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Feature

Inspect the Closet for Skeletons Before Termination

Knowledge of misconduct may be the killer of after-acquired cause

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Terminating an employee's employment for cause is often a difficult decision for employers. It may be even harder when the employee's employment was initially terminated without cause, and the employee's misconduct during their employment is only discovered after termination.

Doctrine of After-Acquire Cause

One potential option for the employer is to utilize the doctrine of after-acquired cause. The Supreme Court of Canada in Lake Ontario Portland Cement Co. v. Groner, [1961] S.C.R. 553 discussed this doctrine, citing the Halsbury's Laws of England in doing so:

> Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

That is, knowledge acquired by the employer after termination of an employee's employment may be relied on by the employer to justify termination for cause.

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After-Acquired Knowledge

An employer may still run into the obstacle of what actually constitutes after-acquired knowledge of misconduct.

The Alberta Court of Queen's Bench in Nelson v. Champion Feed Services Inc., 2010 ABQB 409 noted that the decision of Carr v. Fama, 1989 CanLII 240, 40 BCLR (2d) 125 (BC CA) suggested that allegations of cause can be made after termination, even where the employer knew of the misconduct at the time of dismissal but chose not to rely on it at the time.

However, the Court stated that the extent of the employer's knowledge at the time of dismissal and the circumstances surrounding the dismissal are all relevant to the credibility of the employer's subsequent allegation of just cause.

The Manitoba Court of Appeal recently commented on these concepts in McCallum v. Saputo, 2021 MBCA 62 (***McCallum***), and appears to support this proposition. The Court of Appeal cited the British Columbia Court of Appeal decision Van den Boogaard v Vancouver Pile Driving Ltd, 2014 BCCA 168, and stated that "it matters not whether the employer knew of the particular misconduct and chose not to rely on it at the time of dismissal, unless the employer both knew of and condoned the misconduct."

The obstacle then becomes the requisite level of knowledge required for a court to find that an employer condoned the employee's misconduct. In Doucet v. Spielo Manufacturing Inc., 2011 NBCA 44, the New Brunswick Court of Appeal cited McIntyre v. Hockin, [1889] O.J. No. 36 (Ont. C.A.), stating:

> It may be proper, however, to add a few words on the subject of condonation. When an employer becomes aware of misconduct on the part of his servant, sufficient to justify dismissal, he may adopt either of two courses. He may dismiss, or he may overlook the fault. But he cannot retain the servant in his employment, and afterwards at any distance of time turn him away.

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The plaintiff in McCallum also argued that after-acquired cause is not available where an employer failed to conduct any investigation, citing Cao v SBLR LLP, 2012 CarswellOnt 9184, which stated:

> If it is after-acquired just cause, the onus remains on the employer to prove why it was not known or not discovered at termination and how it was discovered subsequently, so that the court can evaluate the reasonableness and due diligence efforts of the employer in this regard and whether it may even constitute just cause.

The Court of Appeal in McCallum stated that it was not convinced the decision stands for that argument, and disagreed that it reflected the law in Manitoba.

Although the Court of Appeal in McCallum stated that "there is no duty to conduct an investigation prior to termination", it nonetheless provided some cautionary statements regarding inadequate investigations citing various decisions. First, inadequate investigations may result in the employer being unable to gather sufficient evidence to prove cause. Second, inadequate investigations have, in some instances, resulted in punitive damage awards against employers for the manner of dismissal where cause is not found to have been proven.

Employer Takeaway

While the McCallum decision stated there is no duty to conduct an investigation for termination for cause in Manitoba, where an employer suspects an employee may have engaged in misconduct that may justify termination for cause, the employer should seriously consider conducting a thorough investigation and seek legal advice prior to terminating the employee's employment without cause. This is because an employer may potentially lose the ability to argue after-acquired cause if the employee is successful in arguing that the employer knew of the misconduct and condoned it.

A more practical consideration is that the employer's credibility will likely be challenged when alleging after-acquired cause, and without a thorough investigation, an employer may not have sufficient evidence to make a cause argument. This is especially so where evidence collection may become more difficult after the employee departs, and in some cases, a failed cause argument may attract increased damages awards against the employer. Accordingly, to reduce the risk of losing the ability to argue cause, and increase the chances of success for a cause argument, an employer should consider conducting a thorough investigation prior to termination if there is some suspicion of misconduct by the employee.

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