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Insubordination and Dismissal

Posted By Peter Bowal On March 6, 2014 @ 12:55 pm In Employment Law | No Comments

> It is . . . generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.
>
> – Laws v. London Chronicle Ltd. [1] [1]

Introduction

[2]

Much has changed in the last half-century in employment, including the purge of words like "master" and "servant" from our workplace vocabulary. One thing that has not changed is the foundation of employment that employers control the employees' work. It is not up to employees to "consider the wisdom" of employer instructions as long as they are legal, safe and within the compass of one's job. (*Stein v. British Columbia Housing Management Commission* (1992), CanLII 4032 (BC CA) [3]) Even experts who think they are better qualified than their bosses must submit.

Even a single act of disobedience that is not otherwise of a grave and serious nature, if it is clear and wilful, may be sufficient to justify firing if it can be seen as an employee repudiation of the employment relationship. Nevertheless, the real world is characterized by more tinges of gray than laser blacks and whites. Insubordination – the failure to submit to the authority of the employer – the state of disobedience, rebellion and mutiny – is not always easy to identify to a point where one would feel legally secure in firing the employee. Judges today are inclined to grant employees second and third chances (on the basis that everyone is entitled to a bad day once in a while) and expect employers to progressively discipline recalcitrant employees.

In this article, we set out a few judicial decisions that come down on both sides of the insubordination issue.

Amos v. Alberta [4] – the Employer Wins

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Steve Amos, a computer systems analyst working for the government of Alberta, "entered the room and, in a belligerent tone and loud timbre, told Varma (his supervisor) that he should not be taking shit from users, but that he should be giving shit to them." (para 12) He had, on "many earlier occasions" told his supervisor how to do his job. This time, Varma gave Amos a verbal warning. Amos mentioned that verbal warning every day and asked for time at work to write up how this affected his feelings. He was denied and so complained up the ladder. Six months later he refused to perform a simple task. He wrote Varma he refused because he had "lost trust in [Varma's] ethical standing as my Supervisor." Amos was fired for insubordination.

In the ensuing wrongful dismissal lawsuit, the judge said:

- the disobedience must be grave, wilful, and deliberate;
- must go against workplace rules that were consistently and clearly enforced;
- the order disobeyed must be reasonable, lawful and within the employee's normal duties;
- the employee must be aware that discipline would be handed out for disobedience; and
- the employee must have no reasonable excuse for disobeying the order.

Henry v. Foxco [5] - the Employee Wins

Judges today are inclined to grant employees second and third chances (on the basis that everyone is entitled to a bad day once in a while.)

Gerald Henry, an employee at an automobile dealership operated by Foxco, was to remove decals from two vehicles. When his supervisor thought he was taking too much time to do that, he approached Henry and told him to work faster. Henry then became loud and abusive toward his supervisor, swearing at him and provoking him to fire him if he was not satisfied with the work being performed. The supervisor obliged and summarily dismissed Henry on the spot. This is Henry's account of what happened:

> Graham — That better be your second one [van].
> Henry — No, it's the first.
> Graham — J... C..., you've been on it all afternoon.
> Henry — No, I've been out back.
> Graham – It would only take me 20 minutes. Do the one outside.
> Henry — What's your problem?
> Graham — If you don't like it – quit.
> Henry — I'm not going to quit. You'll have to fire me.
> Graham — Alright, you're fired.

While the trial judge found Henry's insubordination significant enough to justify firing, a majority of the New Brunswick Court of Appeal said that such insubordination was not cause for firing under the Supreme Court of Canada's *McKinley* test. (*McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 SCR 161 [6]) The *McKinley* test says that, in order to constitute just cause for firing, an action (for example, insubordination, or in that case, lying to the employer) must be so grave that it violates the obligations of an employment relationship to the extent that such a relationship could no longer exist.

The majority judges ruled that Henry's actions came at a time of great stress and in the "heat of the moment," and did not rise to the level of a firing offence.

Conclusion

Every case of employee insubordination will be judged "as a matter of fact" according to the perceptions of the trial judge. It is hard to lay down hard and fast rules or a catalogue of disobedience that will lead to justifiable firing. The test generally will be whether the disobedience is a clear and intentional rejection of a legal, safe and reasonable work request that, overall, can be characterized as the employee repudiating the job. The test generally will be whether the disobedience is a clear and intentional rejection of a legal, safe and reasonable work request that, overall, can be characterized as the employee repudiating the job. Aggravating factors include where the refusal is accompanied by a bad attitude, public embarrassment, recurring performance refusals or problems, or extra costs or losses to the employer.

On the other hand, after *McKinley*, employers are expected to cut employees more slack, not take all insubordination personally, and try to continue to work with the employee who might be stressed or upset. Firings impair workplace morale and the employer's reputation. Instead

of firing the worker, the employer might start with a lesser form of discipline or serve reasonable notice of termination or pay in lieu. Firing should be an option only where the employer has the strongest evidentiary case that the worker has manifestly repudiated that job by the insubordination.

Notes:

1. [1959] 1 W.L.R. 698 (C.A.), per Lord Evershed M.R., at p. 700

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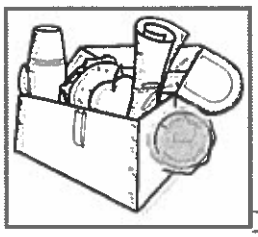

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[3] *Stein v. British Columbia Housing Management Commission* (1992), CanLII 4032 (BC CA): **http://canlii.ca/t/1q095**
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[5] Henry v. Foxco: **http://canlii.ca/t/1gsb0**
[6] *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 SCR 161: **http://canlii.ca/t/521q**