Workplace Drug Dealing Provides After-Acquired Cause For Termination

Employer had just cause based on evidence discovered after termination

In most cases, employees who commit misconduct will face the consequences of their actions during their employment, in the form of discipline or even termination for just cause. But, what if the employer only learns of an employee's misconduct after the employee is dismissed without cause? What recourse does the employer have?

The British Columbia Court of Appeal's ruling in *Van den Boogaard v. Vancouver Pile Driving Ltd* affirms that employers can rely on misconduct discovered after an employee's dismissal to establish "after-acquired" just cause.

Mr. Van den Boogaard was a project manager for Vancouver Pile Driving, a marine contracting company. He was in a supervisory role, which required him to oversee site safety. He was also required to enforce drug prohibition policies. Mr. Van den Boogaard's employment was eventually terminated without cause. However, he was not happy with the amount of severance offered to him and started a wrongful dismissal claim against the company.

At the time of his dismissal, the company was unaware that Mr. Van den Boogaard had been soliciting drugs from his direct subordinate, including during working hours. After Mr. Van den Boogaard turned in his company cellphone, however, the company discovered suspicious text messages from the phone to another employee. The messages showed that Mr. Van den Boogaard had asked to buy a variety of drugs from a subordinate employee, including some of which were listed under the *Controlled Drugs and Substances Act*.

Based on this evidence, the company took the position that it had after-acquired just cause to dismiss Mr. Van den Boogaard and was not liable for any further pay in lieu of notice. The Court agreed.

The Court took the same approach to the issue of whether there was after-acquired just cause as for any just cause termination. Using the "contextual approach", the Court considered whether Mr. Van den Boogaard's conduct – taking into account all the relevant circumstances of his employment – was objectively and fundamentally incompatible with his continued employment. In light of Mr. Van den Boogaard's supervisory authority over the subordinate employee, and his employment obligations to ensure safety in the dangerous workplace and to enforce the company's drug

prohibition policies, the Court found that Mr. Van den Boogaard's conduct justified his termination for just cause.

It was a key part of the decision that the company had no idea Mr. Van den Boogaard had solicited or purchased drugs from other employees before his employment was terminated. The Court made it clear that employers cannot rely on "after-acquired" just cause for termination if they knew about and condoned the conduct before the employee was dismissed (for example, by not investigating and/or disciplining the behaviour).

What does this mean for employers?

If an employee engaged in serious misconduct which was not known or condoned during their employment, employers should consider defending a subsequent claim by alleging after-acquired just cause. Employers may also want to consider a claim or counterclaim against an employee if he/she committed significant theft or fraud against the company. In addition, employers can take the following steps to improve their chances of proving after-acquired just cause:

- Make sure expectations for employees' conduct are clear and consistently enforced. Although Mr. Van den Boogaard tried to argue that the company had a 'lax' approach to drugs in the workplace, the company's policies helped show that Mr. Van den Boogaard's misconduct was not acceptable and was serious enough to warrant termination without notice.
- Investigate allegations of misconduct promptly and comprehensively, both during and after employment. A full and prompt investigation will help prevent an argument that the employer 'condoned' the conduct, in addition to providing evidence for a subsequent proceeding.

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