

## **SLOPPY DISMISSAL MAY NOT BE BAD FAITH**

Domonic Gismondi worked for the City of Toronto for 20 years. Then came amalgamation. The City would be cutting back on the number of managers. Under the new rules, job competitions would be held for all of the managerial jobs. For Gismondi, this meant having to apply to keep a job with his long time employer. He was quite upset by this process but tried to make the best of it.

The City interviewed Gismondi for three different jobs but decided not to offer him any of them. Instead, after 20 years, he was downsized. Gismondi was offered a severance package of 80 weeks' pay. He refused the offer and sued, claiming that he had been treated unfairly.

Since the 1997 landmark decision of the Supreme Court in *Wallace v. United Grain Growers*, dismissed employees across Canada have been awarded increased severance packages for "bad faith" treatment. Gismondi argued that his case met this standard and an Ontario Superior Court agreed. In February, 2002, Gismondi was awarded more than two years' pay, almost nine months more than the City's original offer. Justice Gans held that the City harmed Gismondi by treating him "differently" from other candidates and by trying to be "diplomatic."

The City appealed and the Ontario Court of Appeal released its decision on April 29, 2003. The decision was bad news for Gismondi, whose severance package was reduced back down to the eighty weeks that the City had originally offered. The Court of Appeal ruled that there was no reason why Gismondi should get more than eighty week's pay

Even though the City had been "sloppy" and had not properly followed its own procedure, this was not enough to convince the Court of Appeal to give Gismondi an extended notice period. There was no evidence of intent, malice or blatant disregard for Gismondi that is required in a bad faith case.

In its decision, the Court of Appeal set out a shopping list of conduct that can really land an employer in hot water. Here are some examples:

- Falsely alleging just cause when firing an employee
- Falsely telling an employee that the dismissal was for performance reasons
- Spreading word in the industry that an employee was terminated for dishonesty or for doing something "reprehensible"
- Refusing to provide a letter of reference
- Firing an employee right after a return from disability leave

All of these acts can cause humiliation, embarrassment and damage to the self-esteem of a dismissed employee. The appellate Court confirmed that employees

should be compensated for these misdeeds even if the employer's conduct did not affect their ability to find other work. The City had not done anything like this to Gismondi.

For most dismissed employees, the *Gismondi* decision is not really bad news. It reinforces the importance of treating employees fairly and honestly at the time of dismissal. Employers should provide a reference letter and a reasonable severance package in most cases. They should only allege just cause if they have a really strong case of misconduct and they should deal with dismissed employees fairly during the litigation process. This means that the severance package offered should take into account the person's age, length of service, position, level of responsibility and expected difficulty faced in trying to find other similar work. An employer that designs a severance package with these factors in mind is not usually going to face an accusation of bad faith.

If employers do not meet these standards at the time of firing, dismissed employees can sue for an extended notice period. Extended damages have been awarded by courts across Canada for bad faith conduct. In one case an employee received extended damages when the employer falsely alleged forgery. In another case, the company refused to provide a Record of Employment and held back on commissions owing. Extended damages were also ordered when an employee was purposely fired just before his wedding. He was asked to accept a lowball offer and told that could not work elsewhere while receiving the payments.

None of this means that the average downsized employee is likely to get a better package these days, although there has been an upward trend since the *Wallace* decision was released in 1997. But employers are certainly more likely to exercise caution when letting staff go. If the employee has really been involved in serious misconduct, a just cause defence can still work, even though it is usually an uphill battle for employers to win. Otherwise, the *Wallace* decision can still be used by good counsel to get mistreated employees better settlements.

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