

Can an Employee Get Fired for That?

Ryan Edmonds
Ryan Edmonds Workplace Counsel

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Introduction

Given the high threshold for “just cause”, it may seem like employees can get away with anything. While employers always have the option of terminating “without cause”, the associated cost taken in tandem with the misconduct at issue can make this a non-starter.

That said, as the following colourful collection of cases demonstrate “just cause” does in fact exist. Can you predict which cases resulted in “just cause” being upheld? Review the facts, make your own call, and compare with the judge or arbitrator’s decision further below.

Facts

1) *The Pot Brownie Case*¹

Offices generally abound with bake sales, cookie exchanges and the like. But what if an employee brings in baked goods with a "special ingredient"?

An employee brought in chocolate cake and shared it with two of her co-workers. One co-worker who had been having trouble sleeping was specifically told to eat the cake at home. The two co-workers who ate the cake felt dizzy and sick, and one ended up in the hospital. Tests confirmed the presence of THC in one co-worker's system. The employee later claimed she got the cake from a “friend” and believed it contained only “organic herbs”. Unsurprisingly, she was terminated for cause.

2) *B.O. and B.A. (Bad Attitude)*²

A fragrance demonstrator employed by Calvin Klein cosmetics to sell perfumes to customers in a variety of high-end stores had noticeably bad body odour. The employee's manager mentioned it to the employee over coffee, and after some tears, the employee agreed to fix it. However several months later her unique “fragrance” returned.

The employee also frequently wore a feathered cowboy hat and metallic cowboy boots to work, in violation of the company’s “classically elegant” dress code. As a result of this and the reoccurring body odour problem, the employer asserted just cause for dismissal.

3) *Vengeance by Chocolate*³

¹ *Central City Lodge v. H.E.U.* (1999), 85 L.A.C. (4th) 49 (Laing).

² *Bagnall v. Calvin Klein Cosmetics (Canada) Ltd.* (1994), 5 C.C.E.L. (2d) 261 (Ont. Gen. Div).

A news reporter with four years' seniority came under public criticism from a member of an activist organization. He retaliated by purchasing a box of chocolates, contaminating it with dirt from his kitchen floor and raw chicken juices, and then mailing it anonymously to the individual. Several hours after sending it, the reporter had regrets and confessed what he had done. Despite this, the employer terminated him for cause.

4) Hail to the Bus Driver⁴

A school bus driver was terminated after pornographic pictures of her emerged on the internet that used the company bus as a setting for the photographs. There were three pictures in total, one of which involved the employee and her husband in a sexual act that clearly showed the employee's face and the employer's signage.

The employee was terminated for cause after a school principal called the employer to say that it had received complaints from parents of children who had recognized their bus driver in the pictures.

Apparently the employee had retained a professional photographer to take "tasteful erotic photography", and though no written contract was signed, she always understood that she would have sole possession of the pictures. Instead, however, the pictures found their way onto the internet.

5) Insult to Injury (and Death)⁵

The employee in question was a part-time labourer at a hospital. After an outpatient jumped to his death from a parking garage, the employee was assigned to assist with the cleanup of the scene.

While doing so, however, the employee took two pictures of the scene and posted them on his Facebook page. His comment under the first picture said "mother pleads with kid not to jump off PRCC side of the parking lot but did anyways poor thing", and his comment under the second picture said "this is what I have to clean up".

The employer terminated him for violating its Code of Conduct, and specifically, its policies on maintaining patient confidentiality.

Decisions

1) The Pot Brownie Case

³ *Canadian Broadcasting Corp. v. Canadian Media Guild*, [2004] C.L.A.D. No. 59 (Glass), aff'd 2007 BCCA 232.

⁴ *Badder Bus Services Ltd. V. Reavely*, [2000] C.L.A.D. No. 648 (Etherington)

⁵ *Credit Valley Hospital v. CUPE, Local 3252 (Brathwaite Grievance)* (2012), 214 L.A.C. (4th) 227 (Levinson)..

YES – the arbitrator did not buy the employee’s claim that she got the cake from a “friend” and believed it contained only “organic herbs”. The arbitrator found that the presence of THC in the coworker’s system without any other explanation and the employee’s own statements about the cake clearly showed that she knew the cake was “special”. The obvious and serious health and safety risks of drugging coworkers, combined with the employee’s dishonesty, led to the finding that there was just cause for her dismissal.

2) B.O. and B.A. (Bad Attitude)

NO – While the court found that, given the nature of her job, the employee’s personal hygiene issue was a significant problem, without a formal warning that her job was in jeopardy, it did not give the employer just cause for dismissal. As a 52 year old employee with 18 months of service, she was awarded 10 weeks pay-in-lieu of notice.

3) Vengeance by Chocolate

NO – The arbitrator found that, although the reporter’s behavior was bizarre and bordered on mentally unstable, his remorse, subsequent treatment, and the fact that his actions were as a private citizen and not in his reporting duties, justified overturning his dismissal and substituting a 3-month suspension. The arbitrator also ordered that the reporter attend anger management counseling as a condition of reinstatement.

4) Hail to the Bus Driver

YES – Although the *Canada Labour Code* adjudicator was sympathetic to the employee’s misfortune, he emphasized that she had nonetheless created a situation in which her employer’s business reputation was put at significant risk. As a result, her off-duty conduct made continued employment untenable.

5) Insult to Injury (and Death)

YES – The employee posted and commented on two pictures on his Facebook page of a patient suicide that took place on hospital property. It was clear that others viewed the pictures and comments. By his actions, the employee publicized and disseminated confidential patient information on the internet about this tragic event, which was clearly contrary to the employer’s Code of Conduct. Moreover, the employee was not remorseful nor did he accept responsibility for his actions.

Lessons for Employers

As these cases demonstrate, there is no “one size fits all” approach to just cause for dismissal. That being said, when deciding whether or not to assert just cause employers should be mindful of the following considerations:

- Was the employee's conduct premeditated or was it a momentary and isolated event?
- Would a stern warning have sufficed?
- Has the employer been consistent in its approach to discipline in similar circumstances?
- Did the employee show remorse for his or her misconduct?
- Was the employee given an opportunity to explain or deny the misconduct?

Just cause for dismissal does exist, but nine times out of ten the employers who succeed are the ones who step back and carefully assess the situation and seek proper legal advice before pulling the trigger.

Ryan Edmonds is the owner of [Ryan Edmonds Workplace Counsel](#), a boutique law firm that provides employment, human rights, and workplace investigation services to both employers and employees. Ryan can be reached at 647.361.8228 or Ryan@TorontoWorkplaceCounsel.com.