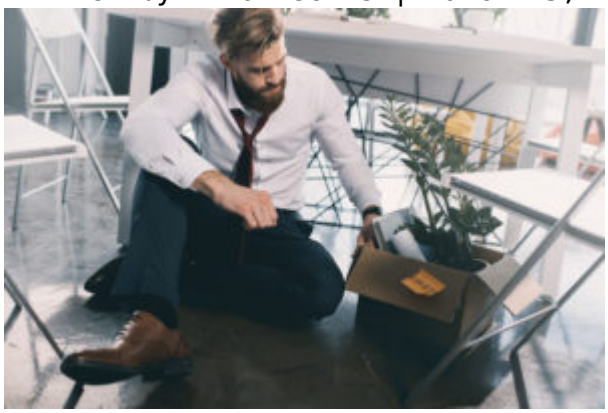
Insolence, Insubordination And After-Acquired Evidence Of Just Cause

written by Tina Tsonis | March 15, 2022



On November 9, 2021, the B.C. Supreme Court released its decision in the case of *Golob* v. *Fort St. John (City)*, 2021 BCSC 2192.

The case concerned a wrongful dismissal claim against the City of Fort St. John by its former Deputy Fire Chief.

The City dismissed the plaintiff for what it alleged to be just cause. This followed an investigation into a report that the Deputy Fire Chief had been overheard making disparaging remarks about his superior, the Fire Chief.

The Court's decision provides a useful refresher on two important legal principles associated with just cause terminations:

1. No duty of "procedural fairness" is owed by an employer to an employee, even when the employer is a public body.
2. Reliance can be placed on after-acquired evidence of just cause that existed at the time of termination.

For the benefit of those who appreciate precision in drafting, the Court also helpfully distinguished between "insubordination" and "insolence" as separate and different forms of misconduct.

Facts

The plaintiff worked for the defendant City for twelve years in total: ten years in the unionized position of Fire Training Officer and the last two in the non-unionized position of Deputy Fire Chief.

Notably, there was a specific term in the plaintiff's written contract of employment that he was not to promote "disharmony or discontent" among City employees.

The City initiated an internal investigation after a colleague of the plaintiff reported overhearing him making negative comments about the Fire Chief. Over the course of nine days, the City interviewed a dozen employees. The plaintiff was not interviewed or even informed that an investigation was underway.

It became apparent that the plaintiff was not well-liked and was generally considered the reason for a "toxic" work environment. Employees interviewed also gave evidence

that they had heard the plaintiff making negative or disparaging remarks about the Fire Chief.

At the conclusion of the City's investigation, the plaintiff was discharged for just cause. The termination letter made reference to breaches of the City's code of conduct and discrimination and harassment policy and the plaintiff's employment contract. It, however, provided no specific detail about the breaches.

After termination of the plaintiff's employment, the City downloaded text messages and e-mails from the employee's work phone. The text messages included further disparaging comments about the Fire Chief, as well as a series of messages from the plaintiff to an employee competing for a second Deputy Fire Chief position. The plaintiff – who was a member of the hiring committee – told the employee that the Fire Chief was favouring other applicants for the position and encouraged him to use his seniority to block the other applicants.

Decision

The Court found that the City conducted an investigation which was "flawed in several respects", including its failure to follow its own policies for conducting an investigation.

However, the Court dismissed the flawed process as the basis for any legal claim, stating that the law is clear that no duty of procedural fairness is owed by an employer to an employee and that is so even where the employer is a public body.

The only issue to be determined was whether the City had just cause to terminate the plaintiff's employment.

On that issue, the Court reviewed what was known at the time of the plaintiff's discharge and concluded that although there was a "credible" case for just cause, the employee's years of service and overall competence would have militated in favour of a second chance.

In passing, the Court noted that while what was pleaded by the City was insubordination, the majority of the conduct on which it relied could more aptly be characterized as insolence. The former is "behaviour which is an intentional refusal to obey an employer's orders or directions", and the latter captures "conduct that amounts to derisive or contemptuous language directed towards a superior".

That was, however, not the end of the story. The Court dismissed the plaintiff's argument that the City should be precluded from relying on the after-acquired evidence as just cause, and restricted to the reasons for discharge stated in the termination letter.

The Court stated that the law is settled on this issue. It relied on the B.C. Court of Appeal's statement in *Carr* v. *Fama Holdings Ltd.*, [1990] 1 W.W.R. 264 (B.C.C.A.) that "an employer may dismiss an employee, giving the wrong reasons, **provided that causes which would justify dismissal did in fact exist at the time**" (emphasis added).

When the text messages discovered by the employer after the plaintiff's discharge were "added to the scale", the Court concluded that the case for termination for just cause was unassailable. The messages evidenced a clear and intentional breach of the terms of the plaintiff's employment contract.

Takeaways

At first blush, this case seems to suggest that an employer might be able to get away with a flawed investigation if just cause for termination ultimately exists. The case is, however, more aptly viewed as a "close call".

The Court concluded that just cause had not been made out at the conclusion of the City's investigation. What more might have been uncovered had the employee been interviewed as part of the investigation will never be known. An employee's behaviour and responses in an investigation can often tip the scale one way or another in a borderline case of cause. Had the City not discovered the text messages, its flawed investigation might have been its undoing.

As for the text messages, this case holds a valuable lesson for employees and employers alike: beware the written word. While insolent text messages or e-mails might go unnoticed during times of employment peace, if things go sideways in the relationship between the employer and the employee, those messages are there to be discovered – before or after termination for just cause.

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