Terminating “Just Cuz” Or For Just Cause? Recent Decisions Maintain A High Threshold For Just Cause Terminations

Courts are increasingly reluctant to find that employers have just cause to terminate their employees: *Underhill v Shell Canada Limited*, **2020 ABQB 341; *Mack v Universal Dental Laboratories Ltd*, 2020 ABQB 738; *Baker v Weyerhaeuser Company Ltd*., 2020 ABQB 808; and *Nagy v. William L. Rutherford (B.C.) Limited* 2021 BCCA 62.**

For many employers, 2020 was a difficult year. On top of the challenges that COVID-19 presented, employers have had to grapple with several unfavourable employment law decisions. The Alberta Court of Queen’s Bench has continued this trend in three recent decisions that all favoured employees and found that the employers did not have just cause to terminate the employees’ employment. Additionally, the British Columbia Court of Appeal overturned a finding of after-acquired just cause for dismissal and remitted the matter back to the trial court. Each of these cases is discussed in greater detail below, following a review of the general principles of just cause terminations.

General Principles of Just Cause Terminations

Absent an enforceable termination provision in an employment agreement, employers have an implied contractual obligation to provide indefinite term employees with reasonable notice of termination unless there is just cause for termination of their employment. This obligation can be significant and in some cases as much as 24 months, and in exceptional cases more than 24 months. If working notice cannot be provided, then the employer must pay the employee the compensation the employee would have earned had the employee worked through the notice period. Therefore, establishing just cause, when it is appropriate to do so, can result in significant savings.

Generally, just cause is serious misconduct that is inconsistent with the fulfillment of the conditions of employment or that causes a breakdown in the employment relationship. Employers can sometimes successfully terminate an employee for just cause if the employee has been guilty of habitual neglect of duty; gross incompetence; conduct incompatible with the employee’s duties; conduct that is prejudicial to the employer’s business; or willful disobedience.

Each case is fact specific. Some prior findings of just cause include theft, dishonesty, serious breaches of workplace policies, violence or harassment in the workplace, unexcused absences from the workplace, insubordination, criminal conduct, serious conflicts of interest, and prolonged and documented performance issues.

In order to uphold just cause, the employer must prove that the conduct of which the employer complains actually occurred *and* that the conduct warrants dismissal.

Employers must ensure that the disciplinary response is proportional to the employee's conduct and must also consider the context of the employment relationship including: the length of service of the employee, the employee's age, the employee's role and responsibilities, the type of business the employer operates, the level of trust placed in the employee, any harm to the employer's business, the employer's policies and practices, and whether there are any mitigating factors that suggest less discipline should be imposed.

It is tempting for employers to adopt an "I know it when I see it approach" to just cause terminations. However, as these recent cases show, care must be taken when considering terminating an employee for just cause.

Underhill v. Shell Canada Limited

Shell dismissed Underhill for just cause following an investigation into her behaviour. In particular, Shell alleged that Underhill was involved in at least six instances of serious misconduct which fell into three broad categories: (i) failing to identify a conflict of interest and protect third party confidential information; (ii) breach of confidence; and (iii) complete disregard for Shell's termination and investigation procedures. Underhill was Shell's Vice President, Commercial Strategy and Business Development, Heavy Oil. Underhill met with her department and advised them that Shell was planning layoffs and employment restructuring. A few weeks later, Underhill also had a private meeting with a subordinate and informed her of Shell's plan to terminate her. At this meeting, the subordinate announced she was preparing her own proposal for a project in which Shell was involved.

Shell alleged that Underhill failed to recognize that her subordinate might be involved in a conflict of interest and may reveal third-party confidential information through the proposal submission. The Court concluded that while in retrospect, Underhill "probably should have asked more questions", the Court was not satisfied that Underhill demonstrated the "serious lack of understanding of conflicts" that Shell alleged. The Court noted that Underhill warned the subordinate to "be careful what you are doing because you could potentially find yourself in a situation of conflict" and sought advice from Shell's legal advisor on the issue.

Shell also alleged Underhill could not be trusted to keep confidences, citing four instances of such misconduct. First, during a monthly meeting, Underhill informed staff that "further layoffs were possible and there was some restructuring planned for the fall". Second, Underhill described the President of Shell as "all talk and no action" to a subordinate. Third, Underhill disclosed to the subordinate that Shell was planning to terminate the subordinate and that the President of Shell "fully endorsed" that decision.

Fourth, Underhill breached the investigation process by discussing the subject matter of the investigation with the subordinate when she knew it was confidential and still ongoing.

The Court concluded that these breaches of confidence were not serious in all of the circumstances. It found that although Underhill made some mistakes, she was not being disloyal or acting in bad faith. Further, the breaches of confidence were not so serious as to give rise to a breakdown of the employment relationship. In the Court's view, Underhill was a loyal and dedicated employee for more than 17 years, had no prior disciplinary history, Shell had not suffered any significant deleterious consequences from Underhill's actions, and there were lesser forms of discipline available to Shell to address the misconduct.

Baker v. Weyerhaeuser Company Ltd.

Weyerhaeuser alleged that Baker, an employee with 14 years of service, was terminated for just cause due to safety violations and other misconduct. Baker alleged that Weyerhaeuser had manufactured a reason to terminate him.

Baker was a supervisor of safety quality production repairs. He had no prior disciplinary history or poor performance reviews until after he got a new supervisor. The new supervisor issued a written warning letter to Baker citing his poor performance and noting that the shift Baker supervised was not achieving the same level of output as Weyerhaeuser's other shift. After the warning letter, matters between Baker and his supervisor worsened. In particular, the supervisor made further allegations of poor performance and alleged that Baker failed to properly deal with a small fire and failed to report it or, alternatively, falsified a report about the fire.

The Court concluded that Baker's supervisor had looked for reasons to terminate Baker and relied on his personal bias against Baker and did not take into account Baker's whole record of employment. The Court noted that there were grounds for discipline as a result of the fire, in particular, failing to report the fire and improperly filling out a safety document. However, the Court held the main reason for Baker's termination was his supervisor's personal feelings towards Baker. The Court also noted that the investigation was not proper and thorough, and that Weyerhaeuser should have more fully investigated the supervisor's allegations.

Mack v. Universal Dental Laboratories Ltd.

Universal alleged that Mack, who was also a shareholder and director of Universal, had engaged in misconduct constituting just cause including: failure to work with diligence, working only a minimal and nominal amount of time at the office, being continually disruptive in the office, using vulgar and abusive language in violation of Universal's policy, providing poor client service, using his work computer to access pornography, showing pornography to other employees, and failing to attend continuing education.

The Court found that Universal proved the alleged misconduct. However, the Court also found that Universal had condoned the misconduct. In particular, Universal failed to issue any written warnings to Mack and did not follow its own performance management process as outlined in its employee policy manual.

The Court also concluded that although Mack engaged in misconduct, termination for just cause was not warranted. Universal should have attempted to use less serious sanctions to address Mack's misconduct prior to his dismissal such as: formal written warnings, the disciplinary process in the employee manual, and addressing Mack's deficiencies at regular management meetings.

Nagy v. William L. Rutherford (B.C.) Limited

As discussed in our previous blog, the British Columbia Supreme Court had found that the employer established after-acquired just cause because an employee sent a single disparaging email to his girlfriend, who was also a co-worker. However, the British Columbia Court of Appeal overturned this finding and remitted the matter back to the trial court. The Court of Appeal held the trial judge erred in finding that there was after-acquired just cause when there was insufficient evidence to conclude that the disparaging email was discovered after the employee was dismissed and in failing to consider the law regarding condonation and the adequacy of the employer's warnings prior to the dismissal. While the Court of Appeal did not determine whether or not the employee was wrongfully dismissed, it emphasized that after-acquired just cause hinges on the employer discovering the employee's wrongdoing after the employee's termination and that issues of condonation and prior warnings need to be properly considered in such cases.

Key Takeaways for Employers

These cases illustrate that just cause terminations should be used sparingly and reserved for serious and egregious conduct. Employers who are contemplating terminating an employee for just cause should:

- maintain documentation of all incidents of misconduct or other potential grounds for termination, performance issues, warnings, and prior discipline as these will likely be crucial pieces of evidence to support a termination for just cause;
- ensure that they do not condone poor behaviour or performance;
- where appropriate, enter into a performance management plan with employees to set clear expectations, a timeline for their completion, and the consequences for failing to meet them, including the potential that the employee will be terminated for just cause if they fail to do so;
- ensure that the manner of dismissal is done in a professional manner. Mistreating an employee at the time of termination can trigger additional punitive and aggravated damages on top of severance costs. Some things to avoid include attacking the employee's reputation, conducting a public termination, misrepresenting the reasons for termination, alleging just cause as a negotiating tactic, and spreading rumours or false information regarding the employee, especially to potential employers;
- maintain up-to-date policies and ensure that employees have access to them, have appropriate training, acknowledge that they have read and will abide by them, and that the employer consistently enforces the policies;
- consider the employee's length of service, position, duties, and other contextual factors when deciding to terminate for just cause to ensure that it is a proportional response;
- consider if an investigation into the alleged misconduct is warranted and, if so, ensure that a qualified, neutral, and unbiased investigator is assigned to conduct the investigation;

- consider if there are suitable alternatives to terminating for just cause such as a warning letter, suspension, negative performance reviews, change in duties, performance improvement plan, revocation of privileges, counselling, coaching, or retraining; and
- if the decision is made to terminate for just cause, prepare a written termination letter that clearly outlines the basis for the termination.

Each termination is unique. Prior to deciding to terminate an employee, employers are encouraged to consult with experienced legal counsel to help mitigate their exposure to claims.

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