

## **Just cause and conflict of interest**

Following the Supreme Court of Canada's decision in *McKinley v. BC Tel*, Canadian courts have in recent years adopted a contextual approach to determining whether an employer's decision to terminate an employee for dishonest or inappropriate conduct can be upheld. Courts now routinely consider not only whether the employee engaged in improper conduct, but the circumstances surrounding that conduct and the proportionality of the employer's response. The ultimate determination courts are asked to make following *McKinley* is one of three things: (1) did the employee's actions violate an essential term of the employment agreement, (2) did the employee's actions breach the faith inherent in the work relationship, or (3) were the employee's actions fundamentally inconsistent with the employee's obligations to the employer.

It has long been accepted that all employees, regardless of position, compensation, or duration of employment, owe a duty of loyalty, fidelity, and good faith to their employers at common law. In the cases of high-echelon managers and directors, the courts have determined that this duty is heightened, as these "fiduciary employees" are expected to act with a view to advancing their employer's best interests, and not to enter into personal engagements which conflict with their employer's ongoing or potential activities. Employees other than high-ranking officials have also been found to owe this sort of heightened fiduciary duty where the employee exercises unilateral discretion or power which affects his or her employer's interests, and where the employer is particularly vulnerable to the employee.

When considering the nature of an employee's alleged misconduct in conflict of interest cases, courts have paid particular attention to any contractual or policy terms which may assist the court in assessing whether the conduct engaged in was actually misconduct. This focus relates, in part, to the obligation of the employer to make it known what will constitute a conflict of interest in that particular employment context, and how conflicts of interest are to be dealt with.

In *Atkins v. Windsor Star*, a pre-*McKinley* decision, the court considered the case of an employee who had been terminated for wrongful competition with his employer. The

employee was engaged to recruit advertisers for the Windsor Star, and was terminated after his employer found out that he had been publishing his own advertising-funded fishing newsletter. While the court noted that the employee's actions could have affected his employer's advertising revenues, and thus amounted to a potential conflict of interest, the court found that the employer did not have just cause to terminate the employee as it had never expressly set out its expectations with regard to conflicts of interest. As such, absent evidence that an employee has been put on notice that engaging in wrongful competition or other such activity is forbidden, it is unlikely that an employer's decision to terminate for such conduct can be deemed "proportionate" under the *McKinley* contextual framework.

Where the prohibition on engaging in conduct which may give rise to a conflict of interest is expressly spelled out by the employer, violations of this expectation have routinely been found to be grounds for dismissal when judged through the *McKinley* lens. In *Dowling v. Workplace Safety and Insurance Board*, the Ontario Court of Appeal found that the employer was justified in dismissing an employee who had purchased laptop computers from an employer whose account he supervised and had received money from one of his WSIB clients. When questioned by his employer, he was untruthful and withheld information. The Court of Appeal found that this conduct was incompatible with the employee's obligations to his employer, and constituted a fundamental breach of the employment relationship.

Likewise, in recent cases where employees have established businesses which, in whole or in part, were intended to compete with their employers, courts have found that such wrongful competition constitutes an irreparable breach of the foundation of the employment relationship and a violation of the employee's "equitable obligation to his employer of loyalty, good faith, honesty and avoidance of conflict of duty and self-interest." While the courts continue to stress the importance of the *McKinley* test, and in particular, the proportionality analysis at step three of that test, wrongful competition cases seem to be determined at the early stages of the test where the courts have assessed whether the employee has in fact engaged in competition with his or her employer. Given the seriousness of this conduct, where proven, courts have left little room for the suggestion that the employment relationship has not suffered irreparable harm.



The importance of this first step of the *McKinley* test in conflict of interest termination cases is best evidenced by the decision in *Alishah v. J.D. Collins Fire Protection Company*. In that case, the plaintiff was terminated after his employer found out that he had been considering opening his own company in the same industry as his employer. While the employee had considered opening his own business, he had not taken any steps to do so at the time of his termination.

The court found that the employee's "vague long-term discussions" about starting his own business did not constitute a breach of his good faith obligations to his employer, and did not constitute the sort of misconduct which warranted dismissal. This factual determination at the first stage of the *McKinley* test was determinative of the matter, and the employee was awarded damages for wrongful dismissal.

While courts will assuredly continue to apply the *McKinley* test in its entirety and focus on the Court's proportionality analysis, the importance of the first stage of the test cannot be ignored in cases of alleged conflict of interest. Given the seriousness of the conduct being considered, there seems to be little chance to salvage the employment relationship where such conduct is proven. In these sorts of cases, it appears that the proportionality stage may only carry significant import where a question exists as to the employee's intentions or his or her awareness regarding the impropriety of his or her conduct.