

## **Investigating Cause for Dismissal – How far does an Employer have to go?**

A recent decision of the British Columbia Supreme Court provides an excellent example of three issues relating to dismissals for cause:

1. the importance of a proper investigation;
2. how to assess whether just cause for dismissal exists in a specific case; and
3. how an employer's failure to carry out an investigation and dismissal properly and fairly can expose it to additional liability.

### **The Case**

The case in question is *Vernon v. British Columbia (Ministry of Housing and Social Development — Liquor Distribution Branch)*. Vernon was a 30-year employee who started as an auxiliary clerk at a liquor store and was promoted repeatedly, to the point where she was a senior store manager. The employer alleged Vernon engaged in workplace misconduct, including bullying, harassing and intimidating subordinates, and it therefore had just cause to dismiss her.

It was no secret within the organization Vernon had a “no nonsense” approach to management; she was widely known as the “Little General.” One employee complained about her abusive or harassing behaviour, prompting an investigation. During the course of the investigation, there were allegations made that Vernon routinely swore, called several employees “f\*\*\*ing idiots” and made a comment about “f\*\*\*ing Muslims.” On one occasion, she responded to a request for light duties due to a back problem by saying to her employee that “if you can f\*\*\*k your husband, you can do a liquor load.”

### **The Decision**

Unfortunately, the investigation was not carried out in a manner that was approved of by the Court. According to the Court, “As a result of her interview of the complainant’s

conduct, Ms. van der Boom appears to have been convinced of Ms. Vernon’s wrongdoing ... The interview of Ms. Vernon was contrary to its intended purpose and unfair in the extreme.”

The Court went on to question the conclusions drawn at the end of the investigation. In particular, the report stated that Vernon had denied all of the allegations. However, the notes taken during the investigation suggested that, while she denied certain specific allegations, she acknowledged and responded to a number of other allegations. The report, and particularly the suggestion that Vernon did not acknowledge any wrongdoing, was relied upon in the decision to dismiss Vernon for cause.

The investigators were found to have chosen witnesses they expected would corroborate the complaints. With respect to the interviews, the court found that:

“The interviews were not simple question and answers affairs. They were interrogations. They were not carried out in an impartial manner. Witnesses who spoke favourably about Ms. Vernon were accused of lying. I accept the evidence of Ms. Whynot and Ms. Rondeau that the interviewers chided and yelled at them when they gave answers that supported Ms. Vernon.”

As the Court stated, the “investigation was flawed from beginning to end. It was neither objective nor fair.”

With respect to the decision to terminate, the Court reviewed all of the principles regarding just cause for dismissal, including the requirement that a contextual approach be adopted which considers all of the relevant circumstances. As we all know, in order to show that just cause for dismissal exists, an employer must prove:

- that the alleged misconduct took place, and
- that the nature or degree of misconduct warranted dismissal

There is a requirement that the extent of disciplinary action be proportionate to the egregiousness of the offence. According to the Court:

Ms. Vernon was a 30-year employee. She had been a store manager for almost 12 years. In all those years there had never been a single complaint made against her. Her performance reviews were glowing... The lack of any prior complaints against Ms. Vernon should have given them cause to stop and reflect.

After the decision to dismiss had been made, representatives of the company met with Vernon. Apparently, they said her actions were “embarrassing and shameful.” The Court found this “could not have been more insensitive.” The company advised Vernon it was going to dismiss her, but offered her the option of resigning, at which point she would be provided with a letter of reference. As the Court stated:

If Ms. Vernon’s conduct was sufficiently serious that the LDB had the right to summarily dismiss her without notice, it would have been improper for the LDB to give her a reference letter. To offer a reference letter as a carrot to resign, is, in my opinion, conduct which is properly the subject matter of retribution, deterrence and denunciation.

The Court found that in light of Vernon’s employment history and untarnished record, “she was entitled to a warning that her conduct was not acceptable.”

As there was insufficient cause for dismissal, the Court awarded damages representing 18 months’ notice. Furthermore, the Court went on to consider other forms of damages that might be appropriate.

### **Aggravated damages**

First, Vernon sought aggravated damages based upon the principles set out in *Honda Canada Inc. v. Keays*. The Court agreed the investigation was unfair and a breach of the company’s duty to act in good faith. Furthermore, the Court accepted evidence the manner of dismissal caused Vernon to suffer mental distress over and above the normal distress and hurt feelings that arise from dismissal itself. Ultimately, the Court awarded \$35,000 of the “Damages Formerly Known As Wallace.”

## **Punitive damages**

Vernon also sought punitive damages. The court found that offering a letter of reference in exchange for Vernon's resignation, when the Company was of the view that it had just cause to dismiss her, was deserving of punishment. As a result, the court awarded an additional \$50,000 in punitive damages.

## **Analysis**

This case confirms several points:

1. When a complaint is made about an employee's conduct, it is incumbent upon the employer to engage in a fair, impartial and objective investigation before taking disciplinary action.
2. In assessing whether or not just cause for dismissal exists, an employer must consider all relevant circumstances and ensure the punishment is proportionate to the egregiousness of the offence.
3. The "Damages Formerly Known As Wallace" will be awarded in situations where employers act in bad faith in the course of dismissal and that bad faith causes actual damages or a loss.
4. Employers that think they have just cause to dismiss an employee should not offer a positive reference in exchange for the employee's resignation.