Employment Law

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The Employee is Just a Little Bad!

We do not accept any argument relating to near cause.
- Dowling v. Halifax*, 1998 Supreme Court of Canada*

Full Spectrum of Cause for Dismissal

Any employer overseeing any employee in any job could probably point to some behaviour or performance that falls below expectations, even if only once in a while. Some employees arrive a few minutes late in the morning or knock off a few minutes early. Most of us have used work time for something personal, whether that is a phone call, searching the Internet, or taking that extra pen home. We all have good days and not-as-good days at work. Many employees never fully reach the promise of their job descriptions.

The question may arise for employers, "Do we have sufficient *cause* to dismiss this employee?" The cause may come in the accumulation of a stream of problems over years, in which case a court will look for employer warnings and progressive discipline. The cause may come from a serious single incident, such as a rude outburst, a physical attack, or some other crime in the workplace. Every case is decided on its own facts to determine the justification for summary dismissal.

Let us assume that an employer thinks it has enough cause to fire an employee and it does so. At the wrongful dismissal trial later, the court concludes that the cause did not justify the firing. Can the employer ask that the wrongful dismissal damages be reduced due to the cause that did exist? In other words, even if it was not *sufficient* to warrant summary dismissal, can *some* cause correspondingly *reduce* damages payable to the employee?

The *Third Alternative*

The judicial approach to termination notice applied by the Supreme Court of Canada was stated in the 1992 case of *Machtinger*: "The most frequently cited enumeration of factors relevant to the assessment of reasonable notice is from the judgment of McRuer C.J.H.C. in *Bardal* [(1960), 24 D.L.R. (2d) 140 (Ont. H.C.)] was, at p. 145: 'There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.'"

Is this an all-or-nothing proposition? Should the lawsuit turn entirely on whether the

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judge thought the employee did enough wrong? Judges surely will see each case differently. How is the employer to predict when each case depends on its own facts? Moreover, everyone agrees that the fired employee did something wrong. An employee should not be able to get full notice period damages if he or she gave the employer almost enough cause for his or her firing. What are the consequences of his or her blameworthy conduct?

The law might be flexible to reduce the notice period and damages for some cause. Likewise, it could require an employer to give some notice period (compensation) when the firing, although justified, would be too harsh in some circumstances, such as where the employee has been a good, long-serving employee. This flexibility in each case, on its facts, has been called the *third alternative*, *almost cause*, *moderate damage*, or *near cause*. It can be invoked to reduce damages where the employee was incompetent, disloyal, insubordinate, or engaged in misconduct that fell short of sufficient cause.

The law knows many other such *middle grounds*. In the law of tort, contributory negligence assesses the fault of each party. In criminal law, one may be convicted of lesser and included offences from the ones charged. Due diligence defences are available for regulatory offences. Allowing an accused to show that it acted reasonably in the circumstances is called the *halfway house*. The realm of equity relieves worthy parties from the strictness of common law rules. Even in other employment law doctrines, there are flexible middle grounds that are considered in each case, such as the *intermediate category* in the independent contractor versus employee dichotomy.

Canadian courts have been inconsistent in applying the flexible near cause doctrine. Cases in provinces such as Saskatchewan,[1] Newfoundland,[2] Manitoba,[3] New Brunswick,[4] and British Columbia[5] say there cannot be a halfway in regard to discharge. On a balance of probabilities, the discharge is either justified or it is abusive. Other jurisdictions, such as Nova Scotia[6] and Ontario[7], applied the flexibility of the near cause doctrine. They acknowledged that cause was not realistically an all-or-nothing factor in practice. Cause cannot be so clearly isolated and quantified. An employee bearing some fault, who seeks redress in court, should also be held legally responsible for his or her part in the same relationship. Near cause proponents say damages for wrongful dismissal are an equity-like remedy, and the actions and shortcomings of the employee – as well as the employer – are to be taken into account.

The legal divide on the near cause doctrine was ripe for resolution.

Dowling v. Halifax

Dowling worked for the City of Halifax as an engineer for 25 years. Involved in the tendering process and the supervision of contracts awarded by tender, he had awarded contracts to a company of which he was listed as an officer and director. He was fired for this conflict of interest. However, he had been listed by accident as an officer and director. He had no interest in the company. After his dismissal, the employer learned of other dishonesty on the job. In the wrongful dismissal action, the Judge ruled that the employee had acted improperly, but without fraudulent intent. The conduct was serious enough to warrant only a reprimand from his employer, not summary termination after 25 years.

On appeal, and despite the variation in the provinces on this issue, a unanimous Supreme Court of Canada issued a brief oral statement, "We do not accept any argument relating to near cause." Only two of the seven judges today remain on the Court, so the near cause doctrine could be re-visited and changed in the future. Until then, the Court has explicitly ordained the *all-or-nothing* approach to cause for dismissal.

Rationale for All-or-Nothing Cause

Why is there no consideration of near cause, whether to increase or decrease notice damages? My theories include the public policy preference for expedition and simplicity in wrongful dismissal actions. If parties to the wrongful dismissal lawsuit can point to every misconduct of the other to attempt to gain an advantage in the assessment of damages, trials would become intolerably bitter and unfocused. The *all-or-nothing* approach recognizes that there will always be some petty squabbles on both sides over the workplace experience which need not be litigated, and thus, the interests of settlement and finality are advanced.

The all-or-nothing rule might tend to favour employees and this may be part of the modern expansion of employee rights generally. Since the *Bardal* principles used to calculate the notice period already take into account the length of employment, and *Wallace* damages address abusive employer conduct surrounding termination, one might agree that we do not need another doctrine of discretion to apply to cause and notice period determinations.

Conclusion

In most employment dismissals that are litigated, improprieties can be found on the part of both employee and employer. The standard required to support a finding of sufficient cause for summary dismissal is left to the instincts of the trial judge in the rich factual context of each case. It may appear simplistic and perhaps arbitrary to determine that an employer possessed either sufficient legal cause or no legal cause to fire an employee. However, the judge has considerable discretion as to whether there was sufficient cause, the length of notice period, and *Wallace* damages. The judge will structure the overall decision to create a just outcome by applying the current mix of

variables, and without the need for the intermediate third alternative of near cause. Indeed the judge ultimately will consider all evidence of cause and performance in rendering the decision.

Employers desiring to reduce the risks of litigation, even when they believe there is sufficient cause for summary dismissal, will instead provide reasonable notice or pay in lieu. To avoid summary dismissal is to completely spurn cause as an issue.

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Cases Cited

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2. *Marystown Shipyard Ltd. v. Rose*, (1985) 6 C.C.E.L. 220, 52 Nfld. & P.E.I.R. (Nfld C.A.) 144, 153 A.P.R. 144
3. *Gorman v. Westfair Foods Ltd.*, 118 Man. R. (2d) 73, 149 W.A.C. 73, 29 C.C.E.L. (2d) 273, [1997] 7 W.W.R. 556, 7 W.W.R. 556 (C.A.)
4. *Beyea v. Irving Oil Ltd.* (1986), 70 N.B.R. (2d) 1 (C.A.)
5. *Steinicke v. Manning Press Ltd.,* [1984] 4 W.W.R. 491, 55 B.C.L.R. 320, 4 C.C.E.L. 294 (C.A.)
6. *Babcock v. Weickert Enterprises Ltd*. (1993) 50 C.C.E.L. 1, 126 N.S.R. (2d) 170, 352 A.P.R. 170; *Morrell v. Grafton-Fraser Inc.* (1981), 44 N.S.R. (2d) 289 (T.D.), aff'd on appeal (1982), 51 N.S.R. (2d) 138 (C.A.)
7. *Queensbury Enterprises Inc. v. J.R. Corporate Planning Associates Inc.* (1989), 27 C.C.E.L. 56 (C.A.)