

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**ANDRZEJ CZERNIAWSKI**

Plaintiff

- and -

**CORMA INC.**

Defendant

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**STATEMENT OF LAW OF THE PLAINTIFF**

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February 19, 2021

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## **Just Cause**

In *Bravo v. Etobicoke Ironworks Ltd.*, [2005] OJ No 2070, the plaintiff was terminated for cause after telling his superior to fuck off and threatening him. The Court found that the defendant did not have cause to terminate his employment, especially in light of his unblemished 6-year tenure (*Bravo v. Etobicoke Ironworks Ltd.*, [2005] OJ No 2070, at para. 42).

In *Dennis v. Ontario Lottery and Gaming Corporation*, 2014 ONSC 3882, the plaintiff was dismissed for cause for alleged theft. The Court found no cause was established and highlighted the importance of a proper investigation (*Dennis v. Ontario Lottery and Gaming Corporation*, 2014 ONSC 3882 at para. 65).

In *Saliken v Alpine Aerotech Limited Partnership*, 2016 BCSC 832, the plaintiff was unprofessional and rude to an auditor. The Court found that his conduct justified disciplinary action, it does not warrant a just cause termination, especially given the plaintiff's clean service record (*Saliken v Alpine Aerotech Limited Partnership*, 2016 BCSC 832 at paras. 148-149).

In *Kitcher v. Royal Canadian Legion, Norwood & St. Boniface Branch No. 43*, 2003 MBQB 266, the plaintiff confronted her supervisor and bookkeeper in an angry fashion over a disagreement about cash shortage. Applying the contextual approach in *McKinley v BC Tel*, 2001 SCC 38, the Court found that her conduct deserved a warning but did not warrant summary dismissal (*Kitcher v. Royal Canadian Legion, Norwood & St. Boniface Branch No. 43*, 2003 MBQB 266 at para. 47).

in *Phanlouvong v. Northfield Metal Products (1994) Ltd.*, 2014 ONSC 6585, the plaintiff punched his co-worker, causing his co-worker to suffer a bloody nose. Notwithstanding the assault, the Court found that the employer did not have just cause to terminate the plaintiff's employment (*Phanlouvong v. Northfield Metal Products (1994) Ltd.*, 2014 ONSC 6585 at para. 74).

In *Shakur v Mitchell Plastics, a Division of Ultra Manufacturing Ltd*, [2012] O.J. No. 743, the employee, who worked there for six years had a physical altercation with another employee, and the employer dismissed him alleging just cause. Justice Broad found that as this was the employee's first instance of misconduct, progressive discipline would have sent the message that this behaviour was unacceptable (*Shakur v Mitchell Plastics, a Division of Ultra Manufacturing Ltd*, [2012] O.J. No. 743 at para. 18).

## **Progressive Discipline**

In *McKinley v BC Tel*, 2001 SCC 38, the Court said:

This being the case, I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with

this Court's reasoning in *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553 (S.C.C.), where this Court found that cause for dismissal on the basis of dishonesty exists where an employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice. (*McKinley v BC Tel*, 2001 SCC 38 at para. 51).

This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances. (*McKinley v BC Tel*, 2001 SCC 38 at para. 52).

...

Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. (*McKinley v BC Tel*, 2001 SCC 38 at para. 57).

In *Geluch v. Rosedale Golf Assn., Ltd.*, [2004] O.J. No. 2740 [*Geluch*], the Court said at para. 95:

Before an employee is terminated for cause, he or she should be advised that the misconduct is a matter of serious significance and its continuation could place his or her employment in jeopardy.

The Court also said at para. 98:

Employers may also have an obligation to properly investigate serious allegations, such as those of theft, fraud, or sexual harassment, to provide the employee with an opportunity to respond to any such allegations, prior to dismissing the employee.

Justice Himel also noted in *Geluch* that the contextual approach to determining whether cause existed for the dismissal involves two steps: first, the employer must establish the employee's misconduct on a balance of probabilities, and second, the employer must establish that the nature or degree of misconduct warranted dismissal (*Geluch v. Rosedale Golf Assn., Ltd.*, [2004] O.J. No. 2740 at para 85).

In *Cassidy v. 277033 Ontario Ltd.*, [2013] O.J. No. 4386, the employee was dismissed for cause for leaving his shift when he was sick. The Court found the defendant did not establish cause, mostly because he was not provided with any progressive discipline. The Court stated at paras. 57 and 65:

I find the employee was terminated. He was not given any formal written warnings. There was no progressive discipline. He was given some coaching. He was not

given any informal hearing or exit interview. I find he was treated very badly in the manner of his dismissal. There was no progressive discipline. There was no written warning that could be considered a written warning. There was some coaching. I find no basis factual basis for near cause and will discuss the legal basis later.

### **Conducting an Investigation**

In *Peoples v Ontario*, 173 A.C.W.S. (3d) 165, the plaintiff was dismissed without cause when several employees complained of her management style. In finding that the Defendant failed to establish just cause, the Court held that the employer should have reviewed the findings of its investigation and afforded the plaintiff of an opportunity to respond in order to address the perceived shortcomings (*Peoples v Ontario*, 173 A.C.W.S. (3d) 165 at para. 18).

In *Poulos v. Toronto & Region Conservation For The Living City*, [2009] OJ No 6066, the plaintiff was dismissed for cause when he swore at fellow co-workers. In finding that the Defendant failed to establish just cause, the Court held that it was wrong and unfair for the employer to refrain from interviewing the plaintiff to obtain his version of events. Being in possession of facts from both parties will allow the employer to reach a decision based on what really happened (*Poulos v. Toronto & Region Conservation For The Living City*, [2009] OJ No 6066 at paras. 39-41).

In *Ludchen v Stelcrete Industries Ltd.*, 2013 ONSC 7495, the plaintiff was dismissed for cause for allegedly making anti-Semitic remarks about the Defendant's owners. In finding that the Defendant did not have just cause for termination, the Court held that because the defendant failed to investigate the matter, there was insufficient evidence of the anti-Semitic remarks. The Court noted that it would have been prudent for the employer to confront the plaintiff and give him an opportunity to respond (*Ludchen v Stelcrete Industries Ltd.*, 2013 ONSC 7495 at paras. 68 and 79).

### **Wilful misconduct, disobedience, and/or wilful neglect of duty**

In *Plester v PolyOne Canada*, 2011 ONSC 6068 [*Plester v Polyone*], the employee who was a supervisor failed to lock out a machine that he was cleaning. What made the employee's actions in this case worse is that the employee failed to report the error immediately. Once he did report the error, he was terminated. The Court found there was no just cause or wilful misconduct and stated that the test for wilful misconduct is higher than the test for just cause, and that to establish wilful misconduct, the conduct must be wilful, and not careless, thoughtless, heedless or inadvertent (*Plester v PolyOne Canada*, 2011 ONSC 6068 at para. 55).

*Plester v Polyone* was appealed to the Ontario Court of Appeal in 2013 ONCA 47 and was upheld on the issue of just cause, and in so doing, stated the following at para. 13:

In the event it succeeded on its argument that it had just cause for dismissal, PolyOne also argued that the trial judge erred in concluding that the respondent's actions had not disentitled him to payments under the Employment Standards

Act, 2000, S.O. 2000 c. 41. Having regard to our conclusion on the just cause issue, it is unnecessary for us to address this argument.

In *Harriott v 1145365 Ontario Ltd*, 2016 CLLC para. 210-018, the employee worked for eight years as a machinist and on one occasion he threatened to kill his supervisor. The board member found that the incident was a spur of the moment utterance and did not constitute wilful misconduct (*Harriott v 1145365 Ontario Ltd*, 2016 CLLC para. 210-018 at para. 21).

In *Patel v Welsh Industrial Manufacturing Inc.*, [2008] O.E.S.A.D. No. 315, the employee called one of his colleagues a “fucking idiot.” When he was terminated the same day, he told his employer “fuck you” five or six times. The member found that the employee was not guilty of wilful misconduct because it was an isolated incident (*Patel v Welsh Industrial Manufacturing Inc.*, [2008] O.E.S.A.D. No. 315 at paras. 24-25).

### Reasonable Notice Period

The Plaintiff relies on the following cases to support his position on notice.

Case	Position	Age	Tenure	Remuneration	Notice Period
<i>Davidson (DeLong) v. Craig Manufacturing Ltd.</i> , 2008 NBQB 302	Oxyfuel Operator	55	21 years	N/A	21 months
<i>Cox v Habasit</i> , [1994] O.J. No. 4170	Production Worker	23	19 years	\$23,000	19 months
<i>Evers v. Maritime Pipe Organ Builders Ltd.</i> , [1984] N.B.J. No. 72	Master Pipe Organ Builder	N/A	17 years	\$17,000	18 months
<i>Jeewa v. Med-Chem Laboratories Ltd.</i> , [1998] OJ No 618	Lab Technician	56	19 years	\$33,000	18 months
<i>Sletmoen v. Nafco Manufacturing Co. Ltd.</i> , 2017 BCSC 1726	Machine Operator	52	18.4 years	\$66,500	16 months

<i>Vinette v Delta Printing</i> , 2017 ONSC 182	Operation of Binding Machine	58	16 years	-	15 months
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### **Wrongful Dismissal Damages**

In *Adjemian v Brook Crompton North America*, [2008] OJ No 2238, the Court stated that a dismissed employee is entitled to recover the value of all losses arising from the failure to have been given reasonable notice of the termination of her employment. (*Adjemian v Brook Crompton North America*, [2008] OJ No 2238 at para. 24)

A Plaintiff who had been wrongfully dismissed is entitled to their full salary for the balance of the notice period, as well as benefits calculated at 10% of the full salary. (*Nasager v Northern Reflections Ltd.*, 2010 ONSC 5840 at paras. 8 and 23, *Adjemian v Brook Crompton North America*, [2008] OJ No 2238 at para. 27, *Camaganacan v St. Joseph's Printing Ltd.*, 2010 ONSC 5184 at paras. 23 and 27).

### **Mitigation**

The onus of demonstrating that the Plaintiff has not acted reasonably to try to mitigate his losses rests with the Defendant (*Lalani v Canadian Standards Assn.*, 2015 ONSC 7634, at para. 27). To meet its onus and prove a failure to mitigate, the employer must advance evidence of comparable positions to which the Plaintiff is reasonably adapted and cannot "pick away at the Plaintiff's performance with a bald suggestion that she could have done better." (*Peticca v Oracle Canada ULC (2015)*, 254 ACWS (3d) 356 para. 20).

### **Punitive and Aggravated damages?**

In *Honda Canada v Keays*, the Supreme Court of Canada stated that damages resulting from the manner of dismissal are available where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith by being untruthful, misleading, or unduly insensitive. To prove that the employee is entitled to punitive damages, the employee must show that there is an independent actionable wrong. The Court was clear that a breach of the contractual duty of good faith in contractual performance qualifies as an independent actionable wrong. As the purpose of punitive damages is denunciation and deterrence, the Supreme Court was clear that the focus of awarding the damages should be on the Defendant's conduct, and not the Plaintiff's loss. (*Keays v Honda Canada Inc.* 2008 SCC 39 at paras. 56-58)

This Court should ask itself whether the Defendant engaged in conduct during the course dismissal that was "unfair" or "in bad faith" and caused the terminated employee mental distress that went beyond normal distress and hurt feelings resulting from a dismissal. (*Keays v Honda Canada Inc.* 2008 SCC 39 at paras. 56-57) Moral damages are recoverable if the employer breaches that obligation by behaving in a way that is "unfair

or is in bad faith by being, for example, untruthful, misleading or unduly insensitive." (*Keays v Honda Canada Inc.* 2008 SCC 39 at para. 58)

The factors relevant to an award of moral damages are not limited to the examples in Honda, nor is the time frame limited to the moment of dismissal. Pre and post termination conduct may be considered in an award for moral damages, so long as it is "a component of the manner of dismissal." (*Doyle v Zochem Inc.*, 2017 ONCA 130 at para. 13).

In *Morison v Ergo-Industrial Seating Systems Inc.*, the Court awarded the employee punitive damages based on the Defendant asserting cause when there was no reasonable basis for such assertion, and because the Defendant was delayed in providing the plaintiff with his record of employment and statutory minimum entitlements. (*Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725 at para. 53)

In *Joseph v Tl'azt'en First Nation*, [2012] CLAD No 184, the employee was dismissed for cause based on baseless allegations of fraud, deception and mismanagement. The employer totally and recklessly disregarded the truth in relation to the allegation of fraud. The accusations were widely distributed within the community and throughout the region, with the predictable impact of destroying the Complainant's reputation in the community and his professional standing among government agencies. In finding that the employee was entitled to \$85,000 in aggravated damages and \$100,000 in punitive damages, the Court stated at paras. 37-40:

The allegations made by the Executive Director about the Complainant were made deliberately, with contrived suspicion, and with wanton and reckless disregard for the truth, which constitutes extreme bad faith and a gross misuse of his authority.

**The Respondent conducted no internal review or investigation** of the documents it had in its possession. It never spoke to anyone responsible for the services Mr. Hank historically provided, or requested any financial audit or breakdown of his fees and services. Instead, the Executive Director presumed to destroy his reputation too, by sending out emails and making telephone calls accusing him of criminal conduct.

In the one email to Chief and Council, the Executive Director was unequivocal about "blatant misuse of funds over the past years Vincent was a Health Director". Yet, he had no proof at all, and at the hearing confirmed that he only had "suspicions", on the basis of which he was content to malign and destroy the Complainant's reputation within the Tl'azt'en First Nation, as well as with Health Canada, Northern Health, INAC and the Environmental Public Health Services.

In doing so, he willfully disregarded all the compelling evidence to the contrary, and at the hearing continued to maintain the absurd assertion that the RCMP did not want or need any evidence, even in the face of an RCMP record that showed he was told the Respondent would have to "provide our office with a report from their accountant with the details of the monies that are subject to the fraud allegations." The RCMP file note goes on to express frustration with his lack of

cooperation in providing evidence, and indicates he misled the RCMP to believe that Health Canada was going to perform an audit.

At para. 94, the Court said:

The Respondent also owed Mr. Joseph a duty of good faith and fair dealing in the course and manner of his dismissal. It failed completely to meet its obligation. It dismissed him in a publicly callous, humiliating, and defamatory manner, involving over two years of grossly arrogant bad faith conduct and increasingly outrageous and false public allegations against him.

In *Downham v Lennox & Addington (County)*, [2005] OJ No 5227, the Plaintiff was dismissed for cause based on an allegation of conflict of interest. The Court held that the numerous facts relied on by the County that were simply not true. The County had a progressive discipline policy that it failed to follow. While the Plaintiff was guilty of poor judgment on one occasion, it did not seriously impair the employer's trust and confidence in the context of his 12-year tenure as a manager. The allegations affected the Plaintiff's self-worth, his health, and his dignity (para. 235). The Court held at para. 231 that the County had a duty to minimize the damage and dislocation (both economic and personal) that result from dismissal. The Plaintiff was entitled to \$100,000 in punitive damages for bad faith in the manner of dismissal and \$50,000 for intentional infliction of mental distress based on the following aggravating factors at para. 233:

- a) There was no effort to contact Mr. Downham at the outset to ascertain his position and to minimize the damage.
- b) The investigation was biased, shoddy and substantially undocumented (despite the direction to create a paper trail).
- c) Mr. Downham was left for a long period in ignorance of what was happening which would foreseeably increase his anxiety.
- d) Mr. Downham was treated unfairly by not being informed of the details of the allegations against him so he could give his version.
- e) The termination letter exaggerated the grounds for dismissal set out in the report.
- f) The termination letter contains extremely serious findings which are essentially groundless.
- g) The termination letter was intended to cause Mr. Downham personal distress and to destroy his professional career.
- h) The County's unfounded allegations has affected all areas of his life including his social life, his volunteer activities, his employment and his having to deal with and feel responsible for the effects on his wife.

In *Ditchburn v. Landis & Gyr Powers Ltd.*, [1995] OJ No. 2882, reversed in part in [1997] OJ No 2401 (ONCA), the Plaintiff was dismissed for cause based on an allegation that he was intoxicated while at work driving a company vehicle. The Court found that the Defendant failed to prove that the Plaintiff was intoxicated. The Court found that in addition to pay in lieu of reasonable notice, the Plaintiff was entitled to \$15,000 for mental distress damages on account of the Defendant failing to give the Plaintiff the benefit of the doubt in the context of his 27-year tenure and clean disciplinary record. The Court

held that it was in the contemplation of the parties that if the Plaintiff was suddenly and unlawfully discharged when he believed his job was secure for his working life, that he would suffer stress and anxiety, entitling him to mental distress damages (para. 44).

In *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245, the court held that the Plaintiff was entitled to punitive damages of \$500,000 and moral damages of \$250,000. The moral and punitive damages were based on the defendant's year-long representation that it would find the Plaintiff another position within the company, the defendant's failure to provide the plaintiff with reasonable notice, the defendant's cancelling of the plaintiff's benefits, and delaying answers to undertakings until the eve of trial (paras. 278-279, and 304).

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