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After-Acquired Cause

The scope of the common law doctrine of after–acquired cause has been potentially narrowed by the New Brunswick Court of Appeal's recent decision in Doucet v. Spielo Manufacturing, where the Court held that an employer cannot assert after–acquired cause where it knew or ought to have known about the cause at the time of dismissal.

Facts

The plaintiff, Doucet, was the vice–president of a gaming company called Spielo Manufacturing; Doucet was in charge of the company's online division. After several years of poor performance, Doucet was terminated without cause; he was told that Spielo wanted to reorganize its online division. Doucet took issue with the severance package, and the dispute culminated in a civil claim with multiple causes of action and damage claims in excess of $30 million.

After the litigation was commenced, the president of Spielo learned a number of concerning facts about Doucet, including that he had been a shareholder of a corporation that had provided substandard printers to Spielo, which in turn had compromised Spielo's ability to satisfy its contractual obligations to the online division's only two major clients. The president of Spielo also learned that Doucet had required the president of the printer corporation to pay Doucet's sister's corporation (of which Doucet was also a shareholder) $56,000 for fabricated consulting fees as "payback" for giving the corporation the sub–contract with Spielo.

Four years after the litigation was initially commenced, and four months before trial, Spielo amended its defence by counter–claiming against Doucet for his dealings with the printer corporation. Spielo sought an order requiring Doucet to repay in full the severance package he had received upon dismissal.

Spielo was wholly successful at trial and Doucet was ordered to repay over $250,000 in severance monies. However, the Court of Appeal allowed Doucet's appeal regarding the counter–claim, finding that the trial judge erred with respect to its application of after–acquired cause. The Court ordered a new trial on the counter–claim.

After–acquired cause — the basics

It is well known that an employer can rely on information learned after an employee's dismissal to establish a just cause defence in a wrongful dismissal action. The doctrine was succinctly described by the British Columbia Court of Appeal in one of the leading cases on the subject, *Carr v. Fama Holdings Ltd* (1989), 28 CCEL 30:

"An employer may dismiss an employee, giving the wrong reasons, provided that causes which would justify dismissal did in fact exist at the time. "

The New Brunswick Court of Appeal noted in *Spielo* that the phrase "after–acquired cause" is somewhat imprecise, given that it is used as a just cause defence in two distinct situations:

1. where, after termination, the employer learns of misconduct that occurred prior to termination that would have warranted summary dismissal had it been known at the time (in *Spielo*, the Court redubbed this "after discovered cause"); and
2. where the employee engages in misconduct after termination that would have warranted summary dismissal (often referred to as "post–termination conduct;" a good example of this situation was at issue in *Gillespie v. 1200333 Alberta Ltd*, 2012 ABQB 105).

Analysis

It may be that *Spielo* bridges the gap between these two distinct approaches to after–acquired cause. Given the requirement of New Brunswick's employment standards legislation to give written reasons for dismissal (which is not unlike requirements in many collective agreements), the Court found that "after discovered cause" can only be invoked if two requirements are met:

1. the employer must not have known of the misconduct at the time of dismissal; and

2. the misconduct, had it been known, would have warranted the ultimate sanction of summary dismissal.

These requirements are directly contrary to the common law doctrine of after–acquired cause, which permits employers to plead a just cause defence even where it knew of the misconduct at the time of dismissal but wished to spare the employee's feelings and so terminated without cause and with pay in lieu of notice. (See, for example, *Giancola v. Jo–Del Investments Ltd.* (2003), 175 OAC 197 (ONCA), and *Carr v. Fama Holdings*, *supra*.)

However, the requirements are consistent with arbitral jurisprudence, as the Court acknowledged in *Spielo*:

"[These requirements] …come as no surprise to those familiar with arbitral jurisprudence. Interestingly, the majority of adjudicators acting on their own, but under the protection of privative clauses found in labour legislation, have adopted the same approach as it provides a measure of protection from the ability of employers to exercise their authority to dismiss in a capricious or arbitrary manner." (para. 84)

It remains to be seen whether the Court's reasoning in *Spielo* will be picked up by the courts in other jurisdictions. Except for the unjust discharge provisions under the *Canada Labour Code*, no other jurisdiction has a statutory requirement to provide written reasons for dismissal. As of the date of writing, no court has discussed or relied on *Spielo* when determining questions regarding after–acquired cause. However, because the Court's reasoning in *Spielo* is consistent with arbitral treatment of the subject, it may be relied upon in that context.

Even if *Spielo* ultimately does not alter the common law doctrine outside of New Brunswick, the Court's reasoning still throws into high relief some of the major concerns that judges face when considering an after-acquired cause defence:

1. employees should not benefit from concealment of their own misconduct;
2. employers should not be encouraged to "dig up" cause after the fact;

3. employers should be expected to exercise due diligence in supervising employees, thus reducing the need to rely on after-acquired cause; and
4. the after–acquired facts should be so egregious as to warrant immediate dismissal; judges must decide whether the impugned conduct destroyed the very foundation of the employment relationship.

It is clear that the Court was trying to strike the right balance between preventing (1) an employee from benefitting from concealment of misconduct; and (2) the employer from engaging in a post–termination witch-hunt. The unanimous Court commented:

"I hold there is a substantive difference between cause for dismissal based on discrete acts of misconduct hidden from the employer, or incapable of discovery in the normal course of the employment relationship, and acts which relate to job performance and which, with due diligence, should have been known to anyone who took the time to observe what was happening in the workplace. Above all else, the law should not encourage employers to take on the role of employment archaeologists, looking through the remnants of an employee's work history in the hope of unearthing grounds for dismissal where none was thought to exist. The employer's cry of "eureka" should fall outside the audible range of those judges who are tuned into the channel of righteous suspicion." (para. 13)

Of course, it should be noted at the outset that the Court's analysis may be of limited effect outside of New Brunswick given that these comments are tied to the Court's consideration of s. 30(2) of New Brunswick's *Employment Standards Act*, which requires an employer terminating for cause to provide written reasons. The Court of Appeal found this provision circumscribed the common law doctrine of after-acquired cause.