

Member's Quarterly

Spring 2016 Edition

Feature

Honesty is the Best Policy

Dismissals for dishonest misconduct

A recent decision of the British Columbia Court of Appeal, *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 ("Steel"), bodes well for the future of Canadian employers in respect to their ability to terminate employees for acts of dishonesty.

The circumstances in which an employer is able to establish just cause due to an employee's dishonest misconduct is currently governed by the hallmark Supreme Court of Canada case of *McKinley v. BC Tel*, 2001 SCC 38 ("McKinley"). Prior to the Supreme Court of Canada hearing the McKinley matter, the British Columbia Court of Appeal upheld the employer's argument that it had just cause to terminate the employee for deliberately and deceitfully withholding a significant medical opinion from his employer that, if produced, would have likely spoiled the employee's attempt to secure a new/altered position with his employer that carried less stress/responsibility. In doing so, the Court of Appeal ruled that any form or degree of dishonest misconduct on behalf of an employee amounts to just cause for termination.

Conversely, the Supreme Court of Canada ultimately overturned the Court of Appeal's decision, holding that not all dishonest misconduct on behalf of an employee will meet the threshold for just cause. Rather, prior to dismissing an employee for just cause because of a dishonest act the employee committed, the Supreme Court of Canada was clear that an employer must contextually assess the alleged misconduct to determine if the degree and nature of the dishonest act is sufficient to establish just cause. In short, according to McKinley at that time, there is no blanket-ability on behalf of an employer to dismiss an employee for any form of dishonest misconduct, regardless of the severity.

In *Steel*, the employee was a member of the employer's Information Technology team that had unsupervised access to the employer's computer system, which included confidential personal folders assigned to each employee. It is also important to note that the employer was a financial institution where confidence in its employees' trust and honesty is of even greater importance than normal. In short, the employee was in a position of trust. The employer's policy provided that members of the Information Technology team were prohibited from accessing the personal folders of other employees, unless express permission to do so was given. Without any permission, the employee accessed the personal folder of a manager for the sole purpose of determining where she was positioned on the parking priority waiting list relative to other employees. The employer was alerted of this dishonest act when the manager was unable to open the parking priority waiting list because it was already opened on the employee's computer. Shortly thereafter, the employee was dismissed for her dishonest act on a just cause basis. The employee subsequently commenced an action for wrongful dismissal.

The trial judge agreed that the employer had just cause to dismiss the employee, and at the Court of Appeal, the trial judge's decision, in this regard, was upheld. Finally, although the employee applied to appeal the matter before the Supreme Court of Canada, leave to appeal was denied. In reaching its decision, the Courts focused on the clear policy governing the employee's access to personal files, as well as the unsupervised position of trust the employee held as a member of the Information Technology team for a financial institution.



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Feature continued

Notwithstanding the foregoing, McKinley still remains the keystone case on dismissals for dishonest misconduct, and as such, the contextual assessment with respect to dishonest acts should still be applied by employers when considering a dismissal. That said, because leave to appeal was denied by the Supreme Court of Canada in *Steel*, the case seems to suggest that, despite the employee-friendly ruling of McKinley, there are circumstances in which an employee can in fact be dismissed on account of a singular dishonest act (particularly when the employee is in a position of trust and/or unsupervised authority), even if that dishonest act is perceived as being trivial.

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