

## Case In Point

# Court of Appeal Upholds Cause Dismissal for Breach of Fiduciary Duty

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In the case of [Dunsmuir v. Royal Group, Inc.](#), the Ontario Court of Appeal recently upheld the cause termination of a Senior Vice-President and Chief Financial Officer of a publicly-traded company for breach of fiduciary duty.

The employee had commenced a claim against the employer for wrongful dismissal and sought approximately \$6.6 million in damages. The employer successfully defended the [wrongful dismissal action at trial](#) on the basis of cause for dismissal arising out of three incidents:

1. The employee had failed to disclose to anyone with oversight authority information relating to the acquisition of property by the controlling shareholder's group and its immediate resale, from which they profited personally. While the employee did not profit from the transaction, he was aware of it.
2. The employee covered up the reason why the bonuses of senior management were greater than the bonus amounts otherwise approved.
3. The employee misled the Canada Revenue Agency to reduce the tax liability of senior management.

In upholding the trial judge's decision, the Court of Appeal rejected the employee's argument that the trial judge failed to conduct a contextual analysis and consider the corporate culture, which the employee argued was dominated by "an autocratic controlling shareholder." It did so on the basis that no corporate culture existing in a public company could reasonably support the course of conduct of a fiduciary in the employee's position, and that the incidents of misconduct struck at the heart of the employment relationship.

The Court also rejected the employee's argument that the trial judge erred by failing to consider that his actions had been condoned and that "what the board of directors would have done had he disclosed the events in question was irrelevant." It stated, "the trial judge concluded, and we agree, that the appellant cannot rely on other senior managers who were themselves participants of the unlawful conduct to establish condonation."

The Court of Appeal's decision confirms that employees who are fiduciaries of their employer are held to a high standard of conduct, and that they must at all times act in the best interests of their employer. This includes a duty to report all facts and information to the company, including wrongdoing by other employees. The failure to do so, regardless of whether a fiduciary employee personally gains from their misconduct, may give rise to cause for dismissal.

In addition, the decision also touches on the principle of condonation. Employees cannot generally rely on an employer's condonation to justify their misconduct or avoid a finding of cause for dismissal, due to the fact that other employees have also engaged in misconduct of which the company is not aware. This is particularly so where the employee is a fiduciary and is held to a higher standard of conduct.