Suspension in non-unionized work place considered by Ontario court

Is suspension a disciplinary tool that is available to non-unionized employers or will it leave the employer open to a claim of constructive dismissal? The Ontario Superior Court of Justice has recently considered these questions in *Carscallen v. FRI Corp.*, a decision released on June 10, 2005.

The case involved a marketing executive who claimed to have been constructively dismissed after 14 years of service. The alleged constructive dismissal occurred after the company's booth and promotional materials had failed to arrive on time at a trade show in Barcelona, Spain. Following this incident, there was an exchange of combative e-mails between Carscallen and the company's CEO regarding the incident, after which Carscallen was informed that she was being suspended indefinitely.

A week later, Carscallen attended at the office where she was advised that, in addition to the week's suspension without pay, she was being demoted, denied the flexible working hours she had enjoyed and moved from an office to a cubicle. Carscallen decided not to return to work and commenced an action for wrongful dismissal.

The Court found in favour of Carscallen and awarded her damages of nine months of notice plus three months for *Wallace* damages (see ""Fairly, reasonably and decently": Employers obliged to deal in good faith with dismissed employees, Supreme Court rules" on our Publications page). Before making its determination as to whether Carscallen had been wrongfully dismissed, the Court considered the propriety of unpaid suspensions in a non-unionized workplace.

NO IMPLIED TERM PERMITTING SUSPENSION

The Court stated that, while it is possible for non-unionized employers to place a term in the contract entitling them to suspend an employee, there would have to be a right to review of the suspension along the lines of a grievance procedure. The supervisor imposing the penalty "must not be permitted to be the sole judge, jury and executioner", the Court stated. When, as is normally the case, there is no express term in a contract regarding suspension, the Court stated that it would imply such a term into the contract only if it is necessary to give it "business efficacy". In the case of this employer, the Court noted, there was no mention in the company's policies and procedures of suspension. Rather, the policies referred to "fair and constructive disciplinary guidelines" which would stress rehabilitation rather than punishment.

However, the Court noted, the employer did not follow those policies in its treatment of Carscallen but showed an intention to punish and humiliate her. Summing up, the Court stated:

> "Given an express company policy which was not followed, an absence of any

> express agreement regarding suspensions between FRI and Carscallen, and based upon the legal principles relating to when implied terms can be added to a contract of employment, I find that terms relating to the right to suspend on an unpaid basis cannot be implied in this instance.
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> To imply a term permitting unpaid suspensions of undetermined length would contradict the express terms of FRI's own policies and procedures which are found on all employees' computers.
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> Further, I find no necessity to do so in order to "give business efficacy to the contract". The contract could be effective without such implied terms."

EMPLOYER'S DISCIPLINE "NOT APPROPRIATE IN THE CANADIAN WORKPLACE"

Even when there is no contractual term – whether express or implied – permitting suspensions, suspensions may be permissible if there is just cause. This is because, if just cause exists, the employer has the right to end the employment relationship and, if it has that right, it also has the right to impose the lesser penalty of suspension. If so, the suspension would not be improper and would not amount to constructive dismissal. However, the Court concluded, there was no just cause for dismissal in this case. It described Carscallen's record in the following terms:

> "While there is no doubt that Carscallen missed deadlines, failed to closely monitor certain undertakings, and engaged in e-mails of an inappropriate tone with her President and CEO, by FRI's own admission, her performance had significantly improved between 2000 and 2003. ...
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> There was dissatisfaction regarding her performance, but not sufficient to permit dismissal without notice of this long-serving employee. It is also troublesome that FRI promulgated an Employment Policy and Procedures Manual and then failed to have any regard for its requirements in these circumstances. No attempt was made to give warnings. No procedural fairness was present in levying an indefinite suspension without pay. … Such corporate discipline is not appropriate in the Canadian workplace."

By suspending Carscallen without pay, demoting her, taking her office away and changing her hours of work, the employer had intended to create sufficient discomfort to cause her not to return to work, the Court held. This amounted to constructive dismissal.
In the result, the Court held in favour of Carscallen.

In Our View

One noteworthy aspect of this decision is the fact that the very conduct of the employer that persuaded the Court that constructive dismissal had occurred also led to the awarding of "Wallace" damages of three months notice to Carscallen. The Court characterized the employer's conduct as "unduly insensitive and perhaps designed with the hope that it could engineer a without-cost resignation of a long service senior employee". In these circumstances, the employer may have fared better had it simply terminated Carscallen.
For other cases related to the issue of discipline short of dismissal, see "Court of Appeal opens door to suspension of non-union employees", "Court says demotion of problem employee is not constructive dismissal" and ""Unreasonable and unjust": SCC says not just any dishonest conduct by employee is cause for dismissal" on our Publications page.

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