

Member's Quarterly

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Feature

Just Cause vs Wilful Misconduct: Overcoming the Statutory Entitlement Hurdle

Standards legislation imposes a higher standard than just cause

The ultimate question when terminating employment is: just cause or without just cause. Generally, when termination of employment is without cause, employees are provided with statutory notice or pay in lieu of notice in accordance with the applicable employment standards legislation, and potentially additional notice or pay in lieu. In contrast, where termination of employment is for just cause because of the culpable conduct of the employee, no notice or pay in lieu of notice on termination under employment standards legislation or otherwise is provided. However, in some jurisdictions, employment standards legislation provides extra protection for employees by imposing a higher standard of culpable conduct in order to disentitle the employee from statutory notice of termination or pay in lieu.

The Ontario Court of Appeal recently confirmed that termination for just cause will disentitle an employee from receiving common law reasonable notice, but it will not always disentitle an employee from receiving statutory notice and severance entitlements.

In *Render v ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310, the appellant, Mr. Render, was employed by the respondent, ThyssenKrupp, for approximately 30 years when his employment was terminated for just cause. At the time his employment was terminated, the appellant was an operations manager and was not provided with any notice of termination or pay in lieu of notice at common law or pursuant to the Ontario *Employment Standards Act, 2000*.

Mr. Render's employment was terminated after an incident in which Mr. Render slapped a co-workers' buttock. The incident occurred in the workplace, which was small, with few female employees and where inappropriate jokes were often told. The person whom the appellant slapped at times reported to the appellant, although he was not her direct report. The employer had an anti-harassment and discrimination policy which Mr. Render was aware of, and was responsible for implementing given his managerial role.

On the day in question, Mr. Render's co-worker made a joke about his height and in response, Mr. Render knelt down close to his co-worker and when he came up, his hand slapped his co-worker's buttock. The co-worker immediately told Mr. Render that his conduct was inappropriate. Mr. Render responded that it was a joke and was not deliberate. Mr. Render's co-worker reported the incident to her direct supervisor and although Mr. Render apologized, his co-worker made a formal complaint to human resources. The employer investigated the complaint and during the investigation, Mr. Render made a complaint against his co-worker for comments she had made towards him in the past. As a result of the incident, Mr. Render's employment was terminated for cause.

Mr. Render brought an action for damages for wrongful dismissal against ThyssenKrupp. There was dispute at trial as to what occurred, and how it occurred in terms of whether or not the slap was accidental or deliberate, and what occurred after the incident. At trial, the judge dismissed the action, finding that Mr. Render's conduct was inappropriate and that despite his apology, he was not remorseful and upheld



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Feature continued

termination for cause. In coming to this conclusion, the trial judge considered Mr. Render's 30-year employment, clean disciplinary record, position of authority over his co-worker, failure to understand the seriousness of the conduct, retaliation against his co-worker, and his responsibility for the anti-harassment and discrimination policy. The trial judge declined to award punitive damages and reduced the amount of costs awarded to the employer by 50% as a result of its misconduct during the trial.

Mr. Render appealed the trial decision arguing that the trial judge erred in finding that just cause was established. Mr. Render also argued that if the trial judge did not err in dismissing his wrongful dismissal claim, he was still entitled to pay in lieu of notice pursuant to the *Employment Standards Act, 2000*, as well as punitive damages and that the costs awarded should be set aside. The Court of Appeal confirmed that in order to be disentitled from notice of termination under the *Employment Standards Act, 2000*, a standard higher than "just cause" is applied. An employee must have been engaged in wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer. To meet that standard, the subjective intent of the employee must be considered. The employee's conduct must be deliberate: the conduct must amount to "being bad on purpose". Finding that the exemption is narrower than the just cause standard at common law, the Court of Appeal found that Mr. Render's conduct did not "rise to the level" of wilful misconduct required to disentitle him from statutory termination pay because although the contact was not accidental, it was not pre-planned and occurred in the "heat of the moment". The Court of Appeal upheld the decision not to award punitive damages but allowed the appeal on costs and declined to award costs to either party.

Employers in jurisdictions like Ontario and Nova Scotia (where the employment standards legislation imposes a higher standard than just cause) should consider the level of culpability, and in particular, the subjective intent, and specific wording of the applicable employment standards legislation before making the decision to decline to provide statutory notice or pay in lieu to employees whose employment they are terminating for just cause.

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