From the "Bagel Incident" to "Butt-Dialed" Revelations, Context Matters — The Annual Just Cause

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The approaching season of year-end lists would not be complete without our annual review of the top just cause cases, over the past 12 months or so, from across Canada. The 2016 list certainly reminds us that, since the Supreme Court of Canada's judgment in *McKinley v. BC Tel* some 15 years ago, whether it's a violent incident over a bagel or the inadvertent, butt-dialed disclosure of moonlighting on company time, the context of the alleged just cause matters.

In *Ross v. IBM Canada Ltd.* (2015) 259 A.C.W.S. (3d) 293 (Alta. Q.B.), a senior, mobile sales employee was terminated with cause when his employer learned, "as a result of two unintended, butt-dialed, communications", that he was working, by his subsequent admission, some 3-4 hours a week on his family business during regular work hours. IBM Canada was successful at trial before the Alberta Queen's Bench in proving that Ross regularly breached the Company's Business Conduct Guidelines and that IBM could no longer reasonably rely upon Ross to devote his full attention to his employer's interests. As a mobile employee, Ross was on the "honour system", as IBM had no effective means of micro managing him, and the employer was entitled to assume that its employee was devoting his full-time efforts to IBM's interests and doing his part to earn the relatively high income he was paid. The Court concluded that the standards of conduct that Ross breached were at the core of the employment contract, this justifying, objectively, IBM's conclusion that there had been a breakdown in the employment relationship.

In *Garreton v. Complete Innovations Inc.* (2016) 263 A.C.W.S. (3d) 947 (Ont. Div. Ct.), the Ontario Divisional Court had occasion to consider the importance of context as a result of the "bagel incident". The plaintiff, a trainer, had purchased bagels for an internal training session; when an employee who was not part of the session tried to take a bagel, the plaintiff grabbed her wrist. As a result, the plaintiff was suspended two days (with pay), for what the employer described as "retaliating with physical violence". Upon returning to work after the suspension, the plaintiff was terminated with cause, because of the bagel incident and two year-old incidents for which she had received warnings. In the end, though, the Divisional Court agreed with the trial judge's finding that the prior discipline of the plaintiff for the bagel incident, by the way of the

suspension, exhausted the defendant's discipline and "that to subsequently dismiss her from employment constituted double jeopardy".

In *Merritt v. Tigercat Industries Inc.* (2016) 264 A.C.W.S. (3d) 628 (Ont. S.C.J.), a labourer was charged with two counts of sexual assault against minors; in the listing of contextual considerations, it was noted that the alleged events did not occur at work, and did not involve other employees. The Court held that, while off-duty misconduct, including of a criminal nature, will amount to just cause in limited situations, there must be a justifiable connection to the employer or the nature of the work.

In *Goncharova v. Marsh Lake Solid Waste Management Society* (2015) 262 A.C.W.S. (3d) 384 (Y.T. Small Cl. Ct.), after reviewing the case law on cumulative cause, i.e., at what point does the proverbial straw break the camel's back, a Yukon Court summarized the applicable contextual considerations in this way:

My view is that the more similar the prior misconduct of the employee is to the present misconduct complained of, the greater the cumulative effect in supporting the argument for dismissal with cause. Conversely, the less similar the prior acts of misconduct are to the present misconduct, the less persuasive the cumulative effect in supporting an argument for dismissal for cause.

However, we have recently received a word of caution when it comes to context, from the B.C. Court of Appeal, in *Steel v. Coast Capital Savings Credit Union* 2015 CarswellBC 710 (BCCA), where it was noted that the contextual approach does not oblige the trial judge to formally balance the length and quality of the service with the nature and severity of the misconduct; moreover, the BCCA stated with respect to the contextual approach, "it is not a balancing exercise between the value of the employment to the individual and the severity of the misconduct."

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