Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers
Emond Harnden LLP

Court of Appeal opens door to suspension of non-union employees

"Progressive discipline", in the context of non-union employment law, has generally meant monitoring a problem employee and issuing warnings as necessary. Eventually, the point may be reached where an employee's record of misconduct or poor performance entitles the employer to dismiss the employee without notice.

In a unionized environment, the concept of progressive discipline confers on the employer the power to impose meaningful penalties short of termination on wayward employees. Now, in a decision issued on October 18, 1999, the Ontario Court of Appeal has suggested that it may be possible to discipline non-union employees before a point at which there is cause for dismissal.

In *Haldane v. Shelbar Enterprises Ltd.*, the employee was dismissed following an incident where she swore at the company's owner in the presence of all of the other employees, save one. The owner told Haldane she would have to provide a written apology to each staff member and accept a three-day suspension without pay. Haldane did not accept the suspension, stating that she could not afford to lose the pay, and suggested the company deduct three days' pay from her vacation pay. The employer refused this proposal, and Haldane's job was at an end.

"THRESHOLD OF INSOLENCE" NOT REACHED

At the trial of Haldane's wrongful dismissal action, the judge, noting that Haldane had been an excellent and hard-working employee, held that the "threshold" where insolence justifies dismissal had not been reached. The judge further found that the employer's proposed penalty of a three-day suspension was excessive, while Haldane's counter-offer had been reasonable. Expressing the view that the employer's proposed resolution had in fact been designed to provoke Haldane's resignation or termination, the judge held that she had been constructively dismissed.

A "RATHER UNUSUAL JUDICIAL WRINKLE"

Shelbar appealed to the Divisional Court. In oral reasons, a majority of the Court allowed the appeal, ruling that Shelbar had the right to take reasonable disciplinary measures, and that Haldane, in refusing to accept this discipline, could not claim she had been constructively dismissed. Haldane appealed.

However, when the Divisional Court issued its written reasons two weeks later, what the Court of Appeal referred to as a "rather unusual judicial wrinkle" arose. The majority of the Divisional Court had changed its view and dismissed the appeal. A review of the case law had persuaded the Court that, absent an express or implied term in the employment contract permitting suspensions, the employer had no right to impose this sort of discipline.

This reversal by the Divisional Court introduced for the first time the issue of the employer's right to impose the suspension.

The Court of Appeal restored the trial judge's decision, holding that there was no basis for disturbing his findings of fact regarding the employer's intention to fire Haldane and the unreasonableness of the suspension. With respect to the Divisional Court's ultimate basis for dismissing Shelbar's appeal - the absence of a legal right to suspend - the Court held that this was an inappropriate basis upon which to decide the case, as this issue had not been argued at trial.

THREE WAYS TO IMPLY A TERM

While not basing its decision on the Divisional Court's revised reasons, the Court of Appeal did address them, taking as its starting point the Divisional Court's observation that a term permitting reasonably imposed unpaid suspensions could be implied into an employment contract. The case law suggested that this could be done in three ways:

- through the custom or usage in the workplace;
- based on the presumed intention of the parties; or
- as a matter of law by the courts.

In the case of the first two ways of implying the term, this determination is based on the "evidence led and the trial judge's findings of fact". The third method, however, depends not so much on evidence as on a judicial determination that a disciplinary power is an implied term in the employment contract:

> "[The implication of a term into a contract as a matter of law] does not depend on evidence but is seen as a legal incident of a particular kind of contract. Terms are implied into a contract by law where they are "necessary in a practical sense to the fair functioning of the agreement"."

There are a number of reasons, the Court stated, to imply such a term in employment contracts: the near universal inclusion of progressive discipline powers in collective agreements, the flexibility this would bring to the employment relationship, and the similar legal implication into employment contracts of the term requiring reasonable notice absent just cause for termination. However, because such a step would raise complex questions about the scope of such a term, the Court stated that the issue should "await a case where it is fully argued and its resolution is necessary for the decision".

In Our View

It is too early to say that employers of non-unionized employees will now have the power to impose reasonable discipline short of termination. However, the case is another indication of the trend towards greater flexibility in the common law of employment. *FOCUS* readers will recall the case of *O'Dwyer v. Dominion Soil Investigation Inc.*, reported in the July 1999 issue of *FOCUS* (see "Court says demotion of problem employee is not constructive dismissal") in which a court held that, where the employer has cause to dismiss an employee, the employer may choose to demote the employee and avoid liability for constructive dismissal.

This is also yet another example of the courts, taking note of what the Court of Appeal referred to as "the special relationship" and "power imbalance" marking employment

contracts, indicating a willingness to read terms into this type of contract. (See also ""Unreasonable and unjust": SCC says not just any dishonest conduct by employee is cause for dismissal".)

For further information, please contact Jacques A. Emond at (613) 563-7660, Extension 224.

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