

# CED: An Overview of the Law

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## Employment Law (Ontario) – Dismissal for Cause - Misconduct

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Part III.6.(a)-III.6.(b).(i) – Common Law of Employment – Dismissal for Cause - Misconduct

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### III.6.(a): Dismissal for Cause – General

**See** Canadian Abridgment: [LAB.II.6.a.ii](#) Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause

An employer may terminate an employment contract for just cause without giving notice to the employee. In cases where the employment contract is terminated without cause, the employer must give reasonable notice or provide pay in lieu of reasonable notice. Dismissal without cause and without sufficient notice or pay in lieu of notice is wrongful dismissal.

A contract of service may provide that the employer has the right to dismiss the employee at any time for incapacity or breach of duty, and that the employer is to be the absolute judge as to the manner in which the employee performs his or her duties. Where there is such a provision, the employer need not show sufficient cause for dismissal, as the power of dismissal has been submitted to the sole, absolute judgment and discretion of the employer. The degree of reasonableness required in arriving at the decision may depend on the terms of the contract and the circumstances of the case.

Dismissing an employee for a reason which does not fall within the ambit of a clause allowing termination for specified reasons repudiates the contract, which is rescinded if the employee accepts the repudiation. The employer may not thereafter attempt to raise the contractual power of termination as a defence to a wrongful dismissal action.

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with the fulfilment of his or her duties or conduct prejudicial to the employer's business, or has been guilty of wilful disobedience of the employer's orders in a matter of substance, the law recognizes the employer's right to summarily dismiss the delinquent employee.

In dismissing an employee for cause, the employer need not state the grounds for dismissal.

# CED: An Overview of the Law

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There is no common law principle that makes retirement at age 65, or any other age, mandatory. Age itself is not a justification for termination, unrelated to cause, nor does age operate as a release from the requirement of reasonable notice, absent cause. As a result of legislative enactment, an employer may establish a policy of mandatory retirement. Otherwise, the common law principles of notice will prevail where just cause is not established.

When an employee is terminated within a probationary period, the employer is still required to show just cause, but there is a lower standard as to what will constitute cause.

## **II.6.(b).(i).A : Dismissal for Cause – Just Cause – Misconduct – General**

**See** Canadian Abridgment: LAB.II.6.a.ii.A Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct

The sufficiency of the justification for dismissal for cause without notice depends upon the extent of the misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal, but conduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. The significance of the degree of misconduct may be in its consequences.

Although numerous incidents of misconduct may not justify dismissal without notice when considered individually, their cumulative effect may do so. The cumulative effect of minor incidents will warrant dismissal if a serious deterioration in the business relationship of the parties results. In exceptional circumstances, a single act of misconduct may justify summary dismissal if it causes serious detriment to the employer.

The issue of whether an employee's actions are serious enough to justify summary dismissal is a question of fact, to be assessed in the circumstances of each case. The degree of misconduct required to justify summary dismissal may be greater in the case of a long-service employee or one employed at a senior level. The employee's record of good conduct should be carefully considered in concert with the incident of misconduct, particularly where the misconduct is out of character.

Responses by the employer to the same misconduct by other employees will be considered in assessing the seriousness of the misconduct. The standards of conduct to be applied are those of "[human beings] not angels", and the standards may change from workplace to workplace and as social mores change.

Where an employee rejects a severance package and sues for wrongful dismissal, an employer is not precluded from amending its statement of defence to plead just cause some time after filing a defence of general denial.

# CED: An Overview of the Law

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## III.6.(b).(i).B: Dismissal for Cause – Just Cause – Misconduct – Criminal Activities

**See** Canadian Abridgment: LAB.II.6.a.ii.A.1 Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct — Criminal activities

Concurring in the commission of a crime is misconduct justifying dismissal.

An employer may dismiss an employee convicted of a criminal offence based on a written agreement between the parties.

Where a partner in a firm has invited an employee to play an active role in an illegal scheme clearly outside the scope of the firm's business, the participating employee will be in breach of his or her duty to the firm, even if the employee has not benefited personally or directed any of his or her actions against the firm.

## III.6.(b).(i).C: Dismissal for Cause – Just Cause – Misconduct – Dishonesty

**See** Canadian Abridgment: LAB.II.6.a.ii.A.2 Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct — Dishonesty

Employee dishonesty will justify dismissal for cause where the conduct seriously prejudices the employer's interests or reputation, or where the conduct reveals an untrustworthy character which undermines the position of responsibility or trust essential to the continued employment relationship.

Whether an employer is justified in dismissing employee for dishonesty is a question of fact requiring assessment of the context and of the alleged misconduct. To justify dismissal the dishonesty must give rise to a breakdown in the employment relationship, either by violating essential condition of employment, by breaching faith inherent in work relationship or by being fundamentally inconsistent with obligations to employer.

Fraud or misappropriation of funds by an employee justifies summary dismissal. The fraud must be against the employer, unless the employee occupies a position in which the misconduct jeopardizes the employer's trust and confidence.

To justify dismissal for cause by reason of dishonesty, there must be a dishonest intent on the part of the employee.

Proof of theft on a balance of probabilities will justify summary dismissal even if the employee is acquitted of criminal charges. General untrustworthiness or collaboration in the dishonest acts of others will also justify dismissal.

# CED: An Overview of the Law

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Mere suspicion of dishonesty or poor judgment on the part of the employee may not be sufficient to justify dismissal without notice. A reasonable explanation showing an innocent intention or an excuse for a mistaken or uncharacteristic act will be considered to determine the seriousness of the dishonest act.

Accepting favours or secret commissions from a third party may justify summary dismissal.

## **III.6.(b).(i).D: Dismissal for Cause – Just Cause – Misconduct – Insubordination**

**See** Canadian Abridgment: LAB.II.6.a.ii.A.3 Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct — Insubordination

An employee who bypasses his or her immediate supervisors and approaches upper management with personal concerns, or whose actions undermine the authority of an immediate supervisor, may be dismissed without notice.

However, where the employee has genuine concerns about job security, where immediate superiors show lack of good faith, or where there is a clearly conflictual situation, such behaviour will not amount to insubordination justifying summary dismissal.

Insolence and insubordination are not compatible with faithfulness if there is a deliberate challenge, if it is repeated, if there is no reasonable excuse, and if there is no apology given and accepted.

## **III.6.(b).(i).E: Dismissal for Cause – Just Cause – Misconduct – Disobedience**

**See** See Canadian Abridgment: LAB.II.6.a.ii.A.3 Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct — Insubordination

Generally, an employee must obey lawful orders and instructions of his or her employer. Serious or wilful disobedience of instructions, or the employee's failure to live up to the essential terms of employment, may constitute repudiation of the employment contract and justify termination without notice. Where disobedience is alleged, the onus is on the defendant to establish that the employee wilfully carried out acts in defiance of clear and unequivocal instructions.

The employer's order must be lawful, in that it contemplates performance by the employee of a task which falls within the scope of duties pursuant to the terms and conditions of the contract of employment.

# CED: An Overview of the Law

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In most cases, a single act of misconduct will not be serious enough to justify dismissal without notice. A single or isolated incident which destroys the harmonious relationship between the parties and is incompatible with the employee's duties and prejudicial to the employer will justify immediate dismissal. A single act of disobedience must be wilful, deliberate, and so serious as to amount to repudiation of an essential term and condition of the employment contract.

Where an employer has provoked or aggravated the employee's conduct, a single serious act of disobedience or misconduct will not justify dismissal for cause.

A reasonable excuse for disobedience must be considered by the employer prior to summary dismissal.

Refusal to agree to a termination arrangement and sign a form releasing the employer from all claims is not misconduct amounting to just cause for dismissal.

## **III.6.(b).(i).F: Dismissal for Cause – Just Cause – Misconduct – Sexual Harassment**

**See** See Canadian Abridgment: LAB.II.6.a.ii.A.5 Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct — Sexual harassment of other employees

An employee who sexually harasses other employees may be dismissed for cause without notice.

## **III.6.(b).(i).G: Dismissal for Cause – Just Cause – Misconduct – Behaviour Outside Work**

**See** Canadian Abridgment: LAB.II.6.a.ii.A.7 Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct — Behaviour outside work

Generally, conduct outside of work will not justify dismissal without notice unless the employee's conduct is totally incompatible with the proper discharge of his or her duties, or has caused severe prejudice to the employer.

Serious misconduct by persons in positions of trust will justify dismissal without notice in some circumstances, even when the misconduct occurs off the job.

An employee has no obligation to disclose criminal allegations relating to matters outside employment to his or her employer.

## **III.6.(b).(i).H: Dismissal for Cause – Just Cause – Misconduct – Refusal to Relocate or Accept Transfer**

# CED: An Overview of the Law

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**See** Canadian Abridgment: LAB.II.6.a.ii.A.8 Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct — Refusal to relocate or accept transfer

An employee's refusal to accept a reasonable transfer, where acceptance is an express or implied contractual term, will justify termination of employment without notice. Where a pending relocation is not specified in the employment contract, a geographical transfer unilaterally imposed by the employer will constitute constructive dismissal, and refusal to transfer in such circumstances will not justify dismissal without notice.

## **III.6.(b).(i).1: Dismissal for Cause – Just Cause – Misconduct – Absence and Lateness**

**See** Canadian Abridgment: LAB.II.6.a.ii.A.9 Labour and employment law — Employment law — Termination and dismissal — Termination of employment by employer — What constituting just cause — Misconduct — Absence and lateness

Chronic lateness or persistent or prolonged absence from work is an adequate ground for summary dismissal in most circumstances. An isolated absence, however, or even occasional absence or lateness will not justify summary dismissal.

Employees who can justify their time off for medical or personal problems cannot be dismissed for cause.

The reasonableness of the explanation for the absence is relevant in determining if there is cause for dismissal. Honesty in expressing the purpose of the absence will be considered, as will wilfulness on the part of the employee.

The seniority, responsibility, and latitude given to the employee will also be considered.

Warnings should clearly express the consequences of continued tardiness or absence.