

## **Court says demotion of problem employee is not constructive dismissal**

Until now, employers faced with a problem employee have probably considered only two options: issuing warnings to the employee or proceeding directly to termination. Now, an Ontario court has ruled that there is another possibility -- demotion. In *O'Dwyer v. Dominion Soil Investigation Inc.* (January 4, 1999), the Ontario Court, General Division has held that, where there is cause for dismissal, an employer can validly demote an employee and avoid liability for constructive dismissal.

### **UNAUTHORIZED PURCHASE, UNTRUTHFUL MEMO**

O'Dwyer was a project engineer who rose to the position of manager of the company's Windsor operations. However, in 1991, O'Dwyer's career prospects were dimmed when the Windsor branch encountered financial difficulties.

In March 1992, as required by company policy, O'Dwyer submitted a request to head office requesting authorization to purchase a radio communication system for over \$15,000. The request was refused, and it was emphasized to O'Dwyer that, in view of the financial pressures on the company, expenditures had to be kept under control.

Despite this directive, O'Dwyer went ahead with the purchase, committing the company to pay over \$23,000 in installments, including financing charges, to the supplier. Further, he sent a memo to his superiors indicating his acceptance of the "recommendation" not to purchase the system. Ultimately, the company found itself having to buy out the contract at a cost of almost \$18,000.

### **THE FINAL STRAW(S)**

But O'Dwyer's missteps had not yet run their course. In September 1992, two more issues came to light. In violation of a company policy that was known to him, O'Dwyer had been making personal use of the company car. Around the same time that this emerged, an audit revealed that the company was obliged to pay for additional air time under a contract that O'Dwyer had entered into without the company's knowledge.

The response was not long in coming. O'Dwyer was informed that, as a result of his demonstrated inability to carry out company policies, he was to be demoted back to senior engineer at the Windsor branch, but with no change in his salary and benefits. O'Dwyer went on vacation and never returned to work.

O'Dwyer commenced a wrongful dismissal action against the employer. Before doing so, however, he applied for unemployment insurance benefits. Employment Canada determined that O'Dwyer had left his job voluntarily without just cause. This decision was

determined that O'Dwyer had left his job voluntarily without just cause. This decision was appealed by O'Dwyer to the Board of Referees, which was provided with O'Dwyer's statement of claim for his court action and a written presentation concerning his employment with the company.

The Board denied the appeal. It agreed that O'Dwyer's resignation was voluntary.

### COURT: CAUSE FOR DISMISSAL, CAUSE FOR DEMOTION

In court, O'Dwyer took the position that his demotion amounted to constructive dismissal. The company responded that he had been discharged for cause, pointing to four grounds: poor managerial performance, the contract for the radio communication system, the unauthorized use of the car, and the non-disclosure of the air time contract.

The court held that O'Dwyer had indeed given his employer cause for dismissal. While his weak managerial performance did not by itself amount to cause, the other factors, particularly in light of his purchase of the radios in direct contravention of a company directive, were sufficient to allow the company to dismiss him for cause.

But the company had not dismissed him. So the court considered whether the demotion exposed the company to a claim of constructive dismissal:

"[I]f a company, with cause to dismiss without notice, doesn't dismiss, is it then susceptible to being sued for constructive dismissal and suffer damages when it demotes that employee but offers him the same salary and benefits he had before notwithstanding he no longer was the branch manager? I don't accept that premise in this case."

The court stated that, once the company had cause to dismiss O'Dwyer, it had four options:

"Without limiting the options of the company, it seems to me it can ... dismiss the employee for cause and not be subject to any damages. Secondly, it could have demoted O'Dwyer to a position of less responsibility and kept him at his same wages and benefits and again not been subject [to] any damages. Thirdly, it could have demoted him to a position of less responsibility, decreased his pay and benefits and fought a case of constructive dismissal. Fourthly, it could have done nothing."

In this case, the court concluded, the company had the right to demote O'Dwyer while maintaining his wages and benefits, without being liable for constructive dismissal.

### In Our View

Managers should appreciate the flexibility this decision provides for dealing with unsatisfactory employees, but should note that the conclusion was based on the finding of cause for dismissal. As *FOCUS* readers will be aware, the Supreme Court of Canada has rejected the doctrine of "near cause" (see "[Supreme Court rejects doctrine of 'near cause'](#)"), so that anything less than cause for dismissal will entitle the demoted employee to treat the demotion as constructive dismissal, for which reasonable notice is required. It is also worth noting that the court differentiated between a demotion that does not entail a reduction in salary and benefits and one that does. (See also "[Court of Appeal opens door to](#)

salary and benefits and one that does. (See also ["Court of Appeal opens door to suspension of non-union employees"](#) and [""Unreasonable and unjust": SCC says not just any dishonest conduct by employee is cause for dismissal"](#) .)

For further information, please contact [André Champagne](#) at (613) 563-7660, Extension 229 or [J.D. Sharp](#) at (613) 563-7660, Extension 233.

For more news about recent developments in Employment and Labour Law, and for information about how our firm can assist you, please visit <http://www.emondharnden.com/>