Just Cause and the Retirement Home Employee – When is bad conduct bad enough?

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Dismissals come in two forms: *with* just cause and *without* just cause. A dismissal with just cause is one that results from employee behaviour so bad it merits immediate dismissal without notice. There is no bright line test for a *with* just cause dismissal, although cases usually involve serious breaches of trust and/or disobedience, and often but not necessarily over a period of time.

When just cause is found to exist, no notice will be owing to an employee at common law (although applicable employment standards laws in your jurisdiction may still require the minimum statutory payment).

The difficulty for employers is knowing what kind of employee behaviour merits dismissal *with* just cause. Get it right and a less than desirable employee can be removed from the workplace without financial cost to the employer. Get it wrong and the risk to an employer could include a judge's award for wrongful dismissal damages, not to mention negative publicity both inside and outside the workplace.

Proving Just Cause

To prove a dismissal was *with* just cause, an employer will bear the legal burden of establishing the employee violated an essential condition of the employment contract, breached the faith inherent to the work relationship, or committed some act fundamentally or directly inconsistent with obligations owed to the employer.

The burden is not one which can be lightly discharged. Judges have a tendency to sympathize with an employee whose honesty or competency is under attack.

An example of particular pertinence to retirement homes is *Ewert v. West Park Manor Personal*

Care Home Inc. The matter concerned a psychiatric nurse employed by the home ("West Park") for 4.5 years, when her employment was terminated.

When West Park was sued for wrongful dismissal, it relied on the doctrine of just cause. Prior to Ms. Ewert's termination, West Park had received complaints from two residents –one complaining Ms. Ewert had thrown a facecloth, and the other of roughness when administering medications and providing care. A representative from the Regulator investigated and made a finding of "patient abuse", and recommended remedial training for Ms. Ewert.

The trial judge heard evidence from five witnesses each of whom testified as to incidents where Ms. Ewert was abrupt, rude and even threatening toward residents.

In the end, the judge rejected Ms. Ewert's contention her employment had been terminated as a result of her advocating quality of care or because of her complaints about co-workers. The court agreed with West Park; Ms. Ewert was responsible for looking after vulnerable persons, the standard of care was high and the threshold for what is considered to be abuse was low.

On the basis of all of that, common sense might dictate Ms. Ewert's misconduct had met the just cause standard. However, the court said 'it had not'.

Ms. Ewert's conduct, the court held, was "not so egregious as to justify summary dismissal". She had not caused anyone to suffer any serious injury and "except for occasional lapse" "fulfilled her duties…in satisfactory fashion." On this basis, the judge determined Ms. Ewert ought to have been given an opportunity through warnings to modify her behaviour, and awarded four months' pay in *lieu* of notice.

Lessons for Employers

Does the Ewert decision mean in every situation an employee is entitled to a warning? No, some types of misconduct are sufficiently serious a warning is not required. But employers will be held to a stringent standard to satisfy a court *with* just cause dismissal is appropriate.

So, before making a decision about a potential termination of employment, consider the following:

- **The extent and quality of the misconduct.** Does the employee's behaviour merit dismissal with just cause or without? The analysis must be objective – not coloured by whatever personal anger and/or disappointment the employee's behaviour may have triggered.

- **Whether proactive performance monitoring can be proved.** The judge in this case was influenced by his view Ms. Ewert's performance had been satisfactory overall. Whether or not the judge's finding was accurate, it was the complaints of two residents that seemed to have brought matters to a head, rather than the employer's own

observations. The decision might have been different had Ms. Ewert's employer been in a position to point to its own observations of her poor performance and the steps taken to remediate her.

- **Whether performance remediation may be appropriate.** Carefully consider whether the employee's performance is irremediable, or whether performance counselling has the potential to improve. If performance counselling is to be successful, it requires a substantial time commitment on the part of a manager or supervisor.

- **The risk of a wrongful dismissal claim.** There are times when the risk to an employer of a wrongful dismissal claim outweighs the cost of an appropriate or even generous severance package. In these cases the best business decision may be to pay the employee to go away in exchange for a full and final release in favour of the employer.

- **Obtain legal advice.** It's true; an ounce of prevention is worth a pound of cure. A decision to terminate with just cause has many potential ramifications. Prior consultation with expert employment law counsel is very often the best medicine.

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