

# "THE RISK OF RED HERRINGS": FAILING TO PROVIDE EVIDENCE OF MISCONDUCT LEADS TO PUNITIVE DAMAGES

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A recent decision by the Ontario Superior Court of Justice, *Gordon v. Altus Group Ltd.*,<sup>[1]</sup> emphasizes how important it is for employers to engage in progressive discipline and to provide honest reasons when dismissing an employee for just cause.

## Background

Alan Gordon ("Gordon") was hired as an employee by the defendant, Altus Group Limited ("Altus") after Altus purchased the assets of Gordon's company. Eighteen months later, Altus dismissed Gordon for cause, without notice or other compensation. Altus claimed that Gordon was dismissed for cause for several reasons: Gordon spoke of senior personnel in derogatory terms, swore frequently, misled Altus about a conflict of interest and lied about improperly employing someone.

## Decision of the Court

The Court held that there were no grounds for dismissal and Gordon was entitled to approximately ten months of pay in lieu of notice (in accordance with the terms of an employment agreement) and punitive damages of \$100,000. The Court found that, based on the evidence: (a) the derogatory and profane language used by Gordon was not enough to justify dismissal and had been exaggerated by Altus, (b) Gordon did not mislead Altus about a conflict of interest and (c) Gordon did not lie about employing someone improperly.

### (a) Progressive Discipline

Although Altus had an employee handbook that had a progressive discipline policy, Altus did not follow it when dealing with Gordon. Altus attempted to justify non-compliance by stating it does not use progressive discipline for senior management, but the Court rejected this argument. Based on the terms of the policy, Gordon (and senior management) was not excluded.

Regarding the use of profane language, the Court noted that Gordon had never received any warnings about his language: he was never reprimanded, never received a written warning, there was no written record of him using profane language, and no one could even indicate a day on which he used profane language. The Court

stated that if profane language was truly an issue then one would expect Gordon's manager to have addressed it. The Court concluded that the complaint was exaggerated post-termination in order to provide justification for Gordon's dismissal.

### **(b) Punitive Damages**

As none of the reasons relied on by Altus substantiated cause, the Court found that the true rationale for Gordon's dismissal likely stemmed from an adjustment Altus made to the purchase price of Gordon's business. The adjustment meant that less money would be paid to Gordon's company, and so Gordon gave notice of his intent to activate the arbitration clause in the Agreement. Upon receiving notice, the Court found that Altus wanted to "be cheap" [2] and end Gordon's employment without having to pay him severance funds, so it created reasons for dismissal to save money.

Because the Court found that Altus had not been truthful in setting the reasons for dismissal, it found that Altus failed to perform honestly under the employment contract. The lack of honesty and fair dealing was an independent actionable wrong and the Court awarded \$100,000.00 in punitive damages.

### **What This Means for Employers**

The *Gordon* case is a reminder for employers that progressive discipline policies should be followed for certain performance issues (like use of improper language), even in the case of senior executives. While it is possible to dismiss employees where performance is in issue, employers should attempt to correct such issues through warnings and providing time to improve, in accordance with an employer's progressive discipline policy.

The key reminder for employers is that they should not allege just cause for dismissal without evidence to substantiate the allegations. While it should be obvious that an employer cannot invent reasons for dismissal after the fact, proceeding to dismiss an employee for cause where the employer does not have a solid factual underpinning is dangerous. The *Gordon* case is also a good reminder to employers that absent evidence, the Court will "fill in the void" and be more responsive to arguments that the termination was based on an improper reason. There was no direct evidence to support the Court's finding that the termination was in response to the notice of arbitration that Gordon served, but because Altus' evidence was so weak to justify cause, the allegation that the dismissal *must* be in connection with the notice received attention from the Court. [3] If an employer invents reasons for dismissal, or uses a minor performance issue or "red herrings" (as the Court found) to support a dismissal for cause, the employer risks a significant punitive damages award like the one in this case.

by Dave J.G. McKechnie and Jennifer Allman, Student-at-Law

<sup>1</sup> 2015 ONSC 5663 [*Gordon*].

<sup>2</sup> *Ibid* at para 25.

<sup>3</sup> Note that this decision is being appealed, so it will be interesting to see if the punitive damage award is upheld.

### **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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