

# **Termination For Cause Update**

## **A Briefing for Human Resources Professionals**

presented by:

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# TERMINATION FOR CAUSE – AN UPDATE

## INTRODUCTION

Today's rapidly changing work environment is creating a range of new situations for employers to respond to. One of the most significant changes has been the introduction of e-mail and Internet access in the workplace. Another change has been the high turnover of employees, often to competitors of the employer. These changes can create novel employment situations that prompt the employer to want to end the employment relationship. This paper will examine recent case law that consider whether such situations constitute "cause" for termination.

Before reviewing the recent case law, it is useful to briefly review some key points concerning termination of an employee. Generally, an employer is entitled to terminate an employee's employment whenever, or for whatever reason it chooses, provided the employer is not acting in breach of contract, including a collective agreement, or a statute (such as health and safety or human rights legislation).

Where the employer does not have "cause" to terminate, it is required to provide a non-unionized employee with reasonable notice of termination or compensation in lieu of that notice. This requirement can be modified by an employment agreement with a valid termination clause describing how termination of employment will be handled.

However, where an employee has engaged in activity that constitutes "cause" for dismissal, the employer does not usually have to give notice or pay in lieu of the notice.

What is cause?

It is impossible to outline all the activities that would constitute cause and each case turns on its facts. But, as a generalization, where an employee has engaged in any of the following it has been held to be cause for discharge:

1. **Serious misconduct:** Theft, dishonesty and assault are generally held to be serious misconduct. Conduct such as absenteeism, lateness and poor performance is usually not serious misconduct unless there has been some form of progressive discipline.
2. **Habitual neglect of duty or incompetence:** For this to be cause, the employee has to clearly understand the requirements of the job, the requirements have to be reasonable and despite the problems being brought to the employee's attention, assistance offered. A reasonable time period must be given for improvement.
3. **Conduct incompatible with the employee's duties or prejudicial to the employer's business:** Engaging in activities during the workday that interfere with employment obligations or that compete with an employer's business is generally considered cause.
4. **Willful disobedience to the employer's orders:** When a clear instruction has been given by a manager and the instruction has been challenged or disobeyed by an employee, in certain situations this can be cause.

In terminating an employee for cause, the onus is on the employer to prove the existence of just cause beyond the balance of probabilities. The finding of cause must be based on real incompetence or misconduct, rather than simple dissatisfaction with performance or concern as to a potential misconduct. Where the employer is unable to demonstrate cause, an employee will be entitled to damages for wrongful dismissal. It should be noted that the Supreme Court

of Canada has emphatically rejected the “near cause” principle.<sup>1</sup> (The “near case” concept would have permitted a court to reduce the damages of a wrongfully dismissed employee in cases where the employee’s work record was not ideal but not enough to justify dismissal.)

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<sup>1</sup>*Dowling v. Halifax (City)*, [1998] 1 S.C.R. 22

## RECENT CASES

As noted, employers are having to respond to a range of novel situations in the workplace. A review of some of the recent case law reveals, in particular, two areas:

- < active planning by an employee to join the competition; and
- < misuse of the employer's e-mail, Internet or other corporate property

### **When it is revealed that an employee plans to join the competition, can the employer dismiss for cause?**

#### *Felker v. Cunningham*<sup>2</sup>

Sherman Cunningham was the president of Electro Source which carried on business as a sales agent for manufacturers of components in the electronics industry. He met Kurt Felker in the summer of 1995 at a golf tournament. At that time Felker disclosed that he worked for a competitor of Electro Source but that he would be prepared to leave if the right opportunity presented itself. He also told Cunningham that he had aspirations of starting his own manufacturers' sales agent company in the future.

Several months later a position opened up at Electro Source and Felker was offered and accepted the position of Toronto Area Sales Manager at an annual salary of \$130,000. The contract of employment provided for an 8 month notice period in the event of termination.

While employed with Electro Source, Felker learned of an opportunity to become the manufacturer's representative in Canada for a company known as Microchip. Felker decided to put together a proposal because he saw this as an opportunity to launch his own business.

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<sup>2</sup>(2000) 191 D.L.R. (4<sup>th</sup>) 734

Felker admitted that he did not devote his full time and attention to his duties at Electro Source during the preparation of the proposal.

A few days prior to Felker making his presentation to Microchip, Cunningham learned of Felker's activities. Because Felker had failed to disclose his plans to pursue the contract with Microchip, Cunningham concluded that he could no longer be trusted and terminated his employment without notice. Felker sued for wrongful dismissal.

Ontario's Superior Court of Justice held that Felker was a fiduciary but his fiduciary duty had been met because he had been frank about his desire to set up his own company before he was offered the job at Electro Source. Felker was therefore entitled to eight months' notice of termination in accordance with the terms of the contract of employment.

The Ontario Court of Appeal examined the extent of Felker's fiduciary duty. In the Court's view, the duty to avoid conflict of interest and self-interest required Felker to avoid putting himself in a position where his own interests, or other commercial interests with which he was aligned, would be in conflict with Electro Source's interest or would detract from his ability to work fully and completely for the benefit of Electro Source.

Further, the Court held that fiduciary employees are not relieved of their duties simply because a particular business is not of interest to the employer. The employee must still make full disclosure of his or her interest in the opportunity and obtain the employer's consent. The casual comments made by Felker that he would start his own manufacturer's representative business if the opportunity to do so presented itself, did not relieve Felker from his fiduciary duties when that opportunity arose after he had become a fiduciary employee at Electro Source. Based on this, there was just cause for his dismissal.

This case is particularly relevant to today's work environment. Employees are changing jobs at a higher rate as employers try to entice the most qualified people to positions. However, even if an employee has disclosed an interest in working in a particular job or a particular

company at some point in the future, this does not relieve them of their obligations if they are a fiduciary. The Courts will still require employees to fulfill the “higher, more exacting duty” required of fiduciaries and not put their own personal interests ahead of the employer.

**When there has been misuse of the employer’s e-mail, Internet or other corporate property, can the employer terminate employment without notice or pay in lieu?**

While still relatively novel, these situations have already been considered by the Courts and arbitrators in Canada and the United States.

***Di Vito v. Macdonald Dettwiler & Associates***<sup>3</sup>

Mr. Di Vito and Mr. Mathers, the plaintiffs, both worked for Macdonald Dettwiler & Associates (MDA), a high tech company, in its service section.

An e-mail composed by another MDA employee was sent to Mr. Di Vito in 1993. The e-mail was based on a monologue performed by a comedian and described, in a vulgar and derogatory fashion, sexual acts with an obese woman. The monologue had been altered so that it referred to a specific employee of MDA who suffered from a weight problem.

Just over a year later, Mr. DiVito retrieved the “joke” from a file he had saved it on and sent it to Mr. Mathers. Mr. Mathers forwarded the “joke” to three other MDA employees and printed out a hard copy. A month later someone posted a copy of the “joke” on one of the office bulletin boards.

The existence of the “joke” on the board was brought to the attention of the service area supervisor. The posted copy of the e-mail showed that the e-mail had been sent to Mr. Di Vito. He was called in by the supervisor for an explanation on the “joke’s” distribution.

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<sup>3</sup> [1996] B.C.J. No. 1436

Mr. Di Vito admitted he had received the message and forwarded it to several employees, including Mr. Mathers. Mr. Mathers also acknowledged that he had received the copy but didn't say that he had printed out a copy of the joke or that he had forwarded it to other employees as well. When asked on three separate occasions if they had both disclosed everything they knew, they both said they had.

Eventually the woman who was the subject matter of the joke found a copy of the email in her in-basket. She was upset and notified management.

After hearing this, Mr. Di Vito admitted that he knew that Mr. Mathers had distributed the e-mail to a number of other employees. Mr. Mathers, again after a series of denials, finally admitted that he had indeed forwarded the "joke".

Both the employees were fired and brought a wrongful dismissal action against MDA.

The employer, in trying to establish cause, said that the plaintiffs had engaged in hurtful and malicious conduct toward a co-worker that had seriously affected the work environment. Their termination was necessary to rehabilitate the working environment. Also, the plaintiffs had been dishonest in their dealings with management during the investigation and could no longer be trusted.

The B.C. Supreme Court said there was nothing humorous about the e-mail. It was humiliating for the female employee and by posting it on the bulletin board, she was publicly embarrassed. Further, there was an aggravating factor in that the e-mail was not just sent once; it was stored for more than a year and they sent again. This defeated any argument on the plaintiffs' part of a momentary lack of judgment.

But the Court was not persuaded that the conduct of the plaintiffs, in so far as the distribution of the mail was concerned, was sufficient grounds for their dismissal. Such conduct, by itself, warranted a severe reprimand but not dismissal for cause.

However, the Court held that the conduct, combined with the dishonesty during the investigation, did amount to just cause. The dishonesty was a breach of the employees' implied duties of honesty and faithfulness and constituted serious misconduct.

*Smyth v. The Pillsbury Company*<sup>4</sup>

Pillsbury's offices had an e-mail system designed to promote internal corporate communications between employees.

Employees had been repeatedly assured that their e-mail communications were confidential and privileged and that they would not be monitored and used as a grounds for termination or reprimand by Pillsbury.

In October, 1994, Smyth, a Pillsbury employee, received e-mails sent from the Pillsbury e-mail system by his supervisor to his personal computer at home. Smyth, in his response e-mail, made threats to "kill the backstabbing bastards" in reference to sales management and referred to an upcoming holiday as the "Jim Jones Kool Aid Affair".

Pillsbury, in contravention of its own assurances, intercepted the e-mail and fired Smyth for transmitting "inappropriate and unprofessional comments" over its e-mail system.

The Court held that there is no reasonable expectation of privacy in an e-mail sent or received on a company e-mail system. Further, even if such an expectation exists, the Court said the Company was justified in reading the mail.

The Court held that the "[C]ompany's interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweighs any privacy interest the employee may have in those comments".

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<sup>4</sup> 914 F. Supp., 97 (E.D. Pa., 1996)

***Westcoast Energy Inc v. Communications, Energy and Paperworkers' Union of Canada,  
Local 686B***<sup>5</sup>

A grievance was filed by Dan Bourdon, the employee, challenging the termination of his employment in April 1999.

Mr. Bourdon sent multiple, anonymous, sexually harassing e-mails to a female co-worker on four occasions. He had used the company's computer and network in order to send the messages. However, he had used an Internet based e-mail system (Hotmail) and not a work e-mail system. The employee became worried and began to think someone was stalking her.

Using a special program, the company was able to trace the e-mails back to Mr. Bourdon's computer at work.

When confronted with this information, Mr. Bourdon lied several times to the employer and his union representatives and even tried to say that the e-mails were sent by his supervisor. When the dismissal went before an arbitrator, the termination was revoked and substituted with a long suspension. The arbitrator took into account the fact that the employee had worked for the company for 24 years, had no previous discipline record, and would have to deal with the shame and loss of credibility he brought upon himself.

In this instance even though the employee was engaged in completely inappropriate behavior and was dishonest, the arbitrator held that there was not sufficient cause for dismissal.

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<sup>5</sup> (1998) 84 L.A.C. (4<sup>th</sup>) 185

***Canadian Pacific Railway v. International Brotherhood of Electrical Workers (Lahaie Grievance)***<sup>6</sup>

An employee with an unblemished work record of nine years was discharged for cheating on a training program required of him as an apprentice with CP Railway. The employee, along with others, had managed to break out of the company's mainframe, allowing them to communicate by e-mail on the Internet and to get answers to the training program tests. Some of the employee's e-mails contained off-colour jokes, a few derogatory comments about another employee, and disrespectful remarks about supervisors in general.

The employer argued that the content of the e-mails violated the company's Harassment and Discrimination Policy. The employer also submitted that the grievor had committed theft by using the company's computers without its authorization.

The arbitrator held that the employee's conduct called for discipline but discharge was unwarranted. The arbitrator was of the view that on the whole the messages were neither disrespectful, nor harming or harassing in nature. Further, while the arbitrator felt it was clear that the employee had misused the employer's equipment for his own purposes, the arbitrator was not prepared to elevate that conduct to the level of theft. Based on the fact that this employee was the only one discharged while other employees had engaged in similar conduct and that the content of the e-mails were relatively innocuous, the arbitrator concluded that the employer was not justified in terminating the employee and he was reinstated.

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<sup>6</sup> [2000] C.L.A.D. No. 151

## E-MAIL PRIVACY

These cases raise the issue of whether it is reasonable for the employee to believe that their e-mail is private and will not be read or intercepted. In Canada, the Criminal Code prohibits the interception of “private communications” which is defined as any “oral communication” or “telecommunication”. E-mail is likely to be considered a telecommunication. However, would e-mail monitoring by the employer be considered an “interception”?

Canadian courts have not specifically addressed this issue of privacy, although American courts have. As mentioned in the outline of the *Smyth v. The Pillsbury Company*<sup>7</sup> case, the Court found that the employee had no reasonable expectation of privacy in an email sent or received on a Company’s system. This position was furthered in *McLaren v. Microsoft Corporation*<sup>8</sup> where the Texas Court of Appeal held that even if an employee creates his own encrypted password no reasonable expectation of privacy is created. Again, in *Bourke v. Nissan Motor Corporation*<sup>9</sup>, the California Court ruled that employees could be terminated for inappropriate jokes and language in e-mails and the employer could monitor their email.

In Canada, there is one recent arbitrator’s decision which came to the conclusion that there is no confidentiality in an e-mail message sent over the employer’s system<sup>10</sup>. In this case, a lengthy e-mail was sent by an employee to a “chat group” on the College’s network with

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<sup>7</sup> Supra, footnote 4

<sup>8</sup> 1999 WL 339015 (Courts of Appeals of Texas)

<sup>9</sup> No. BO68705 (Cal. Ct. App. July 26, 1993)

<sup>10</sup> Camosun College v. C.U.P.E., [1999] B.C.C.A.A.A. No. 490

allegations concerning the competence and integrity of the faculty in his department. The arbitrator relied on *Smyth v. Pillsbury*<sup>11</sup>, of note in reaching his conclusion. Further, the employee in this instance could not have reasonably expected privacy because he chose to use a chat room format to post the e-mail.

Employers appear to have the right to monitor their work e-mail systems. The rationale is that the employer's computer and the product or information that flows in or out of it belongs to the employer. Therefore, employees should not have any expectations of e-mail privacy in the workplace and the content of the e-mails may provide sufficient cause for termination of employment.

## **INTERNET USAGE**

An employer can also monitor an employee's Internet usage to determine where the employees have been, for how long and in what activities they engaged while online. Such information is stored either on the employee's own computer or in the company's computer server. While access to Internet use is often crucial to the employee's ability to do the job well, it also allows employees to "surf the Web" on company time. This is a legitimate concern for employers and in certain circumstances can provide cause for termination.

Coon and Cocker, in their article *'Legal Issues of E-Mail and Internet Access in the Workplace'*<sup>12</sup> cite a recent example. Dominic Petruzzi was a technical inspector for CAE Electronics in Montreal. After a routine audit of employees' Internet activity, it was discovered that Mr. Petruzzi had spent 329 hours over a four month period of time (there were 640 working hours in that period of time) surfing the Internet at work. The majority of the time was spent

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<sup>11</sup> Supra, footnote 4

<sup>12</sup> Coon and Cocker, "*Legal Issues of E-Mail and Internet Access in the Workplace*", 1 I.E.C.L.C. Vol.1, Number 11, January 2001, 84

visiting adult pornographic websites. His employment was terminated. A grievance was filed by Mr. Petruzzi. He tried to say that there was some error on the part of the employer because he never spent more than two hours a day on the Internet. The panel didn't believe his defence and held that the employer had cause to terminate him.

***Re Dupont Canada Inc. (Maitland Site) and Communications, Energy and Paperworkers Unions of Canada, Local 28-o***<sup>13</sup>

This arbitration arose out of a grievance filed by an employee of Dupont Canada alleging that he was improperly terminated from his employment. The employer said the employee had, on a significant number of occasions, used the Internet for the purposes of obtaining pornographic material. He had also used other employees computers to do this rather than his own and had taken office keys to do so. Further, there had not been an immediate admission of wrongdoing by the employee. For these reasons, two of the three arbitrators on the panel held that the dismissal was justified.

For note is the dissent of the third arbitrator who held that the employee was clearly addicted to accessing pornographic material on the computer, and the Board should view this case from the perspective of a worker with an addiction. The arbitrator stated that “an addiction, whether related to alcohol, drugs or other compulsive behaviour, produces a pattern of denial and activity designed to hide or camouflage the addictive behaviour. These symptoms were present in this case”<sup>14</sup>. Given the fact the employee had an addition, his dismissal was described as “industrial capital punishment”<sup>15</sup>. A more appropriate remedy was that the employee receive counseling for addiction for two years, an apology be issued by the employee, all personal-use privileges afforded by the company to employee be stopped and the employee reinstated with his seniority retained.

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<sup>13</sup> (2000) 92 L.A.C. (4<sup>th</sup>) 261(Q.L.)

<sup>14</sup> Ibid., p. 20

<sup>15</sup> Ibid.

Some conclusions with respect to cause for termination that can be drawn from these cases are:

- < Employees do not have a reasonable expectation of privacy in e-mails sent or received on work e-mail systems.
- < The contents of the e-mails might allow for termination with cause of the employee.
- < The sending of inappropriate, even harassing e-mails is not always sufficient to establish cause, although it may be. If the employee has committed some other breach of employment obligations (such as being dishonest during the investigation), just cause will be easier to establish.
- < When e-mails become physically threatening or violent, this should be sufficient just cause for dismissal.
- < Monitoring of Internet use in the workplace is allowed by the employer. Just cause may be established where there is excessive use.

## **TIPS FOR EMPLOYERS**

There are a number of steps employers can take to address the appropriate use of e-mail and Internet in the workplace that will make the legal consequences flowing from misconduct less uncertain:

- < Create an “Information Technology Policy”. This policy should set out that computers, e-mail systems and the Internet are assets of the company. The policy should specify what activity is allowed and what activity is not allowed on the Internet and e-mail system. If monitoring of e-mail is going to occur, employees should be made of aware. Any penalties for the misuse of the company system should also be stated.
- < The employer should make sure all employees are aware of the policy.
- < When misconduct or a breach of the policy occurs, obtain legal advice before terminating the employee.