

Park v. Costco: Ontario Court Upholds Just Cause Dismissal of Employee Who Intentionally Deleted Company Website

Jed Blackburn

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In the wake of the Ontario Court of Appeal's decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (previously reported on here), many employers have had questions regarding the distinction between "just cause" for termination at common law and the statutory test for "wilful misconduct, disobedience or wilful neglect of duty" under Ontario's *Employment Standards Act, 2000* (the ESA).

While terminations for just cause at common law and under the ESA standard require a very high threshold of misconduct and should be approached with caution, the doctrine of just cause remains very much alive in Ontario, as recently confirmed by the Superior Court of Justice in *Park v. Costco*, 2023 ONSC 1013. Indeed, *Park* represents a good example of circumstances where this high threshold was met and provides some instructive lessons for employers when considering a termination for just cause at common law and/or wilful misconduct under the ESA.

Background

Park involved the termination of a 20-year employee of Costco who, at the time of termination, was 43 years old and held the position of Assistant Buyer in the lawn and garden department of Costco's Ottawa office.

As an Assistant Buyer, Mr. Park had management responsibilities (including supervising a number of inventory control specialists) and was responsible for monitoring inventory, setting prices, and negotiating with vendors.

Further, as a managerial employee Mr. Park was subject to Costco's "Standard of Ethics – Managers/Supervisors," which among other things stated as follows:

In accepting a position of management, you must be committed to and demonstrate a role of honesty and forthrightness. Anytime there is the slightest doubt about an activity that could be questioned regarding honesty, integrity or intent, you must discuss it with your Manager or Regional Vice President to remove any doubt. Managers above all else lead by example.

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At the core of our philosophy as a company must be the implicit understanding that not one of us is required to lie or cheat on behalf of Costco or to enhance our company or personal performance. Managers must never engage in any activity that could raise a question concerning their integrity.

Mr. Park's employment agreement also included a section entitled "Causes for Termination," specifying a number of circumstances where "the general course of action will be termination of employment." The specific causes for termination included the following:

18. Wilful damage or destruction of Company property, equipment, merchandise or property of others on Company premises.

19. Any act of insubordination, including but not limited to:

a. refusal to comply with the direct instructions or directions of a manager;

b. contemptuous behaviour or remarks to a manager.

Despite his 20 years of employment and generally positive performance reviews, Mr. Park's employment relationship with Costco was contentious at times and included dissatisfaction with prior promotion/demotion decisions and conflicts with a number of supervisors.

Mr. Park took a medical leave in early 2014, which he attributed to these earlier frustrations and the fact that a "verbal consultation" had been added to his employment file. This was followed by a second medical leave from February 3 to 23, 2015. After his return to work, Mr. Park requested a transfer to another department to reduce his stress, which transfer request was ultimately granted by Costco effective April 13, 2015.

Creation and Deletion of Website by Mr. Park

The circumstances leading to Mr. Park's termination arose from a Google cloud-based website that Mr. Park created in 2014 for Costco's toys department. While the website was Mr. Park's "pet project," it was developed during work hours with the assistance of a coworker and there was no dispute that the website was Costco property. With his supervisor's encouragement, Mr. Park submitted the website to Costco's management for its review shortly before he commenced his second medical leave. Feedback on the website was not provided prior to the leave and neither Mr. Park nor Costco followed up regarding the website upon Mr. Park's return to work.

On April 13, 2015, Mr. Park's supervisor emailed Mr. Park to advise that he could no longer access the website Mr. Park had created. He requested that access be restored and ownership of the website be

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transferred to Costco. In response, Mr. Park deleted the website entirely, and admitted at trial to being “furious,” stating that Costco was “asking for a revenge tactic or out of spite.”

This led to a series of hostile emails from Mr. Park to Costco, in the course of which Mr. Park admitted to purposefully deleting the website. After communicating its disappointment and emphasizing that Mr. Park must seek approval before deleting items from its system, Costco was able to restore the website and subsequently advised Mr. Park of this. However, in the interim, Mr. Park deleted the website for a *second* time (both from his computer and from his computer’s recycling bin).

At trial Mr. Park admitted that he had intentionally deleted the website on both occasions.

Following an internal IT investigation regarding the deletion of the website, Mr. Park’s employment was ultimately terminated on April 22, 2015, for cause.

The Legal Test

In *Park*, Justice Ryan Bell relied on the Court of Appeal’s summary of the legal test for just cause as follows:

[54] The core question for determination is whether the employee engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. Dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship; this is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct: *Dowling v. Ontario (Workplace Safety and Insurance Board)*, at para. 49.

[55] As set out by Gillese J.A. in *Dowling*, at para. 50, application of the standard consists of,

1. determining the nature and extent of the misconduct;
2. considering the surrounding circumstances; and
3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

1. The Nature and Extent of the Misconduct

Justice Ryan Bell had no difficulty in concluding that misconduct had occurred in this case. In fact, despite Mr. Park’s characterization of the second deletion of the website as a mere “continuation” of the first deletion, Justice Ryan Bell identified four discrete acts of misconduct committed by Mr. Park on April 13, 2015:

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- a. Mr. Park's deliberate deletion of the website after receiving his supervisor's email requesting access be granted, which amounted to damage or destruction of Costco's property contrary to s. 18 of his employment agreement.
- b. The misleading reply email that Mr. Park initially sent to his supervisor, in which he failed to disclose that he had deleted the website earlier that day and instead implied he had deleted it at some time in the past.
- c. A further email Mr. Park sent to his supervisor and Costco management, which was found to be inflammatory, insubordinate, and disrespectful. In the email in question, Mr. Park complained that his supervisors had not provided him with timely feedback on the website, stating: "exactly how many times should I be asking for an update, can I not trust in my managers to be able to get back to me in a timely manner and not ignore my requests? They need to take some ownership and responsibility... maybe you need to review with your managers how to manage their workloads... I shouldn't have to babysit and always have to do the follow-up." The comments were found to have seriously undermined management's authority and amounted to insubordination contrary to s. 19(b) of his employment agreement.
- d. Finally, Mr. Park's deliberate deletion of the website for a second time, which was held to be in direct defiance of management's instructions, intentional destruction of Costco property, and insubordination contrary to s. 19(a) of his employment agreement. Mr. Park was also found to have acted dishonestly by failing to notify Costco of this second and permanent deletion of the website.

2. Surrounding Circumstances

While Mr. Park's position at trial was that his reaction and deletion of the website were a "knee-jerk reaction" coloured by the "emotional and mental suffering resulting from his toxic relationship" with his supervisor, Justice Ryan Bell held there was no evidence that this relationship caused or contributed to Mr. Park's misconduct.

The evidence at trial also showed that Costco had placed significant trust and authority in Mr. Park in his position as Assistant Buyer, which included providing him with significant security access and the ability to make edits to a variety of Costco's systems. Mr. Park admitted to being familiar with his employment agreement (which expressly identified wilful destruction of company property and insubordination as being causes for termination), and, in particular, Costco's Standard of Ethics – Manager and Supervisors. Indeed, Mr. Park's own testimony was that management employees have "an extra onus" to set a proper example in terms of their behaviour.

3. Proportionality

Justice Ryan Bell found that terminating Mr. Park's employment for cause was a proportional response to his misconduct, as this misconduct was incompatible with the fundamental terms of his employment. In

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doing so, she emphasized that Mr. Park had engaged in four discrete and deliberate acts of misconduct, that the misconduct was serious, that Costco's trust was essential to his role as Assistant Buyer, and that Costco could no longer trust Mr. Park. In the circumstances, a termination for just cause was warranted.

Wilful Misconduct under the ESA

In addition to meeting the standard of just cause at common law, Justice Ryan Bell also had no difficulty in finding that Mr. Park's misconduct met the higher standard of "wilful misconduct" under the ESA. The deletion of the website on both occasions was deliberate, as were the related emails which were found to be intentionally misleading and insubordinate. This wilful misconduct was not trivial and was not condoned by Costco. As noted in this decision, Mr. Park's conduct amounted to "being bad on purpose."

The decision in *Park* is interesting in its identification of four discrete acts of deliberate misconduct. An example of a somewhat different approach (and a decision where only the common law standard of just cause was met, but not the higher ESA standard of wilful misconduct) can be seen in the Court of Appeal's recent decision in *Render v. Thyssen*, 2022 ONCA 310 (previously reported on here).

Additional Issues

Finally, Justice Ryan Bell rejected both Mr. Park's assertion that Costco had failed to conduct a proper investigation before deciding to terminate him for cause (and in particular, that it had not involved him in the investigation), and that it had failed to consider the "history of interpersonal conflict" between Mr. Park and his supervisor.

Justice Ryan Bell concluded that Costco's IT investigation was sufficient to confirm the relevant facts: namely that Mr. Park deleted the website twice and the timing of the deletions relative to his emails with Costco. In addition, there was no evidence at trial that either Mr. Park's mental health or his transfer request played any part in the decision to terminate his employment.

Key Employer Takeaways

This decision will be of particular interest to Ontario employers who are considering a termination for just cause. Key takeaways from this decision include the following:

- While the threshold for just cause to terminate an employee's conduct remains high (and the ESA standard for wilful misconduct remains even higher), they are not insurmountable in appropriate cases, particularly where there are multiple acts of misconduct.

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- Just cause is much more likely to exist where deliberate misconduct has occurred (such as the intentional destruction of company property), and this “being bad on purpose” element is necessary for the ESA standard of wilful misconduct to be met.
 - Policies with respect to expectations of employee conduct, particularly those with managerial responsibilities, can be important evidence in this analysis.
 - While a specific type of investigation is not required prior to a dismissal for just cause, an employer must ensure that it makes its decision on the basis of all the relevant facts and considerations.
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