

Case In Point

Cause Termination Upheld Where Employee Found to Have Installed Spyware on Employer's Computer

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The Ontario Superior Court of Justice recently upheld a cause termination where an employee was found to have installed spyware onto his employer's computer. The Court also considered the availability of the "after-acquired cause" defence

In [*Sankreacha v. Cameron J. and Beach Sales Ltd.*](#), the plaintiff's employment as a service advisor in the automotive department of a store was terminated for cause after it was alleged he installed spyware onto his manager's computer. The employer also contacted the police and the plaintiff was charged with unauthorized possession of credit card data. Those charges were later withdrawn.

The plaintiff then sued the employer for wrongful dismissal, among other claims. He alleged that he was in fact framed by his managers either (a) for an excuse to dismiss him because he refused to upsell clients; and/or (b) to frame him for a "pin pad" fraud that occurred at the store around the same time as the spyware fraud.

The Court found no evidence to support those assertions and concluded that the plaintiff was responsible for installing the spyware. It went on to find that the installation of the spyware satisfied the common law test for a cause termination. It did not matter that the information collected by the spyware was ultimately "inconsequential" to carrying out bank or credit card fraud. Merely installing spyware "violate[d] an essential condition of the employment contract" and "breache[d] the faith inherent to the work relationship." Moreover, this was not a single incident or a momentary lapse of judgment: the evidence indicated that the "installation of the spyware took considerable planning and subterfuge" and "remained on the employer's computer, collecting data, for one month before it was discovered."

Of note, the Court held there was nothing improper with the employer's decision to plead after-acquired cause in its statement of defence, only to drop that defence as the litigation progressed. It stated that, while "a pleading of after-acquired cause that is devoid of merit may have costs consequences at the conclusion of the trial, the pleading itself cannot give rise to punitive and/or moral damages. [...] There is, in my view, nothing improper about pleading after-acquired cause and waiting until after discovery to decide whether to advance the defence or abandon it."

With respect to the defamation claim, which was dismissed, the Court made the following

observations regarding the defence of qualified privilege and the proper conduct of employers in such situations:

[219] In this case, Mr. Cowan was tasked with investigating an email on the employer's computer that revealed both the downloading of KGB spyware and the transfer or theft of confidential information. He clearly had an interest in sharing this information with the police in these circumstances, and the police had a corresponding interest in receiving this information. Mr. Cowan's report was therefore protected by qualified privilege, and even with the errors made, he can be held liable for defamation only if the plaintiff can prove that the statements were actuated by malice.

[223] Given the evidence available to Mr. Cowan, he had "reasonable and probable grounds" for suspecting Mr. Sankreacha. Mr. Cowan's failure to make further investigations before calling the police does not qualify as recklessness. Based on the information available to him, Mr. Cowan essentially handed the investigation over to the police, which was the proper conduct in the circumstances.

The Court also dismissed the plaintiff's other claims, relying in particular on the findings that his two alternative theories were unsupported by the evidence and that there was no malice in his manager's decision to call the police, based on the information available to him at the time.

Sankreacha is significant as a reminder that a single dishonest act involving subterfuge or planning can be cause for dismissal, even if the evidence fails to reveal any immediate impact on the employer's operations. It is also a reminder that pleading after-acquired cause in anticipation of substantiating evidence at discovery is not improper, unless that defence is found to lack any merit whatsoever.