

NEAR CAUSE: NOT NEARLY ENOUGH, FOR NOW...

In Canada, whether an employee has been wrongfully dismissed depends on whether the employer had “just cause.” Just cause is notoriously difficult for employers to establish because the employer must prove that the employee engaged in misconduct and that the nature of the misconduct warranted dismissal. If just cause does exist, the employee is not entitled to reasonable notice or pay in lieu of notice. If it does not exist, the employee is entitled to a reasonable notice period based on the character of employment, length of service, age, and training and qualifications of the employee. In the event that a court finds that the employee’s misconduct was insufficient to establish just cause, the employee is entitled to the same notice as an employee whose conduct was impeccable. This all-or-nothing approach prompted some courts in Canada to apply the doctrine of “near cause.”

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Rise and Fall of Near Cause

For a time, near cause permitted courts to find that an employee’s misconduct contributed to dismissal even if the employer did not have cause. Practically speaking, this meant that once an employer calculated the employee’s entitlement to reasonable notice, the notice period could be reduced in light of the employee’s misconduct. This near cause misconduct typically included disobedience, subjecting the employer to risk of financial harm, rude or improper treatment of staff/customers, minor conflicts of interest, and poor/disappointing performance.

Ontario courts eventually became suspect of near cause and the Ontario Court of Appeal explicitly rejected it in *Ditchburn v. Landis & Gyr Powers Ltd.*, a case in which a long-service

employee was fired after getting into a fist fight with one of the company’s best clients after a boozy lunch at a strip club. A year later, in 1998, the Supreme Court of Canada in *Dowling v. Halifax* closed the door on the application of near cause for the rest of the country.

Return of Near Cause?

In his 2007 decision, *Laszczewski v. Aluminart Products Ltd.*, Justice Echlin reopened the debate. Although Echlin declined to make a finding of near cause in *Aluminart*, he did suggest that near cause is consistent with employment law principles. Echlin also pointed out that the Supreme Court had altered its definition of just cause since *Dowling*, stating a contextual approach to determining cause is appropriate. As courts already consider a number of contextual factors in calculating reasonable notice, courts should also include the employee’s conduct as a factor.

Echlin’s decision also set out the advantages and disadvantages of near cause. Near cause would facilitate settlements by creating a middle ground where employers could reduce the notice period for employees who engaged in misconduct. This may deter an employer from taking a hard-line approach to an employee’s misconduct and encourage them to provide the employee with the reduced notice or pay in lieu. The risk is that judicial recognition of near cause could also result in employers trumping up false and trivial concerns to support lower notice periods.

For now, the Supreme Court of Canada has rejected near cause. Employers should continue to document incidents of employee misconduct, not only for the purpose of progressive discipline, but in case near cause re-emerges as a factor in assessing reasonable notice. **HR**

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