HOW FAR DOES AN EMPLOYEE'S BEHAVIOUR HAVE TO GO TO BE SUFFICIENT TO CONSTITUTE CAUSE FOR DISMISSAL?

We are often asked by employers just how far an employee has to go for their behaviour to be sufficient to constitute cause for dismissal. The advice we generally give is that, short of outright dishonesty or criminal conduct, it is extremely difficult to prove cause.A decision released by the Ontario Superior Court on April 30, 2010 confirms that impression.

In the decision in *Jazarevic v. Shaeffler Canada Inc.*, the Ontario Superior Court considered the dismissal of a forty-three year old machine operator who had been working for the employer for nine years. The employer had a fairly detailed discipline policy which encompassed a so-called four-step process. The policy set out the implications of the first three warnings from the employee's leader, and specified that the fourth warning would lead to dismissal.

The employee had encountered a series of misfortunes, including the death of his wife in 2002. He was left with five children under the age of 16. As the judge pointed out, the plaintiff had "difficulty coping with his grief and parenting five children on his own." The employee was diagnosed with severe depression and, as a result, went on short-term disability.

Following the employee's return to work, he was given a number of notices of breach of the company's employment policies, and, in particular, the absenteeism policy. Following the third such warning, he received a three-day suspension and was advised that receipt of a further warning before the end of the twelve-month period would lead to his dismissal.

As the court pointed out, on the face of it, the employee's discipline record revealed a consistent pattern of unauthorized absences and arriving late for work. It also disclosed repeated problems with quality control. When the fourth discipline notice was issued to the employee, the employee met with his group leader to discuss the causes for these disciplinary notices. The employee advised his supervisor at the time of the issues outside of work which had given rise to a drinking problem and difficulties concentrating on his work. His supervisor took the employee to meet with the company nurse and the disability claims administrator for the company. The disability claim was accepted by the insurer, and the insurer commenced paying benefits.

For reasons not clear in the judge's decision, the company took steps to terminate the employee's employment shortly after he qualified for disability benefits. The employee sued for wrongful dismissal.

The court first held, surprisingly, that although it was established that the discipline policy had been made known to the plaintiff on numerous occasions, the policy could not be said to be a term of the employment to which the employee had agreed. The judge therefore ruled that the policy could not be relied on as a ground for dismissal. The court was therefore required to consider whether or not the employee's misconduct was sufficient to constitute cause.

The court first pointed out that, in any wrongful dismissal, the onus of proving cause rests with the employer. In considering whether an employee's actions are sufficient to constitute cause, the court, relying on the leading Supreme Court of Canada case in *McKinley v. B.C. Tel*, held that all disciplinary actions by the employer must be proportionate to the alleged wrongful act of the employee. The court stated that "Proportionality requires an analysis of the surrounding circumstances of the misconduct, its level of seriousness and the extent of its impact on the employment relationship." The court felt that, in this case, the employer had not taken the context of the employee's misconduct into account. The judge found that while the employee's conduct was serious, he was "…unable to conclude that it was sufficiently egregious to find that it was incompatible or irreconcilable with sustaining the employment relationship." As the dismissal was wrongful, the judge considered the appropriate amount of notice. In the circumstances, as the plaintiff was a forty-three year old with nine years of service with the company, the judge assessed seven months as the appropriate amount of notice.

The words of the judge should be taken to heart by all employers planning to terminate an employee. The act of termination, being the equivalent of a death sentence in employment law, should be reserved for only the most serious misconduct. We can assist you in analyzing the case law to determine if a planned termination for cause will, in fact, stand up in court.