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Kelly v. Linamar Corp: When an Employee is Criminally Charged for Off-Duty Conduct

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The recent Ontario Superior Court decision of Kelly v. Linamar Corp. is significant because it provides employers with useful guidance as to the factors that should be considered when an employee is charged with a crime of “moral turpitude” allegedly committed outside the workplace and on the employee’s own time. In this case, a supervisory employee was dismissed for just cause shortly after being charged with possession of child pornography. The Court held that the employee’s termination for cause was justified “on sound business principles and as a matter of law”.

Facts

Philip Kelly had been employed by Linamar Corporation in various capacities for 14 years and at the relevant time was materials manager at one of Linamar’s subsidiaries, Emtol Manufacturing. Kelly’s position required supervision of 12 employees and significant contact with suppliers and customers. There was no issue as to his capabilities or loyalty to Linamar.

Linamar was the largest employer in the City of Guelph. In its judgment, the Court noted that Linamar had invested considerable resources in developing and maintaining its reputation as an excellent corporate citizen with a special emphasis on philanthropy directed towards elementary aged school children.

On January 21, 2002, Kelly was charged with possession of child pornography after an extensive police investigation involving nearly 1,000 Ontario residents. The residents had been identified as having made credit card purchases from a company involved in selling child pornography. The charge against Kelly was publicized notoriously in the local press and on local radio stations. The alleged possession was restricted to Kelly’s home computer, and did not involve any company equipment or activity during company time.

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After conducting an investigation, Linamar terminated Kelly's employment for just cause on January 24, 2002. Kelly eventually pleaded guilty to the criminal charge and on November 12, 2003, he received a three month conditional sentence. He later filed a claim for wrongful dismissal damages, alleging that his employer did not have just cause to terminate his employment.

Decision

In dismissing Kelly's claim for wrongful dismissal, the Court conducted a helpful review of the law regarding termination for criminal conduct outside the workplace. The Court confirmed that generally an employer who relies on criminal conduct as cause for dismissal must "present evidence which, when put under a strong light, still manages to satisfy the civil test of proof on a balance of probabilities". With respect to outside misconduct as cause for dismissal, the Court noted prior decisions which held that termination of employment is justified when an employee's conduct is prejudicial or is likely to be prejudicial to the interests or reputation of the employer. The Court also noted that a single incident is sufficient to justify dismissal where the misconduct and consequences are serious.

With respect to Kelly's termination of employment, the Court found that in assessing the allegations, Linamar was entitled to rely on Kelly's conduct in the days after his arrest, which suggested an acknowledgment of guilt. The Court looked favourably on the fact that the decision to terminate Kelly's employment was not made lightly, and noted that Linamar's reputation, the concerns expressed by other employees, and the fact that Kelly's misconduct was restricted to activities outside the workplace, were all factors carefully considered by the employer in weighing the available options. In finding that Linamar demonstrated just cause "on far more than the balance of probabilities", the Court accepted the employer's argument that an employee who is required to work with the general public (suppliers and customers); who must manage or supervise other employees and interact collegially with many peers has a duty to ensure his conduct does not adversely impact on any of those activities. Kelly failed in his duty to his employer by putting himself in a position to be charged with a crime of moral turpitude, and the employer was entitled to take reasonable steps to protect its excellent reputation.

Implications

The decision in Kelly v. Linamar Corp. appears to be consistent with past decisions which have upheld the employer's right to dismiss an employee if he or she at any time engages in misconduct which is incompatible with his or her duty of fidelity and loyalty to the employer. The Court was careful to point out that a charge or conviction of possession of child pornography, or other crimes of similar moral turpitude, will not automatically justify dismissal without notice or pay in lieu of notice. Employers who must deal with employees charged with serious crimes outside the workplace should not rely on the mere potential for bad publicity as cause for

dismissal.

In deciding whether alleged criminal conduct outside the workplace justifies dismissal without notice, employers should first carefully consider the following factors:

- the employee's position in the company and the nature of his or her duties and degree of responsibilities;
- the employee's past employment record;
- the employer's size and prominence in the community;
- the employer's legitimate business interests;
- the seriousness of the alleged conduct;
- the merits of the allegations;
- whether the employee admits, denies, or provides an explanation for the allegations;
- the connection between the alleged misconduct and the employer or the employer's property;
- the publicity of the allegations;
- the impact on employee morale and the concerns of other employees; and
- the real potential for damage to the employer's reputation.

Responsible employers should be diligent in their internal investigations to scrutinize the relevant facts and review all of the above-noted factors before making a decision to terminate employment. As almost always, each case must be carefully considered on its own merits. Employers do not have to wait until the outcome of a criminal prosecution to make their decisions, but would be wise to obtain legal advice prior to dismissing an employee for just cause.



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