

Get It in Writing: Ontario Court Upholds Termination for Cause Based on Written Employment Agreement and Clear Employee Expectations

March 13, 2023

By , Sean Foran, Daniel Wong

Overview

In *Park v Costco Wholesale Canada Ltd.*^[1], the Ontario Superior Court of Justice affirmed the test for just cause dismissal resulting from an employee's dishonest conduct, set out by the Supreme Court of Canada in *McKinley v BC Tel.*^[2] The key question is this: did the employee engage "in misconduct that is incompatible with the fundamental terms of the employment relationship?"^[3] If the answer is yes, just cause for dismissal will almost certainly be warranted.

This test was further circumscribed by the Ontario Court of Appeal in *Dowling v Ontario (Workplace Safety and Insurance Board)*.^[4] The court should assess (1) the nature and extent of an employee's misconduct; (2) the surrounding circumstances; and (3) whether dismissal is a proportionate response to the employee's misconduct in deciding whether a just cause dismissal was warranted. The misconduct in issue must engage "the heart of the employment relationship" to justify a just cause dismissal.

The Facts

Robert Park was an assistant buyer at Costco Wholesale Canada Ltd and, in assuming this managerial position, was subject to Costco's Standard of Ethics—Managers/Supervisors. Mr. Park was terminated by Costco (i) after he deliberately, on two occasions, deleted a website that he created for Costco's use; (ii) for insubordination, and; (iii) for false and misleading statements that he made when he applied for employment insurance. At the time of termination, Mr. Park had been employed by Costco for 20 years.

Mr. Park argued that he was wrongfully dismissed and was thereby entitled to 24 months' pay in lieu of reasonable notice, and for loss of his health and pension benefits. Mr. Park also requested damages for the breach of his human rights and bad faith conduct by Costco. Costco denied these allegations.

Mr. Park's employment relationship with Costco was governed by a written employment agreement. The agreement outlined the standard of conduct required by persons assuming managerial positions with the company and stipulated Costco's exclusive ownership interest in all work that a Costco employee designs and develops. At trial, Mr. Park acknowledged that it is important for management employees to follow the applicable standards of conduct, and that managers have "an extra onus" as leaders to set the proper example. Mr. Park also acknowledged that violations of his employment agreement could lead to discipline, up to and including termination.

The employment agreement's "Causes for Termination" section provided that "the general course of action will be termination of employment" in the event of any of the following:

- “Willful damage or destruction of Company property, equipment, merchandise or property of others on Company premises.
- Any act of insubordination, including but not limited to:
 1. Refusal to comply with the direct instructions or directions of a manager;
 2. Contemptuous behaviour or remarks to a manager.”

Termination for Cause was Upheld

In applying the threshold set out in *McKinley* and the factors outlined in *Dowling*, the court dismissed Mr. Park’s action. The court held that Mr. Park’s misconduct warranted dismissal for just cause, as his misconduct contravened the central terms of his employment agreement with Costco.

Both Mr. Park’s initial and subsequent unauthorized deletion of the website that he created for Costco constituted acts of misconduct, as were his insubordinate and disrespectful emails to his direct superiors. His willful, dishonest and deliberate actions, considered together, triggered the termination provision in his Employment Agreement with Costco.

Regarding surrounding circumstances, Mr. Park’s employment relationship with Costco was subject to the standards of ethics stipulated in his employment agreement. Mr. Park deliberately—and on four notable occasions—did not abide by the standards of ethics stipulated in his employment agreement. The court held that his repeated misconduct compromised Costco’s trust and authority in Mr. Park. Mr. Park’s willful damage and destruction of company property, insubordination, dishonesty and overall actions, which were neither honest or forthright, per Costco’s standard of conduct, warranted dismissal. Mr. Park’s repeated violation of his employment agreement amounted to a repudiation of his employment contract, thereby establishing grounds for a just cause dismissal.^[5]

Key Takeaways: Put it in Writing!

Employers should consider, given the nature of their business, if there is specific objectionable conduct that is at the heart of the employment relationship that they want to specify in writing as being grounds for termination for cause. Similarly, clear written expectations for employee conduct will assist in managing employee behaviour and addressing improper behaviour. As illustrated in *Park*, determining whether a just cause dismissal is warranted is a fact driven. Surrounding circumstances, such as an employer’s policies and practices, are relevant to this determination. In summary, outlining specific objectionable conduct and expectations that an employer considers as going to the heart of the employment relationship may be of benefit to both employees and employers, as it will ensure clarity as to an employer’s expectations and the consequences that flow from an employee’s failure to meet those expectations, being a just cause dismissal.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

^[1] [2023 ONSC 1013](#) [*Park*]; .

^[2] [2001 SCC 38](#) (CanLII) [*McKinley*].

^[3] *Ibid* at para 54.

[4] [2004 CanLII 43692 \(ON CA\)](#) [Dowling]; *Ibid* at paras 53-54.

[5] *Ibid* at para 81.

For more information or inquiries:

Toronto

Email:



Sean Foran

Toronto

416.947.5019

Email:

sforan@weirfoulds.com

Sean Foran is a leading expropriation lawyer, with extensive experience as counsel in large-scale infrastructure projects. Sean also practises real-estate, employment, business and government litigation.



Daniel Wong

Toronto

416.947.5042

Email:

dwong@weirfoulds.com

Daniel Wong is Chair of the Firm's Employment & Labour Practice Group with a practice that is focused on employment and labour relations.

WeirFouldsLLP

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035