
THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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COURT ALLOWS PLEADING OF CONDITIONS OF EMPLOYMENT OF OTHER EMPLOYEES

The Ontario Court of Appeal recently considered whether it is permissible that a party be permitted to rely upon the facts as known to them of the terms of employment of other employees for the purpose of alleging an implied condition into their own contract of employment. The Court held that it is.

The Court concluded that the recruiting practices and policies of the employer were relevant. While this may expand the discovery process by requiring the employer to answer questions concerning its recruiting practice, the requirement for particulars as to the allegations by the employee would put "manageable limits" on the documentary and oral discovery process and avoid fishing expeditions.

The Court upheld the determination of the motions court judge that matters specifically known to the employees were the proper subject matter of a pleading; general allegations concerning recruiting practices were not.

It is easy to see how the scope of this decision could be expanded to the termination context and amounts paid to other departing employees in an attempt to imply a condition that an employee would receive similar compensation upon termination.

EMPLOYER'S RIGHT TO SUSPEND

The Honourable Mr. Justice Echlin found that the termination of an employee following the failure to make a presentation a success did not justify her suspension without pay and subsequent offer of a demotion.

The employee had a 14 year tenure as a marketing executive for a company engaged in the business of developing and supplying software and data information for the securities industry. She reported directly to the President and CEO. The two had a "familiar" relationship and were known to have had "heated arguments" from time to time.

The company was scheduled to have an exhibition booth at a tradeshow in Barcelona. The President was to attend to represent the company and the employee was to make arrangements for the shipping of the exhibition booth. When the President arrived in Barcelona the exhibition booth was not there. The chain of events concerning whether or not this was communicated to the employee is unclear as the evidence at trial was contradictory; however, there is no doubt that at some point the employee was made aware that the booth had not arrived. There was a heated email exchange and the employee was immediately thereafter suspended.

Approximately one week later the employee was offered a demotion to Manager of Marketing, the removal of her flex-hours privilege and the loss of her office. She refused to return from her suspension and asserted that the employer's actions amounted to a constructive dismissal.

While suspension without pay is not something accepted in the non-union context in the absence of some contractual right to do so, the right to issue a suspension with pay is uncertain. Echlin J. went on to comment however that:

“a suspension signals to the underlings that the company has less than complete faith in the individual to whom they report. It can also affect the esteem with which the discipline is held in the eyes of peers and superiors. The ramifications are potentially far reaching.”

In this case, the suspension was affected without informing the employee as to whether it was done with or without pay. The Court noted that the employee had been suspended for a two day period three years earlier. However, there was insufficient evidence to conclude the parties had turned their mind to making this a term of the employment relationship and agreeing to it. There was no right of suspension either express or implied in the contract of employment; the employee had been constructively dismissed.

The employer's actions were found to be punitive in nature rather than representing the implementation of workplace policies.

The Court held that the employee's conduct was not “serious”; did not amount to a “repudiation of the contract”; did not evidence “an intention to no longer be bound by the contract”; and that dismissal is an “extreme measure” and must not be resorted to in trifling cases. “Just cause is truly the ‘capital punishment’ of employment law” he wrote.

Based upon the foregoing, it was held that there was no cause for the employee's constructive dismissal; there was no failure to mitigate by accepting the lesser position and facing humiliation; and as such, she was found to be entitled to appropriate notice in this case, 9 months plus an additional 3 months for 'Wallace' damages having regard to the employer's conduct.

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