



**EMPLOYEE'S CONDUCT FOLLOWING WRONGFUL DISMISSAL DID NOT JUSTIFY THE DISMISSAL, JUDGE RULES**

An Alberta judge has ruled that a clinic operator could not retroactively justify its wrongful dismissal of an occupational therapist by the fact that she improperly took home some letters containing confidential patient information while cleaning out her office in a highly upset state immediately after the dismissal. The judge found that the post-dismissal conduct was not related enough to the employee's impugned pre-dismissal conduct to convert it from insufficient to sufficient cause.

Employed by a group of privately-owned clinics in Edmonton, Alberta known as the Primary Care Network (PCN) since February 2007 as an occupational therapist, Bonita Gillespie was chided by her supervisor on February 6, 2008 after one of the doctors complained about the way she had dealt with a nurse and filled out a patient form.

Five days later, on February 11, 2008, Gillespie used harsh words in expressing to a newly hired social worker her surprise at the latter's hiring. She then became extremely agitated when she was chastised for this the next day at a meeting with her supervisor and a clinic manager to the point that she was sent home for two days and told to return on February 15. Before she left the office, Gillespie was given a letter of reprimand which stated that "if immediate and sustained improvement in your behaviour is not realized, you will be subject to disciplinary action up to and including termination of your employment."

When Gillespie returned to work on the morning of February 15, she was dismissed effective immediately, given two weeks' pay and instructed to clear out her office and leave the premises. Stunned and devastated, she cleaned out her office and desk, taking many personal items and memorabilia. Among the items taken home were letters from patients saying complimentary things about her, some containing confidential patient information including their names and addresses, Alberta Health Care numbers, and other identification numbers. This was confidential information that Gillespie was not entitled to remove from the clinic, pursuant to non-disclosure agreements that she had signed in 2007.

Initially relying on communication difficulties and interpersonal conflicts as the reason for Gillespie's dismissal, the employer sought months later to rely on its post-dismissal discovery of the removal of letters containing confidential and sensitive patient information as further cause for the dismissal.



In a May 17, 2011 decision, 2011 ABPC 167 (CanLII), an Alberta Provincial Court judge held that the evidence of Gillespie's communication difficulties and interpersonal conflicts was insufficient to constitute grounds for her summary dismissal, and further that Gillespie's dismissal on these grounds was unreasonable because she was not given an opportunity to correct her behaviour. However, the judge ruled that Gillespie's breach of the non-disclosure agreements by removing documents from the office following her termination was a breach of a material term of her contract and that the employer's "after-acquired knowledge of misconduct" justified her summary dismissal. He further rejected Gillespie's arguments that, as she had already been dismissed, the non-disclosure agreements were no longer binding on her, and that her removal of the documents was innocent and inadvertent, concluding that the first argument "would negate the very purpose of the non-disclosure agreement once an employee was dismissed," and the second was irrelevant, because the removal of the documents violated a written agreement.

Gillespie appealed this decision to the Alberta Court of Queen's Bench.

Before the Court, Gillespie argued that the trial judge had erred in finding that her post-dismissal conduct was sufficient to justify dismissal for cause.

While the employer acknowledged that the trial judge had erred in law in mistaking post-termination conduct for after-acquired cause, it argued that Gillespie's post-termination conduct in removing confidential documents demonstrated that her dismissal for communication difficulties and interpersonal conflicts was reasonable. It submitted that her pre-termination conduct demonstrated a lack of tact, sensitivity, and professionalism, and that her post-termination conduct of removing confidential information, which it described as "theft," also demonstrated the reasonableness of her dismissal on those grounds. Further, it maintained that, even though Gillespie had already been dismissed, the non-disclosure agreements continued to be binding on her and breach of the agreements was grounds for dismissal.

Ruling that "the Trial Judge erred in law in concluding that [Gillespie's] post-termination conduct was sufficient to ground termination for cause," Alberta Court of Queen's Bench Judge June Ross allowed the appeal and awarded Gillespie damages in lieu of notice.

Justice Ross noted that "there are two circumstances in which evidence of post-termination conduct can be relied upon to establish grounds for dismissal: first, when the post-termination conduct sheds light on the reasonableness of the dismissal for

cause at the time it was implemented, and second, when the post-termination conduct reveals an undesirable aspect of the employee's character, such as deceitfulness, that would itself justify his or her dismissal."

Here, Ross found "no obvious connection between an insensitive communication style and removing documents in contravention of the Non-disclosure Agreements." Rather, Ross found that the evidence of personality conflicts and communication problems did *not* demonstrate that Gillespie's conduct and demeanor were so incompatible with her duty or so prejudicial to the employer's business that a dismissal was warranted, and accepted her evidence that she was stunned and devastated when she "cleaned out her office and desk," taking the items.

As for the trial judge's determination that breach of the non-disclosure agreements could be cause for dismissal even after the termination, Justice Ross disagreed, stating: "No contracting party is entitled to fundamentally repudiate obligations under a contract, as the employer has certainly done ... and to afterwards require the other contracting party to continue to comply with his or her contractual obligations.... It may be that the Non-disclosure Agreements should be treated as distinct from the employment agreement and intended to continue to bind [Gillespie] after termination of her employment agreement. If so, the [employer] could seek damages against [Gillespie] for breach of the Non-disclosure Agreements. Breaches ... may also be relevant in professional disciplinary proceedings against [Gillespie], or in proceedings against [her] under privacy legislation. There are other ways to enforce the Non-disclosure Agreements, that do not involve the illogic and unfairness of permitting an employer to retroactively justify its repudiation of an employment contract by an employee's post-repudiation breach."

In the result, Justice Ross allowed the appeal, ruling that Gillespie was wrongfully dismissed and entitled to four months' pay in lieu of notice, less the two weeks' pay she received upon dismissal.

In *Cie minière Québec Cartier v. Quebec*, 1995 CanLII 113, the Supreme Court of Canada declared that "an arbitrator can rely on [subsequent-event] evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented." In the present case, the appellate judge found that this circumstance did not exist, and therefore the employee's post-termination conduct could not retrospectively justify the dismissal.



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