Case In Point

Discipline, Not Termination, More Appropriate in Case of Single Incident of Misconduct

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In a case that has garnered much attention, *Barton v. Rona Ontario Inc*., the Ontario Superior Court has found that discipline of a managerial employee would have been a more effective sanction than termination where that employee, in a single incident of misconduct, breached the employer's health and safety rules.

At the time of the incident, the plaintiff was assistant store manager with the employer and was responsible for managing approximately 140 employees. A wheelchair-bound employee ("KM") wished to attend a training session, held on the second floor of the worksite to which there was no wheelchair access. The plaintiff had understood that one of the attendees at the session would later train KM. KM's colleague ("GS") came up with the idea of lifting KM in his wheelchair to the second floor on an order picker truck. On a very busy day, KM and GS approached the plaintiff with this idea. The plaintiff testified that he reminded them of the plan to have another attendee train KM and that he was uncomfortable with the "lift scheme." He was called away before the conversation ended.

KM, GS and others proceeded to use the order picker truck to lift KM to the training session on the scheduled day. The plaintiff testified that while he had not given his permission for this, he had failed to order KM and GS **not** to carry out the "lift scheme" despite the fact he had the authority to do so. (The Court stated that this was the plaintiff's most serious mistake.)

The employer found that numerous employees were in clear violation of its health and safety standards as stated in its Employee Handbook, including the rule that "no riders are permitted on forklifts or tractors." The Handbook also stated that certain incidents would be cause for immediate dismissal, including riding on moving equipment, wilful and deliberate violation of company rules and any deliberate act that would endanger the safety of others. The plaintiff was aware of these rules, and was responsible for applying the safety rules in the store. While the local human resources manager had initially recommended no one be terminated for this incident, ultimately both the plaintiff and GS were terminated; others involved in the lift scheme were disciplined.

The Court found that the Employee Handbook was a part of the plaintiff's employment contract and that the plaintiff breached his obligations as a manager in failing to take steps which could have prevented the lift scheme, both prior to the ascent and, when he saw KM at the training session, before the descent.

It then considered whether the plaintiff had "engaged in misconduct that is incompatible with the fundamental terms of the employment contract" (per the Ontario Court of Appeal in *Dowling*). Ultimately, the Court recognized that the plaintiff's misconduct was serious, but noted, among other things, that there was no prior similar misconduct, his performance appraisals were good and he did not give permission for the actual lift scheme. In weighing the balance to be struck between the severity of an employee's misconduct and the sanction imposed, the Court found that in this case the act of misconduct was not severe enough to warrant termination: some other form of discipline might have been appropriate.

In light of the age of the plaintiff (64) at the time of termination, and the length of time he was out of work (12 months) due to the recession, the Court awarded a reasonable notice period of ten months. A claim for *Wallace/Honda* damages was rejected, as "the normal distress and hurt feelings resulting from dismissal are not compensable."

This case is a reminder that before terminating for cause, employers should ask themselves the following question: Will the employee still "learn his lesson" with a sanction short of termination? If the answer to this question is "yes," discipline other than termination needs to be considered — unless, of course, the employer wants to terminate *without* cause, which it can

still do upon providing appropriate notice of termination or pay in lieu of notice.

A major problem for the employer in this case was that the local HR advisor submitted a written report to her bosses advising against termination and recommending a final warning instead. Upper management did not agree. No doubt the Court was influenced by the local HR advisor's recommendation as she was the one who initially met with and interviewed the parties involved. In the end, the Court effectively adopted the recommendation of the local HR advisor. If there are conflicting opinions within management on whether termination is really necessary for the employee to "learn his lesson," this is a good indication that discipline short of termination may be the right approach.