MIND YOUR MANNER: BC SUPREME COURT AWARDS DAMAGES FOR MENTAL DISTRESS ARISING FROM MANNER OF DISMISSAL AND RECOGNIZES PAST SERVICE

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A recent decision from the British Columbia Supreme Court reminds employers of the recognition of past service and the available damage awards resulting from the manner of dismissal.

Background

In *Ram v The Michael Lacombe Group Inc.*[1] the plaintiff sought damages for wrongful dismissal, and aggravated and punitive damages for mental distress suffered as a result of her termination. The plaintiff claimed the defendant failed to discharge its obligation of good faith and dismissed her in a callous and reprehensible manner.

The defendant was a franchisee of Burger King. At the time of the plaintiff's dismissal from the defendant's Grandville Street location, she was 55 years old and had been working as a cook at numerous Burger King franchise locations since 1989. Though each Burger King franchise location was owned and operated by a different franchisee, Mr. Mohammed, one of the defendant's owners, was the manager or area manager for nearly all those locations and assisted in most of the plaintiff's transfers. The plaintiff did not received severance pay on any of her transfers.

Although the plaintiff was a valued employee with no discipline record, she was dismissed because the defendant concluded she had stolen an order of fries and a drink at the end of her shift. The plaintiff admitted to taking the food without paying but insisted she had received permission. Restaurant policy entitled employees to free drinks while working and allowed the managers' discretion to authorize an employee to take free food or drinks. However, the policy was ambiguous regarding whether employees who have just finished their shift were also entitled to take a final free drink. The dispute centers on what items the plaintiff was permitted to take. The plaintiff stated she asked for both a sandwich and fries, whereas the general manager said the plaintiff only asked to take the sandwich. The possibility of a misunderstanding was high given the plaintiff's limited English skills.

In a meeting with the general manager and Mr. Mohammed about the incident, the plaintiff was accused of theft. Although the plaintiff apologized and offered to pay, she was suspended. Mr. Mohammed did not ask for clarification or consider the possibility of a misunderstanding. Upon leaving Mr. Mohammed's office visibly upset, the plaintiff was confronted by Michael Lacombe, another of the defendant's owners. In the presence of other employees, Mr. Lacombe asked the plaintiff whether she had been fired.

The plaintiff was subsequently terminated. As a result of the manner of dismissal by the defendant, the plaintiff alleged she suffered emotional distress aggravating her existing depression.

Decision

Did the defendant establish just cause?

In order to justify cause for dismissal arising from theft by an employee, the employer must prove the theft actually occurred and that the specific nature of the misconduct in the circumstances warrants dismissal.[2] The court found ambiguity in what the plaintiff was authorized to take, particularly given the language barrier, and that the plaintiff did not act with the requisite intent for theft. The court also found that had the theft been proven, dismissal was not a proportionate sanction as the plaintiff's conduct did not cause an irreparable breakdown in the employment relationship.

What was the appropriate notice period?

When considering the appropriate notice period, the court must objectively consider, without giving disproportionate weight, the employee's position, length of service, age, and the availability of similar employment.[3] The court found that although the plaintiff did not require specialized skill to obtain a similar position, as a result of her age, less than fluent English and history of depression, she would have experienced greater than typical difficulty in securing alternative similar employment.

Whether an employer has agreed to recognize an employee's prior service depends upon the construction of the employment contract. Where, as here, there is no express term in the employment contract, there may be an implied term of recognition. An implied term is such that the parties would have agreed to it if when forming the contract, they had turned their minds to the type of situation which later transpired.[4] When the plaintiff transferred to the Granville Street location in 2008, Mr. Mohammed told the plaintiff she would have to quit her current position but he never discussed loss of seniority for her 24 years of service as a consequence of her transfer. The court held that an implied term existed in the employment contract regarding the plaintiff's length of service based on Mr. Mohammed's involvement in the plaintiff's transfers, his failure to discuss her seniority, and the lack of severance pay.

In determining the reasonable notice period, the court considered a case in which two bartenders with over 20

years experience were awarded damages reflecting 44 weeks' notice.[5] The court found that the employees in that case had positions with greater responsibility than the plaintiff but would not have experienced greater than typical difficulty in securing similar alternative employment. The court held that the reasonable notice period for the plaintiff was 12 months.

What were the appropriate damages?

In a wrongful dismissal case aggravated damages may be available to compensate a dismissed employee for mental distress resulting from the manner of the dismissal, only if the conduct of the employer effecting the termination was inconsistent with the employer's duty of good faith.[6] The court held that the conduct of both Mr. Mohammed and Mr. Lacombe was unreasonable, unfair and unduly insensitive during the plaintiff's dismissal. In particular, Mr. Mohammed did not seek clarification from the plaintiff about the incident or give the plaintiff adequate time to respond to his allegations. The court also found it was unfair to the plaintiff to conduct the meeting together with the general manager, as she was the plaintiff's direct supervisor. It was also unfair for Mr. Mohammed to have characterized the plaintiff's apology and offer to pay as an admission of guilt. Furthermore, the court found that Mr. Lacombe occupied a position of significant power over the plaintiff and his comments in front of other employees were insensitive and opened the plaintiff up to ridicule.

The court considered similar cases and found that those cases awarded aggravated damages in the amount of $25,000 to $35,000.[7] Mindful that the court "should exercise caution in its awards for mental distress" it held that an award of $25,000 for aggravated damages was appropriate in the circumstances of this case.[8]

The court did not award the plaintiff punitive damages because the court concluded that the conduct of the defendant did not rise to the required level of maliciousness.

Take Aways

This case provides a good reminder that absent a contractual provision to the contrary, courts will recognize an employee's past service with his or her employer. Although the plaintiff in this case had worked at several locations owned and operated by different franchisees, the court still concluded that the circumstances warranted recognition of past service.

Furthermore, before dismissing an employee (especially an employee with a long length of service) the employer should give the employee an opportunity to provide an explanation for the alleged misconduct. It is only fair that the employee has a chance to respond to the allegations before termination. If a court determines that the conduct of an employer in dismissing an employee is not fair or not in good faith, it can result in an award of significant aggravated damages against the employer.

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[1] *Ram v The Michael Lacombe Group Inc.*, 2017 BCSC 212.[ps2id id='1' target=''/]
[2] *McKinley v BC Tel*, 2001 SCC 38.[ps2id id='2' target=''/]
[3] *Bardal v The Globe & Mail Ltd.* (1960), 24 DLR (2d) 140 (Ont. HCJ); Ansari v BC Hydro & Power Authority, [1986] 4 WWR 123, 2 BCLR (2d) 33 (SC), aff'd (1986), 55 BCLR (2d) xxxiii (CA).[ps2id id='3' target=''/]
[4] *Merilees v Sears Canada Inc*, (1986), 24 BCLR (2d) 165.[ps2id id='4' target=''/]
[5] *Coulombe v Lake Cowichan Elk Lodge No 293,* 2004 BCSC 1350.[ps2id id='5' target=''/]
[6] *Vernon v British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133 ("Vernon"); *Rodrigues v Shendon Enterprises Ltd*, 2010 BCSC 941.[ps2id id='6' target=''/]
[7] *George v Cowichan Tribes*, 2015 BCSC 513; *Vernon; Lau v Royal Bank of Canada,* 2015 BCSC 1639.[ps2id id='7' target=''/]
[8] Vernon.[ps2id id='8' 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.