

INSOLENCE, INSURBORDINATION AND REPUDIATION

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Introduction

Employees are a vital resource to practically all businesses, works and undertakings. While it is hoped that the employer-employee relationship will remain mutually satisfactory, where either or both parties become dissatisfied, termination may result.

Dismissal of an employee is typically viewed by employers as one of the most difficult aspects of the employment relationship. From a legal perspective, terminations of employment in Ontario – especially those initiated by employers – can also be complex.

One particular point of common confusion is whether an employee can be dismissed for cause due to a bad attitude or a refusal to perform assigned tasks or, more formally, insolent or insubordinate conduct, respectively. The confusion is amplified by the courts' general reluctance to find that an employee's conduct was so offensive or unacceptable that it justified summary termination.¹ Nonetheless, some of the diverse categories of employee misconduct are intuitively more serious than others. Accordingly, terminating employment for cause will be better warranted, for example, in a case where an employer can establish that an employee is guilty of fraudulent misconduct in the course of employment. Termination for cause will not usually be supported, however, for "borderline" cases of insolence or insubordination, particularly where there is not a proper path of written discipline leading up to the termination.

Recent court decisions have made it increasingly difficult for employers to establish cause based on insolent and insubordinate acts by their employees. An argument can be made that these decisions are consistent with a general trend towards the erosion of just cause. However, there is hope for employers dealing with difficult employment relationships, including the avenues of discipline leading to termination or, in certain circumstances, repudiation of contract. The purpose of this paper is to outline the circumstances where insolent or insubordinate conduct gives rise to dismissal for cause or repudiation of contract.

Background on Cause Termination

The law makes a distinction between, (a) lawful dismissals, categorized as "with cause" terminations and, (b) unlawful dismissals, categorized as "without cause" terminations. The most significant consequence of this distinction is that, where cause exists, the employer is generally not required to give notice of the termination or pay in lieu of notice. By contrast, in the absence of cause, employers are usually obliged to provide such notice. Employers should be aware that there is no middle ground or "near cause": if the facts do not support a termination for cause, the employee is deemed to have been wrongfully dismissed and is entitled to the full remedies arising therefrom².

¹ Peter Wilson and Allison Taylor, *The Corporate Counsel Guide to Employment Law*, 2nd ed. (Aurora: Canada Law Book, 2003) at 205.

² *Dowling v. Halifax (City)* (1998), 158 D.L.R. (4th) 163 as cited in *The Corporate Counsel Guide to Employment Law*, *supra* note 1 at 205.

Difficulty in Establishing Cause

In a wrongful dismissal action, the onus is on the employer to demonstrate that there was just cause for summary dismissal. The employer is required to prove cause on a balance of probabilities, based on a finding of real incompetence or misconduct, instead of simple dissatisfaction with performance or concern as to potential misconduct³. In particular situations, the employer may be effectively held to a higher standard of proof, such as where the employer alleges that the employee committed dishonest or criminal acts in the workplace⁴.

Defining Insolence and Insubordination

As noted by the court in *Henry v. Foxco Ltd.*⁵, the courts tend to employ the terms “insolence” and “insubordination” interchangeably, even though they are distinct categories of misconduct. Insolence can be defined as an employee’s derisive, abusive or contemptuous language, generally directed at a superior. Insubordination means an employee’s intentional refusal to obey an employer’s lawful and reasonable orders⁶. Insubordination and disobedience are synonymous, however insubordination and insolence are not⁷. A plausible explanation for the courts’ interchangeable use of these terms is that both types of behaviour often occur together; few cases demonstrate insolent behaviour in the absence of insubordination and vice versa.

Circumstances Where Insolence and Insubordination Give Rise to Cause for Dismissal

Although each case possesses novel facts, general trends in the case law are evident. As summarized by Howard A. Levitt in *The Law of Dismissal in Canada*⁸, decisions are illustrative of the following trends:

1. generally, two or more instances of insolence or insubordination are required for cause;
2. the gravity of the offence must be examined;
3. if the employee has a reasonable excuse, such as provocation, the conduct may be excused; and,
4. if the conduct is a deliberate challenge to the employer’s authority, cause may be established.

As employment law cases are primarily fact-driven, there will be instances where cases result in opposite holdings. Notably, some cases may be easily categorized or may fall into one or more categories, yet others are anomalies that defy categorization altogether. What follows is an attempt to summarize cases demonstrating the trends listed above.

³ Howard A. Levitt, *The Law of Dismissal in Canada*, looseleaf (Aurora: Canada Law Book, 1992) at 6-51.

⁴ *supra* note 1 at 205-6..

⁵ (2004), 130 A.C.W.S. 109 (N.B.C.A.) [“*Foxco*”]

⁶ Echlin & Certosimo, *Just Cause: The Law of Summary Dismissal in Canada*, looseleaf (Aurora: Canada Law Book, 1998) as cited by the court in *Foxco*.

⁷ *Foxco*, *supra* note 5.

⁸ *supra* note 3 at 6-51.

1. Generally, Two or More Instances of Insolence or Insubordination are Required

Save for exceptional cases, courts generally require repeated instances of insolent or insubordinate conduct, despite the employer's written warnings to the contrary, in order to find cause for dismissal.

In *Foxco*, the defendant employer dismissed the plaintiff employee for one incident of misconduct. The employee was a repair technician, and on the day in question, the employee was instructed to remove decals from two vans. Perceiving that this task was taking too long, the employer inquired about the length of time and the employee's choice of tools. The employee responded to the employer's questions, in the presence of other employees, by yelling profanities and challenging the employer to fire him. When the employer suggested that the employee go home to cool off, the employee refused, and the employer terminated the employment. The employee brought an action for wrongful dismissal. The trial judge dismissed the action and the employee appealed the decision.

On appeal, the court found that the employee had been wrongfully dismissed, based on the Supreme Court of Canada's decision in *McKinley v. BC Tel*⁹. In *McKinley*, the court set out an analytical framework and two-step test for a court to follow when considering whether an employer had just cause to dismiss an employee without notice. The applicable inquiry is whether, in the circumstances of the case, (1) does the evidence establish employee misconduct on a balance of probabilities; and (2) if so, did the nature and degree of misconduct involve matters of such importance that it destroyed the relationship between the employer and the employee? Though the *McKinley* decision involved employee dishonesty, the court decided that the analytical framework applied to other types of misconduct.

Considering the evidence in context, Larlee J.A. decided that the employee's use of profanities and refusal to go home amounted to insolence and insubordination, respectively. However, Larlee J.A. found that this single incident, viewed along with an otherwise positive employment performance record, did not destroy the employer-employee relationship.

In a concurring decision, Robertson J.A. found that the actual basis for dismissal was the insolent behaviour, instead of insubordination or failure to follow the employer's orders. Given that insolence is deemed less serious than insubordination, it was unreasonable for the trial judge to decide that the conduct justified summary dismissal. Reviewing the relevant case law, Robertson J.A. stated that a single incident of insolence warrants dismissal in one of three circumstances: (1) the employee and superior are no longer able to maintain a working relationship; (2) the incident destabilized the supervisor's credibility in the workplace and, thus, his or her ability to properly supervise; or (3) that as a result of the incident the employer suffered a material financial loss, a loss of reputation or its business interests were seriously prejudiced. As well, applying the Supreme Court's contextual approach and principle of proportionality, the court must weigh the employee's work history and employment record.

In the result, the court decided that the employee's misconduct did not warrant summary dismissal because it was an isolated incident of insolence, which would not lead to irreparable harm to the working relationship. As well, there was no evidence of a prejudicial effect on the employer's ability to supervise or that the company's business interests were prejudiced.

⁹ (2001), 200 D.L.R. (4th) 385 (S.C.C.) [*McKinley*]

However, in some instances, where a single act of insolence was sufficiently severe, the court has found that summary dismissal was warranted. Such was the case in the British Columbia Court of Appeal's decision, *Wise v. Broadway Properties Ltd.*¹⁰. In *Wise*, the employee was a caretaker of an apartment block owned by his employer. The employee felt that he had been performing duties well beyond his job description and that he should be compensated accordingly. After discussing the situation with his employer and failing to reach an agreement, he wrote his employer a letter, threatening to sue for compensation and adding the following statement:

You gave me a building management and subsequently a Property Management job, April of 1992, here at Village Towers. I have undoubtedly fulfilled your expectations in this regard and I do not expect to be treated as the unfortunate Jews were treated when impressed into working without pay for Mercedes Benz, Volkswagen and Siemens during the Second World War.

The employer, a Jewish man in his 80s, was deeply offended by the comparison and subsequently dismissed the employee. The employee brought an action for unjust enrichment and damages for wrongful dismissal. At trial, the court utilized the contextual analysis from *McKinley* and decided that, in the circumstances known to both parties at the time, the threat to sue together with the insult constituted cause for dismissal. On appeal, a unanimous court upheld the finding of cause, based solely on the trial judge's finding in connection with the insult.

2. The Gravity of the Offence Must be Examined

Though perhaps not consistently following the Supreme Court of Canada's analytical framework espoused in *McKinley*, in determining whether there was cause for dismissal, courts tend to consider the gravity of the offence in the context of the whole employment relationship. In some instances, the conduct is contrary to the employment contract and the court holds that this amounts to repudiation. In others, the court decides that the misconduct was relatively minor and did not constitute cause for dismissal.

The use of profane language, without any physical force, and the nature of the proposed penalty were at issue in *Haldane v. Shelbar Enterprises Ltd. (c.o.b. Tool & Cutter Supply Co.)*¹¹. In *Haldane*, the plaintiff employee acted as a small company's controller, supervising accounts payable and receivable. At the applicable time, the employee was co-ordinating a no-smoking policy in the workplace, which was being phased in on a one-day-per-month basis. Contrary to the employee's planning and understanding, the employer announced a particular day to be a "smokeless day". In front of the majority of the employees, the employee expressed her agitation with the change in plans and directed profane language at her employer. The employer advised the employee to leave the workplace for the afternoon. On the next scheduled workday, the employer stated that while he wished to retain the employee, he believed that he must demonstrate to the staff that she was being disciplined. As such, he asked the employee to apologize to everyone who witnessed the event and to take three days off without pay. In regards to the days off, the employee did not accept the loss of three days' pay and suggested that the employer deduct it from her vacation pay. The employer refused and her employment came to the end. The employee brought an action for damages based on wrongful dismissal.

¹⁰ 2005 BCCA 546 ["Wise"]

¹¹ [1997] O.J. No. 2295 (Ont. Ct. J, Gen. Div.).

The Ontario Court of Justice (as it was then known) decided in favour of the employee and held that the appropriate level of discipline was requiring the employee to apologize and to take the afternoon off work, coupled with a memo noting the discipline. In reaching its decision, the court considered the employee's loyalty to the company, her excellent performance and the degree of job-related stress she was experiencing. The court acknowledged that insolence may be a ground for dismissal, but the employee's conduct did not reach the requisite threshold. Finding that the employer's proposal was excessive in the circumstances and the employee's counter-proposal was reasonable, the court determined that the plaintiff was constructively dismissed. The Ontario Court of Appeal affirmed the lower court's decision.

On the other hand, in sufficiently severe and ongoing cases of insubordination, cause may exist for termination or even repudiation of the employment contract. Recently, the Ontario courts considered whether highly insubordinate behaviour supported dismissal for cause in *Roden v. The Toronto Humane Society*¹². In *Roden*, two employees of the Toronto Humane Society were terminated after they had repeatedly refused to implement the Society's policies in terms of accepting stray animals.

The Society had traditionally taken in stray animals from the City of Toronto, pursuant to a contract it had with the City. In 2001, the Society's contract was not renewed and the Society ceased taking in stray animals from the City of Toronto. Approximately one year later, the Society obtained legal opinions indicating that it could recommence sheltering stray animals from Toronto. The Society instructed its employees accordingly; however, two employees objected to this instruction, taking the position that the Society could not lawfully shelter Toronto's stray animals. One of the employees wrote to the Director of the Society and outlined her concerns. As a result, several meetings were held and memoranda were distributed to reassure the employees that their actions were indeed legal. Despite the Society's efforts to inform the staff, the two employees continued to refuse to follow the Society's policy. Shortly thereafter, the two employees were dismissed. The employees brought an action and lost at trial, with the court deciding that they had no reasonable basis for believing the Society's actions were unlawful.

On appeal, the Ontario Court of Appeal found that the case should not be decided on the principles of misconduct; rather, the applicable principles were those that governed repudiation of employment contracts. That is, the employees had demonstrated, by repeatedly refusing to follow instructions, that they would no longer abide by their employment contracts' terms. The court cited *McKinley* and held that the contextual analytical framework was appropriate in cases of repudiation and made an important distinction:

[I]here is a crucial distinction between dismissal for misconduct and termination for repudiation. When an employer claims to have dismissed an employee for cause based on serious misconduct, the employer must point to conduct that took place prior to dismissal. It is then for the courts to determine whether the conduct was sufficiently serious so as to constitute cause. Repudiation, on the other hand, takes place when an employee refuses to perform an essential part of his or her job duties in the future. In such a situation, the employer is entitled to accept the repudiation and treat the employment relationship as terminated because the parties no longer agree on the fundamental terms of the contract.

¹² [2005] O.J. No. 3995 (Ont. C.A.) [*"Roden"*]

Deciding that the trial judge's findings were consistent with repudiation, the Court of Appeal held that the employees were not entitled to damages for wrongful dismissal.

In the labour relations context, arbitrators have developed a well-known principle: "work now, grieve later". The Ontario Courts have not formally adopted this principle but it appears to offer some guidance here. Where an employee refuses to work or to perform some duty, he or she should be encouraged – unless there is a clear safety or unlawful consequence – to complete the work or duty then, and the parties can discuss it later. Failure by the employee to do so may lead to discipline. Where the employee refuses, even after discussion, to perform an essential duty, at that time and in future, the circumstances has potentially gone beyond "mere" discipline and reached the threshold of a repudiation of contract.

3. If the Employee has a Reasonable Excuse, such as Provocation, the Conduct May be Excused

The courts strictly analyze whether an employer's provocation may excuse the insolent or insubordinate conduct of the employee that follows.¹³

In *Thompson v. Lex Tec Inc.*¹⁴, the Ontario Superior Court of Justice considered whether an employee's use of profane language and physical force permitted a dismissal for cause. The incident arose when the employee, a warehouse manager, arrived late for work, due to a highly personal medical errand. When the employee's supervisor doggedly pursued the employee throughout the workplace to obtain an explanation for the tardiness, the employee rebuked the supervisor with profane language, shoved him in the chest and left the workplace to consider his actions. The following workday, upon the employee's arrival, the supervisor presented him with a letter giving notice of immediate termination of his employment. Although the employee was known for his use of "colourful" language, his performance reviews were above average and his work file did not contain any disciplinary notes.

Relying on the Ontario Court of Appeal's decision in *Ditchburn v. Landis & Gyr Powers, Ltd.*¹⁵, the court decided that the single incident of the employee's poor judgment, viewed in the context of an otherwise untarnished employment record, did not constitute cause for immediate termination of his employment. In reaching its decision, the court considered the personality clash between the employer and the supervisor, the reason why the employee avoided explaining his tardiness (potential embarrassment) and that the supervisor provoked the employee into an avoidable confrontation. On a review of all the circumstances, the employee was dismissed without cause. The Ontario Court of Appeal affirmed the lower court's decision, based on its contextual analysis consistent with the *McKinley* decision.

The Saskatchewan Court of Queen's Bench considered if an employee had a reasonable excuse for erratic behaviour in *Gordon v. Peyakowak (They Are Alone) Committee Inc.*¹⁶. At issue was whether a plaintiff employee was constructively dismissed from her position as a Family Violence Counsellor when she was suspended without pay for a period of three months. The defendant

¹³ *supra* note 3 at 6-52.1.

¹⁴ [2001] O.J. 3651 (Ont. C.A.) ["Haldane"]

¹⁵ (1995), 34 O.R. (3d) 578 ["Gordon"]

¹⁶ 2004 SKQB 103.

employer denied the allegation of constructive dismissal and argued that if the employment contract was terminated, it was terminated for cause, including gross insubordination.

The conduct at issue arose during a change in the employer's management. The Executive Director resigned and appointed her sister, a senior person at the organization, as Acting Director. Arguing that this was yet another example of nepotism in the workplace, the employee objected to the appointment and confronted the Acting Director. The employee and the Acting Director disagreed about significant aspects of the confrontation. The Acting Director submitted that the employee entered the Acting Director's office, while a client was present, and yelled that she was a liar and a cheat. By contrast, the employee denied bursting into the office and making verbal threats. She also stated that she was unaware of a client's presence.

Following the confrontation, the Acting Director cancelled the employee's participation in a workshop to be held the subsequent week. The employee responded to this by advising that she would not obey the workshop cancellation instruction. Upon the employee's arrival to work the following workday, affidavits submitted by the Acting Director and a volunteer from the organization indicated that the plaintiff had verbally abused staff members. That same day, the Board of Directors met and decided the appropriate discipline for the employee was a three-month suspension and a requirement to complete an anger management course. The employee did not take the anger management course, nor did she return to work at the end of her suspension.

The court decided that the employee's conduct toward the Acting Director was insolent and insubordinate. However, the court viewed the plaintiff's conduct as an aberration that resulted from her frustration of not receiving the promotion. Accordingly, the court found that that, in all of the circumstances, the disciplinary response was excessive and amounted to constructive dismissal.

4. If the Conduct is a Deliberate Challenge to the Employer's Authority, Cause May be Established

A deliberate challenge by an employee to an employer's authority may provide a basis for cause termination. In some respects, this principle is duplicative of the gravity element discussed above, but it is worthy of examination.

A challenge to the employer's authority was at issue in *Mitrovic v. Pella Windows and Doors*¹⁷. In *Mitrovic*, the Ontario Superior Court of Justice determined whether an employee's unilateral decision to conduct a fraud investigation amounted to insubordinate behaviour. The plaintiff employee brought an action for wrongful dismissal when her employer, Pella, dismissed her after less than three months of work. The employee argued that she was asked to conduct a fraud investigation, and when she reported the results that established fraud, she was summarily dismissed in a humiliating manner. Conversely, the employer argued that the employee was dismissed with cause and that they had not asked the employee to conduct a fraud investigation. The employer maintained that the employee had made serious fraud allegations that lacked foundation. As well, the employer argued that the employee was a probationary employee, so she could be dismissed at any time.

At Pella, the employee worked as Assistant Finance Manager. After having worked at Pella for a little over a month, the employee phoned the General Manager and advised him that she had

¹⁷ [2005] O.J. No. 3869 (Ont. S. J.) ["Pella"]

uncovered a fraud against Pella, masterminded by her immediate supervisor. The General Manager took the allegations seriously and assisted the employee in obtaining information required to verify whether there was a fraud. Upon retrieving the information, the employee's allegations were unsubstantiated; however, the employee was still convinced that her supervisor had been acting fraudulently. Following this event, the employee continued to search for evidence of fraud and to ask the General Manager for additional documentation. When there was still no evidence of fraud, the employee was asked to start focusing on her day-to-day duties and to cease reviewing old records. Over a week later, the General Manager realized that the employee had ignored his instructions. At a meeting, the employee was dishonest about completing certain tasks, and again, the General Manager told her to look after her employment duties. Shortly thereafter, the General Manager learned that the employee had again ignored his instructions and had been involved in a confrontation with her immediate supervisor. Pella terminated the employment for the following reasons: (1) refusing to follow direct orders when told to cease fraud investigations; (2) failing to carry out regular work; and (3) causing a disruption in the office and being insubordinate to her immediate supervisor.

Although the employee's immediate supervisor was unaware of the fraud allegations against her, she was dissatisfied with the employee's work performance. The employee had been rude to staff members on several occasions and had failed to complete her work. The court found that the employee's fixation on finding her immediate supervisor a party to fraud made it impossible for Pella to retain her as an employee. Accordingly, the employer met its onus in establishing just cause for the employee's dismissal, thereby dismissing the employee's claim. Again, it appeared that the continuing nature of the employee's misconduct (bordering on obsession), despite the employer's reasonable responses, justified the termination.

Conclusion

Determining whether insolent or insubordinate conduct amounts to dismissal for cause or a repudiation of contract has been a challenge for courts and employers alike. In general, courts are hesitant to decide that an employee's conduct justifies dismissal and this reluctance is made obvious in cases involving insolence and insubordination. In making the decision, courts consider numerous factors such as the number of instances of misconduct, the gravity of the offence, whether there was a reasonable excuse for the employee's conduct and whether the employer's authority was challenged. The misconduct should be properly categorized and considered in its context, and the strength of the evidence proving the misconduct should be strictly and realistically assessed. Generally, discipline, not dismissal, will be the appropriate legal response. However, in exceptional cases, the misconduct may merit the threshold of repudiation or cause dismissal, and lawful termination may result.

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