

## "Neither insignificant nor trivial": Court of Appeal upholds dismissal of senior employee for conflict of interest

In a recent decision, the Ontario Court of Appeal has overruled a trial court decision concerning the wrongful dismissal of a senior employee of the Workplace Safety and Insurance Board (WSIB). The employee, who was 50 years old, had 25 years of service and was described by the Court of Appeal as "a dedicated employee", had been awarded over \$600,000 in damages, representing 24 months' notice. The decision, *Dowling v. Ontario* (November 26, 2004) clarifies the Supreme Court of Canada decision in *McKinley v. B.C. Tel*, which dealt with dismissal for dishonest conduct (see ["Unreasonable and unjust": SCC says not just any dishonest conduct by employee is cause for dismissal"](#)).

Dowling was a manager in the Ottawa office of the WSIB and was within a few months of early retirement when he was terminated. He had developed a close personal relationship with Ms. Lazar, a representative of employers with accounts with the WSIB. Dowling purchased computers for his family at wholesale prices from Lazar. This constituted a breach of the WSIB's Code of Conduct. He also accepted a cheque for \$1000 from Lazar that contained a notation that it was partial payment for reclassifying one of Lazar's clients. At trial, Lazar testified that the cheque was part of scheme by which she would have her clients reclassified by the Board, invoice them for 20 per cent of the savings and split the invoiced amount with Dowling. Dowling testified that the money was for assistance he had given Lazar to understand the Board's policies and practices.

Dowling was asked to meet with Board investigators, who questioned him about the computers and a payment of \$100. Dowling admitted to receiving the computers but denied receiving \$100. He did not mention the payment of \$1000. Dowling and Lazar subsequently decided to characterize that payment as a repayment of a loan that Dowling had made to help Lazar pay her rent. They drew up a false receipt and a Christmas card in which Lazar thanked Dowling for the help. He then returned the \$1000 to Lazar.

The employer met again with Dowling and confronted him with the cheque containing the notation. Dowling maintained that it was repayment for the loan to Lazar. He further denied that he had met with Lazar to discuss the situation, that money had recently been exchanged between them and that he had been aware of the notation on the cheque. At trial, Dowling conceded that his denials at this final meeting were all untrue. After this meeting, Dowling's employment was terminated on the grounds that he had used his position to obtain a monetary benefit from Lazar.

### TRIAL JUDGE: NO JUST CAUSE

At trial, the judge did not accept that the evidence showed that Dowling had entered a business relationship with Lazar to receive kickbacks for reclassifying Lazar's clients. Nor did he accept that Dowling had failed to notice the notation on the cheque. However, the judge stated that, even if Dowling had accepted the money in return for helping Lazar understand how the WSIB worked, this still constituted a conflict of interest.

Despite this, however, the judge held that the employer's decision to terminate Dowling was not a proportionate response. Citing *McKinley* to the effect that not just any act of dishonesty justifies dismissal, the judge held that the fact that Dowling had accepted the money from Lazar did not mean that he had used his position to obtain a monetary benefit. Lazar had initiated the payment and the discounts on the computers and, whatever her motives may have been, they could not be transferred to Dowling. In the judge's view, allowing Dowling to take early retirement would have been the proportionate response.

### WRONG STANDARD

In reversing the trial judge's ruling, the Court of Appeal held that the judge had failed to apply the correct legal standard to determine whether Dowling's conduct had given rise to just cause for dismissal. The standard dictated by *McKinley* requires an assessment of whether the dishonest conduct is sufficiently serious to give rise to a breakdown in the employment relationship. Here, the Court stated, the judge had asked whether the evidence supported the employer's stated reason for dismissing Dowling. This, the Court pointed out, was not the correct question:

"With respect, the question to be addressed was not whether Mr. Dowling used his position to obtain a direct monetary benefit. That is, the inquiry ought not to have been directed at assessing whether the reason for termination given by the Board had been proved. Rather, as already stated, the question is whether all of the misconduct, considered in context, was sufficiently serious that it gave rise to a breakdown in the employment relationship."

### WRONG ASSESSMENT

The Court then held that the trial judge had also erred in his assessment of Dowling's misconduct by considering only his acceptance of the \$1,000:

"He failed to consider that Mr. Dowling's purchase of computers at a discount, from a Board registered employer, constituted a conflict of interest. He also failed to consider Mr. Dowling's prevarication in the first interview; repeated contact with a witness in the investigation; lies in the second interview; and, preparation of a false document. A proper application of the standard requires a consideration of the full extent of the misconduct."

In addition, the Court noted, the trial judge had not considered the nature and function of the WSIB.

### DISMISSAL WARRANTED

Based on this standard and assessment of the facts, the Court of Appeal concluded that the employer did have grounds for dismissal. It observed that *McKinley* suggested three measures for determining whether the conduct was sufficiently serious to justify dismissal:

- Did the dishonesty violate an essential term of the employment contract?
- Did it breach the faith inherent in the work relationship?
- Was the misconduct fundamentally inconsistent with the employee's obligations to the employer?

On any of these three measures, the Court held, the Board had been justified in terminating

Dowling:

"His misconduct cannot be reconciled with his employment obligations. His actions were not mere errors in judgment; they were intentional, numerous, dishonest acts that occurred over a period of time. He accepted money that, at least in part, related to the discharge of his employment responsibilities. This was conduct which he knew or ought to have known was a conflict of interest and in breach of the implicit and explicit terms of his employment contract. He lied and he prepared a false and misleading document. These actions were committed in the face of his obligation to act with integrity and impartiality in the discharge of his employment duties. The Board's Code of Conduct provided that violation of its terms could result in termination of employment. The trial judge found that the terms of Mr. Dowling's employment incorporated the Board's Code of Conduct and conflict of interest policy. He was in breach of both. Avoidance of a conflict of interest situation was a fundamental term of the employment contract. Mr. Dowling repudiated the employment contract by engaging in conduct incompatible with the obligations that he owed thereunder. This constituted a fundamental breach of his employment obligations."

Dowling's conduct was, in the Court's words, "neither insignificant nor trivial". It was such that the Board could no longer trust him – and the Board's trust was essential to the effective performance of the functions of Dowling's position. Accordingly, the Court allowed the employer's appeal.

#### In Our View

It appears that Dowling's repeated acts of misconduct were key to the outcome, as the amount he improperly received was not significant. This, along with the position of trust that he occupied and the Board's role as a statutory body administering public funds, probably persuaded the Court to uphold the dismissal despite the factors that militated against this result: Dowling's age, his 25 years of "dedicated service" and the fact that he was within a few months of eligibility for early retirement. In any event, employers who wish to take strong action against senior employees suspected of conflict of interest should consider carefully whether the alleged misconduct has caused a breakdown in the employment relationship, as discussed by the Court in this case.

Dowling is seeking leave to appeal to the Supreme Court of Canada. We will keep readers advised of any developments.

For further information, please contact [André Champagne](#) at (613) 940-2735.

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