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Labour & Employment Law Bulletin

Welcome back Deborah Cushing

Lawson Lundell LLP is pleased to announce that Deborah Cushing has returned to the Labour and Employment Group as an associate. Deborah articled with Lawson Lundell and was called to the bar in 2007. She recently spent some time practicing as in-house counsel with the Victoria School Board before returning to the firm.

Deborah advises clients on a range of matters including wrongful dismissal, employment standards, business immigration, labour relations, and human rights issues.

Deborah attended law school following a career in human resources. She worked in labour relations in the public sector followed by experience as an employee relations manager in the financial industry.

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Insubordination and Just Cause Dismissal: Considerations for Employers

We all know that the employment relationship can involve some give and take. Employees today are better educated and more aware of their rights, and accordingly more willing to voice concerns about management. When, however, does employee conduct cross the line from criticism to insubordination? Specifically, when does such conduct amount to just cause for summary dismissal in a non-union workplace?

The general approach to considering whether employee conduct amounts to just cause is to view the incident in the context of the entire employment relationship. Factors such as the seniority, employment history, and responsibilities of the particular employee are relevant and must be considered alongside the nature and extent of the employee's misconduct. Generally, a single incident of insubordination does not amount to just cause for dismissal, but this threshold may be met if the mutual trust and respect between an employer and the employee is so damaged by the misconduct that it would be impossible to carry on the employment relationship.

It is worth considering two recent British Columbia cases with contrasting results that help inform employers as to what amounts to just cause dismissal for insubordination.

In *Grewal v Khalsa Credit Union*, 2011 BCSC 648, a branch manager was properly dismissed with just cause where, through legal counsel, she wrote to her employer demanding an apology for its investigation of her suspicious conduct. She sent copies of her demand to the provincial

regulatory agency and to the company's board of directors. The Court found not only that the investigation into her conduct was justified, but also that her demand letter was effectively a deliberate effort to permanently damage the CEO's reputation. The letter "permanently undermined the employment relationship" and amounted to just cause for dismissal.

Conversely, in *Rodrigues v Shendon*, 2010 BCSC 941, the manager of a Dairy Queen received more than 16 months pay in lieu of notice for her wrongful dismissal. In this case, the manager had received a letter from management indicating that her performance and conduct had been unacceptable and instructing her that she was on probation. The manager proceeded to complain to her staff and to customers about the letter, becoming uncooperative and disobeying instructions to work. Here, the court noted that the manager had not received sufficient notice to change her conduct and found her dismissal to be unjustified.

So what level of insubordinate conduct by an employee constitutes sufficient grounds for summary dismissal? Courts will not just consider the nature of the insubordination, but the entire context of the employment relationship. Employers should consider the following questions when assessing whether they have just cause to dismiss an employee for insubordination:

- How serious is the insubordination?
- Was the employee's conduct premeditated or repetitive, or was it a momentary and isolated event?
- What is the employee's length of service and previous work record?
- Have more moderate forms of corrective discipline been attempted and proven unsuccessful in solving the problem?
- Has the employer been consistent in its approach to discipline in similar circumstances?
- Was the employee provided the opportunity to explain or deny the offence?
- Did the employee fail to apologize after being given the opportunity to do so?
- Does the penalty imposed create any special economic hardship on the individual?
- Are there any mitigating circumstances that should be considered?

British Columbia's Minimum Wage Increased on November 1, 2011

On November 1, 2011, the British Columbia general minimum wage increased to $9.50 per hour and the liquor server minimum wage increased to $8.75. This was the second of three increases, the first of which took effect on May 1, 2011.

The third and final increase will take effect on May 1, 2012 and increase the minimum wage to $10.25 per hour and the liquor server minimum wage to $9.00.

Over the past year, minimum wages have increased in the majority of Canadian provinces and territories. The following chart summarizes minimum wages across Canada:

Province/Territory	**Minimum hourly wage**
British Columbia	General minimum wage: • November 1, 2011: $9.50 • May 1, 2012: $10.25 Liquor servers: • November 1, 2011: $8.75 • May 1, 2012: $9.00
Alberta	General minimum wage: $9.40 Liquor servers: $9.05
Saskatchewan	$9.50
Manitoba	$10.00
Ontario	General minimum wage: $10.25 Liquor servers: $8.90 Students under the age of 18 who work less than 20 hours per week: $9.60
Quebec	General minimum wage: $9.65 Employees receiving tips: $8.35
New Brunswick	Current: $9.50 April 1, 2012: $10.00
Nova Scotia	$10.00 ($9.50 during the first three months)
Prince Edward Island	Current: $9.60 April 1, 2012: $10.00
Newfoundland and Labrador	$10.00

Province/Territory	Minimum hourly wage
Yukon	$9.00 On April 1 of each year the minimum wage for the Yukon is adjusted based on the previous calendar years consumer price index for Whitehorse.
Northwest Territories	$10.00
Nunavut	$11.00

Proposed Amendments to the *Workers Compensation Act* – Mental Stress

A bill to amend the *Workers Compensation Act* was given 1st reading on November 3, 2011. One of the proposed amendments could significantly expand the circumstances where a worker may be entitled to compensation for work-related mental stress. Where the present section 5.1(1)(a) of the Act refers to an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment, the new subsection will refer to a reaction to "(i) one or more traumatic events arising out of and in the course of employment, or (ii) a significant work-related stressor, or a cumulative series of work-related stressors, arising out of and in the course of employment."

The Act will still require that the worker be diagnosed with a medically recognized mental or physical condition and will continue to exclude mental stress caused by a decision of the worker's employer relating to the worker's employment, including performance and discipline matters.

On introducing the bill in the Legislative Assembly, the Minister of Labour cited the significant effect that mental stress can have on workers and their families as one of the reasons for expanding the conditions for eligibility for compensation benefits.

If passed in thier current form, the provisions would apply to decisions made on or after January 1, 2012.

We will follow the progress of this bill through the legislature and keep you informed.

Temporary Foreign Workers - Meeting the "Substantially the Same" Requirement

In a Bulletin released in March of 2011, we outlined important amendments to the *Immigration and Refugee Protection Regulations* ("*IRPR*") concerning temporary foreign workers. One important consequence of these amendments is that employers can be deemed ineligible to hire new temporary foreign workers if existing foreign workers have not been provided with "wages, working conditions and employment in an occupation" that are "substantially the same" as the terms and conditions of the initial job offer (the "STS requirement"). Employers who are found

to be non-compliant may be issued a negative labour market opinion and may be denied access to the temporary foreign worker program for a period of two years. Non-compliant employers may also be publically listed on the Human Resources and Skills Development Canada ("HRSDC") website.

To demonstrate compliance, employers must keep detailed records. In addition to the payroll records that employers are required to keep under the *Employment Standards Act*, HRSDC recommends that employers maintain records of the following documents:

- job descriptions of the positions held by temporary foreign workers;
- company policies regarding terms and conditions of employment;
- copies of work permits for all temporary foreign workers;
- copies of labour market opinions for all temporary foreign workers; and
- proof of workers compensation coverage.

The STS requirement reinforces the employer's obligation to maintain the terms and conditions of employment that were initially offered to a temporary foreign worker. By carefully maintaining the records listed above, employers can be proactive in ensuring they will continue to have access to the temporary foreign worker program.

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