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Constructive dismissal: Should I stay or should I go?

Employee claims becoming commonplace

| BY RITU MAHIL |

"SHOULD I STAY or should I go?" may be the question an employee asks himself when he faces a difficult working environment and considers filing for constructive dismissal.

Constructive dismissal is when an employer indirectly encourages an employee to resign by failing to comply with the employment contract or one-sidedly changing the employment terms without the employee's prior consent.

It is distinguished from an ordinary resignation because it is the employer that initiates changes to the terms and conditions of the employment contract.

Put bluntly, it is when the employer makes the working conditions completely intolerable for the employee with the intention of "swaying" the employee to resign instead of outright firing him.

Once the employer has changed the terms and conditions of the employment contract, the employee must file for constructive dismissal within a 90-day time period from when the changes took place for the case to be admissible in the courts. The extent of an employer's failure to meet its contractual obligations and time taken to deliberate also affect the likelihood the employee will win a constructive dismissal case.

To put this in context, common examples of changes to an employee's working conditions include:

- Reduction in the employee's powers or duties that involve a significant loss of the employee's prestige and status as a result of reorganization in reporting arrangements.
- Threats of dismissal or demotion and unfair suspensions.
- Significant reduction in working hours, salary or employee benefits.

For the past two years, the Supreme Court of Canada has seen a notable increase in constructive dismissal cases. A recent example includes the case of *Potter vs. New Brunswick (Legal Aid Services Commission)*, which began in 2006 when David Potter was appointed as the Executive Director of New Brunswick Legal Aid Services Commission.

During his term, Potter had a number of complaints made against him by staff and his relationship with the commission's board of directors deteriorated. At this point, both parties began discussing a mutually acceptable way of bringing his contract to an end.

In January 2010, Potter went on sick leave and was asked not to return until further direction from the commission. His salary and benefits were continued. Two months later, he filed an action against the commission, claiming he had been "constructively dismissed," meaning the commission had effectively changed the employment contract without providing reasonable notice.

It is advisable for an employer who is unsure whether employees will be recalled to work out the various outcomes of the layoff.

The commission said claiming constructive dismissal was incorrect and essentially meant Potter had resigned. The commission subsequently stopped his salary and benefits. At this point, the case went to court.

The court found Potter was not constructively dismissed and, by commencing legal action, Potter had effectively resigned. In October 2013, the Supreme Court of Canada granted a leave of appeal for the case — it has yet to hand down its final decision.

The *Potter* case demonstrates that employers must exercise caution when dismissing employees. There can be a fine line between constructive dismissal and an employee's resignation.

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In This Issue

Angry worker didn't have intent to quit: Board

AN ONTARIO EMPLOYER has been ordered to fork over termination pay after assuming a worker quit her job following an argument with her boss.

Rita Oomen worked for Oomen's Glass, a supplier of glass products such as windows and mirrors to residential and commercial customers in Kingston, Ont. The company was owned by her cousin, Joe Oomen, and Rita began her employment there on Dec. 11, 2006.

While employed with her cousin's company, Rita Oomen had personal problems to deal with, including health issues and difficulties in her relationship. These problems led to errors that cost Oomen's Glass both money and goodwill with its customers.

Joe Oomen discussed these problems and their effects on the business with Rita, but he chose to continue employing her because she was family. Joe later testified any other employee with similar performance issues would have been terminated earlier.

On March 14, 2012, Rita called Joe on the phone. They started to have a heated argument in which they yelled at each other. Two other employees who were in the office overheard the argument and testified that, after Rita hung up, she said she was going to quit. One co-work-

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Ask an Expert with Brian Wasyliw

Sherrard Kuzz, Toronto

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Reclaiming overpayments due to clerical errors

Question: If an employee's paycheque was too much due to a clerical error, can the employer reduce the subsequent paycheque to even it out? The employee has a set salary and regular pay schedule.

Answer: Yes. In the case of a clerical error, the employer can deduct the overpayment from the subsequent paycheque so long as the reconciliation of the overpayment is done within a reasonable amount of time after discovering the overpayment.

In Ontario, s. 13 of the Employment Standards Act (ESA) places specific limitations on the ability of an employer to make deductions from employee wages. An employer shall not deduct or withhold wages except in the following circumstances: as required or authorized by statute, pursuant to a court order, or with the employee's written authorization (including the precise amount or formula to calculate the amount of the deduction).

However, none of those exceptions applies to the scenario posed in the question above. So how can the employer make the deduction? The answer comes from case law and an examination of the purpose of legislation such as s. 13 of the ESA.

Section 13 is designed to prevent an employer from unilaterally recovering amounts through a payroll deduction. For example, a dispute between employer and employee over an unpaid loan cannot result in the employer simply deducting the disputed sum from the employee's payroll.

However, in the scenario posed above, the employee was overpaid through a clerical error. Accordingly, the amount in dispute was never owed to the employee and is therefore not to be regarded as wages payable.

In *MenuPalace.com Corp. v. Saladino*, a deduction from an employee's wages for vacation days taken but which had not yet been earned did not violate the ESA. The vice-chair explained that s.13 was not intended to prevent an employer from recovering a recent overpayment of wages, stating:

"Section 13 of the act significantly limits when an employer can make a deduction from an employee's wages. However, this provision is not so prescriptive that it prevents the employer from subsequently recovering an overpayment of this nature, provided the deduction occurs within a reasonable period of time. The act is concerned with ensuring that employees are paid all the wages they have earned. Section 13 is designed to prevent an employer from recovering, through a payroll deduction, amounts that are unrelated to wages. Recovering a recent overpayment of wages, as is the case in this instance, cannot be considered a "set-off" or deduction from wages that is subject to section 13 of the act."

Employers should be cautious about applying these principles too broadly. A clear mistake due to a clerical error is to be distinguished from other circumstances where an employer may wish to make a payroll deduction. For example, where an employer decides to pay an employee during a leave of absence when not required to do so, the employer cannot later characterize the payment as an "overpayment" and deduct the amount from the employee's wages.

Where the issue is not a clerical error — for example, where a loan to the employee needs to be repaid — then the employer would require a clear written acknowledgement from the employee regarding a specific amount or formula to repay the money from wages. Failing such an acknowledgement, it would be necessary to commence legal proceedings seeking repayment of the money.

Finally, in a workplace where the employee's relationship with the employer is governed by a collective agreement, it will be important to review the agreement for applicable language, if any.

Time allowed to review employment contract

Question: How much time is appropriate to allow for a new hire to look over an employment contract or seek legal advice before signing? What should an employer do if the employee wants to sign right away?

Answer: While there is no hard and fast rule, three business days is generally accepted as a fair and reasonable amount of time.

There are a few purposes served by giving a potential employee time to review an employment contract. First, and perhaps fundamentally, it's the fair thing to do. However, it is also wise to do so from a business perspective. Canadian courts have long recognized the relationship between an employer and prospective employee is typically not one of equal bargaining power. As such, if an employer seeks to rely on the terms of a written employment contract — often at the time of termination — the employer must demonstrate the contract is lawful and the employee entered into it freely, voluntarily and with an understanding of its meaning, having had time to seek advice as to its meaning.

Allowing an employee time to carefully review a contract can be critical to demonstrating the employee either understood the contract or had the chance to obtain advice as to its meaning. This is why it is also often prudent to include in the contract a statement that the employee was afforded the opportunity to and was encouraged to seek independent legal advice.

Extending the probationary period is problematic since employment is continuous while

At a minimum, three business days is a reasonable time frame for a potential employee to avail herself of the benefit of a contract review (whether by the employee or with independent counsel). Should an employee wish to sign the contract immediately, without the benefit of a review period, the employer should resist this and consider ways to encourage slowing down the process. In appropriate circumstances, this might include making a financial contribution towards the employee having the contract reviewed by independent counsel. Particularly where the potential liability would be significant if the employer was later unable to rely on the contract language. A financial contribution might be a small price to pay toward solidifying the enforceability of the contract.

Finally, it is important to have the contract signed by the new employee before the employee commences her first day at work. If the contract is signed after work has already commenced it is possible the employee could later argue she was not given anything identifiable in

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No cause where employee's spouse deposited employer's funds in joint account

Employee mistakenly thought cheque was for expenses and took it home, but employer didn't believe him

| BY RONALD MINKEN |

THE ALBERTA COURT of Queen's Bench has determined that an employee should not have been terminated for cause after 24 years of service when it was discovered a missing cheque had been deposited by the employee's common law partner into the couple's joint account.

James Winfield, 55, was a commissioned sales representative who had been employed with Pattison Sign Group in Edmonton for 24 years without incident.

Shortly before termination, Winfield had been recognized with a bonus for his overall performance and achieving sales exceeding $34 million during his years of service. The employee received the bulk of his earnings by direct deposit, although he was always reimbursed for business expenses incurred in the performance of his duties by cheque. These cheques would be left by the employer on the employee's desk in an envelope.

Cheque mistakenly left on worker's desk

One day, a cheque payable to the company's Edmonton office where Winfield worked was mistakenly left on his desk. The employee assumed the cheque was to reimburse him for his business expenses and did not notice it was not issued to him.

He took the cheque home and left it for his partner to deposit into their joint account, as she was responsible for their finances. When the employer realized the cheque was missing and investigated the matter, it discovered the cheque had been deposited by the employee's partner.

When the employer confronted Winfield, Winfield confirmed there was additional money in his account that was unaccounted for and tried to explain how the cheque was deposited into his personal account. Winfield also mentioned he was entitled to outstanding business expenses and suggested these be offset against the money to be returned to the employer.

Winfield then promptly repaid the employer. The employer investigated Winfield's prior expense reports and found no errors. It also considered Winfield's comment that he was owed expenses and, unable to verify this, believed the employee to be lying.

The employer felt Winfield could no longer be trusted and, despite Winfield promptly repaying the employer, he was terminated for cause due to the employer's belief he had either stolen money when the cheque was deposited or was dishonest when confronted with the fact that the cheque had been deposited into his personal account.

After termination, the employer discovered it actually did owe expenses to (the worker) and another cheque had been correctly issued to him on the same day as the erroneous cheque.

After termination, the employer discovered it actually did owe expenses to Winfield and another cheque had been correctly issued to him on the same day as the other cheque. This was likely forwarded to Winfield in the same envelope as the other cheque by mistake.

A series of errors

Justice K.G. Nielsen determined that a series of errors, which included errors made by the employer, had led to the employer's cheque being deposited into Winfield's account.

The judge evaluated all of the circumstances, including the length of Winfield's service and his good work record, and concluded there was "no clear, cogent and convincing evidence establishing deceitful conduct on the part of Mr. Winfield on a balance of probabilities."

Accordingly, the employer should not have terminated Winfield for cause and the judge determined that the employee was properly entitled to 18 months' notice.

Impact of decision on employers

Employers should make sure they carefully review all of the facts and the broader context, including an employee's work record and length of service, prior to making the decision to terminate an employee for cause.

While improper conduct and dishonesty can, in some instances, justify the termination of an employee for cause and without notice, this will not always be the case.

The alleged misconduct must be proportionate to the disciplinary measure that is imposed. It will likely be more difficult to terminate a long-term employee who had a good work record for cause as these factors will add a broader context to the misconduct in question.

Impact of decision on employees

Employees should be aware that a single incident of misconduct may not be enough for an employer to establish the existence of grounds to terminate for cause. Further, if an employee has engaged in misconduct and is confronted by her employer, it is likely best for the employee to honestly admit to the misconduct.

Failure to do so may demonstrate a level of dishonesty that may, in itself, justify the employee's termination for cause due to a breakdown of the employment relationship and level of trust.

FOR MORE INFORMATION SEE:

- *Winfield v. Pattison Sign Group,* 2013 CarswellAlta 1948 (Alta. Q.B.).

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CASE IN POINT: ACCOMMODATION

Employer not at fault for failure to accommodate

Employee promised to improve attendance but employer wasn't aware of the extent of employee's depression

BACKGROUND

ALL EMPLOYERS have a duty to accommodate employees or have an illness or disability. The duty to accommodate doesn't always mean the employee must be kept around, but it does mean an employer must investigate all of its options — such as modified job duties, a different job posting or shorter hours — to determine if it's possible to accommodate to the point of undue hardship. If it's not possible to accommodate the employee without causing undue hardship, or harm to the business, then the employer may not have to keep the employee around.

However, an important part of investigating accommodation options is for the employer to have the information it needs to make such a determination. The employee has role in providing such information on her accommodation needs, particularly in letting the employer know accommodation is required in the first place. If the employer doesn't know the extent of the disability, it can't fulfil its duty to accommodate.

I BY JEFFREY R. SMITH I

A NOVA SCOTIA employer failed to properly investigate accommodation options before it terminated an employee due to excessive but innocent absenteeism, an arbitrator has ruled.

The employee worked for the Cape Breton Regional Municipality in Nova Scotia doing payroll, accounts payable and rentals at an ice rink. For the first few years of employment with the municipality, she had no attendance issues at work. Her hours were somewhat flexible in that if she missed time she could make it up by working weekends or overtime. However, in 2004, the employee was diagnosed with cancer, which made it necessary for her to take time off work to have it treated.

The illness required extensive treatment that took more than one year. There were extreme side effects which made the employee sick, and the drugs she took caused depression. The employee received long-term disability (LTD) benefits while she was treated for the illness for nearly two years.

When the employee returned to work, she discovered her department had moved to a different arena with a different workplace regime that didn't have the flexibility of her previous workplace. Since the employee wasn't fully recovered from her medical ordeal, she was frequently exhausted and felt stressed in the new workplace. After several months back on the job, she began to suffer from depression.

Medication and side effects from illness caused depression

In 2006, the employee suffered from another serious illness that required surgery. After the surgery, her depression worsened. In September 2006, a physician in the municipality's occupational health services division — who was responsible for determining the fitness of employees to return to work — noted the employee was depressed, had decreased energy, a lack of concentration and decreased interest as a result of her medication and treatment.

He recognized that she had a "major depressive disorder" and should continue taking medication while seeing a psychologist with the aim of returning her to work.

In March 2007, the municipality's physician and the psychologist felt it was in the employee's best interest to return to work on March 19, but in an "ease back" situation where she would start with part-time duties and gradually work her way back to full-time. The municipality was unaware of the nature of the employee's depression and followed the medical directions that related only to the employee's ability to perform in the workplace. There were no further instructions regarding limitations or the need for any accommodation. The employee resumed full-time duties in June 2007.

Over the next four years, the employee continued to work full-time but often arrived late. In many cases, the employee called in to notify the municipality she would be late for various reasons — such as a flat tire or a toothache, for example. The manager of the rink kept a record of the absences and in none of them did the worker indicate the absence was due to fatigue or depression.

Management was aware the employee was dealing with serious health issues and accommodated these absences based on medical information it received pertaining to the employee's needs without discussing the specific nature of the employee's illness.

Concern about employee's absenteeism

The manager spoke with the employee on several occasions about her absenteeism and stressed to her that it made things difficult when she wasn't at work on time.

Whenever it happened, other payroll staff had to fill in and cover her duties, which caused "considerable hardship" in the workplace. Because the absences were sporadic and came with little notice, the municipality couldn't simply replace her as it would if she were off for some time. As a result, work would often pile up and not get taken care of in a timely manner and other workers became frustrated.

Both the manager and the union vice-president told the employee she needed to be punctual to avoid difficulties in the workplace. The employee replied that she thought she could handle things and she wouldn't miss time in the fu-

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CASE IN POINT: ACCOMMODATION

Employee said she would be on time going forward

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ture. The employee mentioned her issues with depression but reiterated that she could handle it.

The employee missed 41 days of work in 2008 and 29 the following year, along with four unpaid leave days and many vacation days taken in lieu of sick days. In 2010, she took 10 unpaid leave days and more than 20 vacations days taken in lieu of sick days. In addition, she missed more than three months with a workers' compensation claim from a work-related accident that required physiotherapy. The average sick time taken by Cape Breton employees was six days per year.

In March 2010, the director of HR and the employee met to discuss her absenteeism. It was made clear to the employee that the municipality was aware she was dealing with a serious illness, but her "continued excessive absence" could lead to termination.

The municipality also requested medical approval showing she was fit to work a regular work schedule. If not, and if her health problems were serious enough that she was unable to work regularly, then the municipality indicated it would help the employee apply for LTD benefits.

The employee continued to provide assurances she would come to work on time, but she still regularly did not. The municipality finally decided the difficulties the absences were causing were too much and it could no longer accommodate the employee as a full-time worker. It terminated her employment on Jan. 14, 2011, for excessive absenteeism.

Shortly thereafter, the union filed a grievance requesting reinstatement.

The arbitrator found the employee's depression was "of a serious and significant nature" that was a main contributor to her inability to come to work on time many mornings. It qualified as a disability that required accommodation to the point of undue hardship, said the arbitrator.

The arbitrator also found the employee's statements that she would be on time for work after being warned were understandable since she was worried about her job and intended to try harder to be on time. However, her failure to improve and continued excessive absenteeism "had a significant and serious effect on the workplace and other employees," said the arbitrator.

Employer didn't know extent of health issues

While its workplace and other workers were affected by the employee's absenteeism, the municipality had no specific medical information on her medical condition and the impact of her depression on her absenteeism, since it had only been given information relevant to her fitness to work — common practice in such circumstances.

The employer didn't know the impact of her depression on her absenteeism. It had only been given information relevant to her fitness to work – a common practice.

As such, the municipality understood the employee's absenteeism was related to her medical problems and considered it "blameless," but it felt the excessive absenteeism was a pattern that was unlikely to improve in the future. Therefore, the municipality felt it had reached the point of undue hardship and couldn't employ the employee as a full-time worker.

The arbitrator noted a 1995 Supreme Court of Canada decision — *Quebec Cartier* — that stipulated a dismissal should be upheld when the employer has just cause based on the information it has at the time of dismissal. Subsequent information — such as the details of the employee's depression and its contribution to her absenteeism — which came out after the dismissal isn't relevant to the determination of cause.

However, though the municipality wasn't aware of the extent of the employee's health issues and therefore was unable to fully accommodate her, the arbitrator found dismissal wasn't the right course of action.

"I do not see in the (Nova Scotia human rights legislation) as intending to take away any rights which the (employee) may have with respect to an accommodation simply because that information, through no fault of the employer, the union, or the (employee), was not made known or available to the employer prior to termination," said the arbitrator. "Had this information been known to the employer at the time of termination, then there is no question the information as to the disability would have required to have been considered by the employer under the duty to accommodate."

The arbitrator found the employee's disability and its effect on her absenteeism wasn't accommodated, but the municipality didn't have the opportunity to investigate its duty to accommodate since it didn't have all the medical information. The municipality was ordered to reinstate the employee, but only conditionally pending a review of its ability to accommodate her.

FOR MORE INFORMATION SEE:

- *Cape Breton (Regional Municipality) and CUPE, Local 993 (B.(A.)), Re, 2013 CarswellNS 963 (N.S. Arb. Bd.).*
- *M.U.A., local 6869 c. Cie minière Québec Cartier, 1995 CarswellQue 24 (S.C.C.).*

Pattern of behaviour for constructive dismissal

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A similar constructive dismissal case that resulted from poor relations among staff is *Danielisz vs. Hercules Forwarding Inc*. Barbara Danielisz, a customs broker and departmental manager at Hercules, a freight services company in Toronto, complained she was subject to a poisonous working atmosphere.

She claimed her superior undermined her authority by not allowing her to discipline her staff and her colleagues "ganged up" on her. Conversely, Danielisz's colleagues claimed she was not a team player and made derogatory and verbally abusive comments to others.

Hercules held a meeting in attempt to resolve the situation but was unsuccessful. Danielisz went on stress leave and Hercules said it expected her to return to work and perform her duties. Danielisz filed a legal claim for compensation for stress, depression and constructive dismissal, which Hercules took as her resignation.

The British Columbia Supreme Court found there weren't grounds for constructive dismissal and Danielisz had helped to create a poisonous working atmosphere as much as she'd suffered from it. The court said if Danielisz had done more to mitigate the issue, she wouldn't have had to make the claim — which was dismissed and not granted a leave of appeal.

Comparable to Danielisz's case, Yohann Johnson, an employee of automaker General Motors (GM) in Oshawa, Ont., filed for constructive dismissal (*General Motors of Canada Ltd. v. Johnson*) when he attempted to return to work after being away on sick leave for two years from his job as a result of what he claimed was the poisonous working atmosphere and racism.

Upon his return, Johnson was offered two positions in two different departments. However, he did not accept either position, stating he didn't want to come in contact with the racist employee. GM interpreted Johnson's rejection of the positions as his resignation.

Johnson took the case to the Ontario Court of Appeal, where he was initially awarded $90,000. However, the same court later overturned the decision, stating there was no conclusive evidence of workplace racism to prove constructive dismissal.

It didn't agree there was workplace bullying as General Motors had made notable efforts to retain Johnson by offering him two positions, both of which he refused. Furthermore, the court stated that standalone incidences are not enough to prove the existence of a poisonous working atmosphere and that there needs to be a consistent pattern of misconduct to be considered sufficient evidence. Johnson's case was dismissed.

Denial of expected bonuses can lead to constructive dismissal

In addition to the above cases, denial of an annual bonus can also be construed as constructive dismissal, depending on whether the bonus is considered to be discretionary or part of a salary package, as evidenced in *Piron vs. Dominion Masonry Ltd.* James Piron was a long-serving employee at Dominion Masonry, a commercial masonry company in Burnaby, B.C., when his employment ended in 2011 due to a disagreement over his bonus entitlements.

That year, Dominion Masonry stated it was experiencing financial hardship because of the economic downturn and informed Piron it couldn't pay his annual bonus. Piron argued this was unacceptable, as his bonus was part of his employment agreement. Dominion Masonry disagreed, saying his bonus was discretionary. Piron took the case to the B.C. Court of Appeal, where it was unanimously agreed he should receive his bonuses. He was awarded $20,000 in addition to his compensation package, but the court felt a reduction was in order.

These cases demonstrate the need for substantial evidence and multiple incidents of misconduct for an employee to win a constructive dismissal case. Employer attempts to resolve such workplace issues go a long way in the eyes of the court, as evidenced in both *Danielisz* and *Johnson*.

So, the answer to the question an employee may ask when considering constructive dismissal — "Should I stay or should I go?" — is: "it depends on the situation."

Constructive dismissal is discretionary and is largely judged on a case-by-case basis, often requiring additional speculation and legal assistance before a conclusion is reached. Should an employee wish to file for constructive dismissal, he must present hard and consistent evidence to win his case.

For more information see:

- *Potter vs. New Brunswick (Legal Aid Services Commission)*, 2013 CarswellNB 196 (N.B. C.A.).
- *Danielisz vs. Hercules Forwarding Inc.*, 2012 CarswellBC 2321 (B.C. S.C.).
- *General Motors of Canada Ltd. v. Johnson*, 2013 CarswellOnt 10496 (Ont. C.A.).
- *Piron vs. Dominion Masonry Ltd.*, 2013 CarswellBC 1028 (B.C. C.A.).

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Ask an expert: Reviewing employment contracts

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exchange for signing the contract ("consideration") since the employee was already in possession of the job before signing the contract. As such, execution of the contract prior to the commencement of work is an important element of ensuring it is later enforceable for the employer.

For more information see:

- *Bear Day Care v. Hollander,* 2010 CarswellOnt 11089 (Ont. Lab. Rel. Bd.).
- *All-Way Transportation Services Ltd, Re*, 1979 CarswellOnt 855 (Ont. E.S.B. (Adjud.)).
- *MenuPalace.com Corp. v. Saladino*, 2008 CarswellOnt 5544 (Ont. Lab. Rel. Bd.).
- *Altman v. Steve's Music Store Inc.*, 2011 CarswellOnt 1703 (Ont. S.C.J.).

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MORE CASES

COMPILED BY JEFFREY R. SMITH

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er told her she should take a leave of absence "due to stress" rather than quit, while the other thought she said she did quit. Neither co-worker was Rita's superior or had any role in the termination process.

As it was near the end of the workday, Rita packed up her belongings and performed her regular closing duties after the other employees left — duties which included locking the office, putting cash in the safe and transferring the phone to an answering service.

The next day, Rita emailed one of her co-workers with a request to give an attached doctor's note to Joe. The doctor's note indicated Rita was absent from work due to medical reasons and would be assessed on March 27. The note also stated she would drop off her keys and company cellphone the next day.

After her assessment on March 27, Rita's doctor provided a medical certificate that stated she was on a "stress related medical leave." Rita then applied for employment insurance benefits.

Joe assumed Rita had quit her job and Oomen's Glass issued her a record of employment with the comment that Rita was told she wouldn't be coming back to work due to "personal problems causing errors in her work."

Rita filed a claim for termination pay with the Ontario Employment Standards Branch, claiming Oomen's Glass had terminated her employment. An employment standards officer agreed with her and ordered the company to pay her $3.149.22 in termination and vacation pay.

Oomen's Glass appealed to the Ontario Labour Relations Board, claiming Rita Oomen had quit, thereby terminating the employment relationship and making her ineligible for termination pay.

The board noted there were two things to be considered when determining if an employee has quit: a subjective intent to quit and if the employee's actions manifested that intent.

The board found that regardless of whether she told her co-workers she was going to quit, there was no dispute that she never told Joe Oomen — her actual boss — that she quit. Her state of mind immediately following the argument on the phone was likely emotional and not clear-thinking, nor was it a communication to the employer of her intent to quit, said the board.

The board also found Rita's actions indicated her intent to continue the employment relationship. She continued to work and completed her regular closing duties that day. She also sent a medical note for a leave of absence the next day, which indicated she wanted to remain an employee.

"In addition to performing her regular closing duties (which suggests that she intended to continue with her duties after her statements to her co-workers), the medical note provided the following day indicates an intention for a leave of absence," said the board. "This suggests that she was not trying to sever the employment relationship."

The board also determined that Rita's return of her keys and cellphone indicated she didn't want to keep company property while on a leave of absence rather than a belief she had quit.

The board agreed with the original ruling that Oomen's Glass terminated the employment relationship and upheld the order to pay Rita Oomen termination pay.

See *M. Oomen's Glass Ltd. v. Oomen*, 2013 CarswellOnt 17083 (Ont. Lab. Rel. Bd.).

Bus driver's injuries not from driving a bus

THE ONTARIO WORKPLACE Safety and Insurance Board (WSIB) has denied a bus driver's claim for benefits for back and knee pain, which the driver claimed was the result of his bus driving duties.

The driver began his employment driving a city bus in January 2002. Over the years, he worked a significant amount of overtime in addition to his regular hours.

In 2008, he began feeling a jabbing pain in his lower back, numbness in his legs and pain in his right knee. The driver felt these injuries were the result of the countless hours he spent sitting in the same position while driving, along with the repeated pressure and vibration from using the gas and brake pedals. His knee pain, the driver believed, was the result of constantly hitting his knee on the fare box in the bus.

The driver indicated he always drove an older model of bus that had bad shocks, especially when the bus was full. In addition, part of his route featured road construction which caused a ride that was more bumpy than usual, exacerbating the vibration problem. The worker had no previous pain, so when his doctor checked him out he became aware his problems were likely related to years of driving a bus.

The driver's knee injury was diagnosed as a medial meniscus tear and he had surgery in January 2009.

The driver considered his injuries to be a disability that developed from his work and filed a claim for worker's compensation benefits.

The WSIB case manager assigned to the driver's case didn't accept that the driver's impairments were causally related to his bus driving duties. The driver's employer put him on short-term disability (STD) benefits with the intent to have him return to work, since his claim was denied. The driver appealed to the Workplace Safety and Insurance Appeals Tribunal (WSIAT).

The WSIAT agreed with the WSIB, finding there wasn't sufficient evidence to demonstrate the driver's injuries were a direct result of his job duties. The tribunal found the sudden onset of pain in 2008, while there was no prior ailment, made it suspect that the driver's pain was the result of gradual progression of injury over time. He also didn't seem to think the injuries were caused by his job until he saw a doctor, said the tribunal.

The WSIAT also found the city buses underwent "rigorous inspection carried out by both maintenance staff and drivers" and the road construct was minor. In addition, the driver's route featured an extra loop at one end that allowed for frequent breaks during which the driver could get up and move around. Also of note, the driver's condition continued to worsen after he stopped driving a bus in 2008.

The medical evidence included x-rays and an MRI which showed disc protrusion in his back, but no neurological damage. In addition, the torn meniscus in his knee wasn't consistent with the supposed cause of driving or bumping the knee on the fare box, said the tribunal.

"Bulging or protruding discs are common in the general public associated with the natural process of degenerative changes," said the tribunal. "These changes occur regardless of trauma or injury."

The tribunal determined the driver had "a spontaneous flare-up of pain" from his condition but it wasn't causally connected to his job. The driver's injuries did not arise from his employment, but rather were the result of a "degenerative condition which is disabling in and of itself rather than evidence of a causation relationship between the work and the disability."

This finding was supported by the fact the driver's injuries continued to deteriorate after he stopping driving buses and went on disability leave. See *Ontario Workplace Safety and Appeals Tribunal Decision No. 1168/13*, 2013 CarswellOnt 15795 (Ont. W.S.I.A.T.).

Manager or dispatcher?

THIS INSTALMENT OF You Make the Call features a dispute over whether an employee was a manager and was entitled to overtime time pay.

Richard Coles was employed as a dispatcher with Action Express & Hot Shot, a courier company based in Edmonton. His job duties included managing the company's fleet and income without any direct supervision by the owners.

Coles didn't hire or fire any staff, but had some input into hiring. He also reviewed the insurance, vehicle registration and workers' compensation coverage of each driver and reported any issues to the owners of the company. Overall, Coles supervised four call takers and 25 drivers who were independent contractors.

How would you handle this case? Read the facts and see if the judge agrees

If a driver was assigned a call and refused, Coles had the authority to send the driver home. However, the owners instructed him not to engage in arguments with drivers and to refer any problems to them. He assigned calls to drivers and made input into commission raises, but the final pay decisions were made by the owners.

In addition to assigning calls to drivers, Coles was expected to go on sales calls once per week. He didn't have an expense account or company credit card, though he was reimbursed for any money he spent on customers. He did use a company fuel card when he was out on sales calls.

Because Coles assigned the drivers work and ensured they were earning about the same on calls, Action Express considered him to be equivalent to a manager.

He was expected to work 50 hours per week and, although he asked for extra pay, Action Express said he was paid based on those hours. He was also compensated in other ways, such as a company care with paid insurance, a company cellphone and cash advances which were never paid back. One of the owners also claimed he bailed Coles out of jail twice for a total of $7,000.

When Coles was hired in 2008, he acknowledged his position didn't include overtime pay. Though there was no written employment contract, but Action Express made it clear his salary was "all-inclusive."

In addition, the company noted part of his job was making sales calls and salespeople were not subject to overtime pay. During busy times, he was in charge of the company's after-hours phone and during slower times, he was allowed to leave early. He was also allowed to use his company cellphone 24 hours a day for personal use.

In early 2013, Coles' employment was terminated by Action Express. Coles said he wasn't clear on the reason for termination and filed a claim for overtime and vacation pay. He argued he wasn't a manager and therefore was entitled to such pay under employment standards legislation.

In June 2013, Human Resources and Development Canada issued an order to pay Coles more than $10,000 for non-payment of overtime and vacation pay, but Action Express appealed the order, arguing Coles performed management duties and had agreed to his pay arrangement when he was hired.

You Make the Call

- ☑ Was Coles entitled to overtime pay?

OR

- ☑ Was Coles a manager and therefore not entitled to overtime pay?

IF YOU SAID Coles was entitled to overtime pay, you're right. The adjudicator found that, although Coles managed the drivers and assigned their work, there was little evidence that he had any true "independent action, autonomy or the discretion to make significant decisions."

He could mediate driver complaints but could not resolve them — they had to be referred to the owners for that, said the adjudicator.

Action Express argued Coles determined the income of the drivers by assigning their calls, but the adjudicator found Coles was merely dispatching them and ensuring they earned about the same income. Any actual decisions on their rate of pay and commission levels was decided by the owners with his input, and the same could be said of other company matters.

"Mr. Coles did not independently run a major portion of the business on his own," said the adjudicator. "He was restricted by the types of decisions he could make and they did not amount to managerial functions."

The adjudicator also noted that Coles' job title was "dispatcher," not "superintendent" or "manager."

The majority of his time was spent dispatching, with a small part in sales, making him a regular employee who was not exempt from the overtime provision in the Canada Labour Code. The order to pay was upheld.

See *1484174 Alberta Ltd. and Coles, Re*, 2013 CarswellNat 4313 (Can. Labour Code Adj.).

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