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YOU'RE FIRED! JUST CAUSE FOR DISMISSAL IN CANADA

Stuart E. Rudner

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Publisher's Special Release Note 2023

The pages in this work were reissued in June 2023 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the June 2023 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

You're Fired! Just Cause for Dismissal in Canada is a guide for professionals on the law of summary dismissal in Canada, which is a debatable area as there are no hard and fast rules. While providing a thorough understanding on various causes of dismissal, the publication also helps to understand the types of behaviours that can constitute just cause for dismissal, the requirements for appropriate investigations prior to dismissal, and key cases where courts have considered allegations of just cause for dismissal.

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What's New in This Release:

This release updates the case law and commentary in Chapters 3 (The Contextual Approach), 6 (Conflicts of Interest), 8 (Insolence), 9 (Insubordination), 10 (Breach of Rules or Policies), 11 (Theft), 14 (Harassment), 15 (Violence in the Workplace), 17 (From Cyber-Slacking to Cyber-Stalking: Abuse of Technology and Social Media), 20 (Off-Duty Conduct (Including Online Behaviour)), 22 (Last-Chance Agreements), 25 (Progressive Discipline in the Non-Unionized Environment), and 26 (Investigations).

This release also features the addition of 23 detailed case summaries to the Case Summaries section of the text. Each digest includes a detailed summary of the facts and legal analysis in the decision as well as information about findings related to discipline, just cause, and damages.

Highlights

- **GROUNDS FOR DISMISSAL — CONFLICTS OF INTEREST — ABUSING POSITION FOR PERSONAL GAIN** — In *Breen v. Foremost Industries Ltd*, 2023 CarswellAlta 2546 (Alta. K.B.), the plaintiff was President of a mutual fund that oversaw that oversaw all of the employer's operations, as well as those of other related businesses. The plaintiff was party to an employment agreement requiring him to comply with certain policies, to disclose conflicts of interests, and to obtain approval before dealing with certain "red flag" matters. The employer terminated the plaintiff's after several alleged violations of those provisions, including an allegation that the plaintiff unilateral paid bonuses to himself and deposited those misappropriate funds into his own numbered company. The court dismissed the plaintiff's wrongful dismissal action on the basis that he had been dishonest and fundamentally breached the "faith inherent in the work relationship" while placing his self-interest over that of his employer. Further, the court allowed the employer's counterclaim and awarded it \$480,000.00 in compensatory damages and \$50,000.00 in punitive damages. The plaintiff had embezzled funds from the employer while the employer was in a vulnerable position in relation to him.
- **GROUNDS FOR DISMISSAL — BREACH OF RULES OR POLICIES — EXAMPLES — INNOCENT BREACH OF CONFIDENTIALITY POLICY** — While even technical breaches of an employer's confidentiality policy may warrant discipline, are innocent breaches likely to warrant summary dismissal? In *Ratz-Cheung v. BMO Nesbitt Burns Inc.*, 2024 CarswellOnt 210 (Ont. S.C.J.), the court answered that question in the negative. , the Plaintiff, an investment advisor, was initially dismissed without cause. During the Plaintiff's employment she had a longstanding dispute with several assistants. Her dismissal, unrelated to these issues, resulted in litigation. In examinations for discovery which took place a year and a half after the Plaintiff's dismissal, the Defendant learned for the first time that the Plaintiff had copied a significant amount of emails and documents containing sensitive client information. The Defendant subsequently amended its Statement of Defence to allege after-acquired cause. The Court found the

Plaintiff's actions were a breach of the Defendant's code of conduct and put sensitive information at risk. However, the Court did not find that these actions constituted just cause for dismissal. In making this finding, the Court noted that the Plaintiff did not copy documents that she was not entitled to access during her employment, that she had only copied emails and documents once, and did not disclose or even access the copied materials after obtaining these.

- **GROUNDS FOR DISMISSAL — FROM CYBER-SLACKING TO CYBER-STALKING: ABUSE OF TECHNOLOGY AND SOCIAL MEDIA — TYPES OF INTERNET-RELATED ABUSE — WHATSAPP MESSAGING** — To what extent can or should an employer get involved when employees are sending each other private messages while off-duty that are completely unrelated to the workplace. The Ontario Grievance Settlement Board faced this issue in *ATU, Local 1587 and Ontario (Metrolinx) (Juteram), Re*, 2023 CarswellOnt 11202, where five grievors had engaged in intermittent on-line text communications through WhatsApp via their personal cellphones, but did not communicate on-line at the workplace or during working hours. The WhatsApp app was encrypted so only specific members of the chat group they established could access the discussion. In intermittent discussions within chat group, the grievors referred to female employees as having obtained employment advantages in return for sexual favours and referred to a male past member of executive management. The employer dismissed the grievors for cause. The grievances were allowed. The Board found that by communicating privately through WhatsApp, the grievors brought themselves outside of the Employer's legitimate authority to discipline them for off-duty misconduct. The Board also noted that the Employer had failed to prove the offence of sexual harassment arose out of comments made outside of work, as the impact of communications was not manifest within the workplace. Additionally, the Board noted that the Employer did not follow its own policy when it ignored its mandatory terms including express time limits for investigating and resolving the matter, which undercut the legitimacy of disciplinary actions against the Grievors.