YOUNG ANDERSON
BARRISTERS & SOLICITORS

AVOIDING LABOUR AND EMPLOYMENT LITIGATION

DECEMBER 3, 2010

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I. INTRODUCTION

Many recent cases serve as a good reminder of some general principles that employers can follow to try and avoid litigation or at least have a good defence if litigation is unavoidable. Employers must always try to treat employees with respect and not to base decisions on assumptions. This is particularly important in the human rights context. As well, employers should try to be seen to reasonable in their demands and conduct. Finally, good human resources practices are pro-active ways to identify issues early on, to consider ways to address those issues, and have the proper documentation upon which to justify decisions.

II. DO NOT BASE DECISIONS ON ASSUMPTIONS

There have been many cases recently in which employees alleged discrimination on the basis of family status due to childcare obligations. Many of the employers based their responses on the assumption that childcare obligations are the employee's problem and not a human rights issue. The cases discussed below are good reminders of the importance to carefully consider issues raised by employees related to childcare obligations before making a final decision.

In British Columbia, the Court of Appeal in *Health Sciences Assoc. of B.C v. Campbell River and North Island Transition Society*, 2004 BCCA 260, concluded that interference with childcare obligations can constitute discrimination on the basis of family status. However, the Court was clear that something more would be needed than regular childcare obligations. As the Court stated:

> …it seems to me that a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.

This type of analysis was evident in the case of *International Brotherhood of Electrical Workers* (2009), 186 LAC (4^{th}) 180 (Jesin), where the employer changed from an 8-hour to a 10-hour schedule. Four employees complained that the new schedule discriminated against them on the basis of family status because of the negative impact on their ability to carry out childcare responsibilities and interact with their children. The Arbitrator found no discrimination for three of the four employees.

In his reasons, the Arbitrator stated that not every conflict between a work obligation and a parental obligation must be accommodated by the employer. Furthermore, the Arbitrator

stated that not every such conflict should give rise to a finding of discrimination. The Arbitrator noted that finding discrimination every time there is a conflict between work requirements and parental obligations would freeze an employer's ability to act to meet its economic needs as virtually every action could have some negative effect on the parental duties of one employee or another.

The Arbitrator concluded that the new schedule did not seriously interfere with the substantial parental obligations for three of the four employees. These three employees were able to fulfil their parental obligations by rearranging duties with their spouses. As noted by the Arbitrator:

> That is what families do every day. I do not think it is reasonable to expect that workplace obligations would not require one spouse to work together with the other to split their parental duties so as to be able to accommodate their workplace duties.

The Arbitrator was also clear that he did not think it was reasonable to make a finding of discrimination because one of the employees was unable to attend all of his children's extra-curricular activities. As he noted, "…it is a fact of life that parents' work schedules may conflict with their ability to view or attend some extra-curricular activities."

The Arbitrator did find discrimination on the basis of family status for one of the employees, who was separated from his wife and shared custody of their children. The employee's children were relatively young and unable to get to or from school on their own. The employee and his ex-wife had been able to reach an amicable custody sharing agreement that was negotiated on the basis of an 8-hour shift schedule. As the Arbitrator noted:

> The crafting of a custody sharing agreement is a delicate matter which is to be encouraged. Such agreements are reached in circumstances in which children are subject to extra sensitivity and vulnerability. It is reasonable to conclude that a change in a workplace rule which forces parents to alter a carefully constructed custody agreement to their detriment in order to accommodate that workplace rule may be found to be discrimination…

The Arbitrator concluded that the employer needed to consider how it could accommodate this employee in these circumstances.

Likewise, the BC Human Rights Tribunal found that employer discriminated against an employee on the basis of family status in *Cavanaugh v. Sea to Sky Hotel and Mohajer* (No. 2), 2010 BCHRT 209. The employer terminated an employee based on its assumptions regarding childcare obligations. The employee was a single parent and hired for the position of Banquet Manager, which involved long and irregular hours. While there were some performance issues, the Tribunal concluded that the reason the employee was dismissed was because of the

employee's childcare arrangements. The Tribunal also concluded that there was no indication that the employee was unable to meet the hours requirement on a regular basis and that there had been no discussion of possible accommodations or other arrangements.

However, the Tribunal came to the opposite conclusion in *Falardeau v. Ferguson Moving*, 2009 BCHRT 272. An employee filed a complaint against his employer on the basis of family status alleging that he was required to work overtime, which interfered with his obligation to care for his young son. When he refused to work the overtime, his employer fired him. The complainant was a single father who had sole custody of his son who was about 10 years old at the time the overtime issue came to a head.

The complainant had worked previously for the employer and was rehired in 2007. The evidence was that he knew his hours would be irregular and sometimes lengthy but he did not tell his employer at the time he was rehired that he could not work past 4 p.m.. The evidence also showed that the employer thought the complainant was readily able to obtain coverage for his son's care if his work hours were extended and that he had done so on many occasions.

As well, there was no evidence that the complainant's son had any special needs or that the complainant was uniquely qualified to care for him. The Tribunal concluded that the complainant was not discriminated against on the basis of his family status. As the Tribunal noted, there is no human right to refuse overtime. It is important to note that there was no evidence here that the complainant was facing anything other than ordinary childcare obligations.

Local government employers will want to ensure that they carefully consider issues raised by employees when changes to terms or conditions of work impact on their childcare obligations. In British Columbia, the Court of Appeal has been clear that discrimination will only be found where the impact is something more than the general childcare issues that all working parents face.

III. BE AWARE OF HUMAN RIGHTS OBLIGATIONS

The recent case of *Douglas College,* [2009] BCCAAA No. 152 (Lanyon) illustrates the importance of not simply relying on a policy in making a decision, where the policy conflicted with a ground under the *Human Rights Code*. This case involved a conflict between the College's anti-nepotism policy and the rights of employees not to be discriminated against on the basis of marital status.

A College instructor alleged discrimination on the basis of marital status when he was deemed ineligible for a position as Dean because his wife was an instructor in a department for which he would be responsible as Dean. The Arbitrator agreed that this was discrimination, as the grievor would never be considered for the Dean's position as long as he remained married to an instructor in the English department.

The Arbitrator found that the College's decision to exclude the grievor from the interview process constituted *prima facie* discrimination. The College had a Conflict of Interest Policy that stated the College should avoid hiring any employees who might be in a position of having to supervise a family member. The College argued that this policy was a *bona fide* occupational requirement. The Arbitrator agreed that such policies can be a *bona fide* occupational requirement but made the following comments:

> As can be seen, anti-nepotism policies can be justified, both in general terms … and in also in particular circumstances …. Indeed, in respect to a direct supervisory relationship, where neither position can be modified, it is hard to conceive of a standard other than a direct prohibition against anti-nepotism. However, the general acceptability of such a rule, and its acceptability in regard to certain circumstances, does not exhaust the employer's duty to ensure that its interpretation and application of its policy, is consistent with its human rights obligations in a wide variety of other circumstances.

The Arbitrator concluded that the College had applied its policy too rigidly and did not balance its Conflict of Interest Policy with its obligations under the *Human Rights Code*. While the Arbitrator found that the Conflict of Interest Policy as a whole was a *bona fide* occupational requirement, its application in this case was not.

While this case confirms that local governments can enact anti-nepotism policies, they must apply those policies in a way that complies with their human rights obligations. This will require local governments to consider if there are ways they can mitigate any conflict of interest that arises if a spouse or family member would be in a supervisory relationship with another employee.

This case illustrates the obligations on local government employers to consider its human rights obligations even where there appears to be a conflict with an otherwise valid policy or practice of the local government. While this is an onerous task, it is clear that decision makers will require a local government to turn its mind to ways in which it can possibly accommodate an employee in relation to the particular policy or practice.

IV. BE RESPECTFUL

It is important that employers always try to treat employees with dignity and respect even in situations where it may be difficult to do so. The following two cases from the BC Human Rights Tribunal highlight the importance of the procedural aspect of the accommodation process and of treating employees with disabilities in a sensitive manner.

In *Cassidy v. Emergency Health Services*, 2008 BCHRT 125, the complainant was removed from his position as a paramedic because he was not able to palpate pulses manually due to his

disability. The Tribunal agreed that this was a reasonable requirement because of the safety risks associated with having a paramedic attend at a scene who cannot palpate pulses manually. Therefore, the complainant could not be accommodated in a paramedic position.

However, the complainant also alleged that the employer had not treated him fairly during the accommodation process. The Tribunal confirmed that an employer can still breach the procedural aspect of the duty to accommodate even though the ultimate decision is justified. On this point, the Tribunal made the following comments:

> But the fact that the standard may be justified does not mean that the employer in such a case ceases to be obligated to treat an employee to whom the standard is applied fairly and with dignity or that the failure to do so will not result in a breach of the *Code*.

The Tribunal found the employer had breached its procedural obligations in the accommodation process for several reasons, including that the employee had been permitted to work as an attending paramedic for about a year before abruptly being removed from the position. The Tribunal commented that a more sensitive approach could have been taken by the employer who simply phoned the employee one evening and told him not to report for work the next day. The Tribunal suggested that this should have been done in person.

The Tribunal also characterized the employer's conduct as treating the complainant as a safety risk rather than a "…human being to whom the employer owed a duty to accommodate." As well, one of the managers made inappropriate comments to other staff which resulted in the perpetuation of misinformation about the complainant's condition. The Tribunal also found that the employer failed to cooperate with the complainant or the union in trying to find other work that the employee could perform. Further, the employer took independent steps to have the employee's driver's licence revoked even though there was no medical evidence to justify this action. Finally, the Tribunal concluded the employer was unnecessarily aggressive in trying to have the complainant's paramedic license revoked.

The Tribunal made the following comments about the importance of the employer's treatment of the employee during the accommodation process:

> This case highlights the importance of the procedural aspect of the duty to accommodate. Even where a respondent is ultimately able to justify its standard, including showing that the standard is reasonably necessary, in that it would be impossible to admit exceptions to that standard without causing undue hardship, the respondent remains under an obligation to treat the individual to whom the standard is being applied fairly, and with dignity and respect, throughout the accommodation process. The failure to do so may cause real and substantial harm to the person to whom

> the standard is applied, and may substantially undermine the fundamental principles upon which our human rights law is based.

This case is a reminder that the procedural aspects involved in the accommodation process are just as important as the ultimate conclusion.

The complainant in *Ford v. Peak Products Manufacturing*, 2010 BCHRT 155, was terminated from her employment after she had been on sick leave for about three months. The complainant was suffering from a relapse of depression. At the time of the dismissal, the complainant's doctor was not able to provide a return to work date. The employer argued that it could not keep the position vacant any longer for operational reasons. The employer sent her a letter terminating her employment. As a result of the termination, the complainant was no longer eligible to apply for long-term disability benefits.

The Tribunal concluded that the employer had discriminated against the complainant on the basis of a disability. The Tribunal concluded that there was no evidence that the complainant could not return to work in the reasonably foreseeable future. As noted by the Tribunal:

> Rather, the medical information indicated that she was not able to return to work at the time the information was provided, and that her physician was unable to provide a return to work date at that time. This is not the same thing as a statement that Ms. Ford would not be able to return to work in the reasonably foreseeable future. As noted by Dr. Ancill in his testimony, in the context of a mood disorder, it can take some time to determine the appropriate combination of medication. In such cases, the prognosis may be excellent (in other words, the doctor is confident that the individual will be returning to work), but the precise timing of that return cannot be specified.

The employer also did not give the employee any prior notice that her employment was in jeopardy. The Tribunal noted the requirement on employers to provide warnings to employees who are absent on sick leave that their employment is in jeopardy. The purpose of such warnings is to provide employees with an opportunity to provide further medical information about their prognosis and potential accommodation options. The Tribunal also characterized the three-month absence as "relatively brief".

With respect to the employer's argument of the operational difficulties caused by the complainant's absence, the Tribunal noted that the employer did not hire anyone to replace the complainant and had assigned her duties to other employees. If the employer had provided the employee with the requisite warnings and could prove an operational necessity to fill her position, the result may have been different. However, solid evidence will be needed to justify filling positions on a permanent basis when an employee has only been absent for a few months.

V. BE REASONABLE

The cases involving requests for medical information and accommodation are useful examples of the importance of employers being reasonable in its demands in relation to employees. This is often an area where there is a temptation to base decisions on assumptions rather than medical evidence. As well, employers must always be mindful of the employee's rights and interests.

In *Telus Communications Co.* (2010), 192 L.A.C. (4th) 240 (Lanyon), the Arbitrator reviewed the general principles regarding the provision of medical information and an employee's right to privacy. The starting point in this analysis is the conflict between the privacy rights of employees and the legitimate business interests of employers with respect to the disclosure of medical information and medical examinations. While employers do have the authority to request medical information in some circumstances, employers must be aware of the limits to those rights as well as the privacy rights of employees.

This case is regarding Telus' particular policies and collective agreement provisions but it provides a useful review of some of the basic principles in this area. The first principle is that an employer has no management right to demand a medical examination or the disclosure of medical information. This authority must be found in the collective agreement or by statute. The Arbitrator also noted the basic principle that privacy is one of the core values underlying the protections established in the *Canadian Charter of Rights and Freedoms*.

However, the Arbitrator also set out the principle that employees are obligated to attend at work and made the following comments:

> If they are absent from work there is an onus on them to establish that they have a bona fide illness or injury and that the length of their absence is also legitimate. The primary means of proof is usually a medical certificate. The benefits under a health and welfare plan are contractual and there is an onus on the employee to prove that they meet the criteria established for entitlement….

The Arbitrator confirmed that if an employer has reasonable grounds, it may require an employee to provide further additional medical information and noted the following:

> For example, many employees may simply submit what is now universally recognized as insufficient medical information, that is, a prescription pad note from their family doctor stating, "off work due to illness; return to work unknown".

Employers must use the least intrusive means possible to obtain the medical information required. Employers have a right to more detailed medical examinations and information in respect of issues such as fitness to return to work and accommodation situations.

Regardless of an employer's right to medical information, it is up to the employee to decide whether the employee will consent to provide the requested information. However, the Arbitrator was clear that an employee who refuses to do so will suffer the consequences such as not being entitled to sick benefits, prohibited from returning to work, or not being accommodated. While the Arbitrator was clear that an employee cannot be disciplined for refusing to consent to providing medical information, they may be disciplined for the conduct which flows from that decision such as abuse of sick leave or a refusal to return to work.

The case of *Sluzar v. City of Burnaby*, (No. 3) 2010 BCHRT 19 is a good example of where an employer was found to have acted reasonably in its conduct in relation to requests for medical evidence and the accommodation of an employee. The employee in this case alleged that the City discriminated against him on the basis of a physical disability and failed to accommodate him. The City's accommodation efforts spanned a number of years and at the time of the decision the employee was still employed by the City but not actively at work. The Tribunal confirmed that when dealing with accommodation efforts over a long period of time, the question of whether an employer has met its duty to accommodate must be approached on a global basis by considering the entire history of the matter.

The employee argued that the City had failed to communicate with him about the accommodation process. While the Tribunal concluded that the communication between the City and the complainant was less than ideal, the Tribunal concluded that the City had met its duty to accommodate when viewed from a global basis. The Tribunal also confirmed that complainants can only expect reasonable but not perfect accommodation.

The Tribunal also concluded that the complainant failed to communicate properly with the City with respect to his disability and accommodation requirements. This was an important factor in the Tribunal's decision as follows:

> Although the accommodation process has not resulted in a return to work for Mr. Sluzar, I find that Mr. Sluzar's own failure to communicate with the City is fatal to his complaint of discrimination.

Another important finding of the Tribunal was that the City was not required to accommodate the complainant in positions it had previously removed him from for disciplinary reasons that were unrelated to his disability. The complainant, through his physicians, had repeatedly requested a placement in such a position. However, the complainant had been removed from those positions for disciplinary reasons. While the Tribunal recognized that the complainant felt that the disciplinary response was unjustified, the City was not required to accommodate him by putting him in those positions.

The Tribunal also agreed that the employer in that case was entitled to require the complainant to attend a functional capacity evaluation ("FCE") and an independent medical examination with a psychologist (the "IME"). During the employee's absence for which he had provided a medical note that he was off on "medical stress leave", the employer received information from the employee's physician that he could participate in a gradual return to work only if he was allowed to do equipment operation or a supervisory position. The employee had been removed from both these positions for disciplinary reasons.

The fact that the information indicated that the complainant could perform equipment operation duties but not labour duties was the basis on which the City requested the employee complete an FCE. The purpose of the FCE was to get further information to assist the City in finding suitable work for the complainant. The complainant was not cooperative. The City had requested the IME because the reason for the absence was listed as stress and the complainant was becoming increasingly difficult to deal with.

The Tribunal came to the following conclusions regarding both of these requests:

> In my view, on the basis of all the information before the City, its requirement that Mr. Sluzar attend an FCE to assess his functional requirements is reasonable. The medical information provided by Mr. Sluzar is arguably contradictory and certainly raises issues that require resolution before Mr. Sluzar is returned to work. There is no indication that the physician is familiar with the duties involved in heavy equipment operation, or their possible impact on those with back conditions. Mr. Sluzar testified that the physician wrote that he was able to do the job because Mr. Sluzar told him he was able to.
>
> The City's request for an IME is perhaps not as strongly founded. However, there was information before the City that Mr. Sluzar's lengthy absence was precipitate by "stress", and the information from his physician with respect to the FCE indicated that he continued to be affected by stress and that it could affect his ability to work. Further the interactions between the City and Mr. Sluzar had become increasingly difficult and hostile, and, on the whole of the information, may have raised questions about Mr. Sluzar's ability to reintegrate into the workplace.

This case illustrates that the Tribunal does take into account the conduct of the employee in assessing whether an employer has met its duty to accommodate and confirms that employers can request further medical information where it has a reasonable basis to do so.

VI. DO NOT BE SEEN TO BE TAKING UNFAIR ADVANTAGE OF A SITUATION

Employers will be served better if they are seen to be treating employees fairly and with respect, even where the conduct of the employee may make this difficult. Two cases involving alleged resignations illustrate the importance of this.

In the first case, the Court agreed that the employee had resigned even though the employee claimed she had been dismissed (*Khalil v. Infospec Systems Inc.,* 2009 BCSC 547, affirmed on appeal). During the employment relationship, the employee started to experience health problems. At first she began working part-time and then went on sick leave for approximately a month. The parties met and gave conflicting versions of what was said at the meeting. The employee said that the employer gave her the option of working full-time, going on Employment Insurance or resigning. She further alleged that the employer asked her three times if she was resigning and when the employee said she was not, told her she was terminated immediately.

The employer denied that it terminated the plaintiff during the meeting but did make it clear to the employee that part-time work was not an option. The employer also stated that they would continue to accommodate the plaintiff with sick leave but they did not want the plaintiff to return to work until she was fully recovered.

After a series of emails, the employee did not return to work and the employer provided her with a Record of Employment indicating that she had resigned. The issue in this case was whether the employee had actually resigned. The test for determining whether an employee has resigned is an objective one. The Court will consider what a reasonable person would understand from the statements made in all of the surrounding circumstances. Furthermore, a resignation must be clear and unequivocal to be effective.

The Court noted that this case involved an unfortunate miscommunication in emotionally charged circumstances. The Court concluded that the employer had given the employee an opportunity to clarify whether or not she had resigned and that employee had been told that if she had not resigned, she could return to work when a doctor confirmed her ability to work full-time. The Court concluded that the employee appeared to have understood and accepted this but did nothing to follow up or to provide further medical information.

The Court ultimately concluded that the employee failed to prove that she was dismissed without cause. The employee was given the opportunity to return to work when she could do so on a full-time basis. However, the plaintiff chose not to do so and accepted employment with a new employer.

The Court came to the opposite conclusion in *Koos v. A & A Custom Brokers Ltd.*, 2009 BCSC 563, where an employee claimed that she was wrongfully dismissed from her employment while the employer alleged that the employee resigned by abandoning her employment. The employee in this case had left her desk to do a personal errand and was gone longer than she

had originally indicated. When she returned, her supervisor reprimanded her. The employee was upset about the reprimand and reported the incident to a manager who convened a meeting at which both the employee and her supervisor attended.

The manager thought the meeting went well but was not pleased to find out from another employee that the plaintiff said it had been one-sided against her. The manager met with the employee to express her disappointment because she had thought the employee had left it to the manager to speak to the other employees about the meeting. The employee returned to her desk and broke into tears. Her manager approached her and suggested that she leave for the day.

The employee then went to the hospital and asked for medication to settle her nerves and asked that a note be faxed to her employer advising that she must take two weeks off work due to anxiety. The employer received the note but, unfortunately, it was not brought to the attention of the employee's manager until much later. The manager phoned the employee and left messages, which the employee did not return. A few weeks later, the employer sent a letter to the employee stating that they assumed she had abandoned her position.

The employee responded by letter the next day explaining the situation and that she had been away due to sickness as set out in the note from the hospital doctor. The employer refused to accept this explanation and reiterated that her conduct constituted an abandonment of her position.

Again, the Court confirmed that the test for whether an employee has, in fact, resigned, is whether a reasonable person would have understood by the employee's statements and actions that she had resigned. The Court in this case found that the employer should not have taken the position that the employee had abandoned her employment. At no time did the employee ever say she was quitting and the employer could not know for certain that the employee had received her telephone messages.

The Court accepted that the employer was not impressed with the employee's conduct at work and failure to communicate with the employer afterwards. The Court was also careful to state that it was not making any findings as to whether it was reasonable or justifiable for the employee to obtain on request a "two-week sickness pass" without a full examination of the reasons for her absence. The Court did find that in these circumstances a reasonable person would not have regarded the actions of the employee as an unequivocal resignation or abandonment of her employment. Therefore, the employer's actions constituted wrongful dismissal and the plaintiff was entitled to pay in lieu of reasonable notice.

VII. PROPERLY MANAGE PERFORMANCE AND KEEP GOOD DOCUMENTATION

Proper supervision and documentation are essential human resources tools and are invaluable in situations where an employer wishes to terminate an employee for just cause, particularly where the issue is incompetence rather than wilful misconduct.

Dismissal for incompetence is treated differently than other types of dismissal because the termination is treated as non-culpable, meaning that it is not the fault of the employee. In other words, the employee is not engaging in wilful acts of misconduct but rather cannot adequately perform the tasks due to factors beyond his or her control.

Employers can only dismiss employees for incompetence if they meet the following criteria:

- The employer must define the level of job performance required.
- The employer must show that the standards expected were communicated to the employee.
- The employer must show it gave reasonable supervision, instruction and support to the employee and gave the employee a reasonable opportunity to meet the standard.
- The employer must show an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job.
- The employer must show that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

The obligation to warn is especially important where incompetence is alleged. In order to support summary dismissal, an employee's performance must be seriously or grossly incompetent. The courts have clearly stated that employees cannot be held to a standard of perfection in their work.

The case of *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044, is a good illustration of the above principles. The employer argued that it had just cause to terminate the employment of the plaintiff. The Court was clear that this determination must be based on examination of all of the facts and whether dismissal is proportionate to the severity of the misconduct. The Court confirmed that the onus is on the employer to prove just cause and stated:

> The conduct at issue must be 'real incompetence or misconduct,' not 'simple dissatisfaction with performance' or concerns about future conduct…

The employer made various allegations of cause, including incompetence. The Court accepted that there were performance deficiencies on the part of the employee, who was the President and Chief Operating Officer. However, the employer did not diligently oversee the employee about which the Court made the following comments:

> Although an employer's failure to supervise an employee is not a defence for Mr. Kirby's deficiencies, this is an important

> contextual factor. I am satisfied that the board bears some responsibility for consistently accepting and, at times, commending annual reports and other documents authored by Mr. Kirby.

The Court confirmed that an employer can dismiss an employee for incompetence. However, the Court concluded that the employer had given no warnings to the employee and made the following comments:

> I am satisfied that whatever was communicated to Mr. Kirby amounted to a mere admonishment at the most and that he was not given any clear objectives or a deadline for improvement. At no time was there any indication that a failure to meet specific objectives would jeopardize his employment. …
>
> Further, as noted above, if the employer fails to direct and supervise the employee, the courts will be cautious about acceding to the employer's submission that it was entitled to summarily dismiss for incompetence.

While the employer was not successful in alleging cause for incompetence, the employer was ultimately successful as the Court determined that the employee's conduct in relation to mistakes and cover-ups in regards to securities filing was just cause.

The Court in *Marshall v. Old Meets New Furniture Ltd.,* 2009 BCSC 748 also confirmed that unless an employee's performance is grossly deficient, that an employer cannot dismiss an incompetent employee for cause without first adequately warning the employee that continuing failure to meet the required standards would result in dismissal.

These cases highlight the onerous obligations on employers to properly manage its employees and maintain good documentation where employers want to rely on incompetence as just cause for dismissal.

VIII. INVESTIGATE MISCONDUCT BEFORE DISCIPLINING AN EMPLOYEE

Proper investigations are a good human resources practice and will help employers ensure that the discipline imposed will withstand challenge. Employers have an obligation to participate and be honest during the investigation process. Failure to do so by employees can assist employers in justifying the discipline imposed.

The case of *Obeng v. Canada Safeway Ltd.,* 2009 BCSC 8, highlights the importance of the investigation process. In this case, the employer terminated an assistant manager of a Safeway store for just cause. Safeway alleged that the employee had stolen groceries and was dishonest during the investigation of the matter.

Safeway has a zero tolerance for theft, regardless of the amount. The employee in this case had read and signed a copy of Safeway's "Conditions of Employment and Working Rules" and understood that theft could result in dismissal. The employee was also familiar with Safeway's "Code of Business Conduct" which required that employees cooperate with internal inquiries or investigations.

The Court ultimately concluded that nobody could positively say that the employee had taken merchandise from the store without paying for it. However, the employee was not honest during the investigation. In particular, he failed to provide an explanation of what he was doing and denying an important fact which he admitted at trial. The Court ultimately concluded that the employee's dishonesty during the investigation constituted just cause for his dismissal.

In *Lougheed Imports Ltd.*, BCLRB No. B190/2010, two employees had been dismissed for just cause for inappropriate and threatening comments they had posted on their Facebook pages about their managers. The employer had recently been certified by the United Food and Commercial Workers Union and the employees were involved in the certification campaign. The Union filed an unfair labour practice with the Labour Relations Board alleging the reason the employees were fired was because of anti-union animus.

The managers were "friends" of these employees and saw all the posts. The employer conducted separate investigations of each employee and they were provided with a copy of the Facebook postings. During the investigation, both employees denied that they had been disrespectful or had made derogatory comments about management. One employee also denied that he had posted a particular comment and alleged his Facebook account had been hacked. The employer relied on these denials during the investigation meetings in its decision to terminate their employment.

The Board found the comments "…very offensive, insulting and disrespectful". In concluding that the dismissals were justified, the Board noted that the employer conducted detailed interviews with the employees, provided the employees with an opportunity to meet with their Union representatives and allowed them to review copies of the postings before asking them questions about the postings. The Board also noted that if the employee who alleged that his Facebook account had been hacked had admitted the postings, she may have come to a different conclusion.

In *van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73, a senior manager was dismissed for just cause, in part because of the denials he made during the employer's investigation about his conduct at the employer's Christmas party. The employee engaged in various misconduct at the party including inappropriate touching of a female subordinate. He denied this allegation during the employer's investigation of the misconduct. The employer dismissed the employee for just cause for his misconduct at the Christmas party, which it concluded constituted sexual harassment, but also because the employee lied during the investigation.

The Court made the following comments about the importance of investigations:

> However, an employer that fails to conduct an adequate and fair investigation into an allegation of sexual harassment or other misconduct and does not afford the employee a reasonable opportunity to respond to the allegations of misconduct, runs the risk that it may not be able to discharge the burden of establishing cause for dismissal…
>
> An employer who fails to investigate the validity of allegations against an employee, and as a result is unable to establish cause, runs a further risk. If the employer draws unfounded conclusions damaging to an employee's reputation without affording the employee any opportunity to answer those allegations, it exposes itself to a claim for damages for breach of its obligation of fair dealing in the manner of termination of the employment contract ….

The Court did not accept the employee's explanation of the events at the Christmas party. Not surprisingly, the Court concluded that the employee was dishonest when he denied touching a female employee inappropriately. In concluding that the employer had established just cause, the Court noted that the trust and confidence required of the employee as a senior manager. The Court accepted that the dishonesty was serious and directly related to the employment relationship. Therefore, the sexual harassment combined with the dishonesty fundamentally undermined the employment relationship.

IX. DO NOT TREAT A DISMISSAL AS WITHOUT CAUSE AND THEN LATER ALLEGE CAUSE

Two cases will be discussed where employers tried to allege cause after an employee commenced litigation for wrongful dismissal. In both cases, the employer had dismissed the employee without cause and had provided letters of reference. There was no evidence to justify cause in either of these cases. That being said, there may be situations where an employer does find out information after an employee has been terminated that does justify dismissal for cause. In such cases, the employer can use what is called after acquired cause as a defence to any further claims by the employee for reasonable notice. However, this is limited to information that the employer discovered after the dismissal.

The employer in *Marshall v. Old Meets New Furniture Ltd.,* 2009 BCSC 748 terminated the employment of an employee and paid her seven weeks' notice in accordance with the *Employment Standards Act.* Because the *Employment Standards Act* only sets out the minimum severance pay, employees can claim greater amounts of pay in lieu of notice through the courts. The employer also provided the employee with a letter of reference.

After the employee retained counsel, she learned that the employer was alleging just cause because her job performance had significantly deteriorated in a number of areas. However, the employer up to that point had never given the employee any written notice of dissatisfaction with her job performance. While the employer may have had those concerns with her job performance, the Court concluded that the employer never discussed them in any direct way with the employee. As well, the Court noted that the employer's conduct in paying severance in lieu of notice and providing a reference letter were inconsistent with the claim that the employer had just cause for dismissal.

Not surprisingly, the Court found that there was no just cause and that the employee was entitled to pay in lieu in of reasonable notice. The Court also commented that the concerns raised by the employer would not, in any event, justify dismissal without notice.

The employer in *Pritchard v. The Stuffed Animal House Ltd.*, 2010 BCSC 213, dismissed an employee for shortage of work but subsequently took the position it had just cause. As in *Marshall*, the employer provided the employee with a letter of reference. The employer alleged that it found out that the employee had wrongfully used the company expense account and made various other allegations of cause. The Court clearly did not find the evidence of the employer compelling and characterized the situation in this way:

> No issue was made until long after the termination and long after the defendant provided a glowing letter of recommendation. It was only when the plaintiff asserted her right to claim unjust dismissal that the defendant came up with this complaint in an effort to find cause.

Local government employers will want to ensure that they have solid evidence of employee misconduct that was only discovered after the employee was dismissed, in order to allege after acquired cause.

X. CONCLUSION

The above cases highlight the importance of treating employees fairly, reasonably and with respect. Courts, arbitrators and tribunals place onerous obligations on employers in recognition of the importance of the employment relationship and its impact on employees. Properly managing employee performance, keeping good documentation and not basing decisions on assumptions are key strategies in lowering the risk of litigation and providing good defences where litigation is unavoidable.

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