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"JUST CAUSE" ROUND-UP

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Introduction

An employer has the ability to terminate an employee without providing them with notice or any other form of monetary compensation if there is cause for the termination. However, to determine whether an employer is justified in terminating an employee for cause, the specific circumstances of the case must first be considered. This contextual approach to termination for cause has been in existence for more then one hundred years. The Privy Council's decision in *Clouston & Co. v. Corry*[2] stated,

> Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.

Though this concept has been accepted for many years, it was only in 2001 that the Supreme Court of Canada established a test to determine whether the context of the dismissal justifies a termination for cause. In *McKinley v. BC Tel*,[3] the majority found that the employer was justified in terminating the employee for cause. Iacobucci J., writing on behalf of the majority, established the contextual approach to be used in determining whether cause for termination exists as follows:

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[2] [1906] A.C. 122 ("*Clouston*").

[3] [2001] S.C.J.No. 40 ("*McKinley*").

> In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.

Since the decision in *McKinley*, there have been 104 (non-labour) Court decisions in Ontario involving the issue of termination for cause. Out of these 104 cases, the Court found the employer to have wrongfully terminated the employee for cause in 64 of the above cases, while in the remaining 40 cases, the Court determined that the employer was justified in terminating the employee for cause.[4] These cases, along with those from the other provinces and territories, have applied the contextual approach outlined in *McKinley* and have furthered the test by developing a number of mitigating factors to be considered in determining whether cause exists. Some of these mitigating factors include the length of time an employee has worked for the employer, the number of infractions an employee has committed during their employment, and whether the employee's actions are incompatible with their employment duties. These factors along with the contextual

[4] See Appendix A.

approach stated in *McKinley* have provided a framework to determine whether or not an employer is justified in terminating an employee for cause.

In 2008 and to date for 2009, the decisions involving termination for cause in Canada demonstrate that the contextual approach and mitigating factors are still alive and well in their application.

Termination for Cause Cases from 2008 – Ontario

Cause Not Found

Brien v. Niagara Motors Inc.

If an employer does not have adequate procedures to address poor performance, including discipline of employees, it is unlikely that the employer will be successful in proving cause for termination. This is what prevented the employer from being justified in terminating the employee for cause in *Brien v. Niagara Motors Inc.*[5]

In *Brien*, the employee was 51 years old at the time of termination and had been working for the employer for 23 years with only two breaks from service to have her children. The employee began her employment as a clerk and at the time of termination held the position of office manager. She had never been disciplined by the employer or provided with any warnings that her performance was unsatisfactory.

[5] [2008] O.J. No. 3246 ("*Brien*").

On September 19, 2003, the employer terminated the employee and provided her with a letter which included a Release for her to sign. The employee took the letter home and read it over. There was no indication in the letter of either gross misconduct, just cause or any other reason for termination. After reading this letter and receiving a letter of reference which indicated that the employee had been terminated due to the elimination of her position, the employee commenced an action of wrongful dismissal.

In response, the employer claimed that the employee was dismissed for cause due to gross misconduct. To support this position, the employer claimed that the employee was consistently late in filing monthly reports, was rude to her co-workers, swore, and was unwilling to work overtime in order to meet deadlines when asked to do so. Additionally, the employee's co-workers claimed that they had trouble dealing with her. However, the employer admitted that there were no procedures in place to deal with poor employee performance or to enforce discipline.

At trial, the Superior Court of Ontario found that the employer did not have cause to terminate the employee. Justice Lafreniere said,

> "I accept the [employee's] evidence that she was not aware the [employer] had any concerns about the quality or timeliness of her work because this information had never been provided to her."
>
> . . .

> I accept the [employee's] submission with respect to the level of incompetence required to warrant summary dismissal and the evidentiary burden on the employer to establish:
>
> 1. Whether the employer has established and communicated objective standards of competence required;
> 2. Whether the employee failed to meet those standards such that there was real evidence of gross incompetence;
> 3. Whether the employee received, and understood, clear warnings and explicit direction that failure to achieve the stated standards would result in the termination of employment;
> 4. Whether the employee was offered reasonable opportunity to improve; and
> 5. Whether the employer condoned the employee's level of performance.
>
> I also accept this onus must be strictly discharged given that summary dismissal is a drastic and most serious step not lightly undertaken.
>
> In this case the [employer] has not discharged his onus. The [employer] has not proved it had an objective standard of performance. Mr. Dyck acknowledged that there was no job description for the [employee] and that there was no document generated by the dealership establishing any deadline for the submission of the financial statements. His position was that the [employee] should be aware from [the employer] somehow. Mr. Dyck's evidence is that the [employee] did not receive any form of progressive discipline and that he would never discipline the bookkeeper. It acknowledged that she was given no warning whatsoever that her job was in jeopardy nor was she given any opportunity to improve her performance and to allow her to maintain her employment."

The Court further stated that, "the [employer] has played hardball and must accept the consequences of that course of action. The [employer] has engaged in bad faith conduct and as a result....the [employee] is entitled to enhanced notice or 'Wallace' damages." Accordingly, the Court decided that the employee was entitled to 24 months notice.

Not following a workplace progressive discipline policy when dismissing an employee will likely prevent an employer from relying on the policy to terminate that employee for cause. This mitigating factor was considered by the Court in *Dawson v. FAG Bearings Ltd.*[6] and resulted in the employer being unsuccessful in establishing cause to terminate the employee.

In *Dawson*, the employee was employed for fourteen years as a machine operator. In her last year of employment, the employee had changed positions and was working as a step-grinder. The employee experienced performance issues in this new position, specifically, difficulties ensuring proper product quality, and after her fourth quality-related incident, the employer decided to terminate the employee for cause on the basis of a progressive discipline policy that was in place for all employees.

At Trial, the Ontario Superior Court of Justice found that there was no cause for the employee's termination because the employer was not permitted to use the progressive discipline policy plan as a "tool to discharge an employee without reasonable notice or payment in lieu thereof." The Court stated,

> "At a minimum, if the Progressive Discipline Policy is to be relied on, it must be followed. I have concluded that [the employee] failed to follow its own policy when deciding to terminate [the employee's] employment.
>
> The Progressive Discipline Policy entitled an employee to notice if a suspension was the possible result of an investigation. [The employee] was not given notice that a suspension was possible arising out of the Discipline Investigation Notice for the incident in August 2005 which was prompted

[6] [2008] O.J. No. 4305 ("*Dawson*").

by the customer complaint. There was no review by Management and the Employees' Committee with respect to this suspension."

Eady v. TrekLogic Technologies Inc.

Although there may be problems with an employee's work performance, unless progressive discipline is applied, these problems may not be sufficient to warrant a dismissal for cause. This was the finding by the Court in *Eady v. TrekLogic Technologies Inc.*[7]

In *Eady*, the employee founded a company. Due to the possibility of growth and financial opportunities, the employee entered into a consulting agreement with the employer resulting in the employee having to report to the employer. Difficulties arose between the employee and employer and a series of meetings were held to remedy the problems. One of the outcomes of the meetings was a change in the employee's responsibilities. Following the meetings, the employee's lawyer wrote a letter to the employer stating that the employer had repudiated the agreement by changing the employee's responsibilities and requested reinstatement of the employee to his previous position. In response, the employer argued that given the employee's poor performance, there was no reason to reinstate him. The employee did not return to work and sued the employer for breach of the consulting agreement. The employer claimed that the

[7] [2008] O.J. No. 1693 ("*Eady*").

employee abandoned his employment by not returning to work, or in the alternative, that there was cause to dismiss the employee.

The Ontario Superior Court of Justice found that the employer had repudiated the agreement between the employee and the employer. Furthermore, the Court found that although there were performance issues with the employee, they did not amount to incompetence constituting cause for termination. The Court stated,

> "In the case at hand, there is evidence of a series of incidents involving different employees. There is no evidence, however, of repeated warnings. Furthermore, the agreement between [the employee] and [the employer] expressly required that [the employee] be given written warnings and an opportunity to improve. I conclude, therefore, that [the employee] was not dismissed for cause."

Link v. Venture Steel Inc.

To successfully establish that an employee has been terminated for cause, the employer must be able to put forth evidence substantiating the alleged improper behaviour, failing which the Court will likely find that the employee has been wrongfully dismissed, as illustrated in *Link v. Venture Steel Inc.*[8]

In *Link* the employee helped set up the employer's company. After seven years of employment, the employer dismissed the employee for cause on the basis that the employee had stolen carpet from the company and had it installed in his house, as well as causing the employer to substitute lower quality steel on one of its purchase orders.

[8] [2008] O.J. No. 4849 ("*Link*").

The Ontario Superior Court of Justice found that the employer had failed to discharge its burden of proof for dismissing the employee for cause. In regards to the carpet, the Court stated:

> "There is insufficient evidence that [the employee] knew the actual value of the carpet and did not pay for it himself. I am not persuaded that he engaged in any improper activity. The evidence, as presented, does not lead me to the conclusion that just cause exists with respect to allegations of impropriety relating to installation of carpet at the [employee's] home..."

In regard to the lower grade steel the Court stated:

> "[The employee] failed to satisfy me that [the employee] 'knowingly caused' steel of an improper grade to be shipped... [The employer] conceded that if the Agway affair occurred as a result of the [employee's] negligence, this would not be sufficient to establish just cause in this instance. When combined with the testimony from [the employee] that he had turned down Agway orders when he did not feel he could supply what was ordered, I am led to the conclusion that [the employer's] allegations against him are unfounded and unproven. [The employer] has failed to discharge its burden of proof and this allegation of just cause must fail. I therefore find that [the employee] was dismissed by [the employer] without cause."

Puhl v. Katz Group Canada Ltd.

If an employer lacks evidentiary proof to substantiate a termination for cause, it is unlikely that the employer will be able to successfully establish that termination was for cause. Such was the situation in *Puhl v. Katz Group of Canada Ltd.*[9]

[9] [2008] O.J. No. 66 ("*Puhl*").

In *Puhl*, the employee held the position of Vice-Chair. The employer experienced a significant economic downturn in 2003. The executives of the company determined that it was the employee's management that was the cause of this problem and decided to terminate the employee for cause on the basis of his failure to execute his duties, negligence, incompetence, misrepresentations, and breaches of fiduciary duty. The employee sued the employer for wrongful dismissal, claiming that there was no cause for the termination.

After reviewing the case, the Ontario Superior Court of Ontario determined that the employer was not justified in terminating the employee for cause. The Court stated:

> [The employee's] employment record disclosed no prior disciplinary measures of any kind. The [employer] had a duty to consider alternatives to summary dismissal and had a duty to give [the employee] an opportunity to answer its complaints. As well, the [employer] should have advised [the employee] of its concern regarding the inventory issue and its impact on the financial health of the company, its view of the seriousness of the problem and have provided [the employee] with a reasonable opportunity to respond. None of that occurred.
>
> There is no evidence of either misconduct or incompetence by [the employee]. The [employer] has not discharged its burden of proof in establishing the existence of just cause. No facts exist to have supported [the employee's] dismissal for cause. In my view, [the employee] was a hardworking, loyal and committed employee who was 'shown the door in a most shabby way'.

Ross v. 413554 Ontario Ltd. (c.o.b. Chouinard Bros. Roofing)

Poor performance, such as insufficient care at work, is not necessarily a justifiable ground for an employer to terminate an employee for cause. The ruling in *Ross v. 413554 Ontario Ltd. (c.o.b. Chouinard Bros. Roofing)*[10] demonstrates this.

The employee had worked for the employer, a roofing company, as both a foreman and a salesperson, for which he was paid commissions. While assuming the latter role, the employee was terminated for cause. The employer claimed that the employee's measurements for jobs were sloppy and his sketches careless, resulting in shortfall of materials and great expense. The employee sued the employer for wrongful dismissal, bad faith and unpaid commissions. The employer claimed that the employee was an independent contractor and in the alternative, that there was the above mentioned cause to terminate the employee.

After finding that the employee was not an independent contractor but rather a dependent contractor, the Ontario Superior Court of Justice found that the employer did not have cause to terminate the employee. The Court stated:

> "As such, there was no evidence presented by [the employer] which showed how much [the employee's] shortages actually cost them, whether such shortages were excessive compared to other sales team members and how much any commission reductions offset such expenses. I find that discussions did take place either at sales meetings or directly between [the employer] and [the employee] concerning [the employee's] measurement issues. However, I do not find that these discussions were framed in the form of verbal warnings. Further, there was no evidence that any written warning was given to [the employee] nor was he given any specific period of time in which to remedy any alleged measurement issues.

[10] [2008] O.J. No. 3381 ("*Ross*").

...

> Based on all of the evidence above, I find that [employee] was a dependent contractor to [the employer]. He was terminated without cause on October 21st or 22nd 2004. As such he is entitled to pay in lieu of notice and bad faith damages."

Smith v. Ramara (Town)

Failure to have vacation time approved will not necessarily warrant termination for cause as illustrated by the ruling in *Smith v. Ramara (Town)*.[11]

In this case, the employee was a heavy equipment operator and worked for the employer for 18 years. Due to stress that the employee was experiencing, he required time off from work. The employee informed his supervisor that he needed the time off, however, he did not inform the Roads Superintendent. Further, the employee failed to confirm with his employer how much vacation time he had remaining. The Roads Superintendent denied that the supervisor had the authority to grant the employee permission to take the vacation time, however there was no written policy of how vacation time was to be arranged. When the employee failed to show up for work, the employer characterized his conduct as a fundamental breach of the employment contract and dismissed the employee for cause. The employee then sued his employer for wrongful dismissal.

The Ontario Superior Court of Justice found that the employer was not justified in terminating the employee for cause. In making this decision, the Court stated:

[11] [2008] O.J. No. 1319 ("*Smith*").

> "I have found that [the employee] did not communicate his intended vacation time. I have found that his hope that it would somehow be communicated and approved was without basis. I recognize that the onus is on him in these proceedings. However, in the context of the demonstrated flexibility in workplace; his basic entitlement to what he took for himself; others knowing his personal circumstances and how to contact him; his overwhelmed state of mind; his irrational reliance that he had told relevant people enough that it would all work out; and his long unblemished employment record; I find that termination is a response out of proportion to the foolish but not defiant failure of the [employee] to attend for work not having properly obtained authorization for leave."

Townsend v. North American Industrial Inc.

The case of *Townsend v. North American Industrial Inc.*[12] is similar to *Smith*. However, this case demonstrates that the history of an employee's employment can make termination for cause unjustified in certain situations.

In *Townsend*, the employee had taken a leave of absence for a sailing trip in 2005. When the employee returned in 2006, he was assigned to work with another company with whom his employer had secured a new contract. On February 19, 2007, the project and contract with the other company finished and the employee was then scheduled to return to work with his employer. However, the employer had removed the employee's supervisory responsibilities. The employee did not approve of this change and decided that he would not report to work on the scheduled date and refused to take the employer's phone calls. However, he had informed the employer's accountant that he would return the following Monday, February 26, 2007. On February 21, 2007, the employer sent the employee a letter characterizing his absence as a resignation and terminating his

[12] [2008] O.J. No. 5193 ("*Townsend*").

employment. The employee brought this claim suing the employer for wrongful dismissal.

The Ontario Superior Court of Justice established that the employer was not justified in dismissing the employee for cause. The Court stated,

> "This is an unfortunate case because the plaintiff was a long time, highly competent and valued employee and the principals of the defendant company, Mr. Peloski and Mr. Hamilton were fair and generous to the [employee] before his dismissal in February, 2007. I find that it was wrong of the plaintiff not to have reported for work and not to have spoken directly to them at some point on February 19 or 20. I do not find, however, in the 'context' or on the basis of the history of the plaintiff's relationship with them that the nature and degree of misconduct warranted his summary dismissal. Through their accountant, they knew that the plaintiff would return to work. They knew and understood the plaintiff's disappointment that he would be back on the road so to speak, but he had been a dedicated employee who had worked long hours and had made significant contributions to North American [sic]. Cause has not been established. The plaintiff is therefore entitled to an award of damages in lieu of notice."

Cause Found

Kellett v. Mazda

Though some forms of inappropriate conduct may not justify a termination for cause, the case of *Kellett v. Mazda*[13] establishes that inappropriate conduct which is inconsistent with the fundamental aspects of an employee's obligations to the employer may justify termination for cause.

[13] [2008] O.J. No. 5620 ("*Mazda*").

In *Mazda*, the employee was the Director of Operations for the employer. He was responsible for the day to day operations of the employer's company. The employee was terminated for cause by the employer after a number of incidents in which the employee made inappropriate comments of a sexual nature or connotation to a number of female co-workers. These comments consisted of the employee referring to a female co-worker as "'baby' or 'honey', asking if she had missed him on the weekend, asking whether she was screaming his name the previous night, inquiring about her waxing her legs, inquiring about her readjusting her underwear, or commenting about her clothing or about her licking her lips." To another female co-worker, the employee asked "if she had gone on a date on the weekend and if she had left her footprints on the head liner of her car, the head liner being the interior of the roof of the vehicle". The employee also asked a female co-worker to "lower the zipper on the sweater which she was wearing."

After these incidents were reported, the employer investigated the matter and subsequently issued the employee a strong and explicit warning letter stating that they believed the sexual harassment that the employee had committed was incompatible with his supervisory position. Furthermore, the letter stated that if the employee acted in such a manner again or acted unprofessionally in any other manner he would be terminated for cause. Instead of terminating the employee at this time, the employer simply suspended him for one day with pay. Following this suspension, the employee allegedly engaged in similar acts of sexual harassment which lead to his termination for cause.

The Ontario Superior Court of Justice found that the employer was justified in terminating the employee for cause. In reaching this decision, the Court stated:

> "The sexual harassment evidence herein is properly taken into account in deciding whether there was just cause for dismissal. The [employer] did not condone or waive these serious acts of employee misconduct. It disciplined the [employee] and warned him by letter about the seriousness of the conduct in issue.
>
> The evidence herein demonstrates with clarity, in my opinion, that the [employee] repeatedly breached his obligations to the defendant as its most senior operational manager and one of its two most senior employees. These breaches, particularly sexual harassment of female subordinates, his comments to Messrs. Lorence and Patsakos in August 2006 and his intention in making these comments were, I find, inconsistent with fundamental aspects of the [employee's] obligations to the [employer]. I find, therefore, that the [employer] had just cause to dismiss the [employee] as it did."

Termination for Cause Cases from 2008 – Other Provinces

Cause Not Found

Hodgins v. St. John Council for Alberta (c.o.b. St. John Ambulance) **– Alberta**

Although an employee may engage in several incidents of misconduct, the totality of these actions may still not justify termination for cause. In such cases, a form of

discipline of a smaller magnitude is more appropriate. This is what the Court in *Hodgins v. St. John Council for Alberta (c.o.b. St. John Ambulance)*[14] ruled.

In this case the employer was appealing the decision of the Trial Judge who found that the employer was not justified in dismissing the employee for cause. The employee had agreed to a harassment policy that the employer had enforced at the workplace. Following this agreement, there were complaints made against the employee at the workplace, which the employer found to be in violation of the harassment policy. On this basis the employer decided to terminate the employee for cause.

Quoting the Alberta Court of Appeal, the Trial Judge stated that:

> "[T]he policy thus adopted set out a very broad definition of harassment, and that it therefore provided for means of determining whether that harassment had occurred and for the chief executive officer of the [employer] to decide on appropriate corrective measures if the harassment was established.
>
> Taking the policy as a whole…the [employer] had not proven that, under the terms of the employment contract including the policy, the basis for summary dismissal of the [employee] without notice had been made out. The effect of harassment policies upon employment contracts is a fact sensitive question, even if the policies of the general law will apply.
>
> [I]n light of the facts and in light of the content of the harassment policy and of the employment contract as a whole, a 'cause' sufficient to justify termination would in law have to be a 'cause' which involves a breach of the employment relationship of such a magnitude as to be sufficient to declare the employment relationship terminated by the employee."

[14] [2008] A.J. No. 484 ("*Hodgins*").

The Trial Judge concluded that three of four items of complaint raised about the employee constituted harassment as defined in the policy. However, the Judge found "that none of those incidents had been proven to be enough to justify the summary dismissal of the respondent as compared to other 'appropriate corrective measures' in all the relevant circumstances of this case."

The employer appealed this decision to the Alberta Court of Appeal. The Court of Appeal stated "that the conclusion reached by the trial judge was reasonable on the facts and sound on the law."

Pires v. Vectis Technologies Inc. **– British Columbia**

As the British Columbia Supreme Court found in *Pires v. Vectis Technologies Inc.*,[15] an employee's criticism of their employer's inabilities as a manager is not adequate misconduct to warrant a termination for cause.

In *Pires*, the employee was employed by the employer as an Engineering Manager. During the course of the employee's employment, the employer company was experiencing financial difficulties and had asked the employee to take a pay cut for three months and invest money personally in the company or recruit friends and family to do so. The employer also asked the employee to forgo the salary increase promised in his employment contract. Despite these actions, the employer was unable to make ends meet and had to terminate some employees, including the employee who brought this action.

[15] [2008] B.C.J. No. 1288 ("*Pires*").

The termination letter provided to the employee stated that the employer was unable to continue to employ him due to economic circumstances and that he would be receiving one week's severance, the amount required to meet the contractual obligations when sufficient funds are available, and a cheque for any salary and vacation pay owing.

When the employee came back into work to pick up his personal belongings and his one week severance cheque, he asked the employer if the remaining money would be sent through the mail and the employer said that he would be receiving the money when the company received a tax credit that they were expecting. However, this money was never provided to the employee. The employee then brought this claim for wrongful dismissal. The employer claimed cause for terminating the employee on the grounds that the employee had made negative comments about his employer in the presence of an investor.

The British Columbia Supreme Court stated that the employer did not have cause to terminate the employee. In reaching this decision, the Court stated:

> "The [employer] has failed to demonstrate that [the employee] committed acts that constitute cause for dismissal as provided in the Contract... I am not persuaded that [the employee's] criticisms of [the employer's] abilities as a manager constituted a breach of his obligations owed to [the employer].
>
> [The employee] was dismissed by [the employee] for precisely the same reason the other employees' employment was terminated -- the company had run [out] of funds and could no longer pay them. [The employee] is therefore entitled to be paid in accordance with the terms of the Contract providing for a payment of three months, plus three weeks of pay."

***Saulnier v. Stitch It Canada's Tailor Inc.* – New Brunswick**

Although an employer has given sufficient warning to their employee regarding quality of work needing to be improved, the employment relationship may not have been irreparably damaged by the employee's poor performance, therefore not permitting an employer to terminate the employee for cause. This is how the New Brunswick Court of Queen's Bench ruled in *Saulnier v. Stitch It Canada's Tailor Inc.*[16]

The employee in *Saulnier* was employed by the employer as an acting manager and seamstress. During the employee's employment, the employer became concerned about the employee's performance. These concerns were addressed by the employer through non-disciplinary meetings where the employer gave the employee a form of a "pep-talk" in regards to the work she was producing.

Following these meetings there continued to be complaints by customers in regards to the employee's work. The employer responded to these by placing the employee on a period of probation which emphasized the "importance of her making improvements in a number of areas including emphasizing the importance of her adhering to Stitch It policies of 'right away, same day, next day service'." The performance improvement plan also emphasized that if the employee failed to meet her obligations or to demonstrate the required improvement, it could result in her termination. Despite the serious words

[16] [2008] N.B.J. No. 296 ("*Saulnier*").

used in this performance improvement plan, the employer also made several comments to the employee that were seen as being of a softer nature.

Once the probation period ended, there were more complaints made by customers regarding the quality of the employee's work. As a result, the employer terminated the employee's employment for cause.

The New Brunswick Court of Queen's Bench held that the employer was not justified in terminating the employee for cause. In reaching this determination, the Court stated:

> "Against the background of all the cases of the courts, labour arbitrators favouring the concept of graduated discipline and warnings and respect for employees, I am not satisfied that it was fair for the [employee] to be summarily fired in March. To put it another way, I am not satisfied that the work relationship between the [employee] and her employer was irreparably damaged by her alleged mistakes...
>
> Finally, I would note that the performance evaluation form was so positive, it softened the 30/60/90 day Accountability Plan. That 30/60/90 Accountability Plan imposed a responsibility on the employer to conduct regular meetings and to record such meetings as they occurred. I cannot interpret the words 'formal meeting' at the end of 30, 60 and 90 days as implying just a casual conversation at work. That suggests to me a minuted, recorded meeting. Formal meeting seems to me to suggest nothing less and there is just no evidence here of the employer having done what it could have done to properly manage and train the employee to do what the employer wanted to have done here.
>
> Against this background, I find the plaintiff was wrongfully dismissed and I find the defendant has not proven just cause for dismissal."

An employer's belief that an employee stole from the company, thereby impairing the employment relationship, may not justify a termination for cause. The New Brunswick Court of Queen's Bench made this determination in *Slipp v. Woodstock (Town)*.[17]

In *Slipp*, the employee worked for the employer at the Town's reception desk. While she was working for the employer three bank deposit packages went missing over a three month period. This was discovered by the employer when the monthly statements were being reconciled with the deposit slips. The situation was investigated by the police and the employee agreed to take a lie detector test in relation to her knowledge of the missing funds. The employee failed the lie detector test, yet no criminal charges were laid. Despite failing the test, the employee claimed that she was not responsible for taking the missing funds.

Shortly thereafter, the employer provided the employee with a termination letter indicating her immediate termination for cause due to the missing funds. The letter also stated that the missing money was under the employee's care and control, that she had admitted responsibility for the missing funds and that she had failed a lie detector test in relation to the missing money. The employee brought this action claiming wrongful dismissal.

[17] [2008] N.B.J. No. 222 ("*Slipp*").

After reviewing all of the fact of the case, the New Brunswick Court of Queen's Bench determined that the employer was not justified in terminating the employee for cause. The Court stated:

> "In my opinion, based on the information available to it, the [employer] did not have cause to dismiss [the employee]. The polygraph results cannot be relied on by the Court as evidence that [the employee] took the funds and in these circumstances the law does not permit the [employer] to rely on them in assessing its options. No authority was presented to me to support the proposition that the [employer] was in any way entitled to rely on the polygraph test results as a basis for establishing that her conduct was unacceptable to the point it had cause for her dismissal.
>
> The [employer] argued that given the special nature of [the employee's] position and the evidence of the missing deposits, including the results of the polygraph test, the [employer] had no choice but to dismiss and had the right to do so for cause. I have reviewed the authorities put forward by the [employer] for this position... I do not accept these cases as authority for so general a proposition."

Cause Found

***Almeida v. South Okanagan Learning for Little People Society* – British Columbia**

If an employee breaches a fundamental duty of their employment, then an employer may be able to terminate that employee for cause. This was the principle that was applied by the British Columbia Provincial Court in *Almeida v. South Okanagan Learning for Little People Society*.[18]

[18] [2008] B.C.J. No. 1387 ("*Almeida*").

In *Almeida*, the employee had been employed by the employer for ten years as the head teacher's assistant. Her employment duties consisted of supervising the children at the school alongside the head teacher. This employment responsibility required the employee to guarantee the children's safety at all times. During the course of the employee's employment, there had been a few occasions where some of the children had been unaccounted for. The employer had advised the employee that if a child were to be unaccounted for again, then the employee may be in jeopardy of losing her job with the employer. Further incidents occurred and resulted in the termination of the employee for cause. The employee claimed that she had been wrongfully dismissed.

The British Columbia Provincial Court found that the employer was justified in terminating the employee for cause. The Court stated:

> "It is a fundamental condition of employment by the [employer] that the [employee] supervise the children and keep them safe. This duty is essential and imperative.
>
> [The employee] was not able to meet this condition a number of times. On four occasions in her last eight months of employment, children went missing. This justifies dismissal for cause."

Backman v. Maritime Paper Products Ltd. **– New Brunswick**

The same principle from the *Almeida* case mentioned above was applied by the New Brunswick Court of Queen's Bench in *Backman v. Maritime Paper Products Ltd.*[19] in regards to a supervisor viewing pornography at work.

[19] [2008] N.B.J. No. 249 ("*Backman*").

In *Backman*, the employee was employed by the employer as a Structural Design Supervisor where he supervised two other employees. In accordance with his employment, the employee had signed an "Acceptable Use Policy".

Throughout the employee's employment he had used the internet to access inappropriate websites. The employer had responded to this conduct by providing the employee with written warnings. The last warning stated that "Any further incidents of this nature will result in immediate termination of your employment".

Three and a half years after this last written warning, the employer decided to audit the employee's computer. The employer found that the employee had been accessing inappropriate websites and pornographic websites. The following day, the employer audited the employee's computer again and found that the employee had engaged in the same conduct for approximately an hour and a half. The same result was discovered eight other times in the same month. The employer then terminated the employee for cause. In response, the employee alleged that he had been wrongfully dismissed.

After reviewing the facts of this case, the New Brunswick Court of Queen's Bench determined that the employer was justified in terminating the employee for cause. The Court stated:

"After considering all the evidence against the background of the legal authorities, I find that [the employee's] repeated viewing of internet pornography at work in October 2006 was a serious matter. Also I find that it was a pattern of behaviour that destroyed the employer's trust in him as a supervisor.

Accordingly I find that the employer has proven that it had just cause to dismiss [the employee] without notice."

Termination for Cause Cases from 2009 (to date) – Ontario

Cause Not Found

Jones v. Patriot Forge Co. – January 23, 2009

An employer may not be justified in terminating an employee for cause where a less extreme form of discipline would have been more appropriate. This was what the Ontario Superior Court of Justice concluded in *Jones v. Patriot Forge Co.*[20]

In *Jones*, over the course of the employee's employment with the employer he had made many errors and committed many transgressions. Among these were the employee being late for work, being absent from work without a justifiable explanation, making errors on shop orders, and damaging equipment. The employee was warned and disciplined for each of these actions. The employer then terminated the employee for cause on the basis of the totality of the employee's errors and misconduct. The employee sued the employer for wrongful dismissal.

[20] [2009] O.J. No. 294 ("*Jones*").

The Ontario Superior Court of Justice determined that the employer was not permitted to terminate the employee for cause. Instead, a less extreme form of discipline would have been the appropriate response in the circumstances. The Court stated:

> "[The employee] made errors and he was warned or disciplined as was appropriate. However, to terminate his job without notice was indeed harsh. I conclude that the [employer] has not proven on a balance of probabilities that the acts of [the employee] constituted a repudiation of the employment relationship allowing the [employer] to terminate the relationship without notice."

Katz v. Canada Mortgage & Lending Corp. – January 29, 2009

A lack of evidence of previous warnings or progressive discipline may prevent an employer from establishing cause to terminate an employee as illustrated in the Ontario Superior Court of Justice's decision in *Katz v. Canada Mortgage & Lending Co.*[21]

In *Katz*, the employee had been employed by the employer for six months as a Sales Associate. Immediately prior to the employee being terminated, the employer requested a meeting with him. During this meeting the employee was terminated for cause on the basis that he did not follow proper policy and failed to follow the system of telephoning clients personally to confirm their subsequent appointments. The employee brought a claim for wrongful dismissal against the employer.

The Ontario Superior Court of Justice found that the employer did not have sufficient grounds to terminate the employee for cause. In rendering this decision, the Court stated:

[21] [2009] O.J. No. 902 ("*Katz*").

> "There was no evidence from the [employer] as to any previous warnings or progressive discipline with respect to this issue. No employee file with respect to the [employee] was introduced as evidence.
>
> On the evidence before me, I find that the [employer] did not have sufficient cause to terminate the employment of the [employee] and therefore, the [employee] was entitled to appropriate notice or in the alternative, damages in lieu of notice."

Cause Found

Corso v. NEBS Business Products Ltd. – March 17, 2009

The Ontario Superior Court of Justice decision in *Corso v. NEBS Business Products Ltd.*[22] illustrates that an employer may be permitted to terminate an employee who has deceived the employer, thereby resulting in a breakdown of trust between the parties.

In *Corso*, the employer had developed a computer system which provided computer payroll services to businesses. The employer hired the employee as the Director of Sales and Marketing of the Payroll Services Division. Part of the employee's responsibilities included finding new products and services that could be sold to the employer's customers. In assuming this role, the employee signed a conflict of interest and disclosure of proprietary information agreement in which he acknowledged that he had read and understood and acknowledged that he was required to notify the company in advance before undertaking any commitment that might create a conflict of interest.

During his employment, the employee conceived a plan that would allow companies to pay their accounts payable using an internet-based service. As he was not a programmer, he enlisted a software developer also employed by the employer to participate in the

[22] [2009] O.J. No. 1092 ("*Corso*").

project and write the source code. The employee asked the software developer to keep the project confidential. While working on the project, the software developer expressed concerns to the employee that the project was a conflict of interest. The employee told the software developer that he would acquire the correct approvals.

Despite the employee's attempts in keeping the project a secret, word of it leaked out and the employee was confronted by his supervisor about these rumours. The employee denied any involvement in the project. Eventually, the employee admitted to the project, but claimed the he thought he was not doing anything in violation of the company agreement to which he had agreed.

While investigating the issue, the employer discovered a large number of pornographic pictures in one of the employee's personal files on the company computer that the employee used. The employer suspended the employee with pay pending the completion of the company's investigation and ultimately terminated the employee for cause. The employee then brought a claim against the employer for wrongful dismissal.

The Ontario Superior Court of Justice found that the employer was justified in terminating the employee for cause. In reaching this conclusion, the Court stated:

> "Of themselves and probably collectively...the use of company resources and the pornography would not justify termination for cause. They would justify a warning or other discipline, but not dismissal without notice. The more serious deceit was [the employee's] concealment of the eVault project

> in the face of direct questioning. It justified the employer's conclusion that he could not be trusted.
>
> I conclude that [the employee] irreparably breached the foundation of the employment relationship and that the company was justified in concluding that he could not be trusted. It would not be realistic to expect the company to impose some lower level of discipline short of severance."

Hillcoat v. Jump Logistics Inc. – February 17, 2009

When an employee commits several incidents of misconduct and has been warned by the employer for each one, the employer may be permitted to terminate the employee for cause if the employee continues to commit such acts. The Ontario Superior Court of Justice concluded this in *Hillcoat v. Jump Logistics Inc.*[23]

In *Hillcoat*, the employee was employed by the employer as a truck driver. During the course of his employment, the employee was found to have committed a number of incidents of misconduct to which the employer had responded with warnings. The misconduct included: driving for the employer with the smell of alcohol on his breath, behaving abruptly and aggressively, urinating in the parking lots of the employer's customers, parking his truck illegally near his home at night, and appearing to be drunk when delivering a package to one of the employer's customers. It was after this last incident that the employer terminated the employee for cause.

[23] [2009] O.J. No. 607 ("*Hillcoat*").

The Ontario Superior Court of Justice found that the employer was justified in terminating the employee for cause. The Court stated in its conclusion:

> "I am satisfied that [the employee's] conduct, culminating in the sixth incident described above, amounted to a repudiation of the employment relationship; it was conduct that was plainly incompatible with the continued subsistence of that relationship. Accordingly, just cause for dismissal has been made out."

Termination for Cause Cases from 2009 (to date) – Other Provinces

Cause Not Found

***Kalsi v. Greater Vancouver Associate Stores Ltd.* – British Columbia – March 4, 2009**

Where theft is the basis for terminating an employee for cause, an employer may not be permitted to terminate for cause if it is determined that the employee did not intend to commit the theft for which he/she is being held responsible. The case of *Kalsi v. Greater Vancouver Associate Stores Ltd.*[24] applied this principle in its ruling.

In *Kalsi*, the employee worked as a mechanic at the employer's Canadian Tire store for 16 years until he was accused by the employer of stealing a light bulb from the workplace. The employer alleged that the employee arrived at the workplace while he was off work due to an injury and stole a light bulb from a display case in the store and installed it in his vehicle. The employee denied the theft allegation, stating that he took

[24] [2009] B.C.J. No. 390 ("*Kalsi*").

the light bulb, but contended that he told another employee that he would return the light bulb once he determined whether it fit his vehicle.

After the alleged theft, the employee's supervisor informed the employee that he would be terminated, but after further discussion it was decided that the employee would just be suspended for 30 days. However, the suspension continued for approximately four months.

Following these four months of suspension, the employee was called to the store headquarters and told not to bring a lawyer. During this meeting he was informed by his employer that he was being terminated for cause. The employee subsequently brought this claim for both wrongful dismissal and false imprisonment.

After reviewing the facts of this case, the British Columbia Supreme Court concluded that the employer did not have grounds to terminate the employee for cause. In reaching this conclusion the Court stated:

> "Had [the employee] indeed closed down the hood of his car and left, it would have been the easiest of tasks for store security to have found out that [the employee] had entered the store and told the mechanics he was going to replace a light bulb, had spoken to the retail clerk about a light bulb, and that a light bulb was in fact missing from the display case. Those facts together with the evidence that [the employee] had seen the security officer in the store on his arrival, all make it unlikely that [the employee] intended to do other than as he announced, namely to replace the light bulb with the assistance of the mechanics.

Thus I do not find [the employee] intended to steal the light bulb, and the case for just cause is not made out."

Cause Found

***Canelas v. People First of Canada* – Manitoba – March 24, 2009**

Where the nature of an employee's position requires him/her to embody certain characteristics, such as sensitivity, confidentiality, integrity and trustworthiness, an employee who engages in conduct in violation of these characteristics may be terminated for cause as illustrated in the case of *Canelas v. People First of Canada.*[25]

In Canelas, the employee was hired by the employer, a government organization established to raise public awareness and support for intellectually disabled Canadians and their families, as a Community Inclusion Project Facilitator. During the probationary period, the employee accumulated significant overtime hours and was not paid for this time. As the issue of overtime pay had not been explicitly addressed at the time of hiring, shortly after the probationary period ended, the employee requested payment for the overtime hours worked. In response, the employer agreed to pay the overtime hours, but informed the employee that in future, any overtime must be approved in advance. The employer further informed the employee that given the employer's status as a government organization, their budget would not permit additional expenditures for overtime. As a result of the additional monies paid to the employee, which were not part

[25] [2009] M.J. No. 88 ("Canelas").

of the budget, the employer placed the employee on an unpaid leave of absence for approximately six weeks.

During this time, the employer discovered that the employee had sent a series of emails in which he made disparaging comments about the employer as well as disclosed confidential information that had negative repercussions for one of the employee's co-workers who suffered from an intellectual disability. As a result, the employer terminated the employee, providing him with two weeks' pay in lieu of notice. The employee subsequently sued the employer for wrongful dismissal.

Although the employer's termination letter was silent regarding the issue of cause, the Court nevertheless found that the employer had grounds to terminate the employee for cause. The Court's reasoning was as follows:

> "In my view, having regard to the vulnerability of [the employer's] members and the obligations of [the employee] to maintain standards of sensitivity, confidentiality, integrity and trustworthiness, [the employee] breached a fundamental obligation to his board and the people whom it serves. He made an unwarranted negative comment about the integrity of his employer or superior to a person with whom his employer had dealings. He disclosed to that person some confidential information, causing unnecessary anxiety to a vulnerable board member. I find that this amounts to serious misconduct, incompatible with his duties and prejudicial to [the employer's] fundamental goal. [The employee's] continued employment would jeopardize to a significant degree the credibility of [the employer]. Cause existed in the context of the circumstances of this case. On this ground alone, the action should be dismissed."

***Bishop v. Cragg* – Nova Scotia – February 6, 2009**

The Nova Scotia Small Claims Court decision in *Bishop v. Cragg*[26] illustrates that in situations where an employee's misconduct strikes at the heart of the fundamental relationship between the employer and the employee, then the employer may be justified in terminating the employee for cause.

In *Bishop*, the employee worked at the employer's law firm without an exact description as to what her job was, but helped in the office by doing the tasks of a receptionist, legal assistant and a para-professional. During the course of her employment with the employer, the employee and a co-worker had entered into discussions with the employer surrounding the issues of office politics and office procedure. The employer did not find that these discussions made for a harmonious working relationship. At one point the employer met with the employee over lunch in order to straighten matters out, such as her poor practice with respect to Wills. At the end of the meeting the employee stated that she would do better. A similar meeting was held between the co-worker and the employer.

In addition to these matters, the office manager of the employer's law firm had resigned from her position and the employer hired a new office manager. According to the employer, the two employees were not willing to take direction from this new manager.

Following the hiring of the new office manager, complaints were received by another lawyer and a co-worker that the two employees had engaged in inappropriate conduct,

[26] [2009] N.S.J. No. 79 ("*Bishop*").

including leaving the reception area unattended after being instructed not to do so on more then one occasion, and accessing and reading another lawyer's e-mails. Due to this latter incident, the employer terminated the two employees for cause. The employees sued the employer in Small Claims Court for wrongful dismissal and their entitlements to pay in lieu of notice and unpaid vacation time.

The Nova Scotia Small Claims Court found that the employer was justified in terminating the employees for cause. The Court stated:

> "In itself, 'just cause' can arise from a single incident or from a collection of incidents 'built up over time'.
>
> Regardless, 'just cause' must amount to the type of behaviour which strikes at the fundamental relationship between the employer and the employee. In short, whenever an employee has so misconducted himself or herself when considered against the backdrop of the employer's operations, broadly defined, that an abject disinterest in those operations has been shown, 'just cause' will be held to have been established...
>
> In summary, a court must assess all relevant circumstances to determine if, in a particular case, insubordination justifies summary dismissal.
>
> I am satisfied...that the [employer] established cause to summarily terminate the [employees'] respective employments on September 12, 2006. I find in the circumstances that even the single incident of accessing other people's e-mail sufficient to establish that cause existed.
>
> My conclusions in this regard have been driven by several factors.
>
> First, e-mail, like all forms of restricted communication, regardless of the casual approaches which have been permitted to develop around it, is designed and expected to be private.
>
> Second, employers must be free to be able to have open and free-wheeling yet confidential discussions about their employees in order to ensure that

> their business enterprises and professional operations function smoothly and properly.
>
> Third, while far from ideal, e-mail messaging has become a preferred form of communication for many people. It is there that they record their thoughts, their criticisms, their praises, their observations and their suggestions with respect to improvements. If they cannot do so confidentially, the 'chilling effect' would be profound.
>
> Fourth, it would be impossible for any employer to maintain any form of standard behaviour or discipline if all of its thoughts and communications in that regard were open to the employees who were the subject or potential subject of them."

***van Woerkens v. Marriott Hotels of Canada Ltd.* – British Columbia – February 2, 2009**

An employer may be permitted to terminate an employee for cause if such an employee has committed a serious act of misconduct, such as sexual harassment, and furthered such misbehaviour by being dishonest with the employer during investigations into the alleged misconduct. Such a situation and result occurred in the case of *van Woerkens v. Marriott Hotels of Canada Ltd.*[27]

In *Marriott*, the employee was the Director of Sales and Marketing for the employer. On December 10, 2006, the employee attended the employer's holiday party, which he was supervising for the employer. At this party, the employer alleged that the employee permitted excessive consumption of alcohol, engaged in sexually suggestive dancing, and condoned an "after-party" where co-workers attended and continued to drink heavily. At this after party, the employee engaged in inappropriate sexual touching of a female co-

[27] [2009] B.C.J. No. 137 ("*Marriott*").

worker. The employer investigated the misconduct of the employee, and when the employee was questioned during the investigation, he denied the claims. At the end of the investigation, the employer decided to terminate the employee for cause. The employee brought this claim on the basis that he was wrongfully dismissed.

After reviewing the facts of the case, the British Columbia Supreme Court determined that the employer was justified in terminating the employee for cause. In reaching this conclusion, the Court stated:

> "Here, [the employer] was satisfied, correctly, that the [employee] had engaged in a serious act of sexual harassment. The seriousness of the harassment combined with the [employee's] denial of any misconduct, rendered a warning inappropriate in this case. [The employee's] denial limited the options available to [the employer] once it had determined that the harassment had occurred...In the face of the [employee's] denial, this was not a case where an apology might restore the [employee's] working relationship with both the [employer] and [female co-worker], or where the [employee] would likely have been responsive to some form of corrective discipline short of termination of his employment.
>
> I turn now to [the employee's] employment relationship with [the employer]. The [employee] had no prior disciplinary record, and had almost 22 years of service with the [employer]. He was a valued senior employee who until the 2006 holiday party had served his employer well. These are all factors that deserve considerable weight in the assessment of whether [the employer's] dismissal of the [employee] was a proportionate response to the seriousness of his misconduct. However, in this case, those factors are outweighed by the fact that the [employee] was a senior manager, well versed in [the employer's] policies. He knew that his conduct with [the female co-worker] at the after-party was completely inappropriate. Yet despite this, he engaged in serious sexual harassment in breach of his duties to protect subordinates, and to protect his employer. Rather than setting a positive example for his subordinates, he engaged in inappropriate behaviour of a sexual nature in plain view of other...employees and thereby jeopardized the respect and authority he required for the discharge of his duties as a senior manager.

...

This case involved a single incident of dishonesty by the [employee], rather than a pattern of dishonest or fraudulent behaviour extending over a period of months or years. However, the [employee's] false denial of misconduct was directly related to his employment duties. He lied about his conduct toward a subordinate during an event for which he had managerial responsibilities. He denied conduct that he knew to be wrong, and in contravention of his employer's policies. In this context, the [employee's] dishonesty, although confined to a single act, was serious.

...

While the [employee's] consumption of alcohol at the holiday party was not, in itself, a sufficient cause for dismissal, it was a factor which the [employer] was entitled to take into account in assessing its response to his misconduct. The [employee] consumed alcohol to the point where it impaired his judgment and affected his behaviour that evening. His consumption of alcohol showed very poor judgment when he was one of two senior managers responsible for the supervision of the holiday party. That lack of judgment and its consequences, all contributed to [the employer's] loss of trust and confidence in the [employee].

I find that [the employee's] serious sexual harassment of [the female co-worker] combined with his dishonesty during the investigation breached the faith essential to the working relationship between [the employer] and the [employee], and was fundamentally inconsistent with the continuation of the employment relationship.

The [employer] has justified its dismissal of [the employee] for cause."

***Obeng v. Canada SafewayLtd.* – British Columbia – January 7, 2009**

Where an employee is dishonest with the employer and the employee's position requires the utmost of honesty and truthfulness, the employer may be permitted to terminate the

employee for cause due to this dishonesty. The British Columbia Supreme Court used this principle in deciding the matter in *Obeng v. Canada Safeway Ltd.*[28]

In *Obeng*, the employee was the 1st Assistant Manager for the store location where he worked for the employer. When he was hired, he signed the employer's "Conditions of Employment & Working Rules". The employee understood that this document stated that he could be terminated for breach of the rules in this document.

Theft was a large problem at the employee's store location. As a manager, the employee understood that he had to act as the model of behaviour for the other employees.

At the end of one of the employee's shifts, he was walking through the store taking note of empty areas on shelves that needed to be restocked for the next day. The employee claimed that it was not uncommon that during this walk of the employer's store he would come across merchandise that had been put on the wrong shelf by customers throughout the day. His practice was to pick up the items and put them into a basket, and then have the service clerks and cashiers put the items back in the right place. Other employees claimed to have seen at this time the employee grab shopping bags and take them with him while he was picking up the items off the shelves. The employee then headed to the upstairs office, and according to another employee, he was carrying three grocery bags that had items in them. The employee then left at the end of his shift and these

[28] [2009] B.C.J. No. 10 ("*Obeng*").

employees claimed that he left with the shopping bags and did not pay for the items, although the employee claimed that he had no such items with him.

The next day a co-worker informed the store manager that she had seen the employee with three grocery bags that seemed to contain groceries. When the employee came in for his next shift, the manager called the employee in his office to meet with him and the HR advisor. The manager questioned the employee in regards to the alleged theft and the employee denied the claims but did not provide an explanation to the manager or the HR advisor of exactly what he was doing. At the end of the meeting the manager suspended the employee while they conducted further investigations into the matter.

A few days later the employee was contacted by his employer and was questioned about the allegations of theft. Again the employee denied the theft, but still did not provide an explanation to the employer what he was doing. The employer felt that the employee was being dishonest with him and decided to terminate the employee for cause. The employee subsequently sued the employer for wrongful dismissal.

The British Columbia Supreme Court found that the employer had grounds to terminate the employee for cause. The Court stated:

> "By failing to respond in a complete and truthful manner, [the employee] breached the implied duty of honesty and faithfulness owed by him to [the employer].
>
> ...

Here, part of the context involves the nature of [the employer's] business, one where theft is a serious threat and is not tolerated. [The employee] knew that any theft could result in termination. [The employee's] position as an assistant manager, a person in whom management functions are entrusted and who must model appropriate behaviour, is another part of the context. [The employee] knew that it was particularly important that managers be seen to be honest. [The employer's] Conditions of Employment and Working Rules, and its Code of Business Conduct, describing what is expected of employees during an investigation, also form part of the context. [The employee] knew that he had a duty to make full and truthful disclosure, and that [the employer] must be able to trust its managers to be honest and truthful.

Based on his evidence at trial, on the evening of August 28, [the employee] was simply carrying out normal duties of an assistant manager. However, [the employee's] failure to speak up when interviewed by [the manager] particularly when he must have known that [the employer] was looking for an explanation - gave weight to what the other employees reported. He failed to provide an explanation of what in fact he was doing, either to [the HR advisor] when he was interviewed on August 30, or to [the employer] and [the manager] at the meeting the following week. [The employee] does not dispute this.

...

In my view, [the employee's] dishonesty in relation to the investigation of his conduct on August 28 justifies his termination."

What to Employ in the Workplace to Help Ensure Termination for Cause Ruling

1. Keep a written record of all warnings given to employees for misconduct, as well as documenting absences.

2. For minor errors and misconduct, make sure that sufficient warnings and discipline have been imposed in an effort to remedy the situation prior to terminating the employee for cause.
3. Have in place and have all employees agree to workplace policies which provide an outline as to what sort of conduct is permitted and that which is not in relation to their employment, as well as the consequences if the policies are breached.
4. Ensure that the workplace policies are properly enforced at all times.
5. Have a progressive disciplinary plan in place and enforce it at all times.
6. Have fundamental aspects of all employees' obligations well defined so that it will be known to both the employer and the employee when such obligations have been breached (eg. obligation of honesty in a management position).

Appendix A

Distribution of Termination for Cause Cases in Canada

Province/Year	Number of Cause Cases Reported	Number of Cases Where Cause Was Found	Number of Cases Where Cause Was Not Found
Ontario (June 24, 2001-April 3, 2009)	104	40	64
Ontario (2008)	9	1	8
Canada (2008 – excluding Ontario)	12	6	6
Ontario (2009 currently)	4	2	2
Canada (2009 currently – excluding Ontario)	5	4	1