles an employee from common law reasonable notice. If just cause is established, employees are still entitled to receive notice of termination (or pay in lieu thereof) and severance (if applicable) under the *Employment Standards Act, 2000* (the "ESA").
2. Under the Termination and Severance Regulation of the ESA ([O. Reg. 288/01](#)) (the "Regulation"), employee behavior that amounts to "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" disentitles an employee from both statutory and common law notice of termination and severance. To meet this standard, employers must show that the employee purposefully engaged in behaviour that they knew or ought to know amounted to serious misconduct.

Facts

Harold Warkentin was employed as a real estate broker by Cabin Country Realty Ltd ("Cabin"), a company he founded in 1990 and subsequently sold to 2551965 Ontario Limited in 2016. In November 2017, Mr. Warkentin's employment was terminated for several instances of misconduct:

- General inappropriate behaviour, including poaching leads from Cabin, incomplete

forms, telling clients to pay for appraisals in advance, and a careless attitude;

- Writing notes in the in-house computer system, accessible by all employees, including swearing and calling the owner, Mr. Chaze, greedy and a “sniveling idiot”;
- Swearing at and threatening to hit Mr. Chaze during a confrontation after Mr. Warkentin learned that an inaccurate listing he prepared would no longer be listed; and
- Facilitating a sale by another brokerage by offering his services gratuitously to that brokerage and misleading a former client into believing Cabin was handling the transaction. Mr. Warkentin’s actions resulted in the other brokerage taking the commission from the sale.

Following his termination, Cabin and 2551965 Ontario Limited commenced an action against Mr. Warkentin, seeking damages for interference in contractual relations and for breaches of the non-competition and non-solicitation clauses in Mr. Warkentin’s employment contract after his attempts to both work and solicit clients in a nearby area. Mr. Warkentin then filed a counterclaim alleging he was wrongfully dismissed. The case was essentially litigated as a wrongful dismissal action.

The Court’s Decision

The Court found that Cabin had proven each of the reasons advanced to support Mr. Warkentin’s termination in evidence, and proceeded to address whether these reasons amounted to just cause and/or wilful misconduct.

Just Cause

The Court found that three of the reasons advanced by Cabin to support Mr. Warkentin’s termination rose to the level of just cause.

First, the Court held that the notes in the internal database were “unacceptable, unprofessional, and inappropriate” and amounted to significant misconduct, especially since the database was accessible by all employees. The Court found that the notes gave rise to a breakdown in the employment relationship such that continued employment was not feasible.

Second, the Court stated that there should be “zero tolerance for abusive language and threats of violence in the workplace”, and Mr. Warkentin’s confrontation with Mr. Chaze was therefore highly inappropriate. While the Court recognized, as part of the contextual circumstances, that Mr. Warkentin had previously owned Cabin and provided mentorship to Mr. Chaze and the other owner, the Court noted that these factors did not change the standard applicable to Mr. Warkentin. Rather, swearing and threats of violence each independently constituted just cause for termination.

Finally, the Court held that Mr. Warkentin’s actions in misleading a client into using another brokerage breached his duty of loyalty to Cabin and resulted in economic loss. Specifically, the Court found that Mr. Warkentin’s behavior was “in no way consistent with any reasonable expectations” of how he was expected to behave as an employee, and was irreconcilable with a continued employment relationship.

While the Court commented in its evidentiary assessment on the general behavioural allegations as “dismissiveness” and indifference towards his employer and his role, the Court did not find that these allegations amounted to just cause.

Wilful Misconduct

In comparison, the Court found that only two of the reasons cited for the termination met the standards identified in the *Regulation*. These were Mr. Warkentin's intentional use of highly inappropriate language, and deliberate spitefulness towards his employer.

The first was Mr. Warkentin's confrontation with Mr. Chaze. The Court noted that, while Mr. Warkentin's outburst had been in response to a decision he disagreed with, Mr. Warkentin could not say he was provoked. Mr. Warkentin had made the conscious decisions to drive to the workplace, and seek out Mr. Chaze. Once he found Mr. Chaze, Mr. Warkentin further decided to confront Mr. Chaze in a public area in front of Mr. Chaze's family, and to use language he knew was inappropriate in a professional workplace. The Court specifically stated that "aggressive profanity", such as the use of "F-bombs" in the "context of a small, intimate workplace", "cannot be tolerated in the workplace." The Court held that Mr. Warkentin "had sufficient time to think about what happened, calm down, and then approach Chaze in a business-like manner. He chose not to do that." This set of choices made his conduct sufficiently egregious to be wilful.

The Court further held that Mr. Warkentin's actions in the real estate sale similarly constituted wilful misconduct, and wilful neglect of duty because Mr. Warkentin acted out of "pure spite" against Cabin, after being unsatisfied with having lost his position of authority. The Court stated that there was "no legitimate business reason" for him to assist the other brokerage in completing the transaction or allow them to collect the commission. He was similarly aware of the expectations on him as a real estate agent, and chose not to uphold those standards.

Outcome: Both Actions Dismissed

Having found that Mr. Warkentin's actions amounted to both just cause at common law and wilful misconduct under the *ESA*, the Court dismissed the wrongful dismissal counterclaim in its entirety.

The Court also dismissed the main action, finding that the non-compete obligations imposed on Mr. Warkentin were overly broad and therefore not enforceable.

Takeaways

While the Court identified zero tolerance for abusive and threatening language in professional workplaces, context will always be a critical factor in determining the appropriate response to employee misconduct. Of the four grounds advanced for termination, only three were found to amount to just cause, and only two constituted wilful misconduct, given the calculated, aggressive, and spiteful nature of Mr. Warkentin's actions.

Prudent employers should consult with legal counsel before proceeding with either type of "for cause" termination in order to assess the potential risks and liabilities that may result.

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.

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