

## Current Workplace Issues

### Near Cause Termination

#### SANDRA ANDERSON



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Readers of Workwise will be familiar with the principle that an employer is entitled to terminate a contract of employment (a) in response to sufficiently blameworthy conduct on the part of the employee ("just cause"), or (b) in the absence of just cause, by paying compensation for a reasonable period of time, the length of which is determined by factors such as age, length of service, nature of the job, and availability of other employment ("reasonable notice").

Less familiar is the concept of "near cause" or "moderated damages" which mixes together reasonable notice and just cause into a brew designed to reduce the compensation a court will award a wrongfully dismissed employee in cases where the employee is less than satisfactory but the circumstances do not justify dismissal for cause. Near cause permits employers to reap the advantage of terminating employees for reduced damages without having to satisfy the stringent tests the court applies before concluding that just cause existed for the dismissal.

It could be said that near cause levels the playing field because it reduces the period of reasonable notice for employee misconduct or untrustworthiness, in the same way that reasonable notice may be increased to take into account misconduct or bad faith dismissal on the part of the employer (*Wallace v. United Grain Growers Ltd.*, Workwise, Issue 10 - Fall 1997). Yet there is a substantial distinction: by reducing the period of reasonable notice payable by the employer for its breach of the employment contract, near cause imposes an additional penalty on an employee for conduct for which the employee should not have lost his or her job in the first place.

Courts in the majority of the provinces have flirted with the concept of near cause, but have by and large rejected it, with the exception of Nova Scotia. There, in *Dowling v. Halifax*, the courts imposed a notice period of only six months on the City of Halifax with respect to its dismissal of Mr. Dowling after 25 years of service in its public works division because of his misconduct in awarding and supervising a contract, despite otherwise finding that Mr. Dowling was deserving of a reprimand but not dismissal. In a decision released by the Supreme Court of Canada on January 20, 1998, a unanimous court tersely allowed Mr. Dowling's appeal and ordered that the matter be returned to the Nova Scotia court to determine the reasonable notice period without reduction for "near cause." The court said simply: "We do not accept any argument relating to near cause."

The reasons why the concept of near cause has been so resoundingly rejected are explicit in the earlier decisions of the Ontario Court of Justice (General Division) and the Ontario Court of Appeal in *Ditchburn v. Landis & Gyr Powers Ltd.* Mr. Ditchburn was a successful salesman with 27 unblemished years of experience when a lunch meeting with an important customer ended in a bout of drinking and a physical altercation. The college which employed the customer offered him counselling; by contrast, Mr. Ditchburn's employer dismissed him. The Ontario courts discussed the evolving relationship in the employment contract, concluding that the mutual obligations after 27 years were heightened to the point where the company owed Mr. Ditchburn additional support rather than dismissal and awarded 22 months of damages in lieu

2000, 10235 - 101 STREET  
EDMONTON, AB T5J 3G1  
PH: 780.423.3003

400 THE LOUGHEED BUILDING  
604 1 STREET SW  
CALGARY, AB T2P 1M7  
PH: 403.260.8500

201, 5120 - 49TH STREET  
YELLOWKNIFE, NT X1A 1P8  
PH: 867.920.4542

www.fieldlaw.com

of notice, plus \$15,000 for mental stress. The Court of Appeal rejected the doctrine of near cause on which the employer relied by saying that the "conduct of an employee which is not sufficient to justify discharge cannot be weighed against him in determining the appropriate notice period."

The result is that the courts will continue to rely on more objective and traditional factors in the evidence concerning just cause and reasonable notice. At the same time employers will be held to reasonable and good faith conduct on penalty of augmenting the notice period awarded if they fall below what is expected of them in their dismissal of employees.

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The Labour & Employment Group  
Edmonton 780-423-3003  
Calgary 403-260-8500

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