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

B.C. Court of Appeal: offer of unpaid leave of absence not constructive dismissal

Readers of *FOCUS* Alerts may recall that progressive discipline has a problematic place in non-unionized workplaces (see "Court of Appeal opens door to suspension of non-union employees" on our Publications page). The issue is at what point an employer's disciplinary response becomes constructive dismissal. The answer may lie in the terms of the employment contract. But what happens when the proposed disciplinary measure is not to be found in the contract? This was the issue recently considered by the British Columbia Court of Appeal in *Sinclaire v. Intrawest Resort Ownership Corp.* (January 11, 2005). Laara Sinclaire was employed selling time-share condominiums in Whistler for the employer. Under her contract, she was required to make sales to at least 11 per cent of her customers each month. After six years of thriving in this high-pressure sales environment, Sinclaire started to fall short of the mark.

REMEDIAL PLAN OFFERED

The employer became concerned about Sinclaire's performance and that of three other long-term employees. While the employment contract provided for warning letters to employees showing substandard performance, the employer offered Sinclaire and the others two options: a three and a half months leave of absence, or a warning letter giving them three weeks to attain a sales level of 13 per cent or be fired. Sinclaire decided to accept the leave of absence. The leave of absence was designed to allow the employees to skip the slow fall season and return when the market picked up in December.

Shortly after her meeting with the employer, Sinclaire advised an Employment Standards Officer that she had been laid off for three and a half months. She did not mention the warning letter option. The Officer advised her that she had been fired. When Sinclaire met with the employer a few weeks later to formalize her leave of absence, she refused to countersign the letter spelling out the details of the leave of absence. She left the meeting and commenced an action for wrongful dismissal.

TRIAL JUDGE: AUTOMATIC TERMINATION THREAT UNFAIR, TEMPORARY LAYOFF A TERMINATION

Sinclaire was successful at trial, with the judge holding that she had been constructively dismissed. The trial judge reviewed the provisions of the employment contract on progressive discipline and conflict resolution, which provided

> **"Progressive Discipline**
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> We have established procedures which provide for notice of substandard or unacceptable performance and for addressing improper conduct. Depending on the

specific circumstances, disciplinary action may be initiated at any one of the following four steps:

a) 1st Warning
b) 2nd Warning and specific requirements
c) Suspension from work
d) Termination

Every situation is dealt with on an individual basis, and depending on the seriousness of the improper conduct, or the failure to meet performance expectations, the manager/supervisor may initiate any of the above steps (a, b, c or d) as appropriate and a written account of each step will be filed in your personnel record.

It is the responsibility of all managers and supervisors in the company to ensure fair and consistent treatment. In respect to disciplinary action, staff shall be given the opportunity to explain their conduct. If you disagree with the disciplinary action, please refer to the Conflict Concern Resolution System.

Conflict/Concern Resolution

We are committed to maintaining open channels of communication with our team members and to ensuring that everyone is treated fairly. If you have a problem or a concern, we want to hear about it. Your questions, suggestions or concerns should be openly and honestly discussed with your supervisor. Questions should not go unanswered and problems should not go unresolved. By following a practice of open communication, most misunderstandings can be avoided; or at the very least resolved before they cause unnecessary challenges. When voicing a concern or a complaint, we recommend the following channels of communications:

- Any complaint should first be raised with your immediate supervisor/manager. This supervisor/manager will listen to the problem and attempt to resolve the issue.
- If your supervisor/manager has been unable to resolve your concerns, you may take it to the senior departmental manager/director. This manager/director will review and discuss the problem with you and ensure that the issue is properly and fairly investigated.
- If the problem is still not resolved to your satisfaction, you may submit a confidential, written report to the Director of Best Practices for review."

The trial judge considered the options presented to Sinclaire by the employer and held that the warning letter option differed in a significant respect from other warning letters placed in evidence – none of the other letters threatened automatic termination if the 13 per cent threshold was not attained.

While the employment contract granted management some ability to customize its disciplinary action, it also stipulated that management was to ensure fair and consistent treatment in meting out discipline. The judge did not consider the contents of the warning letter to be consistent with the employer's ordinary practice in relation to first letters sent out to discipline underperforming sales personnel. Accordingly, the judge held that the warning letter option presented to Sinclaire amounted to an unfair and inconsistent disciplinary treatment on the part of the employer.

With respect to the option of a three and a half month leave of absence, the trial judge stated that there was no explicit term in the contract that authorized the employer to temporarily lay off Sinclaire for three and a half months and no basis to imply such a term. Moreover, there was no evidence that this measure had been implemented before, and its usage could not be characterized as consistent treatment. In the absence of a clear contractual term, either explicit or implicit, permitting the temporary layoff of an employee, the judge held, the position at common law is clear: such a layoff constitutes a termination of employment. In holding that Sinclaire had been constructively dismissed, the judge concluded that the option offered to her had been to choose between a first warning letter that was inconsistent with the employer's disciplinary treatment and excessive in its consequence and an option that amounted to a dismissal.

COURT OF APPEAL: NO REPUDIATION OF CONTRACT

In allowing the employer's appeal, the Court of Appeal stated that the key question was whether the employer had repudiated any of its contractual obligations. The Court held that it had not. The employment contract gave the employer the flexibility to issue a warning letter threatening termination as its first disciplinary measure. It also gave Sinclaire the opportunity to challenge the employer's disciplinary response, but she had made no move to do so. Moreover, the Court disagreed with the trial judge's description of the warning as inconsistent and unfair, and noted that it was only an intimation of future action, which Sinclaire had failed to challenge. At most, the warning was a threat of future dismissal contingent on poor future performance.

With respect to the leave of absence, the Court noted that it was an option outside the terms of the contract, but that it represented a good faith attempt by the employer to help long term employees improve their lagging performance by giving them the option of returning to work after the slow fall season. It was intended to be more favourable to employees than the progressive discipline contemplated under the contract.

Accordingly, the Court held that Sinclaire had not been constructively dismissed but, rather, had left her employment voluntarily.

In Our View

Employers should be cautious when departing from the terms of an employment contract in matters of discipline. In this case, the offer of an unpaid leave of absence was seen as a positive and helpful response to assist employees in overcoming their performance problems. However, it would also be possible to cast such a measure as a form of constructive dismissal if it is not clearly provided for in the contract. Employers should consult with legal counsel to craft disciplinary policies that will provide the necessary flexibility to respond to misconduct and poor performance, while avoiding the pitfalls of constructive dismissal.

For further information, please contact Lynn Harnden at (613) 940-2731.

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