

Member's Quarterly

Winter 2024 Edition

Feature

Deliberate and Intentional Misconduct

Termination for Just Cause in Ontario



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Introduction

Termination for just cause has come under repeated fire in Ontario in recent years. In *Park v Costco Wholesale Canada Ltd.*, 2023 ONSC 1013 ("Park"), the Ontario Superior Court of Justice held that the deliberate and intentional conduct of an employee amounted to wilful misconduct, meeting the test for just cause for summary dismissal.

Background

Mr. Park was employed for approximately 20 years with Costco Wholesale Canada Ltd. ("Costco"). He was an Assistant Buyer and 43 years old at the time his employment was terminated for cause.

His position did entail management responsibilities such that he was subject to Costco's Standard of Ethics for Managers. His employment agreement also included a section pertaining to cause for termination, which included, "wilful damage or destruction of Company property, equipment, merchandize or property of others" as well as insubordination.

During the course of his employment, Mr. Park had developed a cloud-based website for the toys department. It was not disputed that the website was the property of Costco.

By Spring 2015, Mr. Park was no longer working for the toy department. His supervisor learned that he could no longer access the website. He requested that Mr. Park restore his access, and transfer ownership of same to Costco. Rather than doing so, Mr. Park deleted the website in its entirety, because he was "furious" as to what he felt was a lack of communication on management's part regarding their intention to make use of the website.

An exchange of emails followed wherein not only did Mr. Park not do as requested, but he was not forthcoming about the deletion, and was disrespectful towards management. Despite this, Costco was able to restore the website on its own. When management advised Mr. Park that the site had been restored, Mr. Park proceeded to delete the website a second time.

An internal IT investigation was undertaken by Costco, which ultimately lead to the termination of Mr. Park's employment for cause.

Following the termination of his employment, Mr. Park commenced a wrongful dismissal action against Costco, claiming that he was entitled to 24 months of pay in lieu of notice, inclusive of health and pension benefits. He also claimed damages for an alleged breach of his human rights on the basis of disability, as well as bad faith and aggravated damages.

The Decision

The Honorable Madam Justice Robin M. Ryan Bell found that Mr. Park had indeed engaged in wilful misconduct under the ESA such that Costco was justified in terminating his employment for cause.

The Court reiterated that in order to determine whether Mr. Park's misconduct was sufficient serious to warrant dismissal, which can be measured as follows (all set out by the Supreme Court in *McKinley v BC Tel*, 2001 SCC 38):



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- i. Did the misconduct violate an essential term of the employment contract;
- ii. Did the misconduct breach the faith inherent to the work relationship; or
- iii. Was it fundamentally inconsistent with Mr. Park's obligations to Costco.

Justice Ryan Bell found that Costco was justified in the termination of Mr. Park's employment on any of the three measures. In short, the misconduct was found to be incompatible with the fundamental terms of the employment relationship.

There were four acts of misconduct found at trial. These included the two occasions where Mr. Park had intentionally deleted the website, which he had admitted. The Court held that the intentional deletion of the website amounted to damage or destruction, contrary to the terms of Mr. Park's employment agreement.

Additionally, it was held that there was misconduct on the part of Mr. Park in the nature of the communications with management regarding the website – the first in that Mr. Park was not initially forthcoming about when the website had been deleted, and second, that the language used by Mr. Park was insubordinate and disrespectful.

The Court ultimately found that Mr. Park's multiple, clearly intentional misconduct amounted to wilful misconduct such that he was not entitled to damages for wrongful dismissal under the Ontario Employment Standards Act, 2000 (the "ESA").

Takeaways for Employers

While termination for cause has always been a challenging issue for employers in Ontario, it arguably became even more complicated after the Ontario Court of Appeal upheld *Wakdsale v Swegon North America Inc.*, 2020 ONCA 391.

Park not only reiterates that employers can still successfully terminate employment for cause, but also provides some helpful guidance as it relates to the legal analysis required to justify just cause, as well as the type of (repeated) actions that may provide employers with the basis to proceed.

Despite this, employers are generally encouraged to seek legal advice when considering whether termination for cause is an option. While Park provides comfort that the Ontario courts may still side with employers on the issue of cause, the failure to successfully establish cause can lead to additional exposure and damages.

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