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DEALING WITH THE INSOLENT, INSUBORDINATE OR DISOBEDIENT EMPLOYEE

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Employers need not put up with a recalcitrant employee or workplace malcontent indefinitely. An employee who is insolent, insubordinate or disobedient can, in the right circumstances, be dismissed from employment for just cause – i.e. with immediate effect and without notice or pay in lieu of notice.

The circumstances, however, have to be right. *Kokilev v. Picquic Tool Company Inc.*, [2010] B.C.J. No. 1973 (S.C.) is a recent B.C. Supreme Court decision illustrating what can happen to an employer if the circumstances are not right.

Background facts

Nikolay Kokilev started working for Vancouver-based Picquic Tool Company Inc. in March 2001. He was hired as a bookkeeper but, after approximately 1.5 years, was promoted to VP Finance.

In Picquic's view, Mr. Kokilev was a "key employee" who generally "did a good job". That said, his relationship with the employer's president and CEO, Paul McKenzie, was not always a happy one and he and Mr. McKenzie were known to openly disagree.

For instance, in November 2003, the premises occupied by Picquic were flooded and suffered serious water damage. Following the flood, Mr. McKenzie developed a plan to keep Picquic's employees working so that inventory could be shipped in time for Christmas. Mr. Kokilev disapproved of the plan and expressed the view that "the company should shut down" and "everyone should leave".

There were other incidents of open disagreement between Mr. Kokilev and Mr. McKenzie:

- (a) At a meeting with Picquic's key employees in October 2007, Mr. Kokilev was asked to explain why a bonus plan developed and implemented by Mr. McKenzie was in a deficit position. Mr. Kokilev was critical of the plan, characterizing it as not being "a very good bonus program".

- (b) At another meeting in January 2009, Mr. McKenzie announced a decision to change group benefit carriers and asked Mr. Kokilev what he thought about changing carriers. Mr. Kokilev questioned the wisdom of the decision.

Picquic terminated Mr. Kokilev's employment on February 11, 2009. The employer alleged there was just cause to dismiss him from employment because, among other things, he was insolent and insubordinate, was unwilling to take directions from his superiors, and had "publicly undermined" Mr. McKenzie instead of supporting or co-operating with him.

Mr. Kokilev responded to the termination of his employment by commencing a wrongful dismissal action.

Decision of the B.C. Supreme Court

Madam Justice Linda Loo of the B.C. Supreme Court allowed Mr. Kokilev's action against Picquic. She held that the employer did not have just cause to dismiss Mr. Kokilev from employment and, accordingly, was obligated to provide him with reasonable notice or pay in lieu thereof. The damages to which Mr. Kokilev was found to be entitled were not insignificant.

Madam Justice Loo made a number of instructive statements regarding termination of employment for just cause:

- (a) An employer has "a heavy onus to overcome" in order to establish just cause.
- (b) "In order to establish cause for dismissal without notice, the employer must prove that the employee's conduct, when viewed in all of the circumstances, was seriously incompatible with his or her duties, and that the conduct went to the root of the employment relationship ..."
- (c) "The approach to assessing whether the employee's conduct provides cause for dismissal is objective." Neither the employer's view that "the conduct was sufficient to establish cause" nor "the employee's view that it [was] not" is "determinative".
- (d) "The approach is not only objective" but "it is also contextual". Consideration has to be given to factors such as "the nature and degree of the misconduct, and whether it violates the 'essential conditions' of the employment contract or breaches [the] employer's faith in the employee".

- (e) The contextual approach is founded on “the principle of proportionality”. A balance has to be struck between the severity of the employee’s misconduct and the disciplinary penalty issued by the employer.

In concluding that there was no just cause to dismiss Mr. Kokilev from employment, Madam Justice Loo stated:

While no doubt someone in the position of Mr. McKenzie wants to be supported by those who support his views (and make him look good), disagreeing with his point of view does not give rise to ... just cause to terminate for disobedience or insubordination.

The Supreme Court justice considered the incidents of November 2003, October 2007 and January 2009 and found:

- (a) “There [was] no evidence that the flood incident in November 2003 was ever raised with Mr. Kokilev until [the] litigation commenced ...”
- (b) Regarding the October 2007 incident, Mr. Kokilev could not “be said to have repudiated an essential condition of the contract of employment” and “at worst” had “exercised poor judgment or made inappropriate comments (from Mr. McKenzie’s point of view)”. Mr. McKenzie “asked for ‘input’ ... [and] received input”.
- (c) With respect to the January 2009 incident, Mr. Kokilev was “put on the spot”. He was “asked for his views when Mr. McKenzie knew that [Mr. Kokilev] thought it was not financially prudent for the company to change carriers”. In the circumstances, Mr. Kokilev’s response was “not surprising”.

Picquic, incidentally, initiated an appeal of Madam Justice Loo’s decision in late October 2010 but, as of the date this article was written, there was no reported B.C. Court of Appeal decision regarding this case.

Some lessons for HR professionals ...

HR professionals who are considering whether to terminate the employment of an insolent, insubordinate or disobedient employee for just cause should take the following lessons from *Kokilev v. Picquic Tool Company Inc.*:

- (a) A single incident of insolence, insubordination or disobedience will, generally speaking, not be sufficient to establish just cause. The test is whether the employee's misconduct gave rise to a breakdown in the employment relationship.
- (b) Be objective. Take a step back and ask whether a reasonable bystander would agree with the employer's assessment of the employee's misconduct.
- (c) The context of the employee's misconduct is key. What did the employee do or fail to do? Was the misconduct an isolated incident or part of a pattern of misconduct? Where, when and under what circumstances did the misconduct occur?
- (d) To put it colloquially, the punishment has to fit the crime.

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