

Asserting Just Cause in Good Faith Not Grounds for Voiding Without Cause Termination Provisions

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Employers who discover that an employee has engaged in serious misconduct are faced with a difficult decision: should they attempt to terminate the employee for “just cause” in which case the employee would not be entitled to any notice or pay in lieu of notice? Or should they terminate on a “without cause” basis and seek to rely upon a termination provision limiting the employee’s termination entitlements?

The risks are significant as an employer who asserts just cause without an honest or good faith belief can be found liable for additional damages as well as potentially voiding an otherwise valid without cause termination provision. This could result in an employer being found liable for a much greater amount than had it proceeded to terminate on a without cause basis.

Given these risks and the high burden placed on employers to establish just cause, many employers choose the path of least resistance and proceed to terminate on a without cause basis even in the face of serious employee misconduct.

However, the recent trial decision of the Court of King’s Bench of Alberta in [*Singh v Clark Builders*](#) (*Clark*) gives employers some assurance that, at least in appropriate circumstances, employers who initially assert just cause will not be prevented from subsequently relying on a without cause termination provision limiting an employee’s entitlement to pay in lieu of notice.

Background

In *Clark*, the plaintiff employee was initially hired by the defendant company in the position of VP Corporate Operations, but based on the understanding that he would be subsequently promoted to Chief Operating Officer upon the existing COO’s retirement (which he was).

While the company had actively recruited the employee, there was no power imbalance in the relationship: the employee was found to be a knowledgeable and sophisticated executive in the construction industry with experience in hiring/firing employees, negotiating employment terms, and signing offer letters and employment agreements. The employment agreement was extensively negotiated between the parties, including the termination provision which was specifically amended by the employee to provide that he was entitled to receive 90 days’ notice or pay in lieu of notice if terminated without cause.

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As COO, the employee had significant responsibilities, including being ultimately responsible for the profit/loss of the business. In 2019, the employer discovered there were significant issues with respect to the company's financial reporting and that profits had been overstated. After an external audit, the company's year-end income was written down by over \$10 million.

Following this discovery, the company terminated the employee's employment. While the company took the position it may have grounds to terminate for just cause, it attempted to negotiate an agreement with respect to the employee's departure and offered to terminate on a without cause basis and provide the 90 days' pay in lieu of notice. This was not accepted by the employee, although the parties did agree upon the employee's last day of work.

The employee subsequently commenced legal action for wrongful dismissal. While the company initially defended the action on the basis that it had just cause to terminate, it later amended its defence to remove the allegations of just cause and instead sought to rely upon the without cause termination provision. The employee's position was that he was entitled to reasonable notice at common law because the termination provision was ambiguous and that it was no longer applicable due to his subsequent promotion to COO. The employee further claimed that the company had in any event repudiated the employment agreement by initially asserting just cause/failing to pay the contractual notice amount, and was therefore precluded from relying on the without cause termination provision.

The Decision

The Court held that the termination provision, as amended by the employee, was clear, unambiguous, and binding upon the parties. The Court also held that, even if the termination provision were ambiguous, the standard employment law presumption of resolving any ambiguity in an employee's favor would not apply in this case since the parties had equal bargaining power.

The Court rejected the employee's argument that the "changed substratum doctrine" applied to negate the termination provision in the original contract following the employee's promotion to COO. The Court noted that the promotion to COO was specifically promised by the company during the negotiations between the parties, and was not a sufficient change for the changed substratum doctrine to apply. The employment agreement also specifically stated that the duties and responsibilities of the employee may be changed but that the terms of the employment agreement would continue to apply. As the employment agreement contemplated that the terms of employment may change with the balance of the employment agreement remaining in force, the termination provision was still binding following the promotion to COO.

Finally, the Court rejected the employee's arguments that the company repudiated the employment agreement by (a) alleging the existence of just cause in bad faith, and (b) failing to pay the employee the 90 days' pay in lieu of notice as per the employment agreement. The Court held that an employer who initially

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asserts just cause in good faith is not precluded from subsequently relying on a without cause termination provision to limit its liability. In discussing the good faith requirement, the Court held that this means that the “allegation of just cause cannot be brought dishonestly or for an improper, dishonest, or fraudulent purpose.”

In *Clark*, the Court held that the company had a reasonable basis for alleging just cause both at termination and during litigation in relation to the company’s profit write-down, and therefore was still entitled to rely upon the without cause termination provision despite subsequently withdrawing the allegation of just cause prior to trial.

With respect to the failure to pay the 90 days’ notice on termination, the Court held that the company had not repudiated the employment contract because the company believed in good faith that there was just cause for dismissal and the parties were in the process of attempting to negotiate a settlement where this was a live issue. Further, once the employee chose to commence litigation, the company was entitled to wait for a determination on the enforceability of the termination provision before paying the 90 days’ pay.

As the company did not repudiate the employment agreement, the termination provision was not rendered void: rather, the failure to pay constituted a breach of the employment contract for which the damages were what the company should have paid pursuant to the termination provision.

Takeaways for Employers

Clark represents a win for employers and provides a number of useful takeaways:

- **The presumption of unequal bargaining power between employers and employees is not absolute.** While in most cases any ambiguity in an employment agreement will be interpreted in an employee’s favour, there are exceptions in cases such as *Clark* where the sophistication of the employee and the employee’s role in negotiating/drafting the employment agreement can override this presumption.
- **The changed substratum doctrine will not apply where an employment agreement expressly contemplates a change in the employee’s role and responsibilities.** To avoid this, employers should ensure their employment agreements are carefully drafted to contemplate future changes and are updated when appropriate.
- **Employers are not precluded from relying on a without cause termination provision to limit their liability even after initially asserting just cause.** However, in order to do so employers must ensure they act in good faith, have a valid termination provision in their employment agreements, and that they conduct the termination carefully. Where these requirements are met, employers do not lose the ability to rely upon a properly drafted termination provision to limit their damages even where the just cause allegation is later withdrawn.

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While *Clark* is a very helpful decision for employers, the outcome was heavily dependent upon the circumstances of the case. As employers contemplating a termination for just cause face many pitfalls, they should tread carefully and are well-advised to seek legal advice on the risks of doing so in order to mitigate their potential exposure.

For assistance in reviewing your employment agreements or advising on employee terminations, please contact a member of the Cassels [Employment & Labour](#) team.

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