

Court of Appeal Reinforces Employers' Ability to Rely on Just Cause

The recent decision, *Fernandes v Peel Educational & Tutorial Services Limited (Mississauga Private School)* ("Fernandes"), provides a useful and much needed reminder of the rights of employers when faced with serious employee misconduct. This case reiterates the appropriate test that courts are required to apply in determining whether an employee was properly dismissed for cause, and should strengthen employers' confidence that just cause is alive and well.

Case Facts

The *Fernandes* case involved the dismissal of a computer science teacher, Remy Fernandes, for falsifying student marks and grade reports. Mr. Fernandes had been an employee of the private school for just over 10 years and prior to the events leading up to his termination, he had been a well-regarded teacher with no significant performance issues or incidents of misconduct. Problems arose when, upon submission of his students' grades for the interim report cards, the Employer found that there were numerous "blanks" (ie. no grade) and

calculation errors in Mr. Fernandes' grade reports. The grading system used by the Employer automatically converted "blanks" into zeros, resulting in all of Mr. Fernandes' grades being unusually low. The Employer met with Mr. Fernandes to address the issues with the grade reports, and granted Mr. Fernandes three opportunities to correct the problems.

On April 3, 2009, Mr. Fernandes submitted his "corrected" grade reports to the Employer. The Employer reviewed these grade reports and became seriously concerned about the validity of the grades and the marks given for each assignment. Assignments that had not yet been completed had mysteriously been graded, and Mr. Fernandes' grades went from being the lowest given by any of the faculty to the highest. In response, the Employer conducted an investigation into the validity of Mr. Fernandes' grade reports and completed a report setting out its findings. Ultimately, the investigation revealed that Mr. Fernandes had falsified the grade reports.



Gillian Howe

Employment & Labour

PHONE

416 777 5424

EMAIL

ghowe@torkinmanes.com

Gillian is an associate in the Employment and Labour Group. Her practice focuses on providing counsel to clients in unionized and non-unionized workplaces.

On April 16, 2009, the Employer met with Mr. Fernandes to discuss the findings of the investigatory report, and provided him with a copy of the report. Initially, Mr. Fernandes took the position that he did not agree with the findings of the investigation and denied that he had fabricated any grades or assignment marks. The Employer advised Mr. Fernandes that it would interview students to verify the content of the report if Mr. Fernandes felt it was inaccurate. Upon learning this, Mr. Fernandes broke down crying, admitted that he had falsified his students' marks and grade reports, and apologized.

On April 17, 2009, the Employer advised Mr. Fernandes that effective immediately, his employment was being terminated with cause for academic fraud. Mr. Fernandes continued to be apologetic during the termination meeting. He was asked by the Employer if there was anything that was troubling him or distracting him in his life, Mr. Fernandes replied that there was not. The parties agreed to meet (at Mr. Fernandes' request) on April 20, 2009, to discuss a strategy for communicating Mr. Fernandes' departure from the school, so as to allow him to "save face".

Mr. Fernandes did not attend the April 20 meeting. Instead, he submitted a physician's note to the Employer which stated that, "due to work-related stress, Mr. Fernandes would be off work until further notice." The Employer responded with a letter to Mr. Fernandes confirming that his employment was

terminated effective immediately on April 17, 2009. During the trial, Mr. Fernandes led evidence from his family doctor and his psychiatrist that he suffered from major depression as a result of the termination of his employment. The Employer's benefit provider denied Mr. Fernandes' disability claim on the basis that he was not employed on the date of disability.

The Ontario Court of Appeal's Findings

The trial judge relied heavily on the fact that the Employer had still used Mr. Fernandes' inaccurate marks and grade reports for the interim grade reports that were sent to students and parents. The trial judge also focused on the fact that Mr. Fernandes' conduct was an "abrupt change" for someone who otherwise had a history of being a good employee. In finding that Mr. Fernandes had been wrongfully terminated, the trial judge stated that the punishment outweighed the seriousness of the misconduct. In the trial judge's opinion, a written warning would have been a more appropriate disciplinary response.

The Court of Appeal disagreed with the trial judge, overturning his decision, and finding that the trial judge erred in his application of the legal principles governing employee misconduct amounting to just cause.

The Court of Appeal determined that Mr. Fernandes' conduct was very serious and that he had breached his obligations both as a professional and an employee. In its decision, Justice Gillese, writing for the

majority stated:

"Mr. Fernandes' misconduct cannot be reconciled with his obligations as a teacher. It was fundamentally and directly inconsistent with Mr. Fernandes' obligations to the School and to his students. Considered in context, that misconduct was sufficiently serious that it justified dismissal without notice."

The Court of Appeal confirmed that the core question to ask in cases involving "just cause" is whether an employee's misconduct is serious enough to have caused a breakdown of the employment relationship. Proportionality governs the answer to this core question.

The Court of Appeal emphasized that teachers hold a special position of trust both with their employers and their students, and found that Mr. Fernandes' destroyed that trust. The Court of Appeal went on to state that Mr. Fernandes' conduct went beyond negligence or incompetence. Rather, Mr. Fernandes' actions were intentional. In its assessment, the Court of Appeal commented that there was no explanation offered by Mr. Fernandes that would serve to mitigate or provide a reason for his misconduct.

The Court of Appeal found that the trial judge erred in failing to assess the seriousness of Mr. Fernandes' misconduct. The Court of Appeal took issue with the trial judge's comments regarding the Employer's use of the incorrect marks and grade

reports for the interim grade reports, and stated:

“a single comment on only one aspect of Mr. Fernandes’ misconduct, fails to address the seriousness of that misconduct in any meaningful way and constitutes a legal error”.

The Court of Appeal further found that the trial judge made an error in failing to consider the circumstances of the Employer. The Employer was accredited by the Ministry of Education to award credits toward earning an Ontario Secondary School Diploma. Mr. Fernandes’ actions knowingly exposed the Employer to the risk of having its accreditation revoked. The fact that the Employer did not actually have its accreditation revoked was not important to the Court of Appeal, it was severity of the potential harm that could have been caused which was significant.

The Court of Appeal also overturned the trial judge’s findings regarding the Employer’s liability for Fernandes’ loss of disability benefits. The Court of Appeal held that because Mr. Fernandes was properly terminated with cause prior to becoming disabled, he was not entitled to damages associated with the loss of long-term disability benefits.

“Take-Aways” for Employers

1. **The Fernandes case is a welcome example of when an employer can terminate an employee for just cause.**

In its decision, the Court of Appeal emphasized that Mr. Fernandes’ misconduct “*struck at the very heart of the employment relationship*”, signalling to employers and employees alike, that the Court of Appeal is willing to uphold a termination where an employee has engaged in serious misconduct that is entirely inconsistent with their essential duties and responsibilities.

2. **Employers should take steps to effectively manage and document employee misconduct.**

The Employer in the *Fernandes* case did two key things that benefitted it in the litigation. First, the Employer conducted a thorough investigation into the misconduct. Both the trial judge and the Court of Appeal relied heavily on the findings of the internal investigation in reaching their decisions. Second, the Employer documented its position, both with respect to the date of termination and reasons for termination.

3. **Employers should pay particular attention to the value the Court of Appeal placed on honesty.**

While Mr. Fernandes eventually

admitted he falsified his students’ marks and communicated his remorse, in the eyes of the Court of Appeal his admission of guilt came too late. The Court of Appeal found that Mr. Fernandes’ misconduct was dishonest in and of itself (as it involved falsifying marks), that he repeatedly lied to his employer to cover up his improprieties, and he only admitted his misconduct when he was told that his students would be interviewed. In the view of the Court of Appeal, this was not an honest and forthright employee.

4. **This decision also reminds employers that context matters.**

Whether or not an employee’s misconduct warrants termination will depend on the particular circumstances of the misconduct, the employee and the employer.

If your business is confronted with employee misconduct and you need advice on the appropriate disciplinary response, or if you are facing a claim from an employee who was terminated with just cause, we can help. Please contact Gillian Howe (ghowe@torkinmanes.com).