If You Can't Say Something Nice, Don't Say it in an Email: After-Acquired Cause Established through a Single, Year-Old Email

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British Columbia Supreme Court finds employee terminated for after-acquired just cause based on single email criticizing colleagues.

In the recent decision of *Nagy v William L. Rutherford (B.C.) Limited*, the British Columbia Supreme Court found that a single disparaging email an employee sent to his girlfriend, who was also a co-worker, justified the employer's assertion of after-acquired just cause.

The Facts

Ernest Nagy was a licensed customs broker employed as the B.C. Head Office Customs Import Manager of William L. Rutherford (B.C.) Limited ("Rutherford"), a customs broker and freight forwarding company. Mr. Nagy was responsible for managing a team of customs agents, including hiring, scheduling, training, compliance, and administration of general company email accounts.

On November 20, 2018, Mr. Nagy sent an email to two co-workers relating to shipping documents for a customer, stating:

Hi guys – I am ASSuming that they want us to arrange pickup.

The email was brought to the attention of Rutherford's Vice-President, Edmond Wong. Mr. Wong confronted Mr. Nagy about the email that afternoon. Mr. Nagy explained the capitalization of the email was a joke, but then spontaneously said "I quit" and left for the day.

According to Mr. Nagy, he had not intended to resign and returned to work the following day. When Mr. Wong asked why he had returned, Mr. Nagy told him he had reconsidered and felt regret about their discussion the previous day. Mr. Wong consulted with Rutherford's owner, returning later that morning to ask Mr. Nagy to leave, telling him "He [the owner] just doesn't want you here anymore".

Following Mr. Nagy's last day of employment, Rutherford discovered that on August 30, 2017, Mr. Nagy had sent an email critical of Rutherford, a colleague, and Rutherford's local human resources manager. The email was sent to Mr. Nagy's girlfriend and co-worker, with the subject line "DUMB":

Yes, on all counts, this place never ceases to amaze.

I still don't understand why she is in the position she is. Lets [sic] take it a step further and ask ourselves why the HR manager thinks its ok to post notes in the ladies regarding where to do your business, or knowing what a companies [sic] responsibilities are to an employee who asks for something as simple as a wrist rest…

As dumb as Shareen is, BHB is twice as stupid. I have never heard of anyone who does accounting that has such a difficult time with simple addition and understanding credit and debit.

"BHB" appears to be a reference to the human resources manager and was intended as a highly derogatory and insulting personal description.

In addition to this previously unseen email, on February 2, 2017, Mr. Wong had emailed Mr. Nagy, warning him that his communications with another manager was "out of line and condescending. It is obvious that your tone and delivery of message are an issue. This is an official notice and is in your file".

Mr. Nagy commenced an action against Rutherford, claiming that he was dismissed without cause and entitled to damages for wrongful dismissal. Rutherford defended on the basis that Mr. Nagy had quit his employment and alternatively that it had after-acquired just cause to terminate his employment based on the August 30, 2017 email. There is no information in the decision about how Rutherford discovered this email or whether it had been forwarded to anyone or seen by anyone other that Mr. Nagy's girlfriend.

The Decision

Mr. Justice Funt quickly dismissed Rutherford's first argument, finding Mr. Nagy's statement of "I quit" was an emotional outburst and did not demonstrate a clear and unequivocal intention to resign.

Turning to the alternative argument of after-acquired just cause, the Court concluded that the email was sufficient, on its own, to justify Rutherford's termination of Mr. Nagy's employment for just cause. In considering the email, Justice Funt gave no weight to the fact that Mr. Nagy was communicating with his girlfriend, finding this did not impact his role and responsibilities as a manager. Instead, Justice Funt noted Mr. Nagy sent the email to a subordinate, during business hours and on Rutherford's corporate server. The email was critical of co-workers in the group that Mr. Nagy managed, and he ridiculed the local human resources manager. This criticism went beyond the scope of the duties of a manager (i.e. permissible criticism in a performance review) and was conduct that could only harm the employer. The Court specifically highlighted the fact that an essential condition of Mr. Nagy's offer letter included ensuring "general harmonious relations with all depts, staff and clients", noting the email was antithetical to his role as a manager that represents the employer, its values and principles. Interestingly, Justice Funt made no reference to the warning Mr. Nagy had been given in February 2017 about inappropriate communications in arriving at his decision.

On the basis of his finding of after-acquired just cause, the Court dismissed Mr. Nagy's claim for damages.

Mr. Nagy filed a Notice of Appeal on April 3, 2020.

Takeaways for Employers

This decision is welcome news for employers that may lack complete defences to wrongful dismissal claims, providing some ammunition to those that successfully comb their systems and servers for impolitic and inappropriate emails. However, employers are cautioned from adopting a practice of rotely reviewing all departing employees' emails, texts or desktop messenger histories without weighing this against other considerations.

First, every case will turn on its own facts and context. In *Nagy,* the Court emphasized Mr. Nagy's position as a manager. While senior employees or managers are typically held to a more exacting standard, less senior employees' behaviour may be given more latitude. Thus, the Court might not have found just cause present in a case where a junior customs broker sent an email similar to Mr. Nagy's email.

Second, employers should be cognizant of the potential time and expense, including legal and forensic expert fees, of searching and reviewing employees' communications in what could ultimately be a fruitless hunt through a haystack. This should be considered in light of the context and quantum of the employee's claim.

Third, while not raised as an issue in the *Nagy* decision, employers should ensure their privacy and technology usage policies clearly inform employees that they have no reasonable expectation of privacy with respect to their use of the employer's email, smartphone, desktop messenger services, and other information systems. The failure to include such language could lead the Court to refuse to consider evidence that might carry an expectation of privacy, or otherwise expose the employer to the statutory tort of invasion of privacy under the *Privacy Act* or a potential fine pursuant to a privacy complaint under the *Personal Information Protection Act*. In addition, employers who are known to search employee's emails and communications may quickly lose the trust, and diminish the morale, of their employees.

Fourth, the *Nagy* decision focused on the requirement that Mr. Nagy was required to ensure "general harmonious relations with all depts, staff and clients", as set out in his offer letter. Accordingly, employers should consider including similar language in offer letters, employment contracts, and job descriptions to ensure clear expectations for employees. These can be potentially relied upon in the event an employee acts in a matter that is inconsistent with the employer's expectations and may help establish just cause for the termination of their employment.

Finally, employers must also be cognizant that establishing after-acquired cause depends on the employer discovering the employee's wrongdoing *after* the employee's termination. If the employer was aware of the wrongdoing prior to the termination and failed to rely upon the behaviour to justify the employee's termination, it will be assumed the behaviour was condoned. This means the employer will be barred from later relying on it to justify after-acquired cause.