FOCUS ON *Labour & Employment Law*

Firing for 'just cause' trickier than it seems

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Determining whether an employer has just cause to fire an employee can be difficult enough. Now, a recent decision of the Ontario Superior Court of Justice reminds us that conduct which might constitute just cause for dismissal at common law may not constitute "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" pursuant to the *Employment Standards Act* of Ontario. In other words, the employer may be on the hook for statutory notice or severance even if, based on the common law, they are entitled to summarily dismiss an employee.

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The vast majority of dismissals in Canada are without cause. In that context, employees are entitled to notice of dismissal or pay in lieu thereof. The common law provides that if an employer has "just cause" for dismissal, they do not have to provide notice of dismissal or pay in lieu thereof.

Many employers, HR professionals and lawyers are adept at assessing whether just cause for dismissal exists. If we determine that it does, then we often conclude that there is no need to provide notice or pay in lieu. However, the decision in *Oosterbosch v. FAG Aerospace Inc.* [2011] O.J. No. 1135 is a timely reminder that one must also consider whether notice or severance is required by applicable legislation; the conclusion may not be the same.

In *Oosterbosch*, the plaintiff was dismissed after the employer unsuccessfully attempted to address his performance and conduct issues through its progressive discipline policy. He was 53 years of age and had worked for the company for 17 years at the time of dismissal. The discipline policy in question provided for dismissal in the event an employee receives four written warnings in a 12-month period.

The plaintiff, a machine operator, received four written warnings between Aug. 22, 2007 and March 20, 2008 for: (1) failing to notice a defect on the production line; (2) returning approximately 15 minutes late from a 30-minute break; (3) arriving late for his shift; and (4) failing to notice a defect on the production line and falsification of a production report. There were additional incidents of lateness, absences and unsatisfactory work performance apart from the four incidents that resulted in termination and the plaintiff received numerous coaching or counselling sessions.

The company took the position that the plaintiff was dismissed for just cause and that he was not entitled to either common law notice or termination and severance pay pursuant to the *Employment Standards Act*. According to the Act, employees who engage in "willful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" are not entitled to notice of termination, pay in lieu or severance pay.

Encouragingly for employers, the court concluded that the employer had established just cause for terminating

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University signs precedent-setting pay equity agreement

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In April, the University of Toronto signed a precedent setting pay equity agreement with the United Steelworkers, Local 1998 (Local) which delivered millions of dollars of pay adjustments, retroactive to 2007 and a new wage and classification grid. The project, one of the largest in Canada, was a key demand of workers when they voted in 1999 to certify the Local which represents a majority female bargaining unit composed of around 3,700 staff.

Employers and unions across Canada have much to learn from this agreement and the 10 year job evaluation process leading to it about how to ensure compliance under pay equity laws and also internal equity — fair pay for all jobs. Section 7 of Ontario's *Pay Equity Act* requires all employers to not only achieve, but maintain pay equity. Once jobs are found to be comparable and the pay gap is determined, it must not widen again. The *Human Rights Code* also requires non-discriminatory pay.

The results based on a jointly negotiated job evaluation system, the "Simple Effective Solution/University" (SES/U) system, covered jobs ranging from library technicians to senior business officers and registrars. Despite university claims that its 1990 Pay Equity Plan and subsequent classification practices were still delivering equitable pay, a large majority of the bargaining unit was found to be undervalued and underpaid for the work they did. Some comparable job classes had pay gaps of close to $20,000-$30,000. Many female job classes were underpaid relative to male job classes. The agreement provided that female, male and neutral job classes were all brought up to the male wage line (based on a regression analysis) and job classes above the male wage line have been "green circled," continuing to receive their annual adjustments.

In 2007, all workers and managers were provided the opportunity to complete electronic questionnaires to supplement often out-dated job descriptions. Through the joint work of university and Local job evaluation committees, aided by a dispute resolution process, the parties ultimately agreed on the creation and rating on 17 factors of nearly 400 new job classes, organized into job groupings covering three campuses. The classification and rating of nearly 2,000 jobs, newly created or with reclassification requests since 2007 will be completed this year.

The most important part of the agreement can be found in the joint protocols to ensure equity is maintained into the future. A joint Oversight Committee now oversees the process to ensure proper administration and consistency and fairness in ratings. New positions must be jointly put through the SES/U system. University managers, working with their employees, are required to pro-actively monitor work changes for their classification impacts, meeting annually with their employees to make sure job descriptions and classifications are updated. An online reclassification process along with a Local drop-in centre makes it easier for employees to file requests where jobs have changed. Where agreement cannot be reached, there is an expedited process with two appointed mediator/arbitrators and established hearing dates.

So what are the lessons learned? First, 1990s pay equity plans are outdated and many were

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Court clarifies mitigation duty after termination

CRAIG STEHR

Terminated employees are frequently faced with the difficult task of assessing future employment opportunities. The assessment becomes even more complex in light of the employee's duty to act reasonably in mitigating their loss of employment.

As a result, it can be particularly difficult for employment lawyers to counsel terminated employees on whether to accept a less-than-ideal job offer, or whether to accept re-employment with a savvy employer's job offer following constructive dismissal. The challenge for employment lawyers, as well as the courts, is to determine in which circumstances the employee must accept the alternate position in order to satisfy their duty to mitigate their loss of employment.

In *Whiting v. First Data Canada Merchant Solutions ULC*, [2011] B.C.J. No. 569, the British Columbia Court of Appeal provides guidance on the proper assessment of employees' mitigation decisions. Whiting worked as Director of Corporate Sales with First Data Canada Merchant Solutions ULC, a company that processed commercial credit and debit transactions using new "chip and PIN" technology. In that position, Whiting sold services to corporate clients. His work depended on an agreement between First Data and TD Bank, which provided First Data access to TD Bank's point-of-sale hardware needed to service these clients. Whiting's compensation package would be the envy of most salespeople. He was entitled to earn unlimited commissions in addition to a base salary of $102,140, as well as stock options.

On Nov. 6, 2009, TD Bank announced that it would terminate its agreement with First Data as of Dec. 1, 2009. Whiting would no longer have access to the necessary hardware to service corporate accounts and his position was now redundant.

On the same day, TD Bank offered Whiting a position as national sales manager. The position provided the same salary, and the opportunity to earn a maximum of 80 per cent of his base salary as incentive compensation determined on a group basis. The offer also included a bonus and participation in an employee share purchase plan.

Whiting refused the position. In his view, the TD Bank position provided a "restricted bonus scheme," decreased earning opportunity and a demotion in title. First Data then offered Whiting a position as director of corporate and mid-market sales, but with the compensation based on a mid-market sales model. Whiting turned down the offer, which First Data viewed as his resignation. Whiting commenced a wrongful dismissal action.

The trial judge found that Whiting had been terminated without cause when his job disappeared and that he did not have to accept First Data's offer of employment (with lesser terms) in order to comply with his duty to mitigate his loss. She did find, however, that Whiting's refusal of TD Bank's offer constituted a failure to mitigate his loss. In doing so, she compared Whiting's maximum potential earnings at the TD Bank with his four-year average prior earnings. She concluded that the compensation amounted to "substantially the same money."

The British Columbia Court of Appeal disagreed with the trial judge's approach. Justice K. Smith determined that the trial judge's comparative assessment of the positions was "fundamentally flawed," and that other factual errors also existed. In doing so, the court focused on the comparative assessment, which remains at the core of the mitigation review. Maximum potential earnings and average past earnings were essentially apples and oranges, and not comparable. Justice Smith ordered a new hearing to determine whether the positions were, in fact, comparable.

In another recent decision, *Chandran v. National Bank*, [2011] O.J. No. 1895, the Ontario Superior Court of Justice found that the employer could not force an employee to accept a transfer to a position with different terms, and that the employee's refusal to accept the employment did not constitute a failure to mitigate.

In that case, National Bank grew concerned about Chandran's supervisory skills following a survey of subordinates. As a result, National Bank issued a disciplinary letter and attempted to unilaterally transfer Chandran to one of two available positions, under different terms. Concerned that he could no longer trust his employer, Chandran refused the transfer and claimed constructive dismissal.

The court stated that National Bank did not have unlimited power to transfer Chandran. In light of the disciplinary letter and the fact that the positions offered were at a lesser salary grade, Chandran was not required to accept either position to mitigate his loss. Chandran had no positive duty to accept the transfer with his former employer.

The decisions reiterate that employment lawyers must engage in a comparative analysis, focusing on whether alternate employment includes comparable terms. The mitigation analysis continues to include an assessment of suitability, considering remuneration and status. The objective review of the workplace atmosphere, and whether it is hostile, embarrassing or humiliating, is merely one of the various factors that require attention in the assessment. The analysis remains a broad exercise.

Ultimately, it remains difficult for an employer to force a departing employee to accept a different position where such re-employment contains changes to the terms of employment and/or there exists a hostile work environment. ■

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Joint protocols ensure equity is maintained into the future

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not compliant to begin with. Unless a maintenance process has been maintained, employers and unions should assume the status quo is likely discriminatory and unfair. The university's 1990 non-unionized Pay Equity Plan had many initial flaws and since 1990 was inconsistently applied and unduly influenced by "market conditions" which imported systemic gender bias.

Second, critical to success is the presence of a determined bargaining agent. Local 1998 provided important workplace knowledge and many of the far reaching settlement provisions flowed from its equity requests. While there were many rocky times, the university learned to work with the Local and recognize its expertise, leading ultimately to its willingness to agree to cede its unilateral control of the classification process.

Third, implementing such a large project with widespread implications doesn't happen without committed leaders. Allison Dubarry, Local 1998 President and Mary Ann McConkey, the university's labour relations director provided that ongoing dedication and persistence.

Fourth, the process must be kept separate from collective bargaining. Here the parties kept equity negotiations distinct to ensure pay equity rights were not bargained away.

Fifth, transparency is essential, which requires having an electronic database of information. The system is only as good as the information it depends on. Here, the parties invested in an electronic database which gives employees and managers access to the historical and current job and rating information they need to compare work across the university to ensure it is fairly paid.

Sixth, the process needs to be enforceable with time limits and properly resourced. Here there was binding process language. When the parties reached an impasse in 2006, the Local filed a *Pay Equity Act* complaint which was then held in abeyance until the 2011 settlement. As well, the university paid for employees seconded to the Local's team and agreed to devote adequate resources to the process.

Finally, such equity processes provide employers with an important opportunity to engage with their employees and update their human resource systems. Here, the parties created an updated classification structure with new career ladders and fairer pay to allow the university to better compete for the talent needed to keep its ranking as Canada's leading university.

The Local and the university are now working to implement a joint employment equity process — required by the Code and the Federal Contractors program. Once that is done, the university will be properly able to claim its title as one of Canada's top employers. ■

Mary Cornish and Andrew MacIsaac of Cavalluzzo Hayes Shilton, McIntyre and Cornish in Toronto, were counsel for Local 1998. ■