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McKinley case opens door to 'progressive discipline'

By Erin Kuzz

In *McKinley v. B.C. Tel* (2001), 200 D.L.R. (4th) 385, the Supreme Court of Canada considered the circumstances in which an employer may terminate employment without notice as a result of an employee's dishonest conduct.

A review of the cases that have followed *McKinley* show that the approach adopted by the court in these situations has not significantly changed the outcomes of cases involving dishonesty, and the court's decision may be more interesting for what it suggested than what it decided.

In *McKinley*, the plaintiff was a chartered accountant employed by the defendant since 1977. Following a medical leave of absence and a failed attempt to obtain a less stressful position with the company, B.C. Tel terminated his employment. McKinley sued for wrongful dismissal.

The defendant ultimately argued that it had cause to terminate McKinley's employment because he had lied about the availability of a treatment for his condition, an accusation McKinley denied.

At trial, McKinley was awarded over $200,000 in damages and pension contributions. The B.C. Court of Appeal allowed the company's appeal, and the matter was ultimately heard by the Supreme Court of Canada.

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The questions the court addressed included whether an employee's dishonesty, in and of itself, gives rise to just cause for summary dismissal.

The court considered two approaches that had been adopted by various Canadian jurisdictions: the "automatic" approach, which dictates that dishonesty by an employee, however minor, is automatically considered just cause, and the "contextual" approach which requires the trier of fact to determine whether the nature and degree of the dishonesty warranted dismissal in the context of the entire employment relationship.

The court adopted the contextual approach, citing concern about any absolute rule that dishonest conduct always amounted to just cause, irrespective of surrounding circumstances. The court did note, however, that in cases involving serious fraud, theft or misappropriation, either approach would ultimately lead to a finding of just cause.

Most cases preceding *McKinley* in which Canadian courts found dishonest conduct to be cause for termination involved situations that would likely amount to just cause whether on the "automatic" approach, or on *McKinley*'s contextual approach. Therefore, while *McKinley* may have changed the approach, it has not radically altered outcomes.

For instance, in the wake of

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McKinley, Canadian courts have applied the contextual approach and found the following conduct to constitute just cause for termination: an employee's continued complaints about her supervisor, which the court was satisfied were untrue and may have ultimately led to another employee's termination (*Blair v. Matrix Logistics Ltd.*, [2001] O.J. No. 3040 (Sup. Ct.)); an employee setting up a parallel bank account without authorization and diverting receivables from his employer into that account (*Christensen v. McDougall*, [2001] O.J. No. 3698 (Sup. Ct.)); and the failure of a college business manager to report apparent thefts in an attempt to protect a coworker (*Houlihan v. McEvoy*, [2002] B.C.J. No. 8 (B.C.S.C.)).

Not surprisingly, the contextual approach endorsed by the court in *McKinley* has already been applied in other fact situations beyond terminations for dishonesty, including whether sexual harassment amounted to just cause and whether an employee's momentary display of anger toward his supervisor constituted cause for termination (*Alleyne v. Gateway Co-operative Homes Inc.*, [2001] O.J. No. 4266 (Sup. Ct.) and *Thompson v. Lex Tec Inc.*, [2001] O.J. No. 3651 (Sup. Ct.), respectively).

The Supreme Court also indicated in *McKinley* that sanctions short of discharge may be appropriate for conduct that falls short of establishing just cause. The court suggested, for example, that an employer may be justified "in docking an employee's pay for any loss incurred by a minor misuse of company property," and that this was simply one of "several disciplinary measures an employer may take in these circumstances."

It is noteworthy, first, that the court's suggestion may cause conflict with provincial employment legislation. For instance, in Ontario, the *Employment Standards Act* prohibits employers from deducting or "setting off" against employees' wages except in defined, very limited circumstances not met in the example given by the court.

However, a more interesting issue raised by the court's *obiter* comment is the introduction of the concept of discipline short of discharge into the common-law employment relationship. Before *McKinley*, an employer could be found to have constructively dismissed an employee if it suspended the employee without pay for disciplinary reasons (although in *Haldane v. Shelbar Enterprises Ltd.* (1999), 46 O.R. (3d) 206, the Ontario Court of Appeal, without deciding the issue, also alluded to an employer's ability to discipline short of discharge where an express or implied term could be read into the contract of employment).

The Supreme Court's implicit endorsement of forms of discipline short of termination creates interesting possibilities for employers. The court's comments may be interpreted as importing notions of progressive discipline from collective bargaining regimes into the common-law employment relationship, including disciplinary suspensions.

This, of course, would also raise the corollary issue of whether an employer is *required* to suspend an employee prior to termination for cause as a progressive disciplinary step.

Finally, the Supreme Court's decision in *McKinley* can be seen in retrospect as yet another example of what have become ongoing themes in recent employment law jurisprudence: the central importance of employment in people's lives, and the imbalance of power as between employers and employees.

These considerations can be seen to have influenced the Supreme Court's decisions in *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701, in *McKinley*, and most recently in *Retail Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Beverages (West) Ltd.*, [2002] S.C.J. No. 8, where the court stated that "...the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship."

Employment law practitioners, or general practitioners faced with employment law issues, are well advised to take these considerations into account not only in drafting employment agreements, but in considering for what reasons, and in what manner, an employment relationship may be brought to an end.

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