COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Steel v. Coast Capital Savings Credit Union,* 2015 BCCA 127

Date: 20150320
Docket: CA040816

Between:

Susan Steel

Appellant
(Plaintiff)

And

Coast Capital Savings Credit Union

Respondent
(Defendant)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated March 27, 2013 (*Steel v. Coast Capital Savings Credit Union*, 2013 BCSC 527, Victoria Docket 08 3779).

Counsel for the Appellant:	J. A. S. Legh
Counsel for the Respondent:	H. S. Delaney
Place and Date of Hearing:	Victoria, British Columbia January 27, 2015
Place and Date of Judgment:	Vancouver, British Columbia March 20, 2015

Dissenting Reasons by:
The Honourable Mr. Justice Donald

Written Reasons by:
The Honourable Mr. Justice Goepel (p. 9, para. 18)

Concurred in by:
The Honourable Mr. Justice Harris

Summary:

*The appellant appeals from a decision of the Supreme Court of British Columbia, dismissing her claim for damages from dismissal without cause. The appellant was dismissed without notice from her position as an IT Helpdesk Analyst with the respondent, where she had worked for 21 years. The respondent alleged just cause for dismissal flowing from the appellant's breach of the respondent's privacy policies after the appellant, without permission, used the computer access she was provided as an IT Helpdesk Analyst to view a personal document of a manager stored on the internal computer network. The trial judge agreed that the respondent had just cause for dismissal, partly due to the fact that the respondent's identity as a financial institution necessitated a high degree of trust in employees. Held: Appeal dismissed. The majority (**per Goepel J.A. concurred in by Harris J.A**.) held that the trial judge correctly applied the proportionality test enunciated by the Supreme Court of Canada. The question of whether the misconduct provided just cause for dismissal is a question of mixed fact and law, subject to a standard of review of palpable and overriding error. The trial judge made no palpable and overriding error in finding that the actions of the appellant resulted in a fundamental breakdown in the employment relationship. **Donald J.A. dissented**. In his opinion, the trial judge erred by failing to consider the length of employment and the unblemished employment record of the appellant in the necessary proportionality analysis. Additionally, the respondent's identity as a financial institution was irrelevant for the purposes of considering the necessary trust to be placed in the appellant, as the appellant's actions were not in respect to financial or client matters, but rather internal matters to the business.*

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] The appellant was an IT Helpdesk Analyst whom the respondent fired from her employment of 21 years for accessing a confidential document contrary to internal privacy protocols. Her action for wrongful dismissal was dismissed on the finding that the appellant's misconduct violated the trust essential to the employment relationship and amounted to just cause for dismissal: 2013 BCSC 527.

[2] The appellant alleges the trial judge erred by failing to apply all the factors of *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161. She submits that the judge focussed on her misconduct to the exclusion of her employment history and thus arrived at her conclusion of the justness of the cause without taking into account the appellant's 21 years of unblemished service.

[3] I respectfully agree that the judge's analysis was incomplete and that if *McKinley v. BC Tel* had been correctly followed, the termination would have been seen to be unjustly harsh. I would allow the appeal, give judgment to the appellant, and remit the case for assessment of damages.

FACTUAL BACKGROUND

[4] The appellant's job as a Helpdesk Analyst in the IT department gave her special access to any document or file in the respondent's network, including "Personal Folders" which are confidential and can only be read by the employee assigned to the file. A Helpdesk Analyst must get permission according to a protocol in order to access a Personal Folder.

[5] On 22 July 2008, the appellant accessed the Personal Folder of a manager, without authorization. The manager was in charge of assigning parking spaces, which were limited and much sought after. Because of previous dealings with the manager, the appellant was aware that a parking priority list was kept in the subject file. And so she foolishly decided to satisfy her curiosity as to where she was on the list, by snooping in the file. She was caught when the manager tried to get into the file but was blocked because the appellant was using it. It was not a stealthy operation. When confronted, the appellant admitted to her superior that she did not have authorization.

[6] The judge recites that the appellant commenced her employment in November 1987 and was promoted to the Helpdesk on December 10, 1997. She makes no further mention of the appellant's employment history.

[7] The judge's reasons concluded with this discussion:

> [26] Ms. Steel occupied a position of great trust in an industry in which trust is of central importance. In her position as Helpdesk analyst Ms. Steel was given the ability to access confidential documents. The employer established clear policies and protocols known to Ms. Steel at the relevant time that were to govern access to confidential documents. One of the most important of these was that Helpdesk analysts such as Ms. Steel were not to

> remotely access other employees' files without first receiving specific permission to do so.
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> [27] It was not practicable for Coast to monitor which documents Ms. Steel accessed and for what purpose. The employer had to trust Ms. Steel to obey its policies and to follow the protocols. It had to trust Ms. Steel to only access such documents as part of the performance of her duties and to follow the protocols when she did so. Such trust was fundamental to the employment relationship in relation to Ms. Steel's position. It was, to use the language of Iacobucci J. in *McKinley*, "the faith inherent to the work relationship" that was essential to this employment relationship.
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> [28] Ms. Steel violated that trust in two distinct and important ways. First, she opened a confidential document in another employee's file for her own purposes, not as part of her duties and not at anyone's request. Second, she violated the protocols that were to govern situations in which remote access of such documents was undertaken. Specifically, she did not have permission to do so from the document's owner, or from anyone entitled to grant such permission.
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> [29] I have concluded that in the circumstances this conduct amounted to just cause for dismissal. It follows that the action is dismissed.

[8] In my view, the appeal ultimately comes down to whether the leading case of *McKinley* was correctly followed. A subsidiary issue is whether the judge incorrectly elevated the standard of trust on the basis that the respondent is a financial institution.

DISCUSSION

[9] Under the heading of "Legal Principles", the judge discusses *McKinley* and the trust standard in the following way:

> [22] In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, the Supreme Court of Canada described the contextual approach to be taken in the determination of whether the employee's misconduct amounted to cause for dismissal. Mr. Justice Iacobucci, for the Court, stated the importance of the principle of proportionality in this regard. The court must strike a balance between the severity of the misconduct and the sanction imposed. The misconduct at issue in *McKinley* was dishonesty. At para. 48, Iacobucci J. described the contextual analysis to be applied as follows:
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> > In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could

> say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
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> [23] In *Dilg v. Dr. D. Sarca Inc.*, 2007 BCSC 1716, at para. 35, Mr. Justice Preston noted that the contextual analysis described by Iacobucci J. in *McKinley* is to serve as the basis to be applied in all cases of summary dismissal.
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> [24] A relationship of trust has been found to be particularly critical in the banking industry where employees are held to a higher standard of trust than employees in other commercial or industrial undertakings, see, for example, *National Bank of Canada v. Lepire*, 2004 FC 1555; and *Rowe v. Royal Bank of Canada* (1991), 38 C.C.E.L. 1 (B.C.S.C.).
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> [25] In addition, employees who work with greater autonomy are held to a higher standard of trust. The greater the autonomy the employee enjoys, the more fundamental trust becomes to the employment relationship, see *Godden v. CAE Electronics Ltd.*, 2002 BCSC 132.

[10] In my opinion, the foregoing analysis ignores the key precedential change in employment law brought about by *McKinley*. What was new about *McKinley* was the value of a job as a key factor in determining the justness of cause for dismissal. The contextual analysis and proportionality to which the judge refers in her reasons are not simply a process of ensuring the penalty fits the crime. It involves a wider appreciation of the employment relationship, taking the length and quality of service into account, as well as the inherent value of the job to the employee.

[11] It will be remembered that this Court took a hard line on employee dishonesty in *McKinley*, and the Supreme Court of Canada adopted a more humane approach. This is reflected in the following passage from *McKinley*:

> 53 Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:
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> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is

> an essential component of his or her sense of identity, self-worth and emotional well-being.
>
> This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, and in *Wallace*, [*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701], at para. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".
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> 54 Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position *vis-à-vis* their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.
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> 55 In light of these considerations, I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. As a result, the consequences of dishonesty would remain the same, irrespective of whether the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship.
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> 56 Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.
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> 57 Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[12] What is absent from the trial judge's reasons is an explanation why a single instance of a breach of the privacy rules should end a 21-year career. The judge

does not find this to be a case of dishonesty. The record does not show deceit, fraud, theft or stealth. The misconduct was serious, as the judge found, but her analysis of the proportionality of the penalty left out a vital factor.

[13] This leads me to the standard of trust vis-à-vis financial institutions. It would appear that the judge found the misconduct to be more egregious because of this element and so it affected the balance. In my view, unless the impugned behaviour involves money or the affairs of a client, the fact that an employer is a bank or a credit union is irrelevant. Every business organization large enough to have an IT department is entitled to impose reasonable rules for confidentiality and privacy. The standard of trust is not elevated simply because the business is financial in nature. In the instant case, the matter was an internal administrative issue: parking spots. The integrity and probity of the respondent as a credit union could not have been compromised by the appellant's actions.

[14] Each of the cases cited at para. 24 of the judge's reasons to support the elevated standard of trust for employers of financial institutions involved financial transactions harmful to the business: in *National Bank of Canada v. Lepire*, 2004 FC 1555, the employee was administering loans to family members, contrary to a conflict of interest policy; and in *Rowe v. Royal Bank of Canada* (1991), 38 C.C.E.L. 1 (B.C.S.C.), the employee became financially involved with a client similarly in violation of conflict of interest policies.

[15] Without minimizing the importance of privacy and confidentiality, I do not think it is self-evident that termination must be the inevitable consequence of the appellant's misconduct. Our attention was drawn to the respondent's policy book, which we were told was annually reviewed with the IT group and constituted fair warning that breach of the rules could lead to dismissal. What is revealing is that the warnings are not expressed in terms of automatic termination, but as a range of sanctions. For example, in reference to reviews (monitoring) of computer use by company personnel, the warning is of a general nature:

> Any individual conducting unauthorized reviews will be subject to disciplinary action.

and, in reference to the overall policy for use of computing and network services:

> Any employees at CCS found to have violated this policy may result in disciplinary action, up to and including termination of employment or financial recovery by the company depending upon the type and severity of the violation, whether it causes any liability or loss to the company, and/or the presence of any repeated violation(s).
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> [Emphasis added.]

[16] In summary, a full *McKinley* analysis would have produced a result favourable to the appellant, and in my opinion she is entitled to succeed in her action and to have her damages assessed.

CONCLUSION

[17] I would allow the appeal, give judgment to the appellant and remit the case for assessment of damages.

"The Honourable Mr. Justice Donald"

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[18] I have had the privilege of reading, in draft form, the reasons of Mr. Justice Donald. I have, however, come to a different conclusion. For the reasons that follow, I would dismiss the appeal.

FACTUAL BACKGROUND

[19] The factual background has been set out in detail by Mr. Justice Donald and I need only to touch on it briefly.

[20] The appellant was fired from her employment of 21 years for accessing a confidential document contrary to internal privacy protocols. She was part of the Helpdesk team which provided internal technical assistance to other employees of the respondent. The appellant was in a position that required the complete trust of the respondent. Notably, she worked unsupervised in her day-to-day functions and was one of only a handful of people that had complete access to the respondent's computer system. As a result, she had unfettered access to every document and file on the system, including the private and personal files of the respondent's employees.

[21] The respondent took privacy and confidentiality very seriously. All of its employees were assigned personal folders which were kept on the network and were to be used solely by that employee. The folders were intended to be used for confidential information (personal and business) pertaining to the company. Employees were forbidden from accessing anyone else's emails or files without permission.

[22] The respondent established a detailed protocol for Helpdesk employees to access a personal folder that operated as follows:

(a) The employee with the problem contacts the Helpdesk;

(b) if the problem can be solved orally, it is;

(c) if oral advice is not successful, the Helpdesk employee may provide on-screen support. This allows the Helpdesk employee to remotely control the employee's computer in order to address the issue. The employee can follow the Helpdesk employee's progress on their screen;

(d) before the Helpdesk employee can remotely access the employee's files, the employee with the problem must specifically give permission;

(e) the employee seeking support must determine whether it is appropriate for the Helpdesk support person to be viewing the document in question;

(f) even if the Helpdesk employee is authorized to view the document, its contents must remain confidential.

[23] The appellant knew the protocol and was aware that personal files were not to be accessed unless the protocol was followed. Following this protocol was part of her obligations as an employee with the Helpdesk. The appellant knew that a breach of the protocols could lead to termination.

[24] The trial judge found that the appellant had improperly and intentionally accessed the personal file of a manager of the respondent for her own purpose. Her actions were discovered by happenstance. The manager in question discovered that the appellant was viewing her file when she attempted to open it for her own purposes, which she could not do because it was being accessed remotely by the appellant.

[25] After considering the situation, the respondent dismissed the appellant. In its letter of termination, it wrote:

> The reason for cause is based on a decision following the incident that occurred on Tuesday, July 22nd at which time it was found that you had accessed a confidential file kept in a staff member's private folder. You were clearly aware that this file was not for your viewing. Sue, this is outside the boundaries set for your position as a Helpdesk Analyst and an action which flies in the face of the trust that is required in a position that holds access to confidential and private information. The severity of this breach of trust has led Coast Capital Savings to lose faith in your judgment. It has resulted in a serious loss of confidence in you which we believe has irreparably damaged the employment relationship and hence the difficult decision to end your employment with Coast Capital Savings.

DISCUSSION

[26] I agree with Mr. Justice Donald that *McKinley v. BC Tel*, 2001 SCC 38, reflected a watershed change in the law governing just cause dismissal. In essence, *McKinley* requires courts to apply a contextual analysis to determine whether employee misconduct amounts to just cause for dismissal: *Van den Boogaard v. Vancouver Pile Driving Ltd.,* 2014 BCCA 168. Following *McKinley,* a single act of dishonesty as a matter of law no longer gives an employer an absolute right to dismiss its employee.

[27] However, *McKinley* makes clear that a single act of misconduct can justify dismissal if the misconduct is of a sufficient character to cause the irreparable breakdown of the employment relationship. In a passage cited by the trial judge, the Court said:

> 48 In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

[28] The governing principle from *McKinley* is that a trial judge is tasked with determining whether, in the totality of the circumstances, the alleged misconduct was such that the employment relationship could no longer viably subsist: *McKinley*

at paras. 56-57. However, the inherent value of the job to the employee need not be expressly considered in determining whether there was just cause to dismiss. Put differently, the trial judge is not obligated to formally balance the length and quality of service with the nature and severity of the misconduct in determining whether there was just cause to dismiss, though it may be appropriate on the facts of a particular case to engage in just such an analysis.

[29] The framework adopted by the Court in *McKinley* focuses on the nature and severity of the misconduct in relation to its impact on the employment relationship; it is not a balancing exercise between the value of the employment to the individual and the severity of the misconduct. As a result, considerations that underpin the value of the employment to the individual simply go to the fact-specific understanding of the particular employment relationship against which the impact of the misconduct is determined. All of this is done to determine whether, as a matter of fact, the employment relationship has irrevocably broken down. The Court explains:

> 57 … I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[30] Misconduct "going to the core of the employment relationship" includes, as the Court explains at para. 48, behaviour that "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer." In a case where the employee admits to having engaged in the misconduct, the sole issue for the trial judge to consider is whether that conduct caused a breakdown in the employment relationship. Therefore, whether the length of service or the quality of service is a relevant factor that mitigates the effect of the misconduct on the employment relationship is a question for the trial judge to determine based on the specific facts and circumstances of a particular case.

[31] With regard to the standard of review, the question of whether the alleged misconduct provided just cause for dismissal is a question of mixed fact and law: see *Panton v. Everywoman's Health Centre Society (1988)*, 2000 BCCA 621 at para. 7. Given that the issue on this appeal involves the trial judge's interpretation of the evidence as a whole, the standard of review on appeal is palpable and overriding error unless the trial judge made some extricable error in principle: see *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 36-37.

[32] The trial judge found that the appellant's conduct had breached the faith inherent to the work relationship, the result of which was that the relationship had irrevocably broken down. In that regard, she found as follows:

> [26] Ms. Steel occupied a position of great trust in an industry in which trust is of central importance. In her position as Helpdesk analyst Ms. Steel was given the ability to access confidential documents. The employer established clear policies and protocols known to Ms. Steel at the relevant time that were to govern access to confidential documents. One of the most important of these was that Helpdesk analysts such as Ms. Steel were not to remotely access other employees' files without first receiving specific permission to do so.
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> [27] It was not practicable for Coast to monitor which documents Ms. Steel accessed and for what purpose. The employer had to trust Ms. Steel to obey its policies and to follow the protocols. It had to trust Ms. Steel to only access such documents as part of the performance of her duties and to follow the protocols when she did so. Such trust was fundamental to the employment relationship in relation to Ms. Steel's position. It was, to use the language of Iacobucci J. in *McKinley*, "the faith inherent to the work relationship" that was essential to this employment relationship.
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> [28] Ms. Steel violated that trust in two distinct and important ways. First, she opened a confidential document in another employee's file for her own purposes, not as part of her duties and not at anyone's request. Second, she violated the protocols that were to govern situations in which remote access of such documents was undertaken. Specifically, she did not have permission to do so from the document's owner, or from anyone entitled to grant such permission.
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> [29] I have concluded that in the circumstances this conduct amounted to just cause for dismissal. It follows that the action is dismissed.

[33] In my view, the trial judge did not err in principle in applying the *McKinley* analysis. As the above-cited passage illustrates, she applied a contextual approach and considered whether the nature of the misconduct, which the appellant admitted

was the result of a deliberate choice, was reconcilable with a continuing employment relationship. The trial judge expressly referenced para. 48 of *McKinley*, which set out the applicable test, at paras. 22 and 27 of her reasons.

[34] The trial judge was aware of the length of the appellant's service, which she noted at para. 3 of her reasons, and the seriousness of the transgression, all of which she considered in the circumstances of the employment relationship and the respondent's clear policy on privacy-related matters. The record established that accessing confidential documents only in accordance with the privacy policy of the respondent was a fundamental obligation of a Helpdesk employee. It was open to the trial judge to find that this fundamental obligation placed the appellant in a position of substantial trust, and made the continuing existence of that trust fundamental to the viability of the employment relationship. In addition, it was open to the trial judge to find that, in the circumstances of the case before her, breach of the confidentiality policy and failure to follow Helpdesk protocols resulted in a fundamental breakdown of the employment relationship.

[35] Absent a palpable or overriding error or an error in principle in applying *McKinley*, this Court cannot interfere with the trial judge's determination of just cause. In the circumstances of this case I find no such error.

DISPOSITION

[36] For all of the above reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Harris"