

Employment and Human Rights Law

Employment Law

Treating Employees Unfairly, Insensitively will be Costly

In a recent decision of the Ontario Superior Court of Justice, the Court considered a wrongful dismissal claim by Shelly Altman, a 59 year old woman who had worked for Steve's Music Store ("Steve's") for slightly more than 30 years. She was suffering from cancer and off work at the time of her dismissal from employment.

The Court concluded that she had been wrongfully dismissed and awarded Ms. Altman 22 months' salary in lieu of reasonable notice along with other damages for unpaid wages, unpaid vacation pay, and profit sharing benefits.

The Court also awarded \$35,000 to Ms. Altman under the heading of "moral damages" for the insensitive and bad faith conduct that the company demonstrated towards her in terminating her employment and an additional \$20,000 as "punitive damages" for conduct that the Court described as repugnant and deserving of additional sanction.

Steve's is a family run company with about 200 employees at various retail stores in Ottawa, Toronto and Montreal. Ms. Altman was a retail store manager. She had worked for the company since 1978. Her employment was extremely important to her. She was a valued employee for 30 years. Sadly, she was diagnosed with lung cancer in December 2007. She required chemotherapy treatment which forced her



to take time off work. She worked reduced hours as she was able, but the physical effects of cancer treatments made working very difficult. Steve's was fully aware of her illness and had agreed to reduce the hours she was working.

On October 15, 2008, Ms. Altman received a letter from Steve's lawyers, served by a bailiff. The formal letter advised Ms. Altman that she was remiss in her duties to Steve's because she had failed to work the minimum hours required. Steve's accused her of lateness, leaving early and not showing up for work. The letter threatened that if she did not improve, her employment would be terminated "without further notice or delay". Ms. Altman was completely shocked and devastated. She had no reason to expect this correspondence. She had to take a medical leave of absence due to the stress and anxiety of the situation.

Ms. Altman advised Steve's that she would be able to return to work in April 2009. However, before she could return, Steve's terminated her employment. Again, she received a formal letter from Steve's lawyers, served by a bailiff. In the letter, Steve's referenced the October 15, 2008 correspondence as support for the termination. It

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Special points of interest:

- Occupational Health and Safety Page 3
- Workplace Violence and Harassment Page 4

stated that, since she had recently applied for long term disability benefits, Steve's had abolished her position and had no obligation to reinstate her.

Moral Damages

Generally speaking, moral damages may be available to an employee if an employer engages in conduct during the course of dismissal that is "unfair or is in bad faith for being, for example, untruthful, misleading or unduly insensitive." The normal distress and hurt feelings resulting from dismissal are not compensable but damages for mental distress and psychological harm that are actually suffered can be compensated for by the Court.

In this case, Ms. Altman was awarded \$35,000 in moral damages. After Ms. Altman received the first letter from Steve's lawyers, she suffered from psychological distress and major depressive episodes. According to her doctor, receipt of this letter was even more traumatic for Ms. Altman than being diagnosed with cancer or being told that her cancer could not be cured. Her employment was extremely important to her. It allowed her to continue functioning and contributing. Her employment was closely linked to her identity and purpose in life. As a result, the letter, served on her by a bailiff, sent by Steve's lawyers, attacking her attendance, and threatening termination of employment, was especially traumatic, harmful and insensitive.

The Court concluded that Steve's treatment of Ms. Altman was callous and insensitive. After 30 years of service, Ms. Altman deserved better than twice having a bailiff deliver a letter replete with mistruths from Steve's lawyers. The Court held that Steve's did not have the courtesy or decency to speak with her personally, electing to communicate through legal

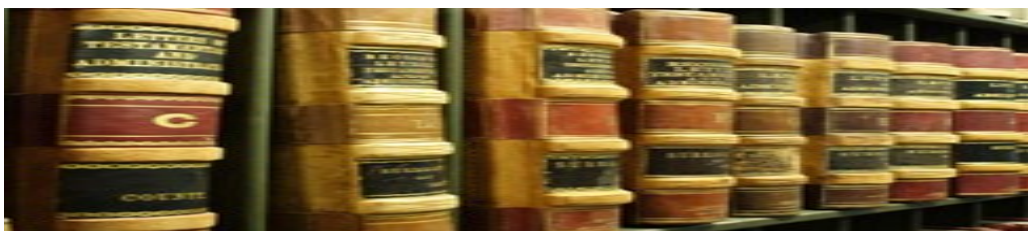
counsel. The Court concluded that the letters had a devastating effect on Ms. Altman and caused her tremendous and long lasting mental distress to the point of clinical depression. For this, the Court awarded her an additional \$35,000 in damages.

Punitive Damages

The Supreme Court has restricted awards of punitive damages to cases where wrongful acts are "so malicious and outrageous that they are deserving of punishment on their own." In this case, the Court considered various breaches of the Ontario *Employment Standards Act, 2000*, including Steve's refusal to pay wages that had been earned and termination pay. Ms. Altman was forced to bring a motion to compel Steve's to pay statutory termination pay in advance of the trial. Steve's also refused to provide information to Ms. Altman about the deferred profit sharing plan, contrary to prior Court order.

Steve's unreasonably refused to complete its portion of Ms. Altman's disability benefits application, which caused substantial delays in her ability to collect benefits. Finally, Ms. Altman was forced to retain a lawyer to obtain a copy of her Record of Employment, which impacted on her employment insurance benefits. The Court described Steve's actions as repugnant and considered the above wrongs separately from the moral damages. It awarded Ms. Altman an additional \$20,000 as punitive damages.

The law in Ontario requires that employers treat employees with good faith and civility at the time of termination. This case provides a powerful (and costly) example of what can happen when employers ignore this basic obligation.



Occupational Health and Safety

Expanding the Scope of the Occupational Health and Safety Act with Respect to Independent Contractors

The Ontario Court of Appeal recently considered whether independent contractors fell within the definition of “regularly employed” workers under the *Occupational Health and Safety Act* (“Act”) in *Ontario (Labour) v. United Independent Operators Ltd.*, 2011 ONCA 33. The court interpreted the Act broadly in their analysis, finding that independent truck owners constituted regularly employed workers. As a result, the United Independent Operators Ltd. (the “Company”) was found to be bound by obligations under the Act, such as the requirement to establish and maintain a Joint Health and Safety Committee (“JHSC”).

The claim originated when the Ministry of Labour was called to investigate an injury to one of the Company’s independent contractors. The Ministry ordered that the Company institute a JHSC and charges were laid for failing to do so prior to the accident. The Company challenged the charges and was successful at trial and on appeal to the Ontario Court of Justice. The Ministry of Labour further appealed the decision to the Ontario Court of Appeal.

The Company was charged for violating Section 9(2) (a) of the Act, which requires employers to establish a Joint Health and Safety Committee “at a workplace at which twenty or more workers are regularly employed.” The Company disputed this finding, arguing that it only had eleven full time employees and that the truck drivers were not “regularly employed” by it. In support of its position, the Company listed the following considerations:

- All of the truck drivers were independent owner/operators;
- The Company did not own any of the trucks;
- The Company operated as a dispatch business and the truck drivers paid the Company a fee for its dispatch services
- The truck drivers paid all of their own taxes, fees and tolls;
- The truck drivers paid their own WSIB coverage; and

- The truck drivers did not operate physically from the Company office and only went to the office to submit paperwork.

The trial judge agreed with the Company, relying on an Ontario Labour Relations Board decision in *526093 Ontario Inc. (c.o.b. Taxi Taxi)*, [2000] O.O.H.S.A.D. No. 98 (QL). This was further upheld on appeal to the Ontario Court of Justice. The courts accepted that the word “employed” in Section 9 was limited to a traditional employment relationship.

The Court of Appeal took a more expansive view of the definition. The terms “regularly employed” were not defined in the Act. However, the Company agreed that they fell within the definition of employer and the truck drivers fell within the definition of workers. The court also found that it was customary for the Company to have between 30 and 140 truck drivers working for it, meeting the dictionary definition of “regular”.

The Court also looked at the context of the definition within the Act. JHSCs are part of the Act’s overall philosophy of an internal responsibility system, one which is based on the principle that hazards are best dealt in the workplace through the joint communication and cooperation of employers and workers. Interpreting Section 9 as only requiring JHSC in traditional workplaces would run contrary to the purpose of the Act to guarantee a minimum level of protection for the health and safety of workers. The Court found that interpreting the words “regularly employed” to include independent contractors supported the purpose of the legislation.

This decision has expanded the obligations of employers under the Act and has considerable ramifications for those employers who use independent contractors.

Good people. Great lawyers.

Workplace Violence and Harassment

Consider Your Words Carefully: Verbal Threat constitutes Workplace Violence

As of June 15, 2010, every employer in Ontario was required to have a program in place to prevent harassment and violence in the workplace. Many employers have implemented policies in response to these legislative requirements made by the Bill 168 amendments to the *Occupational Health and Safety Act (OHS)*.

The legislative changes require more than policy implementation. The changes require an employer to proactively "develop and maintain a program" against workplace harassment and violence. For example, in addition to the creation and implementation of an appropriate policy (which must include clear mechanisms for raising a complaint, how the employer will investigate the complaint and identify protections against reprisal), employers are also required to conduct an assessment of risks of workplace violence and to communicate those risks to employees.

Workplace safety is now a primary consideration for employers when making employment decisions arising from misconduct involving workplace violence or harassment. An employer has a positive legal obligation to respond to and investigate acts of violence and harassment. On August 18, 2011, Arbitrator Newman considered such a case involving an employee with the City of Kingston who was terminated from her employment because she uttered death threats against a co-worker. The employee had 28 years of seniority but also a history of anger management issues in the workplace. The employee had just completed anger management training before making the verbal threat to her co-worker.

The employee challenged the termination and filed a grievance. In defending the termination, the employer

relied heavily on the new requirements and obligations under the *OHS* in support of its decision to terminate her employment. It submitted that the threshold of tolerance for workplace violence of any kind, including verbal threats, is significantly lower after the changes to the *OHS*.

In making her decision, the Arbitrator noted the profound impact of the Bill 168 amendments in cases such as this. The Arbitrator highlighted four critical areas of change:

1. Verbal threats are now defined by statute as workplace violence. This is not just language; this is workplace violence by definition. She described the use of threatening language as a "new classification" of workplace violence as a "clear and significant change".
2. Workplace parties must respond to a threat. The utterance of a threat constitutes workplace violence and must be reported, investigated, and addressed. The arbitrator wrote that "...the utterance of a threat in the workplace requires that the workplace parties stop cold. They must report. They must investigate. They must assess the existence of real danger. They must act."
3. While a number of factors are important in assessing whether a termination is proper (such as length of service, acceptance of responsibility and disciplinary record), the arbitrator suggested that due to the legislative amendments, incidents of violence and threats at the workplace including the seriousness of those incidents is the most important factor in determining whether a termination was proper.

Workplace safety is now a critical factor in assessing the merits of a termination from employment. To the extent that either party can rely on workplace safety in support of its position, the Bill 168 amendments

Consider Your Words Carefully: Verbal Threat constitutes Workplace Violence Cont'd.....

have provided legislative authority for those arguments. For example, in this case, the employer successfully argued that it would be unsafe to permit this employee to return to the workplace.

The termination was upheld, despite mitigating factors such as a very long service record with this employer and substantial emotional hardship. Notably, in her concluding remarks, the arbitrator stated that this would not have been her conclusion if the grievor had accepted responsibility for her misconduct, demonstrated an understanding of the severity of her actions, or had demonstrated an ability to control her anger.

As a result of the Bill 168 amendments, workplace safety was the most important factor in this decision. This case confirms that workplace safety is not optional – for employees or employers.

If you have any questions about your obligations arising from the Bill 168 amendments, please do not hesitate to contact us.



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This publication is intended to discuss employment matters of interest. Comments provided reflect the views of the authors and are not intended as legal advice. Persons who wish to be informed of the specific implications of any of the matters discussed or decisions referenced herein should consult with a lawyer.

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