

MANAGEMENT COUNSEL

Employment and Labour Law Update



“Mr. Dowling's pattern of intentional deception was incompatible with his role as a senior manager in a position of trust.”



Workplace Dishonesty Justifies Termination of a Senior Employee with Exemplary Record - Proportionality is Key

In recent years, the inconsistent application of the law of just cause has made it challenging for employers to know whether acts of workplace dishonesty are sufficient to justify dismissal.

In *Dowling v. Ontario (Workplace Safety and Insurance Board)*, the Ontario Court of Appeal may have clarified the issue somewhat. In *Dowling* the Court held that a senior employee, with long service and an exemplary performance record, was nevertheless properly terminated for just cause on the basis of a pattern of dishonest and deceptive behaviour which was incompatible with his role as a senior manager in a position of trust.

THE FACTS

Michael Dowling was employed by the Workplace Safety and Insurance Board (the "Board") as a senior manager. In his position, Mr. Dowling had significant discretionary decision-making authority over substantial amounts of public funds, directly supervised 10 employees who also had authority to administer public funds and earned an annual salary in excess of \$75,000.

Mr. Dowling had 25 years of dedicated service and was months away from reaching eligibility for early retirement. Only days before his termination, Mr. Dowling received commendation for going above and beyond the call of duty.

THE ACTS OF DISHONESTY

Mr. Dowling's termination stemmed from two principal acts of workplace dishonesty. First, he purchased two computers from a client at a discount without disclosing the transaction to the Board. Next, Mr. Dowling accepted \$1,000.00 from the same client, ostensibly for courtesies he had shown to her throughout his years of service. Unfortunately for Mr. Dowling, the Board's Code of Conduct prohibited employees from accepting direct or indirect benefits from Board clients. The stated penalty for a breach of the Code included termination.

When Mr. Dowling was confronted, he compounded his misconduct by lying and attempting to deceive the Board. In his initial interview, he admitted to having received the computers, but lied about accepting the money. He then contacted the client and concocted a story that the \$1000.00 was repayment for a loan

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he had advanced to the client. He even prepared a fraudulent receipt to substantiate the "loan" story. At his second interview, Mr. Dowling perpetuated the lie and tendered the fraudulent receipt.

The Board terminated Mr. Dowling's employment for just cause. He commenced an action for wrongful dismissal.

THE TRIAL COURT'S DECISION

Despite the repeated acts of dishonesty, the Superior Court of Justice found that Mr. Dowling had been wrongfully dismissed and awarded him \$603,570.00 representing 24 months' notice, grossed up to reflect the adverse tax consequences of the lump sum payment.

The Board appealed to the Court of Appeal.

THE COURT OF APPEAL'S DECISION

The Court of Appeal unanimously overturned the decision of the trial judge.

In so doing, the Appeal court set out a three-part analysis to determine whether dismissal could be justified: (i) the nature and extent of the misconduct; (ii) the surrounding circumstances; and (iii) whether dismissal was a proportionate response to the misconduct.

This basis of this three-part analysis was the decision of the Supreme Court of Canada in *McKinley v. B.C. Tel*:

[W]hether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer...

Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to

which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees...

THE THREE-PART ANALYSIS APPLIED TO DOWLING

Applying the first part of the analysis - the nature and extent of the misconduct - the Court of Appeal held that the purchase of the computers, the acceptance of money and the lies aimed at misleading the Board constituted a *pattern of dishonesty and deception* that was neither inadvertent nor trivial, but rather intentional and serious.

In terms of the second part of the analysis - the surrounding circumstances - the Court of Appeal juxtaposed Mr. Dowling's long service, exemplary employment record and position of trust against the Board's role as a statutory body administering public funds, the public trust placed in Board employees and the Board's own Code of Conduct which directly prohibited any act which would place the employee in a conflict of interest.

Finally, in terms of the third part of the analysis - whether dismissal was *proportionate* to the misconduct - the Court of Appeal held that Mr. Dowling's pattern of intentional deception was incompatible with his role as a senior manager in a position of trust. As such, termination was a proportionate response.

LESSONS FROM DOWLING

If one concept emerges from both the *McKinley* and *Dowling* decisions as the key to sustaining a discharge for dishonesty, that concept is proportionality. When making a decision whether to dismiss an employee who has committed an act (or acts) of misconduct, the fundamental question courts - and employers - will and should ask is "does the punishment fit the crime?"

Of course, every situation must be evaluated on its own merits. However, the key to making the correct decision is to ensure that as an employer you have honestly and objectively considered the nature of the misconduct within the context of the broader employment relationship. Only where, on a truly objective view, discharge is the reasonable response to the misconduct will a termination for cause be defensible.

DID YOU KNOW?

Ontario's Ministry of Labour has hired and trained an additional 100 health and safety inspectors who will begin work across the province on April 1, 2005. They will initially target the 6,000 workplaces with the highest lost-time injury rates.

Is your workplace ready?

Promotion of Employee Does Not Preclude Finding of Racially Poisoned Workplace

In a recent decision of the Superior Court of Justice - Divisional Court, the Court unanimously overruled a decision of the Ontario Human Rights Tribunal in which it was held that race was not a factor in the termination of a senior employee whose workplace environment had been poisoned by racial commentary and activity.

THE FACTS

Mr. Smith, a black employee, commenced employment with his employer, "Mr. Lube", as a young trainee. He was a superior employee and as a result was quickly promoted to the positions of upper technician, junior supervisor, supervisor and finally to senior supervisor.

Despite his advancements, Mr. Smith was the subject of racial harassment by his fellow co-workers and managers. He was called "slave" related nicknames such as Kunta Kinte, Chicken George and Congo, and on one occasion after Mr. Smith gave instructions to a subordinate, he overheard the subordinate say "Two hundred years ago, we would have told him what to do". There was also evidence that Mr. Smith had been disciplined more harshly than other, white, employees.

When Mr. Smith complained, the employer failed to take appropriate corrective action. Eventually, Mr. Smith was terminated ostensibly because of poor work performance.

THE DECISIONS

At a hearing before a tribunal of the Ontario Human Rights Commission, the tribunal found that race was not a factor in the decision to terminate Mr. Smith. The Tribunal based its decision primarily on its finding that the termination had not been motivated by race. In other words, because Mr. Smith had been promoted several times throughout his employment, Mr. Smith could not possibly have been terminated on the basis of race:

I find that the termination was not racially motivated. Why would the very people who hired him, who were impressed by him, who promoted him, and who accommodated his school schedule in terms of working hours, suddenly make a decision against him based on race?

THE DIVISIONAL COURT DISAGREED

In terms of the law, the Court reiterated that the *Human Rights Code* is remedial legislation, aimed at remedying the effects of discrimination, not focused on punishing the individuals involved in the discriminatory practices. In other words, it is not the motivation or knowledge of the employer that is the

issue, but rather the effect of the discrimination on the employee. As such, the fact that Mr. Smith had been promoted several times did not negate the fact that he was made to suffer racial discrimination within the workplace.

In terms of the facts, the Court found that that the Tribunal erred in finding that at the time of his termination, the employer was unaware of the racially poisoned atmosphere in which Mr. Smith was required to work. At the very least, the Court held, the employer was reckless in its infringement of Mr. Smith's right to be free from a poisoned atmosphere.

“...it is not the motivation or knowledge of the employer that is the issue, but rather the effect of the discrimination on the employee.”

The Divisional Court also warned employers not to fall prey to the myth that racial harassment and discrimination could not possibly exist simultaneously with advancement and promotion. Employees, the Court said, have a right to work in a harassment free workplace, a right that exists separate and apart from any advancement or promotion the employees may receive.

The Divisional Court ordered the employer to pay to the employee lost wages and damages for mental anguish in an amount exceeding \$35,000, and also to implement an anti-harassment policy, staff training, an internal complaint process, and an education plan for its management team, all subject to the supervision of the Ontario Human Rights Commission. [*Smith v. Ontario (Human Rights Commission)*]

LESSONS FOR EMPLOYERS

The *Smith* decision provides several important lessons for employers:

1. In determining whether human rights legislation has been breached, proof of intent or motive on the part of the employer - an element necessary in criminal law and other punitive legislation - is not the determining factor. The issue is not the intention of the employer, but rather the effect on the employee. Employers must therefore be particularly vigilant and proactive to ensure that their workplaces are free from any and all forms of harassment - direct or indirect.
2. Turning a blind eye to harassment or discrimination, or addressing only the most severe instances of abuse, is not sufficient management of the workplace.

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3. In determining whether a breach of human rights legislation has occurred, human rights tribunals will look at the totality of the circumstances. If race was "a" factor in a decision adverse to an employee's interests (it need not be "the" factor) then the human rights legislation has been breached.

4. Advancement of an employee in the workplace does not necessarily preclude a finding that a poisoned work environment exists. The two - advancement and discrimination - may exist simultaneously.

BREAKFAST SEMINAR

Next in our series of employment and labour law update seminars:

HReview
Seminar Series

TOPIC: Sin In The Workplace

1. Workplace Romance: Where to draw the line.
2. Workplace Bullies: The newest form of harassment.
3. Codes of Conduct: Are they the answer?

DATE: Thursday, May 19, 2005, 7:30 a.m. — 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)

VENUE: Toronto Board of Trade, Country Club - Fireside Lounge
20 Lloyd Street, Woodbridge, ON 416.746.6811

Please RSVP by Friday, May 13, 2005 to 416.603.0700 or elavoie@sherrardkuzz.com



155 University Ave., Suite 1500
Toronto, ON Canada M5H 3B7
Phone: 416.603.0700
Fax: 416.603.6035
24-Hr. Line: 416.420.0738
www.sherrardkuzz.com

Erin R. Kuzz
Direct: 416.603.6242
Cell: 416.459.2899
erkuzz@sherrardkuzz.com

Mark A. Mendl
Direct: 416.603.6251
Cell: 416.420.0137
mmendl@sherrardkuzz.com

Michael G. Sherrard
Direct: 416.603.6240
Cell: 416.809.9204
msherrard@sherrardkuzz.com

Madeleine L. S. Loewenberg
Direct: 416.603.6244
Cell: 416.523.6233
mloewenberg@sherrardkuzz.com

Ronald J. Ouellette
Direct: 416.603.6254
Cell: 416.788.4893
rouellette@sherrardkuzz.com

Thomas W. Teahen
Direct: 416.603.6241
Cell: 416.453.5395
tteahen@sherrardkuzz.com

Daniel J. McKeown, Counsel
Direct: 416.603.6245
Cell: 416.200.2555
dmckeown@sherrardkuzz.com

Shelly M. Patel
Direct: 416.603.6256
Cell: 416.949.6256
spatel@sherrardkuzz.com

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