

Asserting Cause: What Not To Do

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Occasionally some employers use an allegation of cause which they know to be unsupportable, or worse, untrue, as leverage to “encourage” a dismissed employee to settle a potential wrongful dismissal claim on terms that are favourable to the employer. While this can be a successful, although ethically questionable strategy, it can also backfire if the employer elects to rely on the unsupported or false allegations following the commencement of legal proceedings.

CANLII and Westlaw are littered with tales cautioning against this course of action. It is common for judges to punish employers for making unsupported or false allegations of cause. Usually the punishment is in the form of a longer notice period. However, there are other options available to a judge and which can have significant adverse financial consequences for the employer.

Aside from, or in addition to, awarding a lengthy notice period, a judge could award damages for:

- mental distress caused by the false allegations;
- aggravated, exemplary or punitive damages;
- defamation if the allegations are untrue and have been communicated to people other than the dismissed employee;
- loss of competitive advantage; and
- bad faith.

The list above is in no way a comprehensive overview of the claims which could be asserted against an employer. There are many other claims which could be made by creative plaintiff's counsel.

The Take Away

An employer should only assert cause where it is reasonably confident that it has some evidence to support its allegation. This is particularly true where the grounds for cause are based on alleged criminal behaviour or moral turpitude as courts are usually more offended when employers raise these types of allegations but are unable to support them.