

GOTTA HAVE (GOOD) FAITH: WRONGFUL DISMISSAL AND AGGRAVATED DAMAGES IN *GEORGE V. COWICHAN TRIBES*

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In a recent decision of the British Columbia Supreme Court, *George v. Cowichan Tribes*,^[1] an employer was faulted both for dismissing an employee for conduct outside the workplace and for failing to allow an exemplary employee to respond to the allegations against her. The case is a cautionary tale for employers, demonstrating some of the issues that can arise when due care is not taken in the course of dismissing an employee.

An Exemplary Employee

Prior to her dismissal, Ms. George worked as the Associate Executive Director of the child and family services agency of the Cowichan Tribes. The court described her achieving this senior position by diligently working her way up in the Cowichan Tribes over approximately 30 years; beginning as a receptionist at a pre-school, working in the finance, education and housing departments, and then becoming the Native Education Coordinator at the school. During this time, Ms. George also went to school part-time to get her high school diploma, which she had not obtained while attending residential school and then dropping out of high school. Eventually Ms. George took a leave from the Cowichan Tribes to return to school full-time for a social work degree. Upon her return, she joined the child and family services agency as a social worker and worked her way up to Associate Executive Director of the agency.

Ms. George was, not surprisingly given her employment history, characterized by the court as an exemplary employee with a spotless disciplinary record.

Wrongdoing Outside the Workplace

The conflict giving rise to Ms. George's dismissal occurred on a night out in February 2013. Ms. George had been drinking and ran into another member of the community, Ms. Seymour, at a pub. There was an altercation between the two women concerning Ms. George's grandchildren and their father, who was dating Ms. Seymour. Ms. George admitted that she was intoxicated and that she approached Ms. Seymour regarding visits by the father. However, Ms. Seymour alleged that Ms. George both verbally and physically assaulted her, as well as threatened to have her children taken away by the agency.

Ms. Seymour subsequently wrote a letter to Cowichan Tribes summarizing her complaints about Ms. George. Upon receiving the letter, Cowichan Tribes took the prudent course of retaining an independent investigator to undertake an investigation of Ms. Seymour's claims.

While Ms. George had previously confessed to being intoxicated and confronting Ms. Seymour to her supervisor and had received a verbal reprimand, Cowichan Tribes nevertheless decided to terminate Ms. George.

Ms. George brought an action for wrongful dismissal against Cowichan Tribes.

Credibility

The court was faced with an issue of credibility between the evidence of Ms. George and Ms. Seymour. Ms. Seymour was ultimately held to be untrustworthy due to her tendency to exaggerate, the rehearsed nature of her testimony, the lack of corroboration, and the fact that there were internally inconsistent details.

Critically for the employer, the court did not accept her assertion that Ms. George threatened to have her children removed. This was the aspect of the case which, if true, would have elevated the incidents of the night from personal to professional, thereby justifying the involvement of her employer.

The Law of Wrongful Dismissal

Employment is viewed by the courts as an "essential component of an individual's sense of identity, self-worth and emotional well-being", and courts are therefore rigorous in their analysis of whether cause for termination has been established. In the determination of whether cause for termination has been established, there must be a contextual analysis of all relevant facts and circumstances; this contextual analysis must aim to determine "whether the misconduct is such that it has led to a breakdown of the employment relationship or is otherwise irreconcilable with the continuation of that relationship." The test is an objective one, viewed through the lens of a reasonable employer, and has an embedded requirement for proportionality and balance in relation to the particular circumstances.

The court found in this case that the employer was unable to prove the worst of the allegations made by Ms. Seymour against Ms. George. Having failed to prove those allegations, the employee had engaged only in an isolated incident, away from work, about a family matter, that was wholly out of character. The dismissal was found to be without cause and Ms. George was awarded almost \$125,000 as compensation in lieu of a reasonable notice period of 20 months.

Aggravated Damages

In reviewing whether or not Ms. George was entitled to aggravated damages, the court noted that there is an

implied term in employment contracts that an employer will act in good faith in the manner of dismissal, and where the employer does not meet this threshold, aggravated damages may be awarded to compensate the employee. In other words, while most employees will be upset when they are terminated, if an employer engages in behaviour during the dismissal that creates independent mental distress, an employee may be compensated for this by way of an additional award of aggravated damages.

In the present case, the court took the unusual step of awarding aggravated damages in the amount of \$35,000 in favour of Ms. George. The fundamental reason for this award was that she was never given an opportunity to respond to the allegations against her – she was simply dismissed. In addition, Ms. George gave testimony about the impact this dismissal had on her life, including feelings of depression, increased alcohol consumption, and damage to future employment prospects in the close knit community of Duncan, British Columbia.

Lessons for Employers

Termination for cause is recognized as the "capital punishment" of employment law. This means that any claim for just cause is likely to be heavily scrutinized by the courts and the burden is on the employer to justify the dismissal. Even when confronted with damaging allegations such as those levelled against the employee in this case, employers should conduct appropriate investigations and seek legal advice before making any decisions.

Moreover, where employers believe they have just cause for termination they must still respect their duty of good faith in the course of the termination. If an employer engages in any unjust conduct, such as not permitting the employee to address the cause for termination, an employer may face an aggravated damages award in addition to an award for failing to give reasonable notice of termination.

In this instance, the court indicated that an appropriate response by the employer would have struck a balance between ensuring that proper steps were taken so as not to minimize the issue, while at the same time keeping in mind that this was a valued senior manager with no previous performance issues.

by Melanie Harmer, Tyson Gratton and Becky Rock, Student-at-Law

¹ *George v Cowichan Tribes*, 2015 BCSC 513.[ps2id id='1' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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