

The Dentons logo, consisting of the word "DENTONS" in a bold, white, sans-serif font, enclosed within a white arrow-shaped graphic pointing to the right. The background of the slide is a purple gradient with a faint, repeating pattern of evergreen trees, and a large, curved purple shape on the right side that overlaps a photograph of a forest with vibrant autumn foliage in shades of yellow, orange, and red.

Just cause case law update

Janice Pereira & Mia Music

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Agenda

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2. Just cause dismissals – general factors to consider
3. Common law threshold vs. Statutory threshold
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The legal context

- Two ways for an employer to terminate employment in Ontario:
 - Dismissal for cause – serious misconduct
 - Dismissal without just cause (i.e. with a severance package inclusive of statutory entitlements upon termination)

Just cause dismissals

- Just cause is a very high bar to meet in Ontario.
- Terminating for “just cause” requires misconduct that:
 - Is intentional;
 - Is serious; and
 - Has not been condoned.
- The reasons for a just cause dismissal must be set out clearly in the termination letter.

Just cause dismissals

General factors to consider

- The nature and extent of the employee's misconduct;
- The context and surrounding circumstances, including the circumstances of the employee (seniority, role and responsibilities, employment history and performance, etc.);
- The circumstances of the employer (nature of business activity, relevant policies and procedures, degree of trust placed in employee, etc.); and
- A determination of whether misconduct can be reconciled with the continuation of the employment relationship, or whether it is so serious that it results in an irreparable breakdown of that relationship.

Just cause dismissal

Common law threshold vs. Statutory threshold under the Ontario *Employment Standards Act, 2000*

The common law: “Just Cause”

- Misconduct that is sufficiently serious that it strikes at the heart of the employment relationship.
- Does not require the employee to commit an intentional act.

The ESA: “Wilful Misconduct”

- Conduct in question must be “*wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer*”.
- Actions of the employee must be intentional, i.e., “wilful”.

Understanding the common law threshold

- The traditional view:
 - Just cause has been known in law as “the capital punishment of employment law”
- Rethinking the analogy:
 - In *Arora v. ICICI Bank of Canada*, 2024 ONSC 4115 the court challenged the traditional "capital punishment" framing. The analogy is unproductive and can lead to an overly restrictive application of just cause. Instead, the court suggested that just cause is a legitimate tool and appropriate option for employers in certain circumstances.

Establishing just cause

- Generally, employers must provide **clear evidence** of just cause.
- Two key questions:
 - Did the misconduct give the employer the right to impose some form of discipline?
 - If yes, was the discipline selected by the employer appropriate in the circumstances?

Common grounds for just cause dismissal

Serious Misconduct

- Theft
- Fraud
- Dishonesty
- Illegal conduct
- Harassment or violence
- Serious breaches of workplace policies

Poor Performance

- Incompetence
- Repeated culpable absenteeism

Render v. ThyssenKrupp Elevator (Canada) Limited, 2022 ONCA 310

- Employee was an operations manager with 30 years' service.
- Employee was terminated for cause without notice or pay in lieu after he touched a female co-worker on her buttocks.
- Employer had clear-anti-harassment and anti-discrimination policies which stated that the company had a “zero tolerance” for harassment and discrimination.
- Trial judge upheld the termination for cause.
- The Court of Appeal agreed with the trial judge that the employer had just cause for dismissal at common law, as non-consensual touching of a private part of the body is considered serious misconduct.
- However, employee's misconduct was not premeditated, but rather done in the heat of the moment. As such, the Court concluded it did not disentitle him to his statutory entitlements under the ESA, because it did not amount to “wilful misconduct”.

Park v. Costco Wholesale Canada Ltd., 2023 ONSC 1013

- Employee was an assistant buyer for Costco with 20 years of service.
- Employee built a website which allowed users within the department to easily share files with one another.
- The website was developed during work hours, and there was no dispute that it was Costco's property.
- On two separate occasions, the employee deliberately deleted the website, asserting he did so because he was angry with management's lack of communication.
- Costco dismissed the employee for cause.
- The Ontario Superior Court of Justice found that the employee's misconduct met the standard of cause under the common law and of wilful misconduct under the ESA.
- In the Court's view, the conduct was not merely an error in judgment. It was an intentional act involving the destruction of company property and insubordination, resulting in a breach of trust between the parties.

Progressive discipline

- Progressive discipline should be used when appropriate.
- Ensure that you have a well drafted and clear progressive discipline policy:
 - Clearly set out the process of using escalating disciplinary measures when an employee fails to perform according to expectations.
 - Progressive discipline policy can function as a defensive tool against potential human rights claims alleging discriminatory treatment – particularly, if you are clearly following your progressive discipline policy.
- Document all performance management efforts.

Progressive Discipline



Potential termination for cause ahead: What comes next?

Consider:

- Has a thorough and proper investigation been conducted?
- Are all facts accurately documented?
- Can the misconduct be proven if challenged?
- Has the employee been given a full opportunity to explain?
- How have similar situations been handled in the past?
- Are you acting promptly after discovering the misconduct?

! **Pro Tip:** Use it or lose it! If an employer does not allege just cause at the time of dismissal, it cannot later be raised as a defence to a wrongful dismissal claim.