

Dismissal: Just Cause and Fair Treatment

By Monique Brassard



Will an Employee's Dishonesty Always Constitute Just Cause for Dismissal Without Reasonable Notice?

In a unanimous judgment¹, the Supreme Court of Canada answered "no", stating that one must assess the context of the alleged misconduct. In order for dishonesty to be a just cause for dismissal without reasonable notice, the nature and seriousness of the dishonesty must be such that it is irreconcilable with the employment relationship.

The Facts in *McKinley*

Mr. McKinley, a chartered accountant, had been working for British Columbia Tel. Co. ("B.C. Tel.") for 17 years. Over the years, he had been promoted and had held various positions. In 1991, he was appointed Controller, Treasurer and Assistant Secretary to certain B.C. Tel. companies. In June 1994, due to high blood pressure problems, he took an authorized leave of absence.

One month after the start of his sick leave, the employer raised the possibility of terminating his employment. Mr. McKinley then indicated to his employer that he wanted to return to work, but in a position that carried less responsibility. On August 31, 1994, while he was still on sick leave, B.C. Tel. terminated his employment. Alleging that he had been dismissed without just cause and without reasonable notice, Mr. McKinley instituted proceedings for wrongful dismissal.

The employer raised several grounds of defence, including Mr. McKinley's dishonesty regarding his state of health. In particular, it reproached him for having deliberately withheld the fact that his cardiologist had recommended a treatment which would, according to the employer, have allowed him to return to work without incurring any health risks.

Nonetheless, it should be noted that the employer only raised this ground of defence three (3) days into the trial, after it had discovered a letter from Mr. McKinley dated December 12, 1994 [although the dismissal was carried out on August 31, 1994] in which Mr. McKinley acknowledged that a beta-blocker treatment had been recommended to him by his cardiologist if his blood pressure remained high after his return to work.

The Judgment at First Instance

The case was heard before a judge and jury, as is permitted under the applicable rules of court in British Columbia.

In his instructions to the jury, the trial judge acknowledged that there was some evidence of a lack of frankness on Mr. McKinley's part. He also instructed the jury that, in order to constitute just cause for dismissal without notice, the alleged dishonesty must have been of a degree that was incompatible with the employment relationship. In particular, he indicated that Mr. McKinley's conduct must have been such as to undermine or impair the trust the employer was entitled to place in its employee. The judge of first instance concluded that, failing such circumstances, dishonesty is not a just cause for dismissal without reasonable notice.



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¹ *McKinley v. B.C. Tel.*, [2001] SCC 38; 200 D.L.R. (4th) 385.

The jury applied these instructions to the evidence and found that the employer had not proven the existence of just cause for dismissal without reasonable notice at the time it terminated Mr. McKinley's employment.

The Judgment of the British Columbia Court of Appeal

The British Columbia Court of Appeal was of the opinion that the trial judge had erred by inviting the jury to consider the extent of the dishonesty. According to the Court of Appeal, the only issue before the jury should have been whether or not there was dishonest conduct. If the jury had concluded that there had in fact been dishonest conduct, then as a matter of law it would have had no choice but to decide that there existed just cause for dismissal without notice.

However, the Court of Appeal expressed some doubt as to whether the evidence did in fact point to dishonest conduct and, rather than simply dismissing the action, it ordered a new trial.

The Judgment of the Supreme Court of Canada

After having analyzed English and Canadian case law on the issue, the Supreme Court of Canada, in a judgment written by Mr. Justice Iacobucci, concluded that no clear standard or principle emerged from these cases.

Turning then to consider the standard which should apply, Mr. Justice Iacobucci was of the view that the key question was whether the employee's dishonesty had

given rise to a breakdown in the employment relationship. This would be the case where, for example, the dishonesty violated an essential condition of the employment contract, breached the relationship of trust that was inherent to the employment, or was fundamentally or directly inconsistent with the employee's obligations to his employer. Mr. Justice Iacobucci further noted that the key judgments in the line of jurisprudence which held that dishonesty "in and of itself" warrants dismissal without reasonable notice dealt with very serious acts of dishonesty (secret commissions or dishonesty bordering on theft, misappropriation of funds, forgery or fraud).

In short, the sanction must be proportional to the alleged misconduct, that is to say, one must strike a balance between the severity of the alleged misconduct and the sanction imposed; less severe misconduct should give rise to less severe sanctions than dismissal without reasonable notice.

According to Mr. Justice Iacobucci, this balance recognizes the fact that work is an integral part of the lives and identities of individuals in our society. Therefore, care must be taken in fashioning rules and principles of law which would allow the employment relationship to be terminated without reasonable notice.

In Mr. Justice Iacobucci's view, it is all the more important that such care be taken, given the powers that employers wield within the employment relationship. Allowing dismissal without reasonable notice in all cases in which an employee's conduct may be labelled as dishonest would unjustly increase the employer's power over its employee.

Applying these principles to the facts in question, Mr. Justice Iacobucci did not see any reason to modify the jury's verdict that Mr. McKinley's dishonesty in failing to disclose all of the facts relevant to his state of health was not serious enough to undermine, or to be incompatible with his employment relationship.

Conclusion

This judgment makes it clear that there is no set rule stating that dishonesty of any kind whatsoever, even if it is minimal, constitutes just cause for dismissal without reasonable notice. A balance must be struck between the severity of the dishonest conduct and the sanction imposed. Notwithstanding this principle, the fact remains that dishonesty which goes to the very heart of the employment relationship will always constitute just cause for dismissal without reasonable notice.

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Will Bad Faith or Unfair Dealing in the Course of a Dismissal Affect the Notice Period?

In the *McKinley* case, the jury had also concluded that the reasonable dismissal notice to which Mr. McKinley was entitled was twenty-two (22) months. However, the jury extended this period by four (4) months to take into account the damage caused to Mr. McKinley because the employer had acted unfairly and in bad faith.

Relying upon a prior decision of the Supreme Court of Canada in the matter of *Wallace*,² Mr. Justice Iacobucci did not find the jury's decision to be unreasonable. Indeed, he was of the view that bad faith or unfair conduct by an employer in dismissing an employee deserves to be sanctioned by way of an extension to the reasonable notice period. **This remedy is not triggered by the dismissal itself, but by the exacerbating factors in the means of carrying out the dismissal that, in and of themselves, inflict injury upon the employee.**

According to Mr. Justice Iacobucci, in Mr. McKinley's case, the employer's bad faith resulted from the fact that it had dismissed its employee while he was suffering from high blood pressure and depression and was still on short-term disability leave; that the employer had taken this route rather than finding him another position within the company; that the employer had made it difficult for the employee to obtain a copy of his long-term disability insurance plan; and, finally, that it had reduced its offer of severance pay during negotiations over his dismissal.

The matter of *Wallace* dealt with a fifty-nine (59) year-old employee who had been dismissed after fourteen (14) years of service as a salesman for Public Press, a company operating in the field of commercial printing. Until he was hired by Public Press, Wallace was working for a competitor, where he had worked for twenty-five (25) years. It was Public Press which approached him regarding potential employment. After having obtained assurances of fair treatment and remuneration and a promise that he could continue to work until his retirement if he performed as expected, he had left his job in order to work for Public Press. Throughout his years at Public Press, he enjoyed great success and was the top company's salesman every year. In August 1986, he was summarily dismissed on the ground that he had been unable to perform his duties satisfactorily. However, in the days preceding his dismissal, both the sales manager and the general manager of United Grain Growers, the parent company of Public Press, had congratulated him on his performance.

In a majority decision also written by Mr. Justice Iacobucci, the Supreme Court of Canada first drew attention to the general criteria used by the courts in determining the reasonable notice period, including the nature of the employment; the employee's age and length of service; and the availability of similar employment in light of the employee's experience, training and qualifications.³

Furthermore, Mr. Justice Iacobucci also emphasized the fact that, depending upon the circumstances, the courts have also considered factors such as incentives to leave a previous stable job and promises of job security. However, he stressed that each case must be judged on its own facts and that the weight given to the various factors may vary depending upon the particular circumstances of the case.

He also emphasized that **injuries flowing from the dismissal itself will not give rise to compensation.** Although injured feelings and emotional distress often result from the loss of employment, the law does not recognize them as compensable losses.

However, where an employee can establish that his employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In such a situation, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was carried out by the employer.

² *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

³ *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140.

The unequal bargaining power which underlies almost all facets of the individual employment relationship and the importance which our society places upon employment⁴ are such that employees must be considered as a vulnerable group, particularly when the employment relationship is ruptured. To ensure that employees are adequately protected in the event of dismissal, **employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal.**

Although he did not further specify the content of this obligation, Mr. Justice Iacobucci noted that, in the context of a dismissal, the obligation requires an employer to be candid, reasonable and honest with its employees and, consequently, that the employer should refrain from, among other things, being untruthful, misleading or unduly insensitive. **Any breach of the obligation of good faith and fair dealing in the manner of dismissal will be compensated for by extending the length of the notice period by varying amounts depending upon the nature of the acts in question and their repercussions on the employee.**

To those who would say that this imposes an overly onerous obligation on employers, Mr. Justice Iacobucci answered that he failed to see how it could be onerous to treat people fairly, reasonably, and decently at a time of trauma and even despair. In his view, the reasonable person would expect such humane treatment and so should the law.

Applying these principles to Mr. Wallace's situation, Mr. Justice Iacobucci ruled that the twenty-four (24) months of salary awarded by the trial judge in lieu of notice was reasonable, even if he was of the opinion that this award was at the top of the scale.

Conclusion

Although an employee may not obtain compensation for injured feelings, emotional distress and other similar injuries arising from the dismissal itself, the humiliation, embarrassment and loss of self-esteem resulting from the **unfair conduct of the employer in the means of carrying out the dismissal will give rise to compensation by way of an extension to the reasonable notice period.** Clearly, each case must be determined on its own facts and the duration of the extension will vary depending upon the nature of the acts in question and their repercussions on the employee.

Monique Brassard

⁴ Writing for the majority, Mr. Justice Iacobucci referred in particular to the Supreme Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

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