

**MAY 2014**

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Human Resources Professionals Association Toronto Chapter

**UPCOMING**

# EVENTS



DATE & TIME	EVENT	DESCRIPTION	LOCATION
May 28, 2014	LegalEase Series	Occupational Health and Safety Top 5 Updates and issues	CMA - 25 York St., #1100 Toronto. ON
May 28, 2014	Breakfast Series	LinkedIn Presentation	Toronto Marriott Yorkville
June 10, 2014	Annual Golf Tournament	Annual Golf Tourney (SCN) Strategic Capability Network	Glen Eagle Golf Club Caledon, ON
June 17, 2014	Summer Paradise Party	Annual Social Toronto Chapter	'C' Lounge 456 Wellington St. West
June 25, 2014	Breakfast Series	Innovation in Pension & Benefits	The Old Mill, West Toronto
Oct. 29, 2014	LegalEaset Series	Managing Mental Health in the Workplace	CMA - 25 York St., #1100 Toronto. ON
Dec. 10, 2014	LegalEase Series	The Year in Review: Top 10 Issues	CMA - 25 York St., #1100 Toronto. ON

## Surveillance effective in proving Cause for Dismissal

By Ronald S. Minken

In *MacBurnie v. Halterm Container Terminal Limited Partnership*, the Nova Scotia Supreme Court on November 8, 2013 upheld a cause termination based on the employee's breach of the condition of employment regarding providing notice of absences and dishonest misrepresentation of the reason for the absences.

### Background

In four months Mr. MacBurnie missed sixteen days of work of which seven of those days he did not provide notification of his impending absence. Debilitating back pain was provided as the reason for eight absences.

In past the Employer had presented a "Last Chance Agreement" to "give the employee an opportunity to continue his employment". Mr. MacBurnie was requested to obtain a medical note for his absence and to provide advance notice. As no medical note was produced with any complaint of back pain at work, the Employer retained a private investigator.

The Court observed in Mr. MacBurnie's voice message in the early morning he "sounds like he is in pain to the point of debilitation". He said he is taking pills, he relaxed all weekend, but he only got an hour's sleep at a time. 'It's brutal.' The brutal pain radiates from his lower back all the way to his neck. His father is going to take him to the hospital. 'I'll let you know how I make out.' 'It's not good.'"

Surveillance established that “at noon on that day, Mr. MacBurnie left the main entrance of his apartment and went on a twenty-minute walk. The video surveillance shows a spry man without evidence of disability. He started out with a visit to the grocery store”, and thereafter “walked briskly”. “Mr. MacBurnie took the bus out to Dartmouth General Hospital. Never in any of the video captures do we see him slowdown or make any gesture suggesting pain.” “When he was called from waiting to see a doctor, Mr. MacBurnie walked slowly with one hand at his lower back.” After a “four-hour trip”...“there were no signs of 'brutal' pain radiating from his lower back to his neck. Nor did he report to Mr. Baillie as promised.” Early the following morning, Mr. MacBurnie left a voice message indicating that "I won't be moving today. I know that."

Surveillance further determined that at about 1:20 “he left his apartment. He appeared vigorous as he walked to the shopping centre...and patronized a grocery store, a drug store, and a restaurant. With his usual vigor and without showing any pain, he walked to the liquor store...and carried the usual brown bag away towards his home. Mr. MacBurnie failed to call...he is seen in the early afternoon visiting the neighbourhood grocery store and at night making another trip by foot to the liquor store and back home.”

#### **Court Decision**

The Court found that Mr. MacBurnie breached his condition of employment that he give "advance notice for time off" and that the "deliberate breach of an employer's rule or policy about notice of absence is just cause for terminating the employment contract." In this case the requirement had become "an explicit condition of his employment as a result of past transgressions." The Court cited *McKinley v BC Tel*, [2001] S.C.J. No 40 at para 48, "Dishonesty is also another just cause when it gives rise to a breakdown of the employment relationship." In this case the Court determined that "the surveillance establishes the dishonesty."

#### **Lessons for Employees**

Employees should exercise great caution to not breach an employer's rules or policies as they may be conditions of employment justifying a termination for cause without any notice. The Courts view dishonesty that gives rise to a breakdown of the employment relationship very seriously; deceit even about health may justify a cause termination without notice. Seek advice from experienced Counsel when confronted with circumstances that may be considered questionable.

#### **Lessons for Employers**

Employers should remember that Courts will uphold terminations for cause without notice for deliberate breaches of their rules or policies especially where the requirements are explicit conditions of employment and where there is dishonesty that gives rise to a breakdown of the employment relationship. Guidance should be sought from experienced Employment Law Counsel to assure that sufficient evidence is obtained to establish a termination for cause.

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Minken Employment Lawyers is your Canadian source for expert Employment Law advice and advocacy on today's employment law issues.

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