

Welcome to the premier edition of **HR INSIGHTS™**, a publication which explores the issues, ideas and trends affecting strategic human resources management.

At  **Benemax**, we consider benefits to be a core component of a firm's HR function, strategically linked to employee recruitment, retention, compensation and engagement. Benefits do not stand alone, however, and must be aligned with other elements of the firm's corporate and human resources strategy.

In order to fulfill our mandate, we collaborate with a select group of professionals from other HR disciplines. While we may practice in different areas, we share a common objective: increasing our clients' return on their HR investments.

Periodically, we will commission a feature article from one of these colleagues. We will only approach individuals we know and respect, and who offer unique services and insights into their particular field.

We are delighted to launch this series with an article written by Stuart Ducoffe, LL.B and Krista Hiddema, CHRP. They are partners with e2r Solutions, a service of Woolgar VanWiechen Ketcheson Ducoffe LLP. e2r Solutions is an innovative service that provides clients with timely human resource and employment law support, in real time. Stuart and Krista bring a wealth of real-world experience from both the legal and management perspectives of HR.

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Crime Pays! *By Stuart Ducoffe and Krista Hiddema, e2r Solutions*

Are you planning to terminate one of your employees 'with cause'? Was it theft or dishonesty? If so, it would seem like a 'reasonable cause' termination wouldn't it?

Or would it?

It has generally been the consensus that where an employee has engaged in an act of theft or dishonesty, that the employer is in a position to terminate the employee for cause. As we are all aware, termination for cause permits the employer to terminate the employee without providing reasonable notice of the termination or compensation in lieu thereof...

In light of some recent decisions, including the Supreme Court of Canada decision in *McKinley v. B.C. Tel*, that proposition is now in doubt. In this case, the court, in finding in favour of Mr. McKinley charted a new path in this area in considering an act of dishonesty against an assessment of the context of the act of dishonesty. According to the court,

“... a balance must be struck between the severity of an employee's misconduct and the sanction imposed.”

A striking example of this view is illustrated by another recent decision, *Banque Laurentienne du Canada vs. Lussier (2003)*.

Emilia Sousa, a unionized bank cashier for Laurentian Bank of Canada stole \$500 in September 1998, and a few days later stole an additional \$2000. When questioned, she initially lied about it, but finally admitted that she had stolen the funds to “satisfy a pathological attraction” to video-poker gambling machines.

The Bank felt justified that her acts of dishonesty warranted dismissal for cause. The arbitrator appointed to hear the dispute under the collective agreement felt differently. The arbitrator held that under the circumstances, the penalty of discharge was overly severe, and that a suspension should be substituted for the discharge. The Bank appealed to the Quebec Superior Court, which determined that the decision was not unreasonable and affirmed the decision of the arbitrator.

The Bank continued to insist that the employee's dismissal was justified on the grounds of her dishonesty, and further appealed the decision of the Quebec Superior Court to the Quebec Court of Appeal.

The Quebec Court of Appeal agreed with the Quebec Superior Court and the arbitrator, and found the termination to be too severe a penalty. The Quebec Court of Appeal found that:

- ♦ Ms. Sousa had a 25-year employment record with the Bank.
- ♦ There were no previous disciplinary problems.
- ♦ She was eventually remorseful about her thefts.
- ♦ She had a gambling addiction.

She had been experiencing both health and family problems at the time of the thefts.

Ms. Sousa was ultimately suspended for 22 months, then ordered to be reinstated.

In both of these 'with cause' terminations, the employee was found to be wrongfully dismissed.

Accordingly, when making a decision to terminate with cause on the basis of dishonesty, it is not sufficient to simply confirm the underlying facts, but it is imperative that the employer consider the penalty of discharge **in the context** of certain employment related factors such as:

- ♦ length of service
- ♦ age
- ♦ position and contribution to the organization
- ♦ patterns of similar behaviour and reprimands
- ♦ extenuating personal circumstances
- ♦ existing illnesses / medical conditions

Be sure that you have all the facts, that you seek advice from experts in the field, and that the punishment indeed fits the crime.

It is not surprising that the courts are raising the bar for employers to support terminations for cause given the strong language of the Supreme Court of Canada in McKinley:

“Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identify, self worth and emotional well-being.”

For a detailed white paper on the above topic which references the relevant recent case law, please contact Krista at 416.867.8693 or khiddema@e2rsolutions.com, and she will be pleased to send it to you.