



## IS IT SAFE TO ALLEGE JUST CAUSE FOR PERFORMANCE ISSUES?

Underperforming and misbehaving employees have existed since the first master-servant relationships. There were no doubt similar problems in master-slave relationships, but that was not an issue for the courts. Although the law recognizes an employer's right to terminate the employment relationship for just cause, Canadian courts require an employer to show more than mere displeasure with an employee's performance in order to avoid the general rule that employers must provide reasonable notice of termination, or pay in lieu of notice. It is not uncommon for employers to be frustrated by an employment lawyer's advice that a given episode, or pattern of poor performance, does not amount to just cause.

In order to minimize their liability and avoid the often unpalatable step of paying severance to a problem employee, some employers are tempted to allege cause for misdemeanours or performance issues that do not rise to the level of serious misconduct that the law requires. Often, these employers are willing to pay some amount of severance but want to use the allegation of cause as a lever in the negotiation of a settlement with the terminated employee.

Although this strategy can occasionally be successful (most often when the employee does not seek legal advice), it is a very risky one. Allegations of cause are notoriously difficult to prove. The Supreme Court of Canada has determined that the nature and degree of an employee's misconduct must be assessed in context to determine whether it warrants dismissal. In

borderline cases, it is frequently difficult to determine with sufficient certainty whether a court will accept an employer's defence of cause based on minor misconduct or poor performance.

In addition to finding an employer liable to the employee for damages in lieu of notice, courts can punish employers who make weak or unfounded allegations of cause by awarding increased damages for this "bad faith" conduct. Courts can also award legal fees to the successful employee at a higher rate, known as special costs, to compensate the employee for having to conduct litigation against an employer that has maintained allegations of cause that it knew or ought to have known would not succeed. Even if the claim does not proceed to trial, the employee's lawyer will make it an issue in settlement negotiations and demand an increased amount to settle the claim as a result of the employer having made improper allegations of cause.

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There are circumstances in which an employer is entitled to terminate an employee without notice. Theft and dishonesty are examples of misconduct that normally amount to just cause. Even in cases of poor performance, for example, an employer can take steps prior to the termination to maximize the chance that an employee will not challenge a termination for cause, or that the court will accept the defence of cause. Employers can reduce their potential liability by ensuring that the employee's misconduct or poor performance is properly investigated and documented, and that the employee has been given adequate warnings and opportunities to correct the performance issues.

*The content of this Newsletter is intended to provide information on Bull, Housser & Tupper LLP, our lawyers and recent developments in the law. The information contained herein is summary in nature, and does not constitute legal advice. For additional details or advice concerning specific situations please contact any member of our Labour & Employment Group.*



If you have any questions, please contact any member of our Labour & Employment Group.

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