

SUPREME COURT OF NOVA SCOTIA

Citation: MacBurnie v. Halterm Container Terminal Limited Partnership,
2013 NSSC 361

Date: 20131108

Docket: Hfx No. 341635

Registry: Halifax

Between:

Tim MacBurnie

Plaintiff

v.

Halterm Container Terminal Limited Partnership,
a body corporate

Defendant

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: May 1, 2, 6, 7, and 8, 2013

Counsel: Kevin A. MacDonald, for the plaintiff
Richard M. Dunlop and Jessica L. White, for the defendant

Moir J.:

Introduction

[1] Timothy MacBurnie is a man in his early fifties. He joined the Halterm container terminal in May of 1988 to work at the gatehouse. He was dismissed in May of 2010. He was a good worker, he was well-liked at work, but he had problems in the end.

[2] Mr. MacBurnie sued for wrongful dismissal, and he says that the manner of his dismissal was so *mala fide* as to entitle him to *Wallace* damages. However, I find that Mr. MacBurnie's underlying problems caused him to behave in ways that constituted just cause. And, I also find that Halterm acted *bona fide* and did much to try to keep Mr. MacBurnie in his job despite the problems he presented.

Findings for Period Before Dismissal

[3] *Gatehouse Operations at Halterm.* There are two container terminals in Halifax, one in the north end on Bedford Basin and one in the south end on Halifax Harbour. Halterm operates the south end terminal.

[4] Most of the containers are taken by train to the yard for loading on ships and from the yard after unloading from ships. Some are delivered, or taken away, on trucks. Although most containers are shipped by rail, trucking is an important part of the business and efficient turnaround is essential to successful operations.

[5] The trucks are handled through the Halterm gatehouse. From eight o'clock to five each weekday, except for a one-hour shut down at lunch, trucks line up for entry into the yard. The gatehouse workers organize them in a queue, which sometimes exceeds a hundred trucks. They direct entries and solve various problems. They keep required records and supervise compliance with laws, such as regulations for the shipment of dangerous goods.

[6] Sometimes the queue is seriously backed up. The gatehouse worker can call for a work-through under collective agreements with unionized workers, such as longshore men and stevedores. Along with the rest of the workforce, the gatehouse workers work through lunch or for an extra hour into the evening.

[7] A valued customer may request a Saturday delivery, and the gatehouse workers need to come to work that day.

[8] A gatehouse worker deals with the stevedores, the longshoremen, other Halterm staff, the drivers, the transport companies, and the main customers, the shipping lines. Theirs is to get the volume of trucks in and out as efficiently as possible, to the profit of Halterm and to the satisfaction of its customers. It is a busy job.

[9] *Mr. MacBurnie's Background.* Mr. MacBurnie was born in 1962. He finished high school in 1980, after which he took some college courses and worked. He started at Halterm on May 16, 1988 and worked there for twenty-two years until he was dismissed on May 30, 2010.

[10] Mr. MacBurnie married Krista MacBurnie in 1991. They had a home in Mineville. The couple have three children, who are now in the their teens or early twenties. The MacBurnies separated in 2001. Ms. MacBurnie and the children moved to Kentville. Mr. MacBurnie lived in the Dartmouth area.

[11] *Work with Halterm.* Mr. MacBurnie was hired as a gatehouse clerk. There were only two regular gatehouse workers. Another worker could be called in for backup. Also, a person who worked in stowage was designated to work at the gatehouse when needed.

[12] The volume of work and the responsibilities increased in Mr. MacBurnie's twenty-two years. Consequently, he felt more stress as time went on.

[13] Like other non-unionized employees, Mr. MacBurnie was entitled to take twelve days off a year with pay if sick. He never took more than was allotted to him. Sick leave cumulated and Mr. MacBurnie had plenty to his credit when he was terminated.

[14] His performance was reviewed each year. The results were good. Mr. MacBurnie considered himself to have been professional and customer-oriented. He feels he had a good relationship with shippers.

[15] Mr. Douglas Rose, who held senior management positions with Halterm from 1992 until his retirement in 2011, testified about the importance of gatehouse

operations to Halterm operations. The gatehouse was very active, and Mr. MacBurnie handled it well. His performance was always rated as acceptable or better.

[16] Mr. Rose promoted Mr. MacBurnie to gatehouse supervisor in the late nineties. This resulted from his good performance, especially the good relationships he cultivated with customers. His salary was increased by ten thousand dollars.

[17] Mr. Kevin Baillie also testified for Halterm. He joined the electrical department as supervisor in 2000, became maintenance manager in 2001, and was operations and maintenance manager in Mr. MacBurnie's last five years.

[18] For reasons to be discussed later, Mr. Baillie considered firing Mr. MacBurnie in late 2006. He did not do so. He explained on the stand that Mr. MacBurnie did a "great job" at the gatehouse, he was very likeable, he was a conscientious long-term employee, and he took pride in the operation. As will be seen, this high appraisal continued into 2010 when the problems with Mr. MacBurnie became intolerable.

[19] For his part, Mr. MacBurnie says his job was "extremely important" to him. I believe that is true, even though it leads to an inconsistency, if not a mystery.

[20] I find that Mr. MacBurnie performed well for Halterm. I find that the only problems that Halterm had with Mr. MacBurnie were his lateness and absences, what he told his employer on that subject in 2009 and 2010, and how he evaded communication on the subject in 2010.

[21] *Mr. MacBurnie's Complaints.* He makes several complaints apart from the termination. They do not relate to liability, and it is hard to see how the evidence on these subjects could affect damages if there was liability. However, I will provide my findings.

[22] Mr. MacBurnie attempted to show that one of Halterm's lawyers bore a grudge against him. The evidence was about a real or perceived slight, and unkind words spoken, at a cocktail party. The complaint is far too insubstantial to deserve exploration. It had nothing to do with Halterm.

[23] Mr. MacBurnie complains that he was never promoted from the gatehouse supervisor position to stowage. He believes there was a benchmark of so many years before promotion from the gatehouse to the position of rail clerk in stowage was to kick in. Stowage pays better. A more junior person was given that promotion in the late 1990s.

[24] Mr. MacBurnie says that he complained to the operations manager at the time, and the operations manager, a Tony MacInnes, told him that if he did not like the situation "there's the door". He sent out resumés but could find nothing that paid better than gatehouse supervisor at Halterm. So, he stayed there.

[25] During cross-examination, Mr. Rose said there was no basis for Mr. MacBurnie's expectation that he would advance from the gatehouse to stowage, and he pointed out that Mr. MacBurnie was promoted within the gatehouse. It appears that the promotion to gatehouse supervisor happened around the time of the "there's the door" conversation. It does not appear that Mr. MacBurnie raised the subject afterwards. According to his own evidence, over ten years later the gatehouse supervisor job remained very important to him.

[26] Mr. MacBurnie also complains that demands to work overtime became very stressful after he started having a family. This complaint centres around work-throughs and weekend duties. Ms. MacBurnie says that "There was constant stress at home about that job".

[27] Often the MacBurnies would have only an hour to cope with an evening work-through. Mr. MacBurnie would get Ms. MacBurnie home and make it back to work just in time. The frequent demands to work weekends disrupted the family's rest times and social plans.

[28] Mr. MacBurnie claims that he was forced to take vacation in lieu of overtime pay and there were long waits before a determination was made about which method of compensation would be used. According to Mr. Rose, there were periods when Halterm was slow to pay overtime not taken in vacation, but it was always paid. In any case, the delay caused stress to Mr. MacBurnie, as did his perception that vacation in lieu of pay was forced on him.

[29] Even the promotion to gatehouse supervisor caused stress to Mr. MacBurnie. He had to recognize and solve problems causing trucking delays. It

could be that an employee was not doing what he was supposed to do. He had to work more closely with unionized employees and the shipping lines. He had to see that things got done.

[30] Other experiences added to Mr. MacBurnie's job related stress. There was an occasion when he felt threatened by a union official. That was related to violence done by a drunk worker in the gatehouse when Mr. MacBurnie was present. And, there were two fatal injuries at the container yard.

[31] As I said, these complaints and the stress do not logically relate to the question of just cause. However, Mr. MacBurnie was anxious to tell us about them and I think they give some insight into the behaviour that led to his dismissal. The key to that subject is in these findings: Mr. MacBurnie was under stress, but he was well-liked and easy to get along with at work. The stress did not show at work.

[32] With that background in mind, let us turn to the facts that are crucial to the question of just cause.

Findings About Termination

[33] *Position of the Parties.* According to Mr. MacBurnie and Ms. MacBurnie, he chronically suffered from back pain starting sometime in the 2000s. Mr. MacBurnie says it started around 2004 or 2005, but Ms. MacBurnie gave evidence about her observations of the problem before the couple separated in 2001. Mr. MacBurnie says the problem got worse as time went on. He never used up all his accumulated sick time, but the pain prevented him from going to work sometimes.

[34] Mr. MacBurnie says that he missed work because of back pain, and Halterm did not have cause for termination. Mr. Rose says that sick leave was not the issue. The issues were failing to give notice that he needed to take sick leave, and misleading Halterm about his condition.

[35] *Problems in 2002 and 2003.* Between August of 2002 and April of 2003 Mr. MacBurnie missed work on five days. On three of those days he did not telephone. On two, he reported back pain. The first record of back pain was made on January 20, 2003:

Tim calls 0750 and advises hurt back. Going to hospital on way to work to have it checked-out and would be at work later. Tim calls Sonny at 1630 saying he is unable to make it back to work. Tim tells Sonny he will call Andre that night, and would be in next day.

[36] In addition to the days missed, Mr. MacBurnie was off three mornings and one afternoon. The employer was not advised. No explanation was offered.

[37] These events caused Mr. Rose to speak with Mr. MacBurnie twice. He followed that up with a letter in which he explained the difficulties absence without notice causes:

I have, on at least 2 occasions, spoken to you directly about the necessity to call and advise Sonny Whitman if you are not able to come to work so that alternative staff arrangements can be made. As you know, we have only two people manning the gate operation and only one person trained to provide back-up for gatehouse personnel. The back-up person is not always available at short notice due to shift work. I have also spoken to you about the need to report to work on time.

[38] In cross-examination, Mr. Rose, Mr. Baillie, and Mr. Brigley were challenged about not having more backup for gatehouse operations. They explained the financial difficulties Halterm has faced since the early 2000s. I note that the problem was not so much insufficient backup, but insufficient notice for

backup staff to be put in place. These witnesses also described the disruption to overall operations caused by an insufficiently staffed gatehouse.

[39] The letter Mr. Rose sent to Mr. MacBurnie in April of 2003 recorded these "requirements and procedures":

1. You are expected to report to work on time and stay at work until the end of the period being worked.
2. Tardiness is not acceptable, nor is leaving early.
3. In those exceptional circumstances when you are unable to be at work on time, you must contact [the Operations Manager] to advise that you will be late and give a time when you will be in.
4. If you are unable to work due to illness or injury, you should report this to [the Operations Manager] with as much advance notice as possible; but, certainly not later than 1 hour in advance of the shift start.

The letter closed by saying that Halterm was giving Mr. MacBurnie a "last chance warning".

Further evidence of lateness, failure to report to work as scheduled, lack of advance notice for time off and time off without permission will not be tolerated and will result in your immediate discharge from the employ of Halterm with just cause.

[40] Mr. MacBurnie took the morning off one Friday in October of 2003. He did not give notice or seek permission. Mr. Rose rebuked him and followed this up with a letter that included:

During our discussion on Wednesday, October 15, you indicated that you were very sorry and that this was the first incidence of not reporting off since our letter of April 17. Again, Tim, on the basis of your long-term service at Halterm and with some evidence that you have tried to comply with our work procedures, we are prepared to grant you, without prejudice, one last chance to rectify your behavior. So that we are absolutely clear, any further evidence of lateness, failure to report to work as required or scheduled, lack of advance notice for time off and time off without permission or any other improper conduct, will not be tolerated and will result in your immediate discharge from the employ of Halterm with just cause. ***This is your final last chance written warning.***

[41] *Reoccurrence in 2006.* Mr. Baillie became operations manager. Mr. MacBurnie missed work a few times during 2006, but on October 17, 2006 he was missing for the day and he did not call the operations manager.

[42] Mr. Baillie made extensive notes in preparation of deciding whether to fire Mr. MacBurnie. To some extent, these are notes of Mr. Baillie talking to himself. He wrote down pros and cons. Ultimately, he decided not to terminate the employment.

[43] Mr. MacBurnie submits that these notes show Mr. Baillie's bad attitude towards him. I do not assess them that way. On the contrary, I accept Mr. Baillie's evidence that he decided not to fire Mr. MacBurnie because he did a great job at the gate, he was very likeable, he was a conscientious long-term employee, and he took pride in the operation.

[44] *Reoccurrence in 2009.* Mr. Baillie started keeping track of Mr. MacBurnie's absences. His computer record for 2009 reads:

- Called in sick Feb. 12
- Called in sick Feb. 13
- Didn't report to work, called saying he hurt his back April 22nd.
- Again didn't come to work, called saying back still hurt April 23rd.
- Called in again today April 24, 2009 saying back was still sore. I tried calling him at 9:06am and did not get an answer (I didn't leave a message).
- Called in with a bad back did not show up Oct. 7
- Called in again with a bad back Oct. 8th, I tried calling him twice, left a message for him to call my cell the second time.
- Called in with a bad back Dec. 7.
- Called in again with a bad back, Dec 8. I tried calling him; no answer left a message at 0850 on Dec 8.

- Called in again with a bad back, Dec 9. I tried calling him again and got no answer. I left several messages and in each message I told him I need a Dr. note from him. The message he left today he said he was going to the hospital.

[45] The October 8th telephone message did not get returned. So, the two men had a meeting on October 9th. Mr. Baillie explained the importance of Mr. MacBurnie's job and "the difficulty it puts us in when he is not available for work". Mr. Baillie made this record of the rest of the discussion:

Tim indicated that his back has been giving him trouble for number of years. I explained to him that I understand the complications that a sore back would give him and that we would work with him through out this process, however I do require a note from a Doctor. He agreed to provide this as he was going to the hospital to get some medication.

Mr. MacBurnie failed to produce the required note.

[46] The failure to produce a note and the unanswered telephone messages led to another meeting, which was held on December 10, 2009. Here is the record:

I met with Tim at 3:00pm on this day in my office.

I asked him why he was not able to work Dec. 7, 8, and 9. He explained that his back was acting up again and that he couldn't move out of his apartment. I mention[ed] that I tried calling him each day and he responded that the medication he got made him sleep and that he didn't hear the phone. I also asked why he didn't call my cell phone, the messages I left, I asked him to call my cell and I left the number. He didn't have an answer for this, but did apologize for not doing it.

I asked him where was the Doctor note that I had requested back in October, he said that he didn't get a chance to get it. I told him that the message I left on Dec 8th and the 9th I asked for a Doctor note. He seems to be getting very agitated about this topic. I explained to him that this was not only for the companies benefit, but also for him as it reassures his back problem. He said that he understands this and would be meeting with a Doctor to get this note.

I asked Tim if there was any other problem he would like to talk about and responded by saying no everything is under control, he went onto talk about his addiction problem he had several years ago but stated this is no longer a problem.

I told him that if there is anything he needed to talk about or help with that he could always talk to me.

I am satisfied that the records prepared by Mr. Baillie are fair and accurate.

[47] I note that Mr. MacBurnie told Mr. Baillie on December 10, 2009 that he had been unable to leave his apartment because of his back pain and that his excuse for not picking up the phone was that his medication made him sleep.

[48] Mr. MacBurnie had gone to the hospital on December 9th. The record shows that the medication he was on when the calls were placed was over-the-counter ibuprofen and robaxacet. The triage note says "acute central moderate pain" and "pain can ease if walks for a little bit". A painkiller was prescribed.

[49] *Reoccurrence in January and February 2010.* Mr. Baillie became suspicious. No medical note had been produced. Mr. MacBurnie sat most of the time he was working and never once came to Mr. Baillie to complain that he experienced back pain at work. Mr. Baillie had a hunch that Mr. MacBurnie was not being honest, that something besides back pain was contributing to his absences. Mr. Baillie retained a private investigator.

[50] Mr. MacBurnie called in sick on January 25th, January 26th, February 17th, and February 18, 2010. Mr. Baillie asked the private investigator to commence surveillance.

[51] On February 19th, Mr. MacBurnie called Mr. Baillie again. He left a message "It's not good. I feel so bad. I know we are short-staffed. It kills me." The message goes so far as to complain that Mr. MacBurnie had to crawl to get to the washroom. He said he would try to go to the hospital. He said, "If I can get up, I'll call your cell phone." Mr. Baillie called back and left a message. Mr. MacBurnie did not return the call.

[52] The voice on the recording sounds pained. Both the tone of voice and the content tells the listener that Mr. MacBurnie is incapacitated for the day and that he will call if that changes to the extent that he is able to get up.

[53] The MacBurnies did their credibility no good when they denied that the man in the surveillance video is not Mr. MacBurnie. They did not explain why a man who looks just like Mr. MacBurnie and wears his somewhat distinctive winter jacket would be seen coming from a place near his apartment building and walking around his neighbourhood in north Dartmouth.

[54] The surveillance was done by Mr. Chris Morley of Progress Investigators, who has been doing this kind of work for about twenty years. He used a hand-held video camera and copied the results directly to DVD. He kept contemporaneous records by way of a voice recorder.

[55] On February 19, 2010 at three, a sly-looking Mr. MacBurnie is seen on Windmill Road near his apartment. We see him briskly walk Pelzant Street, John Street, the field between John and Faulkner streets, and across Faulkner to the liquor store near the bridge. Then we see him leave the liquor store with a brown

bag big enough to hold a dozen cans of beer. Finally, we see him as he makes his way briskly back to his apartment building.

[56] Mr. MacBurnie called in sick again on Friday, February 19, 2010. Mr. Baillie called him back but got no answer. He left a message that Mr. MacBurnie needed a doctor's note. Mr. MacBurnie called again at six in the morning on the next work day, Monday the 22nd, and left a recorded message.

[57] In the recording, Mr. MacBurnie sounds like he is in pain to the point of debilitation. He says he is taking pills, he relaxed all weekend, but he only got an hour's sleep at a time. "It's brutal." The brutal pain radiates from his lower back all the way to his neck. His father is going to take him to the hospital. "I'll let you know how I make out." "It's not good."

[58] At noon on that day, Mr. MacBurnie left the main entrance of his apartment and went on a twenty-minute walk. The video surveillance shows a spry man without evidence of disability. He started out with a visit to a grocery store. He walked briskly on Windmill Road to Jamieson Street, down Jamieson to the train

tracks that run by the harbour, along the tracks all the way to Alderney Landing, and up to the bus stop on Alderney Drive.

[59] Mr. MacBurnie took the bus out to Dartmouth General Hospital. Never in any of the video captures do we see him slowdown or make any gesture suggesting pain. Mr. Morley followed Mr. MacBurnie into the hospital. I accept the investigator's testimony about what he saw inside. When he was called from waiting to see a doctor, Mr. MacBurnie walked slowly with one hand at his lower back.

[60] Mr. MacBurnie took the bus back to Alderney and got out there at four. He made a four-hour trip plus whatever time it took for him to do whatever he did after getting off the bus. There was no sign of "brutal" pain radiating from his lower back to his neck. Nor did he report to Mr. Baillie as promised.

[61] That was on Monday the 22nd. Mr. MacBurnie missed work every day that week. He was caught by surveillance again on Tuesday the 23rd. The six o'clock phone message that day said, among other things, "I won't be moving today. I know that."

[62] He did move that day. He left his apartment at twenty after one. He appeared vigorous as he walked to the shopping centre on Wyse Road, and patronized a grocery store, a drugstore, and a restaurant. With his usual vigour and without showing any pain, he walked to the liquor store near the bridge and carried the usual brown bag away towards his home.

[63] Mr. MacBurnie failed to call on Wednesday the 24th. He is seen in the early afternoon visiting the neighbourhood grocery store and at night making another trip by foot to the liquor store and back home.

[64] He did not call on Friday either. Mr. Baillie was becoming nervous. He called the police in case Mr. MacBurnie was not all right.

[65] I find that Mr. MacBurnie took sick leave when he was able to work, and repeatedly lied to his employer about his condition. The employer would have been fully justified had it terminated the employment on February 28, 2010.

[66] *Yet Another "Last" Chance.* Mr. MacBurnie failed to go to work, and he failed to call in, on March 1st and March 2nd. Mr. Baillie organized a meeting of Mr. MacBurnie, Mr. Brigley, and himself. That took place on March 4, 2010.

[67] Mr. MacBurnie presented hospital records for the December and February visits. He denied being able to work when he was absent. He was confronted with the surveillance video. Mr. MacBurnie chose to have it turned off before long.

[68] Mr. Baillie told Mr. MacBurnie Halterm had just cause. He suggested a \$50,000 severance might be possible. Mr. MacBurnie said he needed his job. That pleased Mr. Baillie, who told Mr. MacBurnie, "We want you back."

[69] They discussed depression and alcohol abuse as possible causes of the absences. Mr. MacBurnie testified, and I accept, that he drank eight to ten beers a night. He was at pains to point out that he never drank before or at work, which I also accept. The voice messages he left do not sound like they were made by a man under the influence of alcohol.

[70] There was a program in the Annapolis Valley Mr. MacBurnie was interested in. Mr. Baillie also gave him literature on Halterm's employee assistance plan.

[71] Mr. MacBurnie took some vacation time. His position with Halterm was to be discussed when he returned. That discussion occurred between Mr. Baillie and Mr. MacBurnie on the last day of March.

[72] Mr. Baillie presented a "Last Chance Agreement" prepared by Halterm's lawyers. The draft agreement begins with six pages of recitals mostly about facts. There are some errors in them, but they are accurate by and large.

[73] The last two recitals are more promissory. They would have Mr. MacBurnie admit that, as a result of the misconduct and dishonesty apparent from the factual recitals, Halterm had just cause, that the last chance agreement would not alter that situation, and that the parties enter into the agreement "in order to give the Employee an opportunity to continue his employment".

[74] I find that Mr. MacBurnie did engage in misconduct by taking sick leave when he was able and by not notifying Halterm when he decided not to go to

work. I find that Mr. MacBurnie had been dishonest when he left the telephone messages that exaggerated his back pain and claimed the pain confined him to his apartment.

[75] The substantive terms begin at the bottom of page four and continue for four more pages. They include promises for attendance at work and performance, permission for alcohol testing, the right to require medical evidence of sickness, possible implementation of the employee assistance plan, possible requirements for the assessment or treatment of alcoholism, and a provision for termination on breach by the employee. The draft also included a restriction on employer liability designed to keep just cause open, such that only the employer's breach of the last chance agreement would be compensable.

[76] Mr. Baillie said, and I find, that Mr. MacBurnie's primary reaction when the agreement was presented, and explained in detail, was relief that he could keep his job. Mr. Baillie asked if Mr. MacBurnie had any questions and he said, "No. I completely understand."

[77] Mr. MacBurnie asked to take the draft home. Mr. Baillie agreed, but he said an agreement had to be signed. He said he was open to discussing any problem Mr. MacBurnie has with the terms of the draft.

[78] That was on March 31st. Mr. Baillie heard that Ms. MacBurnie wanted her former husband to review that draft with a lawyer. That was fine. A couple times, Mr. MacBurnie said he was having trouble finding a lawyer. He got time off work to attend what Mr. Baillie understood to be a meeting with a lawyer. Still, there was no signed agreement, and there were no proposed amendments, as of May 19, 2010.

[79] *Reoccurrence in May 2010 and Termination.* Mr. MacBurnie failed to report for work on May 19, 2010. He failed to call in. He failed to return a message left by Mr. Baillie. The next day, he did leave a message. He said "I am not in a good place." He said that he was stressed out. He failed to return Mr. Baillie's subsequent message. For a third day, on May 21st, Mr. MacBurnie failed to come to work. He left no message. He failed to return messages. Mr. Baillie's last message that day told Mr. MacBurnie his employment with Halterm was terminated.

[80] *Conclusion.* In four months, one of which was vacation, Mr. MacBurnie missed sixteen days of work. On seven of those days, Mr. MacBurnie did not call Halterm to warn of his impending absence. On eight occasions, he called and claimed debilitating back pain. The last time he called, he claimed to be stressed out, the truth about his back having been discovered. Again and again, he evaded his employer when it tried to communicate with him.

[81] I find that since at least October of 2003, it was a condition of Mr. MacBurnie's employment that he give "advance notice for time off". Not only had this been put in writing for Mr. MacBurnie, the necessity of notice was explained several times. The requirement was reiterated in the draft last chance agreement. I find Mr. MacBurnie knew of his employer's requirement for notice when he was taking sick leave.

[82] Mr. MacBurnie breached this condition over and over again to, and including, the last day of his employment. The continuous breaches of the employment contract in this regard had afforded Halterm just cause for months. Its tolerance did not waive the breaches. At no time in 2010 did Halterm say

anything that could be taken as an election to maintain the contract. And anyway, the last breach constituted just cause for termination on its own.

[83] Deliberate breach of an employer's rule or policy about notice of absence is just cause for terminating the employment contract: *Kearley v. Iron Ore Co. of Canada*, [1980] N.J. 117 (S.C., T.D.) and *Deakin v. Northern Telecom Canada Ltd.*, [1992] A.J. 261 (Q.B.). The case against Mr. MacBurnie is even stronger because, as I said, the requirement had become an explicit condition of his employment as a result of past transgressions.

[84] Dishonesty is also just cause when it gives rise to a breakdown of the employment relationship: *McKinley v. BC Tel*, [2001] S.C.J. 40 at para. 48. Once deceitful conduct is established on a balance of probabilities, a factual inquiry must be undertaken into "whether the nature and degree of dishonesty warranted dismissal": para. 49.

[85] The surveillance establishes the dishonesty: Mr. MacBurnie took sick leave by telling his employer that back pain debilitated him so severely that he was confined to his apartment for days at a time. The surveillance shows that he was

not debilitated or confined. The dishonesty goes to the heart of the employment relationship because it concerns taking from the employer what the employee was not entitled to take and because of the need Halterm had for Mr. MacBurnie to perform when he was not sick.

[86] Halterm, rightly, asserted just cause to Mr. MacBurnie when he was caught with the truth. It did not waive its right to termination, or elect against it, when it explicitly maintained just cause while searching for a way to mend the relationship. And, Mr. MacBurnie put an end to that effort by skipping work yet again rather than negotiating the last chance agreement.

[87] For both of these reasons, breach of the condition of employment about notice of absences and dishonest misrepresentation of the reason for the absences, Halterm had cause justly to terminate Mr. MacBurnie's employment.

[88] The action will be dismissed.

J.