

# Current Workplace Issues

## Just Cause and the Dishonest Employee

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From time to time, employers may be forced to deal with the issue of dishonest employees. The Supreme Court of Canada has recently addressed the issue of whether or not employee dishonesty constitutes just cause for dismissal.

In the case of *McKinley v. BC Tel*, the employee was a chartered accountant. He discovered he suffered from hypertension, took some time off work and was terminated shortly thereafter. He was offered a severance package, but refused it and sued for wrongful dismissal. During the trial, the employer argued that the employee was dismissed for just cause because he was dishonest about his medical condition and the treatment available for it. At the end of the trial, the Judge instructed the jury that in order to find just cause, they must find that the employee's conduct was dishonest and that "the dishonesty was of a degree that was incompatible with the employment relationship." The jury found in favour of the employee and awarded general damages, special damages, aggravated damages and pension contributions. The trial decision was overturned by the Court of Appeal, which held that the jury should have been instructed that if it found dishonesty, then it must find that there was just cause for the dismissal. The Court of Appeal decision was subsequently appealed to the Supreme Court of Canada.

The Supreme Court stated that the critical issue for the Court to determine was whether dishonesty, in and of itself, constitutes sufficient cause for an employee's termination or whether the nature and context of the dishonesty must be considered in assessing whether or not just cause exists. While the Supreme Court had not previously considered the issue of employee dishonesty and just cause, it referred to two lines of lower Court authority on the issue, one which required an assessment of all of the circumstances surrounding the dishonesty and another which indicated that the mere fact of dishonest conduct constitutes cause for dismissal. The Court stated that it had "serious difficulty" with the absolute rule that dishonesty constitutes just cause for dismissal in any circumstances, noting that such an approach could lead to unreasonable and unjust results. The Court held that the appropriate test is as follows:

"I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligation to his or her employer."

The determination of this issue involves two questions: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and

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(2) if so, whether the nature and degree of the dishonesty warrants dismissal. Assessing the seriousness of the misconduct requires a careful consideration of the facts in any particular given case. It is likely that in cases of serious misconduct, such as theft, misappropriation or fraud, the circumstances will reveal cause for dismissal, however, it is equally possible that less serious sanctions for less serious misconduct may be appropriate. The premise behind the analysis is that a balance should be struck between the severity of the employee's misconduct and the sanction imposed.

At the end of the day, the Supreme Court upheld the jury verdict that just cause had not been established and did not interfere with the amount of notice given to the employee. The Court did set aside the order for aggravated damages on the basis that there was insufficient evidence to allow that issue to go to the jury.

The effect of this decision is to call into question practices of immediate termination for dishonest conduct. Employers must now take care to consider the facts surrounding the dishonesty and determine whether or not the circumstances and the conduct are sufficiently serious to constitute just cause.

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