

Change in performance expectation not grounds for cause dismissal

Employee showed improvement after warning under new system, but was terminated at the deadline anyway

BY RONALD MINKEN

POOR PERFORMANCE at work is not always grounds for termination for cause. In *Cottrill v. Utopia Day Spas and Salons Ltd.*, the British Columbia Supreme Court found that Utopia Day Spas and Salons wrongfully dismissed Jennifer Cottrill over alleged performance issues after Utopia had changed her performance expectations.

The Supreme Court of Canada case of *McKinley v. BC Tel* concluded that a “contextual approach” must be taken when an individual is to be terminated for cause, meaning the court needs to look at all the relevant facts and circumstances that led to a “breakdown of the employment relationship.”

The court in *Utopia* needed to determine whether the employee’s misconduct was enough to cause a breakdown in the employment relationship or if it is irreconcilable with the continuation of that relationship. The decision cited *Hennessy v. Excell Railing Systems Ltd.*, which held that where the employee is terminated for cause based on poor performance, the employer needs to show that:

- It has established reasonable and objective standards of performance
- The employee has failed to meet those standards
- The employee has had warning that she has failed to meet those standards and the employee’s position will be in jeopardy if she continues to fail to meet them
- The employee has been given rea-

sonable time to correct the situation.

Jennifer Cottrill worked at Utopia for 11 years as a skincare therapist before her employment was terminated. In 2005, Utopia introduced a new compensation and evaluation system called the “level system” where there were platinum, gold, silver, and bronze levels. When Cottrill returned from maternity leave, she remained in the old system for compensation. However, she was placed into the level system for performance expectations. Cottrill was under the impression that the level system performance standards did not apply to her.

In 2015, the skin care department head and direct supervisor of Cottrill left the company. This is when Utopia’s owner, regional manager, and general manager looked at Cottrill’s file and determined she had been underperforming. The past department head had not been applying the level system to Cottrill’s performance evaluation. On March 13, 2015, the two senior managers had a meeting with Cottrill and gave her a letter advising her of her performance deficiencies and stating that she was not performing at the “platinum” level. They also informed her that she had three months to show improvement by having two out of three “successful” months in the platinum level or her employment would be terminated on June 12.

On June 12, Cottrill was told it

was her last day. She had significantly improved her performance, meeting the criteria on the performance spreadsheet for March/April and April/May, but her employment was terminated for cause anyway. Utopia claimed Cottrill did not have two successful months due to her poor attitude during the mandatory monthly meetings scheduled to track her process over the past three months. Cottrill was never provided with a written termination letter or severance. Utopia stated that the March letter was her termination letter so she had already received more notice than to which she was entitled.

The court held that Utopia did not establish it had cause to dismiss Cottrill. Utopia unreasonably sought to hold Cottrill to performance standards which it has not previously required of her and failed to provide her with a fair and reasonable assessment of her performance. The company did not give any meaningful attention to the improvements for which they were looking. While an opportunity was given to Cottrill to improve, the company had already made up its mind to terminate her for cause. Utopia did not provide Cottrill with an explanation of why her attitude was deficient or why Utopia believed it had cause for her termination. Cottrill also did not have a reasonable opportunity to respond to Utopia’s conclusions before she was dismissed, and the company did not demonstrate that

there was “serious or gross incompetence” such that it could be said that Cottrill repudiated the contract, said the court.

The court held that it was not enough for Utopia to assert Cottrill had a bad attitude. Utopia had to establish that, viewed objectively, the employee had manifested related behaviour in the workplace and that dismissal is a proportionate response.

Lessons for employers

If you wish to terminate an employee for cause based on performance you must follow the appropriate steps, otherwise, they could be entitled to notice under employment standards legislation and common law notice.

Lessons for employees

There are steps employers need to follow if they need to terminate an employee for cause based on performance. Employees who have been terminated for cause or are threatened with being terminated for cause should ensure they have been given sufficient opportunity to save their employment.

For more information see:

- *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2017 CarswellBC 1144 (B.C. S.C.).
- *McKinley v. BC Tel*, 2001 CarswellBC 1335 (S.C.C.).
- *Hennessy v. Excell Railing Systems Ltd.*, 2005 CarswellBC 1164 (B.C. S.C.).

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