

LABOUR AND EMPLOYMENT NEWSLETTER



Spring 2011 Edition

Welcome!

We are pleased to provide you with the inaugural issue of Watershed's Labour and Employment Law newsletter. Since opening our doors for business on January 1, 2010, we have been busy implementing our unique vision of legal service (hence the name of the firm). We had hoped that our vision, based on collaboration, open and fair pricing alternatives and unparalleled client service would be well received, our experience over the past year has confirmed that we are on the right path, and with your feedback we will continue to innovate to better serve you. We would like to thank our clients who have entrusted us with their legal matters. We fully recognize that you have options, and we greatly appreciate the confidence you have shown in us. Our business, like most, is based on relationships, and we are sincerely grateful for the many relationships we have and continue to develop.

We are also very pleased to announce that we recently hired Kate Dearden as a lawyer with the firm. Many of you will know her as Kate Zavitz, and will also know of her creative, practical and results-oriented approach when dealing with client matters. Kate is fitting right in!

We hope you enjoy this issue of the Newsletter and if you have any comments, suggestions or questions, we are always delighted to hear from you. Our contact information is at the end of the Newsletter.

EMPLOYER DISMISSES EMPLOYEE FOR JUST CAUSE, BUT ORDERED TO PAY *ESA* TERMINATION AND SEVERANCE PAY

While just cause is, as one would expect, difficult to prove, it is not impossible to prove. A recent case in point is [Oosterbosch v. FAG Aerospace Inc.](#), where the court found that a long-service employee had been properly discharged for just cause following his having received a number of disciplinary notices which culminated in his termination based on progressive discipline.

The court summarized the legal principles as follows:

The onus is on the defendant [employer] to establish just cause for the termination of the plaintiff's employment. The standard that the defendant has set is articulated in its progressive discipline policy. Although the plaintiff's dismissal following receipt of four written warnings within a year complies with that policy it does not necessarily follow that there was justification for his termination in

law. Just cause at common law requires proof of misconduct that constitutes a repudiation of the employment relationship.

The leading just cause case is [McKinley v. BC Tel](#) in which the Supreme Court of Canada provides a comprehensive review of the jurisprudence and concludes that a contextual approach ought to be adopted in these cases where the principle of proportionality is paramount. In short, the punishment (summary dismissal) must be appropriate in all the circumstances. Iacobucci J. concluded his analysis in *McKinley* by stating:

I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship.

In other words, the trial judge must consider the employee's misconduct in the context of the overall employment relationship in deciding whether just cause for summary dismissal is present. As was observed by the Ontario Court of Appeal in [Carscallen v. Fri Corporation](#), disciplinary measures short of dismissal may be appropriate for less serious types of employee misconduct.

That said, and following an analysis of the context, the court concluded in *Oosterbosch* that just cause for the plaintiff's summary dismissal without notice was present.

Employee disentitled to notice at common law, but not under ESA

Even though the employee in *Oosterbosch* was dismissed for just cause, and thus disentitled to reasonable notice of termination at common law, the court's inquiry did not end. The court went on to consider the plaintiff's alternative claim that, despite a finding of just cause at common law, he was, nonetheless, entitled to be provided with termination and severance pay under the [Employment Standards Act, 2000](#) (the "ESA").

The ESA sets out minimum terms and conditions of employment applicable to most Ontario employees, including an obligation to provide a terminated employee with notice of termination or termination pay, and, if certain conditions are present, statutory severance pay. There are a number of exceptions to the entitlement to termination notice and severance pay in the ESA and its regulations.

For purposes of this article, the relevant exception to an employer's obligation to provide termination notice or pay in lieu thereof is found in [Regulation 288/01](#). An employee in the following circumstances will not be entitled to termination notice or pay in lieu thereof, or severance pay:

An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

The issue before the court in *Oosterbosch* was whether the employee's conduct rose to the level of "wilful misconduct, disobedience or wilful neglect of duty". The trial judge concluded that, in the circumstances of this case, it could not be said that the plaintiff's conduct was wilful or reckless. Recklessness, in the court's view, occurs when an employee "engages in conduct without regard for the outcome or consequences".

While lacking the force of law, and although not referred to by the court in *Oosterbosch*, the Ministry of Labour's Employment Standards Act, 2000 Policy and Interpretation Manual is instructive. The Manual provides that:

This exemption will apply only if all of the following criteria are met:

1. The employee's conduct is wilful.
2. The employee is guilty of:
 - (a) misconduct, or
 - (b) disobedience, or
 - (c) neglect of duty.

3. The employee's conduct is not trivial.
4. The employee's conduct has not been condoned by the employer.

The court in *Oosterbosch* commented that:

[The employee] was undoubtedly careless and the persistence of that carelessness justified his dismissal. I would not, however, characterize his offending behaviour as “wilful misconduct, disobedience or wilful neglect of duty” that would disentitle him to receipt of termination and severance payments under the provisions of the Employment Standards Act, 2000.

Accordingly, the court awarded the plaintiff \$7,904 representing 8 weeks termination pay and \$17,127.33 as severance pay under the ESA. In addition, the court awarded costs in favour of the plaintiff. All of this despite the conclusion that the employer had just cause for the dismissal.

Lessons for Employers

There has been hushed discussion among management lawyers for years about whether a finding of just cause would automatically disentitle an employee to termination pay and severance pay under the ESA. *Oosterbosch* stands for the proposition that an employee could lose his or her claim for common law reasonable notice, but nonetheless be successful on an alternative claim for termination pay and severance under the ESA.

This case, if not appealed, will likely result in similar claims by plaintiffs and could result in an employer being caught in a “win the battle lose the war” scenario. Employers should be prepared to fight these cases on two-fronts - just cause and under the ESA exceptions and present evidence and arguments in a manner that not only meets the common law test for just cause, but that also sustains a defence under the ESA exceptions.

With respect to the court, the ESA analysis is sparse and no precedent is cited for the conclusions reached.

Furthermore, and while the employee's conduct in this case was not, on its own deserving of the ultimate penalty of summary termination for just cause, cumulatively, one can envision an argument that an employee was reckless or showed “wilful” disregard for his precarious employment situation. For example, the *Manual* discusses recklessness as follows:

... where the employee's behaviour was so reckless as to amount to wilful misconduct. For example, wilful misconduct was found where the employee, by failing to put pads on a hoist, caused a car to fall from the hoist (see *Re Northwest Motors Ltd.*). In this case, the employee knew or ought to have known that his actions would cause the accident.

While the reference in this section is to an accident, could it not be argued that an employee who is aware of his precarious employment circumstances is reckless where, in spite of clear warnings that his employment is at risk, nonetheless engaged in conduct that is in disregard to those warnings? Could it not be argued, in the words of the *Manual* that the “employee knew or ought to have known that his actions” would lead to his termination? At a point, one would think that continued misconduct (albeit minor) in the face of clear warnings, amounts to recklessness.

In any event, right of wrong, employers will need to consider the arguments in these cases and ensure that they are able to meet the common law test for just cause, as well as the ESA exceptions.

RECENT CASES DISTINGUISH BETWEEN “REPREHENSIBLE” EMPLOYER CONDUCT AND “OVERSIGHT”

In employment litigation, the context of the employment relationship and dismissal plays an important role. The courts are often called upon to decide whether the employer’s conduct warrants further damages beyond reasonable notice of termination.

Two types of damages can be awarded against employers who act in “bad faith” and/or who are considered to have acted in a “reprehensible” manner: moral damages and punitive damages. Two recent cases illustrate what type of conduct might attract the court’s attention, and result in damage awards against an employer in addition to an award of damages for reasonable notice at common law.

In [Altman v. Steve’s Music](#), Shelley Altman was considered a loyal and proud store manager at Steve’s Music. After thirty years of service, at age 59, Ms. Altman’s employment was terminated for “frustration” of the employment contract due to disability-related absences. She sued for, among other things, reasonable notice, moral damages for the manner of her dismissal, and punitive damages arising out of the employer’s conduct. In an earlier decision, Ms. Altman successfully obtained an order for termination pay under the [Employment Standards Act, 2000](#) (the “ESA”). The remaining issues were considered during a five-day trial.

Having decided that Ms. Altman’s contract was not frustrated due to disability and awarding a reasonable notice period of 22 months, the court turned its attention to the claims for moral damages and punitive damages. The employer’s conduct was front and centre in the court’s decision to award \$35,000 in moral damages and \$20,000 in punitive damages.

Context of the Dismissal

Ms. Altman had been diagnosed with lung cancer a year and a half before her dismissal. Her treatment

included surgery, chemotherapy and radiotherapy and required periods of absence and reduced hours over a period of eight months in 2008. Ms. Altman worked when she could, and was generally supported by Steve’s Music. She received her regular salary and was not advised that she was remiss in her duties or that her absences were putting her job at risk.

Eight months after her surgery and during the time when she was working reduced hours, Ms. Altman received a letter from a law firm representing her employer. Ms. Altman was shocked to receive such a letter by bailiff, and shocked by the letter’s contents, which were as follows:

We are the attorneys representing the interests of your employer Steve’s Music and as such, we have as instructions to serve you with the present letter. According to the information provided by our client, it appears that you have been remiss in your duties and obligations towards Steve’s Music in failing to work minimum number of hours required by your employer from Monday to Friday. You have taken it upon yourself to come in late and leave early or for that matter not attend for days on end, without providing your employer with prior notice or written justification for your absenteeism.

In view of the foregoing, we have as instructions to advise you that unless you fulfill your obligations towards your employer in full by working regular working day [sic] as stipulated by your employer’s directives, Steve’s Music will have no alternative but to advise you that your employment will be terminated, without further notice or delay.

Taking the contents of the letter seriously, Ms. Altman went to work the next day. Ms. Altman then went on a three-month medical leave, which was subsequently extended to six months. Ms. Altman advised her employer that she would be returning from her medical leave on April 8, 2009. She then sent a letter on April 6, 2009, advising that she had fractured her back and was

given medical advice to take another two weeks off work.

On April 7, 2008, the company terminated Ms. Altman's employment by letter from its counsel. The termination letter was delivered by bailiff and contained the following passages [excerpt provided by the court]:

We have as instructions from our client to advise you that in light of our correspondence addressed to both you and your attorney since October 2008 to date, as well as your application for long term disability and the fact that your position with Steve's Music, has since been abolished, Steve's Music has no obligation to re-instate you.

.... Steve's Music was fully entitled to offset and deduct from your remuneration or for that matter any other sums due and owing to you, for your absenteeism, late arrivals and early departures.

Moral Damage Award of \$35,000

As the Supreme Court of Canada recently confirmed in [*Honda v. Keays*](#), moral damages are awarded where an employer engages in conduct during dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive." While the normal distress and hurt feelings resulting from dismissal are not normally compensable, a court may award compensatory damages for mental distress where actual damages are proven. In answer to *Honda v. Keays*, the courts are no longer meant to award extensions to notice periods as punishment for "bad faith" in the manner of dismissal.

The evidence of Ms. Altman's actual damages was critical to the court's decision to award \$35,000 in moral damages against the company. Ms. Altman called a doctor who specializes in treating psychiatric complications in cancer patients. The doctor gave evidence that Ms. Altman's depression was precipitated by having received the first letter by bailiff

informing her that she would be terminated if she did not work full-time hours.

The doctor testified that receiving this letter was more traumatic to Ms. Altman than being diagnosed with cancer or being told her cancer could not be cured. Ms. Altman's doctor testified that it was important to Ms. Altman to continue working and that receiving the letter produced a response in Ms. Altman similar to a "loyal and defenceless dog [that] is unpredictably whipped and abandoned to die by its owner."

Relying largely on the doctor's evidence, the court concluded that the way the employer treated Ms. Altman was callous and insensitive. In the court's view, a 30-year employee recovering from cancer treatment deserved better than to be sent a letter by bailiff containing mistruths about her attendance. The court made particular mention that no one at the company had the "decency or courtesy" to speak to Ms. Altman personally to discuss the work arrangement or her hours. Ultimately, the court concluded that the employer decided that Ms. Altman was a liability and asked its lawyers to deal with her. The letters sent by the company's lawyers caused significant mental distress to Ms. Altman, as evidenced by her doctor's testimony, and the court therefore awarded \$35,000 in moral damages.

Punitive Damages Award of \$20,000

Courts award punitive damages if the following conditions are met:

1. The employer's conduct was so harsh, vindictive, reprehensible and malicious or so malicious, oppressive and high handed that it offends the court's sense of decency.
2. The employer committed a separate or independent actionable wrong causing the damage.
3. The compensatory damages are not sufficient to express the court's repugnance at the

employer's conduct, and to punish and deter the employer.

In awarding punitive damages, the court cited the following employer conduct:

- The employer refused to pay termination pay under the ESA and had to be ordered to do so after Ms. Altman brought a motion for summary judgment.
- The employer improperly withheld earned wages, contrary to the ESA.
- Despite being ordered to do so by the court in a preliminary hearing, the employer did not provide an accounting of amounts held for Ms. Altman in its deferred profit sharing plan.
- The employer used Ms. Altman's vacation bank to reimburse itself for absences, even though it led her to believe she was being paid her salary. This was found to be in contravention of the ESA requirement to hold vacation pay in trust.
- The employer failed to complete the employer portion of a disability benefits form, causing substantial delay in Ms. Altman receiving benefits.
- The employer delayed in issuing a Record of Employment to Ms. Altman, causing her to have no income for several months during 2008.

The violations of the ESA were determined to be an "independent actionable wrong", thus meeting the second condition for awarding punitive damages.

Finally, the court decided that upon viewing the totality of Ms. Altman's circumstances, its conduct in clawing back her vacation, failing to meet its obligations under the ESA and failing to comply with a court order was "reprehensible and high handed conduct" that was deserving of the court's denunciation. The employer was thus ordered to pay \$20,000 in punitive damages.

***Jensen v. Schaeffler*: Oversight and Inadvertence**

The facts in *Altman v. Steve's Music* are unique and the court's decision does not require much explanation. The more common and perhaps difficult cases are those similar to [Jensen v. Schaeffler](#), another recent case where the court was asked to award moral damages.

The employee, Ms. Jensen, was upset after being permanently laid off by her employer of 28 years, Schaeffler. At the time of her dismissal, Ms. Jensen was recovering from a workplace injury and was participating in the WSIB's Labour Market Re-Entry Program. The company paid Ms. Jensen her entitlements to termination and severance pay under the ESA, although there was a delay in providing these payments. Subsequently, Ms. Jensen sued for reasonable notice and moral damages for the manner of her dismissal by Schaeffler.

In deciding not to award moral damages, the court recognized that the evidence did not support a finding of misconduct on Schaeffler's part or any intention to avoid its obligations to Ms. Jensen.

Schaeffler's decision to lay off Ms. Jensen was found to be "reasonable and justified" in the context of Schaeffler's business. The employer's gesture of driving Ms. Jensen home after speaking to her about the dismissal was found to be "commendable", and not evidence of misconduct or bad faith.

Contrary to the facts in *Altman*, the delay on Schaeffler's part in making payments under the ESA was held to be "unfortunate" and due in part to an "apparent misunderstanding" between Ms. Jensen's counsel and Schaeffler about transferring funds into an RRSP. Upon reviewing the evidence, the court found that Schaeffler had no intention of avoiding its obligations to Ms. Jensen. Its actions were not misconduct, but merely "oversights and misunderstandings."

Unlike the employee in *Altman* whose doctor gave compelling evidence linking the employer's conduct as the cause of Ms. Altman's psychological distress, Ms. Jensen was unable to prove through evidence that Schaeffler engaged in misconduct, or that any alleged misconduct caused her mental distress. The evidence established that Ms. Jensen struggled with psychological issues before her layoff, but fell short of identifying any "measurable distress" that could be associated with the manner in which she was dismissed. As the court said in *Honda v. Keays*, distress from the fact of dismissal is not compensable. Ultimately, the court dismissed Ms. Jensen's claim for moral damages.

Conclusion

The availability of additional damages beyond reasonable notice of termination should motivate employers to step back and consider their conduct in light of the overall context of the dismissal. As for punitive damages, the court will look at the employer's misconduct and the "totality of the circumstances" to decide whether further damages are necessary to punish and denounce employer conduct that is reprehensible, callous and harsh.

On the other hand, courts will look to the plaintiff for evidence to support a claim for moral damages. Such evidence must establish more than distress for the fact of termination, but that employer misconduct in the manner of dismissal caused damages that should be compensated. An employee's personal medical history will be highly relevant to deciding whether medical harm was suffered and, if so, whether it was caused by an employer's bad faith conduct. Again, context and evidence are paramount.

EMPLOYERS LIKELY TO FACE NEW DISABILITY-RELATED REGULATION IN 2011

Although the upcoming provincial election in Ontario makes it difficult to predict what, if any, new laws or regulations will be passed between now and October, it is possible that a new regulation affecting employers will be released in the coming months. The regulation in question relates to the Accessibility for [Ontarians with Disabilities Act, 2005](#) (the "AODA"), legislation administered by the Ministry of Community and Social Services. The purpose of the AODA is to identify and remove "barriers" to accessibility in certain areas by January 1, 2025.

The purpose of the AODA is intended to be achieved by regulating public and private sector organizations. The regulations, known as "standards", will cover five areas:

1. Customer service
2. Built environment (buildings and other structures)
3. Employment
4. Information and communications
5. Transportation.

The first regulation to be passed under the AODA is [Regulation 429/07](#), which regulates "Information and Communications". It has become known as the "Customer Service Standard". Although not strictly an "employment" regulation, the Customer Service Standard has implications for employers in industries where employees have a high degree of interaction with the public, such as students, patients or clients. The public sector was required to comply with the Customer Service Standard by January 1, 2010. Private sector employees were scheduled to comply with the Customer Service Standard as of January 1, 2012. However, this may soon change.

After the Customer Service Standard came into force, the government announced that it would harmonize three standards into a single integrated regulation. The

"Integrated Standard" would encompass Information and Communications (i.e. the Customer Service Standard already in force), Employment and Transportation. After a period for public comment, the final draft of the Integrated Standard was submitted to the Minister of Community and Social Services in March 2011 for a response.

The Ministry of Community and Social Services has not announced when the Integrated Standard will be passed or whether it will be amended from its draft form, but there are some indications that it could be passed in 2011. For one, the AODA requires the Minister to respond within 90 days after the public comment period ended, which could indicate action from the Ministry in June or July 2011. The second clue is the Ministry's website, which says the government anticipates "... that the proposed Integrated Accessibility Regulation will be enacted in 2011, pending government approval." These indications aside, it is difficult to predict what could happen to the Integrated Standard, or the AODA generally, given the upcoming provincial election.

Draft Employment Regulation

The draft Integrated Standard would, if passed without amendment, distinguish between private sector employers based on the number of employees: "large organizations" have more than 50 employees, and "small organizations" have more than one, but fewer than 50 employees. The standards do not apply to volunteers and other "non-paid individuals".

Policies and Plans

"Large organizations" must:

- establish accessibility policies by January 1, 2014
- establish accessibility plans to remove barriers by January 1, 2014
- provide training for employees by January 1, 2015

“Small organizations” must:

- establish accessibility policies by January 1, 2015
- provide training for employees by January 1, 2016.

Specific Employment Requirements

Employers will be subject to fairly detailed regulations that affect the “life-cycle” of the employment relationship.

- Recruitment, including the candidate assessment or selection process (e.g. notifying candidates of accommodation policies)
- Notice to successful applicants of accommodation policies
- Informing employees of supports
- Accessible formats and communication supports for employees
- Workplace emergency response information
- Documented individual accommodation plans (small employers excepted)
- Return to work process (small employers excepted)
- Performance management
- Career development and advancement
- Redeployment

“Large organizations” must comply with the employment requirements by January 1, 2016, and “small organizations” must comply by January 1, 2017.

Compliance and Appeals

The Integrated Standard proposes administrative penalties of up to \$100,000 for non-compliance. The amount of the penalty depends on three factors:

- whether the contravention is “minor” (contraventions of administrative requirements), “moderate” (contraventions of a requirement for organizational preparedness) and “major” (contraventions of a “priority requirement”, including any that “may pose a health and safety risk to a person with disabilities”),
- the organization’s history of contraventions, and
- whether the organization is an individual or corporation.

Appeals concerning the AODA and its regulations will be heard by the [License Appeals Tribunal](#).

Interaction with existing legislation and decision-making bodies

The interplay between the regulations and other disability and employment legislation is not yet known, partly because the content of the Integrated Standard has not been finalized, but also because of its wording. For example, it is not clear how employers will satisfy an obligation to “take into account accessibility needs” of employees when applying performance management. This language is different from the language known in the [Human Rights Code](#) context, such as “accommodation” and “undue hardship.”

We also note that employers will remain subject to other legislation, decision-making bodies and processes including grievance arbitration, [Ministry of Labour](#) claims, the [Workplace Safety Insurance Board](#) and its [Appeal Tribunal](#), the [Human Rights Tribunal](#), as well as civil litigation before the courts. It is not known how the [License Appeals Tribunal](#) will be integrated with existing employment-related legislation and decision-makers.

We will continue to monitor developments under the AODA and will provide updates when more information is available.

If passed, the Integrated Standard, at least in its current form, would create some significant challenges for employers. One wonders whether a reset is called for and whether a second, more practically sensible approach is called for which achieves the important aims of the legislation.

The Labour and Employment Law Newsletter is published four times per year by Watershed LLP. The articles and other items in the Labour and Employment Law Newsletter provide general information only, and readers should not rely on them for legal advice or opinion. Readers who need advice or assistance with a matter should contact a lawyer directly.

© Copyright 2011 Watershed LLP

CONTACT US

Watershed LLP
Barristers and Solicitors
2650 Bristol Circle
Suite 200
Oakville, Ontario
L6H 6Z7

Tel: 905-491-6888

Fax: 905-491-6887

Kate Dearden

kdearden@watershedlaw.com

Michael Fitzgibbon

mfitzgibbon@watershedlaw.com

Steve Mendelsohn

smendelsohn@watershedlaw.com