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When can an employee be fired for the contents of a letter ?

Two very recent cases illustrate the approach Canadian courts take to correspondence laced with an employee's critical discontent: *Grewal v. Khalsa Credit Union* and *Bennett v. Cunningham*.

The Cases

In *Grewal*, the British Columbia Court of Appeal upheld a dismissal for a letter arising as the final act in a saga of personality conflict between a credit union employee, Ms. Grewal, and the CEO. Notably, the letter at issue in this case came from Ms. Grewal's legal counsel.

By way of the background, the circumstances leading to Ms. Grewal's dismissal began when the CEO raised issues regarding her performance. Ms. Grewal responded in a defensive manner that was critical of the CEO's approach. For example, Ms. Grewal made formal allegations that the CEO had attempted to invade her privacy and that he was out "to get her" by campaigning for her dismissal. Although asked specifically to do so, she refused to substantiate her complaints of privacy intrusion. The flames were also fanned by the investigation of an irregularity in Ms. Grewal's mortgage at the credit union.

Ultimately, Ms. Grewal was formally questioned about her mortgage. Before any findings were made, Ms. Grewal's legal counsel delivered a letter to the CEO. The letter repeated the accusation of "serious invasions" of Ms. Grewal's privacy, and alleged the CEO had acted in "bad faith" and that the issues with Ms. Grewal's performance had been "baseless," made only with the intent of injuring her reputation. The letter demanded that the CEO issue a written apology to Ms. Grewal within 21 days. Ms. Grewal's lawyer sent the letter to not only the CEO, but the board of directors and the credit union regulator as well.

At trial the Court held that the "disrespectful and inflammatory" letter was the tipping point from which cause for dismissal arose. Important to this assessment was the surrounding context including the "litany of ongoing difficulties in the employment

relationship."[4] The British Columbia Court of Appeal upheld the finding that the letter — viewed in context — was sufficient to establish cause.

The importance of context was also discussed by the Ontario Superior Court of Justice, Divisional Court, in *Bennett*, with the converse finding that cause had not resulted from the correspondence at issue. While this case also involved a letter written by a lawyer, in this instance the lawyer was also the employee: Ms. Dawn Marie Bennett.

By way of background, in mid–2002, the employer, Ms. Cunningham, hired Ms. Bennett to work as an associate lawyer in her small legal office. A fee and billing arrangement was agreed between them stipulating that Ms. Bennett would receive 50% of her billings.

Shortly after she started, Ms. Bennett raised several issues with Ms. Cunningham regarding the functionality of the office. Some upgrades were made, but several problems remained. The most important to Ms. Bennett was an error in the docketing system, which had resulted in some of her billings being credited to Ms. Cunningham. After raising this issue several times, Ms. Bennett ultimately delivered a four–page letter to Ms. Cunningham, laying out her concerns and making the following accusation:

…As my income depends solely on my billable hours docketed and collected, the monetary gain to you is both dishonest and negligent…

At trial before the Ontario Superior Court of Justice, this sentence was characterised as "insolence" and was found to have provided cause for Ms. Bennett's dismissal.

On appeal, the Divisional Court held that the trial judge had erred by failing to consider the context surrounding the "highly critical" letter. The nature of the employment relationship was important to the inquiry, including that there had been no prior discipline, that Ms. Bennett was a new lawyer "struggling in her practice" and that the letter included polite phrasing, using the terms "please" and "kindly" in preface of requests. Of particular note was the closing sentence of the letter:

"I would like to work together with you to resolve these issues. Kindly contact me so that we may work together to make this arrangement a successful one for both of us."

Looked at properly in context, the letter had not destroyed the trust or the employment relationship.[5] As a result the Divisional Court overturned the finding of just cause and awarded damages.

Analysis

These cases highlight the importance of context in weighing the option of termination of an employee for a piece of inappropriate communication. While an insubordinate letter may tip the scales for a problematic employee, the same may not be true for an employee with good intentions and a clear disciplinary record.

These cases also illustrate that the formality of insubordinate conduct will not insulate it from assessment as just cause. The *Grewal* decision makes it apparent that lawyers need to be cautious when advising an employee who remains in active employment: if the employment relationship has already soured, a lawyer's letter can be the last straw that provides the employer with just cause and deprives the employee of a remedy.[6]

Another factor considered in *Grewal* and *Bennett* was whether the correspondence had been intended as a private communication or with intent to embarrass the employer. In *Grewal*, the offending communication was copied to several people, including the employer's regulatory body. On this basis, the Court found that the letter had been intended to do "serious damage" to the CEO. Conversely, in *Bennett*, the Divisional Court commented on the lack of embarrassment suffered by the employer as the letter was delivered privately and not intended for third parties.