

Terms of settlement upheld following allegation of termination for cause

Settlement agreement supersedes after-acquired information

BY RONALD MINKEN

TERMINATION settlements can be a good way for employers to protect themselves from liability. However, it may leave them stuck with paying out even if new information comes to light later that could provide just cause for dismissal.

In *Dennis v. Ontario Lottery and Gaming Corp.* the Ontario Superior Court of Justice enforced the terms of a termination without cause settlement between the employee and the employer despite the employer's claim of termination for cause, based on after-acquired information.

In October 2012, after 13 years of employment, the employee was terminated without cause. She accepted the terms of a settlement package, which provided for, among other things, 53 weeks of salary in return for the employee signing a full and final employment release.

During the employee's employment she assisted in the facilitation of discount tickets from the amusement park Canada's Wonderland offered to all employees. Specifically, Canada's Wonderland offered discounted tickets, which the employee distributed to her co-workers. The employee was then required to submit the money received from her co-workers to Canada's Wonderland in November 2012. In August, the employee became subject to a fraud scam which resulted in her using over \$1,000 of the money owed to Canada's Wonderland for other purposes. The employee intended to repay the monies prior to having to remit them to the theme park.

Missing money discovered

Following the employee's termination and agreement to the settlement, the employer discovered the missing funds. The Ontario Provincial Police became involved in the matter, interviewed the employee and charged her with theft and breach of trust. As a result of the criminal charges against the employee, the employer held the terms

of settlement in abeyance until the criminal matter was resolved. On Dec. 13, 2012, the Crown withdrew the charges against the employee, of which the employer was made aware.

The employer conducted an internal investigation into the employee's actions and concluded the employee stole the money from the company. Due to the conclusions of the investigation, the employer advised the employee it would no longer adhere to the terms of the settlement due to having found after-acquired cause to terminate the employee's employment.

Employer bound to settlement agreement

The Ontario Superior Court of Justice found "that it is totally disproportionate for (the employer) to view (the employee's) conduct as support for termination with cause" and held the employee was entitled to the enforcement of the settlement agreement with the employer. In reaching this decision, the court noted the following:

- There was no evidence of the employee inducing the employer to make the accepted settlement.
- The employee "voluntarily assumed carriage of the arrangement wherein (the employer's) employees could obtain Wonderland tickets at a discount."
- The selling of discount Wonderland tickets "was an unpaid function and was distinct from (the employee's) employment

relationship with (the employer)."

- The employee's "role in selling discount Wonderland tickets to (the employer's) staff was not part of her employment duties."
- The employee intended on repaying the amount.
- The "cash related to the Wonderland tickets was not the property of (the employer)."
- The employee "never admitted to anyone that she had the requisite intent for theft" and the employer's report stating there was "an admission of guilt before the court" was "totally inaccurate."

Lessons for employers

The above decision demonstrates the difficulty that can exist for employers in proving they are justified in terminating an employee's employment for cause, especially in the context of information which is discovered after finalizing a settlement with the employee with respect to the termination of employment. Options should be explored prior to entering into terms of settlement and sufficient steps should be taken in response to new information that comes to light.

For more information see:

- *Dennis v. Ontario Lottery and Gaming Corp.*, 2014 CarswellOnt 9687 (Ont. S.C.J.).



ABOUT THE AUTHOR

RONALD S. MINKEN

Ronald S. Minken is a senior lawyer and mediator at Minken Employment Lawyers, an employment law boutique, located in Markham, Ont. He can be reached at www.MinkenEmploymentLawyers.ca. Ron gratefully acknowledges Sara Kauder and Kyle Burgis for their assistance in preparation of this article.

— Employment law blog —

Canadian Employment Law Today invites you to check out its employment law blog, where editor Jeffrey R. Smith discusses recent cases and developments in employment law. The blog includes a tool for readers to offer their comments, so discussion is welcome and encouraged. The blog features topics such as young employees, medical marijuana, religious discrimination and employee criminal charges.

You can view the blog at www.employmentlawtoday.com.

