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EMPLOYERS' ALERT

Court Finds Just Cause: Employee's Case Dismissed

When employers contact employment lawyers to discuss an employee's misconduct, more often than not, they are advised that they do not have just cause to terminate. That is because there is a very high threshold for establishing just cause. *Pinto v. BMO Nesbitt Burns Inc.*, a recent Ontario decision, is one of the rare cases where the Court concluded that this threshold had been met.

Ms. Pinto was an investment advisor with BMO Nesbitt Burns Inc. ("BMO"). From September of 2000 until June of 2002, BMO received complaints from eight of Ms. Pinto's clients regarding her handling of their accounts. BMO investigated these complaints and concluded that Ms. Pinto had conducted transactions on behalf of several of her clients without their approval. As a result, after two years of employment, BMO terminated Ms. Pinto for cause. Ms. Pinto sued BMO for wrongful dismissal.

In dismissing Ms. Pinto's action, the Court noted that dishonesty does not, in and of itself, automatically warrant termination for cause. It referred to the 2001 Supreme Court of Canada decision in *McKinley v. BC Tel* where a "contextual approach" was set out to deal with these cases. Simply put, before concluding that it has cause to terminate an employee, the employer must consider the nature and degree of the dishonesty, as well as the surrounding circumstances. In Ms. Pinto's case, the Court found that not only had she engaged in a pattern of unauthorized trading, she attempted to "cover up" her actions during BMO's investigation, which included providing BMO with fabricated evidence.

What does this mean for employers?

- While it is not impossible to terminate an employee for just cause, this decision will be subject to intense scrutiny. Courts want to be satisfied that the decision to terminate without notice is a proportionate response to an employee's misconduct. As a result, prior to terminating someone for just cause, employers are wise to consult with legal counsel to ensure that their decision is defensible.
- BMO counter-sued Ms. Pinto for the settlement money that it paid to her former clients as a result of her misconduct. Although the Court agreed that Ms. Pinto should be held responsible for any losses arising from her

misconduct, it found that BMO could not simply equate the settlement money with the damages that it sustained; instead, BMO needed to prove the actual damages caused by Ms. Pinto's misconduct. BMO decided not to call evidence to substantiate its damages because it believed that it would have difficulty collecting from Ms. Pinto. This is a reality employers often face in these circumstances. That said, the Court was clear that if an employer decides to pursue such a claim, in order to be successful, it must be prepared to prove its damages.

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- Upcoming RT training workshop "How to Conduct a Workplace Investigation" on October 19, 2005

If you have particular concerns about how certain standards might impact your business and what you can do about them, or if you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at contact@rt-law.ca

(Janice Rubin and Nicole Guerin, August, 2005)

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