

Ontario Court of Appeal considers repudiation of employment contract by employees

If an otherwise exemplary employee refuses to carry out an employer's instructions based on an honest but mistaken belief that the instructions are illegal, is this cause for dismissal? If the employer terminates the employee without mentioning cause and provides the employee with some notice pay, does this prevent the employer from alleging cause at trial? These are among the questions considered by the Ontario Court of Appeal in *Roden v. The Toronto Humane Society* (September 22, 2005).

The case involved the termination of a Shelter Manager and a Shelter Supervisor who reported to her. The two employees were dismissed after they refused to implement the employer's decision to take in stray animals within the City of Toronto. The employer had accepted the strays under the terms of a contract with the City that expired when the City was amalgamated in 2001. However, in 2002, the employer decided to resume taking in Toronto strays. The two employees took the position that the new direction was unlawful and refused to carry out the employer's instructions. When they persisted in their refusal, the employer terminated them, providing them with two weeks' termination pay and benefits. The employees sued for wrongful dismissal.

TRIAL JUDGE: EMPLOYEES DISMISSED FOR CAUSE

At trial, the judge dismissed the employees' action. He held that they had been dismissed for cause because their failure to follow the instructions of senior management amounted to serious and willful misconduct. He also held that, if they were not dismissed for cause, the notice provisions of their contracts were valid and enforceable and they had been paid in accordance with those notice provisions. The employees appealed.

Before the Court of Appeal, the employees argued that the trial judge was precluded from finding that they had been dismissed for cause because the employer's termination letters did not mention cause and they had been offered severance packages. They also argued that, in any event, the trial judge was wrong to conclude that their refusal to instruct their subordinates to follow the employer's instructions in relation to stray animals amounted to serious and wilful misconduct justifying dismissal for cause.

COURT OF APPEAL: EMPLOYEES REPUDIATED CONTRACTS

The Court rejected both arguments. It held that the fact that the employer had initially treated the dismissals on the basis that they were without cause was not determinative of the issue. Given that cause had been raised as an issue in the employer's pleadings, the trial judge had the legal power and obligation to decide whether the employer was entitled to terminate the employees for cause.

The Court held further that the trial judge was entitled to find that the employees had given

the employer cause for dismissal – but not because they had indulged in serious and wilful misconduct. Rather, the Court held, the judge's findings were sufficient to support the conclusion that the employees had repudiated their employment contracts. Repudiation occurs when an employee refuses to perform an essential condition of the employment contract or when the refusal is directly incompatible with the employee's obligations to the employer. The Court explained the difference between terminations for misconduct and for repudiation:

"[T]here is a crucial distinction between dismissal for misconduct and termination for repudiation. When an employer claims to have dismissed an employee for cause based on serious misconduct, the employer must point to conduct that took place prior to dismissal. It is then for the courts to determine whether the conduct was sufficiently serious so as to constitute cause. Repudiation, on the other hand, takes place when an employee refuses to perform an essential part of his or her job duties in the future. In such a situation, the employer is entitled to accept the repudiation and treat the employment relationship as terminated because the parties no longer agree on the fundamental terms of the contract."

In this case, the Court held, the trial judge's findings were consistent with repudiation. He had not found that the employees were terminated because of any prior misconduct. In the Court's view, the employees' unequivocal refusal to perform the duties assigned to them amounted to a repudiation of their employment contracts. Accordingly, the employer was entitled to accept the repudiation and to treat the contract as terminated. Because the employees had terminated the contract, they were not entitled to damages for wrongful dismissal.

In the result, the Court dismissed the employees' appeal.

In Our View

This case has a number of paradoxes. The Court held that, while the employees were not dismissed for cause, they were not owed any notice. They were, in fact, given some notice and were not advised that they had been dismissed for cause, but this did not preclude the employer from asserting cause at trial.

The Court noted that, if an employee's refusal to carry out instructions is reasonable, the refusal may not constitute repudiation. In this case, however, it observed, the employer had secured a number of legal opinions supporting its authority to take in the stray animals. As the employees' concerns had been fully addressed by the employer, their refusal to perform their duties was unreasonable.

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