Proving Just Cause as Employer's Counsel:

Warnings, fairness, condonation, standard of proof and onus

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Introduction

Wrongful dismissal cases involving non-unionized employees are so fact-driven that there is a temptation to review all of the recent caselaw to show how the law has developed. It is, of course, impractical to do so in this short paper.[2] Further, the basic principle of wrongful dismissal law has not changed: the employer still has the right to summarily dismiss a non-unionized employee for just cause.

But there has been a change in emphasis. Employers now have an expanding number of duties to their employees even when dismissing them. The Courts have required the employer to act fairly and have characterized the employee about to be dismissed as a vulnerable person in need of the Court's protection. This paper looks at just cause from the employer's perspective. It considers what the employer must do to bolster its case for just cause. Bolstering the case for just cause is important not only for marshalling evidence at trial. In our ADR-Case Managed world, the reality is that few cases reach trial.

[1]The authors acknowledge the assistance of their colleague, Nadine J.L. Barmania, of ELLYN-BARRISTERS, Toronto, for her assistance in researching the cases for this paper.

[2] A more complete analysis is found in: R.S. Echlin and M.L.O., Certisomo, *Just Cause, The Law of Summary Dismissal in Canada*, Canada Law Book Inc., Part II (looseleaf); and G. England, *Individual Employment Law*, Ch. 9, (Available on Quicklaw Employment Law database)

The strength of the employer's case for just cause will be crucial in settlement negotiations, mediation and pre-trial conference. The stronger the case for just cause, the more likely employee's counsel is to recommend a small settlement or, in some cases, to abandon the employee's claim completely.

What is Just Cause?

The doctrine of "just cause" is founded upon the principles of repudiation of contract. If the action taken by an employee shows the employee's intention not to be bound by the terms of the employment contract or a fundamental term of it, or is guilty of a repudiatory breach of contract, then the employer may summarily dismiss the employee for "just cause".

The courts have sometimes had difficulty fitting employment contracts into contract law doctrine. Sometimes, rather than determine whether the contract of employment has been repudiated by the employee, the courts have viewed the question to be whether there has been rescission of the employment contract.[3] Whichever doctrine is applied, the issue appears to remain whether the employee's conduct is incompatible with a fundamental term of the employment contract.

Geoffrey England, in his online work (Quicklaw), *Individual Employment Law*, describes the concept of just cause as follows:[4]

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[3] Legge v. Newfoundland Telephone Co. (1989), 75 Nfld. & P.E.I.R. 21 at p.28 (Nfld. S.C.), aff'd. 9 C.C.E.L. (2d) 316 (C.A.).

[4] G. England, Individual Employment Law, Quicklaw ed., c. 9, at f.n. 152. See also the works cited by G. England at f.n. 152, for a comprehensive analysis of all the common law cases: D. Harris, Wrongful Dismissal, 3d ed., looseleaf (Don Mills, Ont.: DeBoo, 1984) at para. 3.10; E.E. Mole, Butterworths Wrongful Dismissal Practice Manual, looseleaf (Scarborough, Ont.:

> Modern courts have developed a common law doctrine of just cause that emphasizes safeguarding the personal dignity and autonomy of the employee. This doctrine is reflected in the following main features:
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> Firstly, courts require that the decision to dismiss a worker must be taken in good faith, non-arbitrarily, and without discrimination. Essentially, this means that the worker's conduct must have harmed the production process or the symbolic authority of management to command an order to warrant dismissal; the employer cannot fire an employee for extraneous reasons unrelated to legitimate business interests. It also means that the plaintiff must be accorded the same treatment as other workers unless there are legitimate grounds for differentiation.
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> Secondly, the courts apply a requirement of proportionality, which means that the ultimate sanction of dismissal can only be invoked for conduct on the employee's part that causes a substantial harm to the employer's interests.
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> Thirdly, the courts impose relatively stringent standards of "procedural fairness" on the employer as a precondition to dismissal.
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> Fourthly, the courts have afforded the non-unionized employee roughly equal protections under the common law doctrine of just cause as are available to unionized workers under the just cause provision found in most collective agreements.

While the grounds for dismissal for just cause have been found to be innumerable, conduct of an employee that constitutes just cause has been defined to include:

1. serious misconduct;
2. habitual neglect of duty;
3. incompetence;
4. conduct incompatible with duties or prejudicial to employer's business;
5. willful disobedience of an employer's orders in a matter of substance;
6. failure of supervisor to implement employer's policy;
7. failure of a supervisor to protect management from suits by individual complainants (as, for example, in sexual harassment)
8. concealed or after-discovered conduct;

Butterworths, 1984) c. 3, and M.J. Mackillop, Damage Control: An Employer's Guide to Just Cause Termination (Aurora, Ont.: Canada Law Book, 1997).]

9. serious misstatement of qualifications;
10. serious conflicts of interest;
11. incompatible personality; and
12. insubordination or insolence.[5]

In determining whether to treat the employee's conduct as constituting just cause, Courts have considered, *inter alia*, the character and nature of the employment, the context of the misconduct and the length of the employee's service.[6] However, the impugned conduct must be incompatible with the employment relationship. Even dishonesty or conviction to a jail term will not be a ground for summary dismissal unless it undermines or is incompatible with the employment relationship.[7]

Another factor which the courts may take into consideration is the supervisory role of the employee, particularly in sexual harassment cases. In *Simpson v. Consumers Association of Canada*,[8] the Ontario Court of Appeal held that Simpson's conduct constituted sexual harassment and the employer had just cause to dismiss him. In coming to this conclusion, the Court found that there was a power imbalance between an employee in a supervisory position and his or her subordinates, and this was to be taken into consideration in

[5]Port Arthur Shipbuilding Co. v. Arthurs (1967), 62 D.L.R. (2d) 342 at p. 348 (Ont. C.A.), rev'd 70 D.L.R. (2d) 693 (S.C.C.); see also R.S. Echlin and M.L.O. Certosimo, *Just Cause: The Law of Summary Dismissal in Canada*.

[6]Ibid., at p. 1-3.

[7] Heynan v. Frito Lay Canada Ltd., (1999) O.J. 3560 (Ont. C.A.) Leave to app to SCC dismissed [1999] SCCA 560; McKinley v. BC Tel [2001] SCR 161, (2001) 200 DLR (4th) 385 at paras. 48-57 where SCC held that employer was entitled to discipline the employee short of dismissal.

[8] (2002) 57 O.R. (3d) 351

determining issues such as consent. To the same effect is *Bannister v. General Motors of Canada Ltd.*[9], where the Ontario Court of Appeal reversed the finding of the trial judge ,who had awarded damages of 21 months notice to a supervisory employee.

It has also been held that the sanction imposed for an employee's misconduct should be proportionate to the offence.[10] The implication is that summary dismissal will not be justified for minor matters that do not go to the fundamental terms of the employment contract.

Who has the onus to prove just cause and what is the standard?

Initially, the onus is on the employee to establish that there was a contract of employment and that he or she was dismissed. The onus then shifts to the employer to prove, on a balance of probabilities, that there was just cause for the employee's dismissal.[11] However, if fraud or theft is alleged, a "higher degree of probability" will be required.[12]

There is no well-defined threshold as to what constitutes cause. The conduct must be serious, and it depends on the nature and circumstances of employment and the nature and circumstances of the misconduct. The test is objective. "The fault must be something which a reasonable man could not be expected to overlook, regard being had to the nature and

[9] 40 O.R.(3d) 577 and 590 (version française)

[10] Simpson, at para. 53

[11] Butler v. C.N.R., [1940]1 D.L.R. 256 (Sask. C.A.), at p.261; Matheson v. Matheson International Trucks Ltd. (1984), 4 C.C.E.L. 271 (Ont. H.C.J.), at p. 275

[12]Hanes v. Wawanesa Mutual Insurance Co. (1963), 36 D.L.R. (2d) 718 (S.C.C.)

circumstances of the employment".[13]

There is no clear definition of the degree of misconduct necessary to justify dismissal.[14] In *Yeager v. R.J. Hastings Agencies Ltd*.[15], Wood J. stated that if the misconduct of the employee amounted to a fundamental breach of the contract of service, the employer is entitled to, in effect, rescind the contract without notice.

A single act of misconduct will not justify summary dismissal unless the employee's conduct is extremely serious. As stated by LeBel J. at the trial level:

> It is only in exceptional circumstances that an employer is justified in summarily dismissing an employee upon his making a single mistake or misconducting himself once. The test in these cases is whether the alleged misconduct of the employee was such as to interfere with and to prejudice the safe and proper conduct of the business of the company, and, therefore, to justify immediate dismissal.

One act of disobedience can constitute cause if it goes to show that the employee is repudiating the contract or one of its essential conditions.[16] In *Houlihan v. McEvoy*,[17] it was held that failing to report a theft was a breach of the implied duty of faithfulness and honesty owed by the employee to the employer and was sufficient to constitute cause.

Cumulative Cause

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[13]McIntyre v. Hockin, (1889), 16 O.A.R. 498 at 501

[14]Butler v. C.N.R., supra.

[15](1984), 5 C.C.E.L. 266 at 284 (B.C. S.C.)

[16]Laws v. London Chronicle (Indicator Newspapers), Ltd. [1959] 2 All E.R. 285 (C.A.).

[17][2002] B.C.J. 8, at paras.52-53.

As stated above, the Court is entitled to take into account the employee's record. This means that past instances of misconduct may be considered in determining whether there was just cause for the employee's summary dismissal.[18] Zuber J.A. (as he then was) makes a particularly persuasive argument in favour of its use in *Nossal v. Better Business Bureau of Metropolitan Toronto Inc.* where he states:

> In any event, the case at hand presents even stronger reason for placing past misconduct in the scale. The trial judge found that the earlier misconduct did not amount to sufficient cause for discharge. How, then, could it be said that the failure to discharge prevents an employer from using past misconduct as a part of the accumulation?
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> In my respectful view, past misconduct of an employee, whether sufficient to amount to just cause for discharge or not, can be used or put in the scale with subsequent misconduct to determine if the accumulation amounts to just cause.[19]

There are differing views at the appellate level in Canada as to whether the conduct must be similar in kind before it can be weighed cumulatively to justify dismissal. Zuber J.A. considered this point in *Nossal v. Better Business Bureau of Metropolitan Toronto Inc.*:

> The learned trial judge appears to have been of the view that past misconduct would have to be of the same kind as the subsequent misconduct before it became significant. I do not agree. The critical question remains, whether or not the accumulated misconduct, composed of similar and dissimilar misconduct, amounts to just cause.[20]

Similarly, in *Legge v. Newfoundland Telephone Co.*, at first instance, the Court found:

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[18]Nossal v. Better Business Bureau of Metropolitan Toronto Inc. (1985), 19 D.L.R. (4th) 547 (Ont. C.A.), at p. 551; Hewes v. Etobicoke (City), 93 C.L.L.C. para.14,042 at p. 12,262 (Ont. C.A.), leave to appeal to S.C.C. refused 65 O.A.C. 79n.

[19]Nossal v. Better Business Bureau of Metropolitan Toronto Inc, supra, at p. 551; contra. Morrell v. Grafton-Fraser Inc. (1982), 51 N.S.R. (2d) 138 (C.A.) at p.145.

[20]Ibid

> If continuing to employ an individual prohibited an employer from using past misconduct, particularly where the instances separately did not warrant dismissal, there would be no way to dismiss an employee for the cumulative effect of a number of instances. The weight of authority is that past misconduct whether sufficient to amount to just cause for discharge or not and whether composed of similar or dissimilar conduct can be examined with subsequent misconduct to determine if the accumulation amounts to just cause...[21]

In summary, to establish cause, there must be a fundamental breach resulting in rescission of the employment contract, or a repudiation of the contract or its essential terms evidencing an intention to no longer be bound by the contract.

Duty to warn

An employer does not have a duty to warn an employee prior to dismissal. However, warnings are often relevant, even crucial to establishing just cause. As employer's counsel, you will undoubtedly advise your client to warn the employee if the circumstances warrant. In *Bois v. Majestech Corp. Canada*, the Court described the duty to warn as follows:[22]

> An employee is only entitled to dismiss an employee without notice or payment in lieu of notice whose performance it believes to be substandard after providing the employee with a warning which specifically informs the employee that his or her job is in jeopardy. It is insufficient if the employer is merely critical of the employee's performance or is merely urging improvement. The employer should not only bring home to the employee that his or her performance is inadequate but should inform the employee that improvements must be made within a specified time period. The employer must ensure that the employee understands the significance of any criticisms and warnings.

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[21] (1989), 75 Nfld. & P.E.I.R. 21 at p.28 (Nfld. S.C.), aff'd. 9 C.C.E.L. (2d) 316 (C.A)

[22] [2001] O.J. No. 3759 (Ont Sup Ct J. Templeton J.), quoting from *Wood v. Canadian Marconi Company* (1995), 9 C.C.E.L. (2d) 174 (Ont. Div. Ct.)

Some types of conduct are more conducive to warnings than others. A serious act of theft or other illegal activity does not require a warning. However, where the previous incidents of the same or similar conduct have been condoned or where incompetence is alleged, a warning will increase the prospect of making a case for just cause.

In disruptive behaviour cases, particularly where the incidents complained of are trivial, but annoying, it is accepted that a warning is required prior to dismissal.[23] The warning says to the employee, in effect: "You can't work here anymore if you continue to act this way." The employer may be satisfied to keep the employee if the unacceptable conduct stops.

The more serious the wrongdoing, the less likely an employer will be required to give the employee warning. An employer who has evidence or reason to believe that the employee has been stealing or committing some other illegal act need not give the employee a warning letter.

If the employment relationship is of long standing, the courts have recognized that the employee is entitled to a "benefit of the doubt" prior to dismissal for otherwise serious misconduct, but it will be a question of fact whether the conduct is so serious as to warrant

[23]Bagnall v. Calvin Klein Cosmetics (Canada) Ltd. (1994), 5 C.C.E.L. (2d) 261 (Ont. Ct. Gen. Div.) , at p. 276. However, if each of the incidents are serious in themselves, then a warning may not be necessary. Fonceca v. McDonnell Douglas Canada Ltd. (1983), 1 C.C.E.L. 51 (Ont. H.C.J.), at p.57.

dismissal without a warning.[24]

How is the Warning given?

The warning should be clear and should be in writing so there is no doubt as to what warning was given. It must state the conduct which is unacceptable, require improvement, preferably within a specified period of time, and bring home to the employee that his or her job is in jeopardy if there is insufficient improvement.

The onus is on the employer to ensure the employee understands the criticisms and the consequences of his or her conduct.[25] The employer must then provide the employee with a reasonable opportunity to improve. How long is reasonable depends upon the circumstances.[26] A long standing employee who has performed well is entitled to a longer time to improve.[27]

Duty to Give Reasons for Termination

The common law has not found the employer to have a duty to give reasons for dismissal at

[24]Ditchburn v. Landis & Gyr Powers, Ltd. (1995), 16 C.C.E.L. (2d) 1 (Ont. Ct. (Gen. Div.)), var'd 97 C.L.L.C. para. 210-015 (C.A.).

[25]Wood v. Canadian Marconi Co. (1995), 9 C.C.E.L. (2d) 174 at 178(Ont. Div. Ct.)

[26] Desrochers v. Canada (1982), 24 A.C.W.S. (2d) 395 (F.C.T.D.)

[27]Pilon v. Peugeot Canada Ltd. (1980), 144 D.L.R. (3d) 378 at 382-3 (Ont. H.C.J.)

the time of dismissal[28]. In fact, the employer is entitled to rely on ground discovered after the employee has been terminated.[29] Nor does the employer historically have an obligation to grant an employee a hearing before making a decision to dismiss.

However, there is a question whether the Supreme Court of Canada's decision in *Wallace v. United Grain Growers Ltd.*[30] has created such a duty. There the Supreme Court held that employers have an obligation "to be candid, reasonable, honest and forthright with their employees" at dismissal.[31] Even prior to *Wallace*, the courts have sometimes found against the employer where no reasons were given for the dismissal.[32]

Duty to provide an opportunity for response

Where fraud has been alleged, it has been held that the employer ought to furnish the employee with an opportunity to respond to the allegations because the consequences are so

[28]Tracey v. Swansea Construction [1965] 1 O.R. 203 (H.C.J.)

[29]Lake Ontario Portland Cement Co. v. Groner (1961) 28 D.L.R. (2d) 589

[30] [1997] 3 S.C.R. 701

[31]Ibid., supra, p. 734

[32]Johnson v. Able-Atlantic Taxi Ltd. (1987), 17 C.C.E.L. 239 (Ont. Dist. Ct.), at p.243; Wawro v. Westfair Foods Ltd. (1995), 10 C.C.E.L. (2d) 49 at p.58 (Sask. Q.B.), aff'd. 23 C.C.E.L. (2d) 247 (C.A.)

serious.[33] In *Jivrag v. Calgary*[34], the trial judge found that the absence of an opportunity for the employee to respond to damaging allegations of theft aggravated the damages to which the wrongfully dismissed employee was entitled:

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal... the loss of one's job is always a traumatic event.[35]

Duty of Fairness

Traditionally, employers have always been held to have no duty of fairness in dismissing an employee. The rules of natural justice have not been held to apply to employers. At common law, the only exception is an employment relationship where the employee can only be terminated for cause, in which case there is a duty to act fairly.[36] Clearly, the common law obligations or lack of obligations can be varied by contract.[37]

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[33]Francis v. Candian Imperial Bank fo Commerce (1992), 41 C.C.E.L. 37 at p. 48 (Ont. Ct. Gen. Div.), var'd on other grounds 120 D.L.R. (4th) 393 (C.A.)

[34] (1986), 13 C.C.E.L. 120 at p. 127 (Alta. Q.B.), var'd. 18 C.C.E.L. xxx (C.A.).

[35]Ibid., supra, p.33

[36]Ridge v. Baldwin, [1963] 2 All E.R. 66 (H.L.), at pp. 71-72, per Lord Reid, adopted with approval by S.C.C. in Nicholson v. Haldimand-Norfolk (Region) Board of Police Commissioners (1978), 88 D.L.R. (3d) 671, per Laskin C.J.C.

[37]Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653 at para.28

However, in cases involving serious allegations such as theft or fraud, the courts have repeatedly suggested, at least in obiter, that the employer put the allegations to the employee and allow the employee the opportunity to respond.[38] In addition, there seems to be an increasing trend to find that the employer has an obligation to deal fairly with employees. In *Marlowe v. Ashland Canada Inc*.[39] an employer gave a warning to a sales employee. Then, the employer gave the employee a very poor performance review, even though he had always met his sales targets. He was then dismissed for cause and refused a reference letter. The court found that the employer had no cause for dismissal. The B.C. Supreme Court held that the employer had a duty to act in good faith and treat the employee fairly. To the same effect is *Makarchuk v. Mid-Transportation Services Ltd.*[40]

In *Wallace v. United Grain Growers Ltd.*,[41] Iacobucci J. held that employers have a duty to be reasonable, honest and forthright with employees even at the time of dismissal. This means that the employer must have a termination meeting the employee in which the employee is treated respectfully and receives an explanation of the reasons for the dismissal.

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[38]Reilly v. Steelcase Canada Ltd. (1979), 103 D.L.R. (3d) 704 (Ont. H.C.J.)

[39][2001] B.C.J. No. 1338 (B.C. S.C.)

[40] (1985) 6 CCEL 169 (Ont. S.C.), where the employer persisted with an allegation of even after an independent report had exonerated the employee

[41] [1997] 3 S.C.R. 701

The Court makes it clear that the employer-employee relationship is not to be treated like other kinds of contracts. The relationship between employer and employee is a "special relationship", where there is a power imbalance between the parties. Iacobucci J. characterizes employees as a "vulnerable group" in our society, especially at the time of involuntary termination of the employment relationship:[42]

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal.

The characterization of employee as vulnerable manifests itself in two ways. First, the Court will scrutinize whether the employer has been reasonable in dismissing the employee. Further, if the employer is found not to have had cause and the dismissal was humiliating or disrespectful of the employee's feelings and needs, the damages will be greater.

Condonation

When an employer has knowledge of an employee's misconduct which would constitute cause for dismissal, and chooses to keep the employee in his employ, then he has condoned the employee's actions.[43]

An employer who knowingly elects to continue the employ of someone who has, in effect,

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[42] Wallace, supra. at para. 95

[43] Boston Deep Sea Fishing and Ice Co. v. Ansell (1888), 39 Ch.D. 339 (C.A.).

repudiated the employment contract, cannot summarily dismiss that employee for the same misconduct.[44]

Where an employer has cause to dismiss, the employer must make a choice. Either the employer accepts the repudiation and dismisses the employee with cause or the employer accepts the misconduct and condones the employee's offence. An offer to provide notice or pay in lieu of notice, where there is knowledge of cause, will be taken to be condonation of the misconduct, acceptance of the breach and termination of the contract with the implied term that reasonable notice will be given. The employer will be taken to have waived its right to plead cause.[45]

If there is condonation, the employer will not be allowed to later rely upon the misconduct to justify dismissal for cause.[46] However, condonation is subject to an implied condition of good conduct on the part of the employee, and whenever any new misconduct occurs, the old offences may be invoked and relied upon against the offender as part of the grounds constituting cause.[47] In Ontario, new misconduct does not have to be similar to condoned

[44]Tracey v. Swansea Construction (1964), 47 DLR.(2d) 295 at p.312 (Ont. HCJ); aff'd. 50 DLR (2d) 130n (C.A.).

[45]Tracey v. Swansea Construction (1964), 47 D.L.R. (2d) 295 at p.*** (Ont. H.C.J.); aff'd. 50 D.L.R. (2d) 130n (C.A.).

[46]Nossal v. Better Business Bureau of Metropolitan Toronto Inc. (1985), 19 D.L.R. (4th) 547 (Ont. C.A.) at p.551.

[47]Ibid., at p.551.

misconduct to be invoked.[48] However, there are conflicting decisions at appellate levels.

An employer must clearly have full knowledge of the nature and extent of the fault. He cannot forgive or condone matters about which he is not fully informed. Knowledge on the part of a supervisor or other duly authorized official of the employer is sufficient to bind the employer.[49] An employer should also be allowed a reasonable amount of time to decide what to do, to consider whether or not he will dismiss the employee, or to look for a replacement.[50]

Evidence of investigations with on-going indication that misconduct is not being tolerated can rebut suggestions that there was condonation particularly if the employer can show that the employee knew or ought to have known that there was no acceptance of the conduct by the employer. The Court may draw inferences about the employer's intentions from the circumstances, including acts or omissions and whether there has been any delay.[51]

Clear warning is important where the practice was previously condoned or encouraged.[52] Similarly, if accepting a certain standard of performance, an employer cannot without proper

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[48]In Ontario - see Nossal, ibid., at p. 551.

[49]Reilly v. Steelcase Canada Ltd. (1979), 103 D.L.R. (3d) 704 (Ont. H.C.J.) at p.721.

[50]McIntyre v. Hockin (1889), 16 O.A.R.) 498 (C.A.) at pp.501-2.

[51]Connolly, ibid., para.42.

[52] Paitrich v. Clarke Institute of Psychiatry (1988), 19 C.C.E.L. 105 (Ont. H.C.J.); aff'd. 30 C.C.E.L. 235 (C.A.).

warning change or raise the standard unilaterally for the purpose or with the effect of relying upon the employee's failure to achieve the elevated expectations as grounds for just cause.[53] Condonation is a question of fact, and the employee has the onus of proving it.

Subsequent Facts

An employer's basis for dismissing an employee often does not rise to level of just cause even if, at the time of dismissal, the employer believes that just cause exists. Investigation of the employee's history will still be relevant to the employer's case. As pointed out by the Ontario Court of Appeal in *Bannister v. General Motors of Canada Ltd.*, [54] justification for dismissal can be shown by proof of facts ascertained subsequent to the termination.

Misstatement of Qualifications

An element of misconduct is evidence that the employee misrepresented his or her qualifications or experience at the time of employment. This is an application of the principle that an intentional misrepresentation will entitle the innocent party to rescind the contract and even give rise to an action in damages. The principle was recently addressed in *O'Donnell v. Bourgault Industries Ltd.*,[55] where the Saskatchewan Court of Appeal upheld

[53] Scott v. Domtar Sonoco Containers Inc. (1987), 20 CCEL 290 (Ont. Dist. Ct.); aff'd. 17 ACWS (3d) 731 (C.A.).

[54] (1998) 40 O.R. (3d) 577 , [1998] O.J. 3408 QL

[55] [2002} S.J. No. 145 (QL - Sask. C.A.),

the trial judge's finding that a misrepresentation of qualifications at the time of application was a grounds for dismissal for cause.

Although not mentioned in *O'Donnell*, it is arguable the Supreme Court of Canada's decision in *McKinley v. BC Tel, supra.* could impact on the basis for dismissal for misrepresentation of qualifications. Here again, the length of service, the nature of the misrepresentation and the relevance of the misrepresentation to the employee's employment will assist in determining whether the misrepresentation justifies immediate dismissal for cause or some lesser sanction.

The result in the case of an imposter professor of astrophysics is simple, but the case of the CEO who, it turns out after 20 years' of exemplary service, received his M.B.A. from "Timbuctu U." instead of Harvard School of Business, may, depending on how you look at it, be a little more difficult. Perhaps even more difficult is the "intentional omission" of an employee's conviction for shoplifting, theft or indecent assault, especially if the question was not asked and the employee has performed admirably for the benefit of the employer.

In these circumstances, the principle that the result must be fair for both the employer and the employee must be taken into account. If the employer is senior, if the transgression has gained some notoriety within the corporation or, in the case of a public company, if it has

found its way into the media, the credibility of the corporation may be seriously harmed until the employee is removed. There is a pragmatic answer to these issues in most cases: neither the employee nor the corporation will wish to "wash the laundry in public" any more than absolutely necessary, and these cases are very likely to settle.

Keeping Just Cause and Warnings in Perspective

In their important text, *Just Cause*[56], the distinguished chairs of this program, Matt Certosimo and Randy Echlin refer to recent studies which have assessed the probability of an employer succeeding in proving just cause and the factors which increase the likelihood for success:

> There are two research studies that show a low employer success rate in wrongful dismissal litigation at trial. In one of the studies which looked at 332 Canadian cases between 1980 and 1993, the employer was successful in establishing just cause in only 37% of the cases. In an earlier study conducted between 1975 and 1989, the success rate at trial was only 30%. The researchers found that the likelihood of an employer succeeding increased if the employee was afforded a hearing and an opportunity to respond to allegations of incompetence, and was "significantly greater" if the employee had been previously disciplined.
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> The lesson to be learned for employers is that even though there may not, strictly speaking, be a duty to warn, or to provide an opportunity for response these are steps which will assist the employer in proving cause. The employer will also be in a stronger position, of there has been a clear warning, preferably in writing, outlining the unacceptable behaviour, providing a reasonable time for improvement having regard to the length of service, and stating that failure to improve would mean the employee's job was in jeopardy.

With these statistics in mind, employer's counsel knows that the battle to prove cause is

[56] R.S. Echlin and M.L.O. Certosimo, *Just Cause*, Canada Law Book (looseleaf)

largely uphill. It will only be the clearest case with a stubborn plaintiff which will find itself to trial. In most cases, the claim of just cause will be more strategic.

Its objective will be to persuade the plaintiff, her counsel, the mediator, and even the pre-trial judge or settlement conference Master that the battle will be long, painful and expensive for the dismissed employee. Seen in this light, the small settlement offer made by the employer will begin to assume the appearance of the "golden handshake" the dismissed employee was hoping to receive.

Toronto, May 21, 2002