CANADIAN
Employment Law Today
A Carswellbusiness Publication ■ www.employmentlawtoday.com

CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

ISSUE NO. 494 • SEPTEMBER 26, 2007

TV station manager resists cancellation

Manager's job function was transferred and he claimed constructive dismissal after given 'make-work' duties until retirement

BY JEFFREY R. SMITH

A television station constructively dismissed a long-time employee when it changed his role after he insisted on working up until his retirement date rather than be laid off, the British Columbia Supreme Court has ruled.

Stuart Johnson, 67, worked for 39 years for CH Vancouver Island, a Victoria station owned by the Global Television Network and its predecessor. He worked in various positions in on-air production throughout his career and was the manager of on-air operations from December 1998 until December 2004. In this position, he supervised a dozen unionized employees, administered an annual budget and oversaw on-air operations for Global.

CONSTRUCTIVE DISMISSAL

In 1974, Johnson joined a retirement plan through an insurance provider. The plan stated his normal retirement date would be the first day of the month following his 65th birthday. It also said he could remain employed beyond that date, on a year-to-year basis, with the consent of his employer up to his 71st birthday. Johnson received an annual statement of pension benefits indicating his normal retirement date of August 2005 (he turned 65 in July 2005) and his pension payable at age 65. In 2002 a booklet about the Global retirement plan was circulated to employees, which reiterated the normal retirement date for employees was the first of the month following their 65th birthday and mentioned the policy for a postponed retirement date up to 69.

In 1997, Global made some changes at the station and told Johnson he was being laid off. He was offered 24 months' severance as part of a buyout package. An agreement was reached in November 1997 but Johnson was asked to stay on until the spring of 1998. However, Johnson worked hard during a 1998 strike and impressed Global enough that it wanted to keep him on staff. Global rescinded the layoff and the president of B.C. operations conveyed a message to Johnson saying he had a job "as long as he wants it."

In 2004, Global decided to transfer master control functions to Calgary, which made Johnson's job obsolete. He was told his position would no longer exist as of Nov. 27, 2004. The network said it would continue to pay him his salary and benefits from that date until his normal retirement date of Aug. 1, 2005.

According to Global, Johnson seemed happy with the arrangement. However,

Continued on page 6

IN THIS ISSUE

Ask an expert

Disclosure of employee's medical information deemed OK by privacy commissioner

More cases

You make the call

CASE IN POINT: Government employee arrested for breach of trust after leak

Ask an Expert

with

Tim Mitchell

Laird Armstrong, Calgary

Have a question for our experts?
E-mail **carswell.celt@thomson.com.**

EMPLOYMENT STANDARDS: Regulation and minimum requirements for holiday pay

Question: How is holiday pay regulated for Canadian employees? If an employee works on a holiday, what is the minimum requirement for payment on top of regular pay?

Answer: Holiday pay is regulated by employment/labour standards legislation and regulations in each province and territory as well as in the federal jurisdiction. Employment standards legislation sets out minimum standards. If an employee's employment is governed by a collective agreement or written employment contract, the minimum requirements for holiday pay will be dictated by that agreement provided they meet or exceed the standards set out in the legislation.

While it is possible to contract for greater benefits than those set out in the legislation, it is not possible to enter into a contract or collective agreement that provides a lesser benefit. Where greater benefits are provided for under a collective agreement or employment contract, those holiday pay entitlements will determine the minimum requirement for payment.

Assuming there is no agreement between employer and employee governing holiday pay, it is necessary to determine what legislation applies to the particular employment. Work performed within a province may be regulated by the provincial legislation in force in that province or it may be regulated by the *Canada Labour Code* and the applicable minimum standards set out in that legislation.

Once the applicable legislation is identified, the next step in ascertaining the minimum entitlement is to examine the legislation to ensure the particular employment is not exempt from the holiday pay requirements or covered by provisions dedicated to that type of employment. Legislation and regulations often contain special provisions applying to workers in continuous operations such as hospitals, restaurants and hotels and to salespersons, construction employees, film extras and domestic service employees. Legislation may also permit substitution of another holiday for a particular general holiday under certain conditions (see, for example, *Canada Labour Code*, s. 195; *Manitoba Employment Standards Code*, s. 28). Where such an arrangement is in place, working on the original holiday may produce no additional pay entitlement.

Assuming the work performed on the holiday is governed by the general provisions of the legislation, the entitlement will typically differ depending whether the holiday was a normal work day for the employee or not. For example, under Alberta's *Employment Standards Code*, when the holiday falls on a normal work day for the employee, the employee is entitled to 1.5 times her "wage rate" for each hour worked on top of "an amount that is at least the average daily wage of the employee" or provide a day off with pay equal to at least the employee's average daily rate. If the holiday worked is not a normal work day, the employee is entitled to at least 1.5 times her "wage rate" for each hour worked. Although a premium equal to "time and a half" on top of regular pay is common, the applicable statute should be examined.

Finally, it is necessary to determine what amounts are included in the rate which serves as the basis of the holiday premium calculation.

In Alberta, the premium is one and one-half times the "wage rate." The "wage rate" is defined as "the hourly rate of pay for wages." In turn, "wages" is defined as including "salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated" but excludes overtime pay, vacation pay, general holiday pay and termination pay; discretionary gifts or bonuses; expenses or expense allowances; and tips or other gratuities. Where a particular employee works on commission or on some other basis that does not have a normal hourly wage, the legislation or regulations may specify how the premium is to be calculated. In some jurisdictions, a percentage of total wages for a specified period may be used. In others, the calculation may be based on minimum wage.

As the statutory provisions are significantly different from province to province, it is essential that any question of exact holiday pay entitlement be addressed in the context of the particular legislation applicable and the individual circumstances of the claimant.

OFF-DUTY MISCONDUCT: Obtaining information for employer's investigation

Question: A casual employee who works on an on-call basis allegedly assaulted someone during a weekend party. The alleged victim is contemplating laying charges and has made a statement to police. Can we as the employer obtain the names of witnesses or any other information about the case from the police for our own investigation into the incident?

Answer: In the situation you have described, it is unlikely that witness names and statements would be more readily available from the police than they would be from the victim. Generally speaking, an employer is not considered to have an interest in or a right to regulate or impose discipline in respect of an employee's off-duty conduct. In the absence of some connection between the assault and the workplace, which does not appear to exist on the

Continued on page 6

Safety concerns outweigh employee's privacy rights in disclosure of medical information

Employee claimed breach of privacy but employer said disclosing information on medical condition was in the interest of public safety

By Jeffrey R. Smith

PRIVACY

The office of the Alberta Information and Privacy Commissioner has found a driver's former employer did not breach privacy legislation when it provided personal information about him to Alberta Driver Fitness and Monitoring Branch (DFMB) relating to his ability to drive.

The employee was involved in a serious motor vehicle accident in 2004 which left him with post-traumatic stress symptoms. He received psychological treatment on an ongoing basis and was still receiving it when he was hired by Hearing Conservation Consultants Ltd. (HCC) in 2005. HCC provides mobile hearing test facilities for on-site testing of employees of organizations subject to occupational health and safety requirements. The position required a large amount of long distance driving.

About a year into his employment with HCC, the employee started getting high-blood pressure and blurred vision. He thought these symptoms may be a recurrence of the post-traumatic stress from his 2004 accident and he agreed not to drive until the symptoms subsided.

The employee provided a letter from his psychologist which explained he was suffering from a recurrence of stress symptoms and he went on leave in October 2006. However, a short time later, while still on leave, he was terminated. HCC contacted the employee's psychologist, but couldn't find out if he had passed on the medical information to the DFMB. Consequently, it reported the employee's condition to the DFMB on Jan. 5, 2007, saying the company was concerned for public safety and its former employee's ability to drive.

On Feb. 9, 2007, he received a letter from the DFMB that asked for a medical report from his doctor so it could determine if he was fit to drive. After he did so, the DFMB said he could continue to drive as long as he took an annual medical and psychological report.

The employee later learned his symptoms were not a recurrence of post-traumatic stress after all. He felt the conditions placed on him to operate a motor vehicle were unfair and the result of an unauthorized disclosure of his personal information to the DFMB. He filed a complaint with Alberta's privacy commissioner, saying the medical information he had given to HCC was for the purposes of his leave and HCC wasn't authorized to disclose it for another purpose. He also claimed the DFMB wasn't authorized to collect his personal information from any source other than a physician to restrict his driving privileges. These would all be violations of Alberta's *Personal Information Protection Act* (PIPA).

The portfolio officer hearing the complaint found the DFMB was authorized to collect the information by the *Freedom of Information and Protection of Privacy Act* (FOIP), which allows a public body to collect information for sources other than the individual if it is for the purpose of law enforcement.

The officer found HCC passed on the employee's information out of concern for public safety and "license issuers" should be aware of the information to take what action was needed. The DFMB used the information to investigate and gather more information directly from the employee. It didn't impose any conditions on his ability to drive until it had investigated further. DFMB policy dictates it must investigate only valid complaints. HCC's complaint was investigated and determined to be legitimate. As a result, the information was used to apply licensing conditions, which was the purpose for which it was collected and allowed under FOIP.

The officer noted PIPA made exceptions for consent where the personal information is disclosed to a public body which is authorized to collect it from an organization and found the DFMB met that criteria.

The officer found HCC disclosed information which was provided directly by the employee and it had made attempts to see if his psychologist had informed the DFMB, a reasonable concern given the potential effects on his ability to drive. When HCC couldn't determine this, it disclosed the information to the DFMB itself, which was a reasonable disclosure for a legitimate purpose, according to the officer.

The officer found neither HCC nor the DFMB violated privacy legislation but in order to avoid a similar incident, he recommended HCC make a standardized insurance form available to employees for illness and disability, a standardized form for doctors to complete omitting specific details and develop a written privacy policy, which it was lacking.

"Employers and members of the public are able to report legitimate concerns about a person's fitness to drive," the officer said. "If (the DFMB) has reasonable and probable grounds to believe that a person poses a risk to him or herself or to the public, it is entitled to require a person to submit a medical or physical examination and place conditions on driving privileges." CELT

For more information see:

- Alberta Office of the Information and Privacy Commissioner Investigation Reports P2007-IR-005 (Hearing Conservation Consultants Ltd.) and F2007-IR-004 (Alberta Infrastructure and Transportation).

CASE IN POINT: BREACH OF TRUST

Government employee arrested for breach of trust after leak

Environment Canada employee who leaked environmental plan to media raises the question of how far employers can go to punish a breach of trust

ON APRIL 17, 2007, the RCMP Commercial Crime Section received a complaint from Environment Canada's security department that a secret draft copy of "Climate Change Section of the Eco-Action Plan" had been released a week before it was meant to go public.

The source of the leak also attached a manifesto justifying the leak as an act of protest against the "secrecy of the Harper government" and stating the action was taken because the need for public information outweighed the importance of due process. Jeffrey Monaghan, a 27-year-old temporary employee for Environment Canada in Gatineau, Que., was arrested on an allegation for breach of trust under the *Criminal Code*.

Monaghan's arrest raises the issue of dealing with a serious breach of trust by employees. How serious does it have to be where discipline or dismissal isn't enough and employers can go to the legal system?

The code distinguishes public employees as having a greater duty than non-public employees with regards to protecting information but can a private employer resort to criminal charges if the breach is serious enough?

By Ronald S. Minken

In his position with Environment Canada, Jeffrey Monaghan was trusted with handling information which was not public. When he leaked details of the government's environmental plan to the media, he breached that trust. The agency felt his actions were serious enough to call the RCMP. Monaghan was charged under the *Criminal Cod*e, which states:

"Every official who, in connection with the duties of his office, commits fraud or breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person."

Since Monaghan is still under investigation, it is unclear whether or not he will be criminally charged for his actions as an employee. In order for Monaghan to be found criminally liable for breach of trust, five factors must first be established as outlined by Chief Justice Beverly McLachlin in *R. c. Boulanger*. The Crown would have to prove beyond a reasonable doubt that Monaghan:

- is an official;
- was acting in connection with the duties of his office;
- breached the standard of responsibility and conduct demanded of him by the nature of the office;
- acted in way that was a serious and marked departure from the standards expected of an individual in his position of public trust; and
- acted with the intention to use his public office for a purpose other than the public good.

Monaghan, an Environment Canada employee, could be considered an "official" given the term, under section 118 of the code, broadly includes "a position or an employment in a public department."

It is possible because of the nature of his work, specifically, summarizing daily news coverage and managing the department's internal communications website, Monaghan was acting in connection with the duties of his office. However, he may not have been privy to highly confidential information on a regular basis and it is unclear how he obtained the secret draft of the document. It can be argued Monaghan breached the standard of responsibility and conduct required of him as an employee responsible for analysing government-specific information.

In addition, there is a higher duty of care associated with employees of a government department serving the public interest because such employees are in a position of public trust regardless of their ranking. It may be difficult for the Crown to prove Monaghan acted with the intention to use his position as an official for a purpose other than the public good, since the manifesto attached to the leaked documents indicated they were being disclosed for the purpose of the public good — the need for the public to be fully informed about their government's plans and decisions.

The possibility of the government charging Monaghan for breach of trust as a public official demonstrates the

Continued on page 5

CASE IN POINT: BREACH OF TRUST

Employees with high accountability can face charges

...continued from page 4

ability employers have in seeking remedies against employees who commit a breach of trust. Non-public official employees are not held to the same standard as public official employees because they do not carry the same level of duty of care or fiduciary obligation. Non-public officials can be charged by their employer for breach of trust but only in rare circumstances would this warrant a criminal charge.

Perhaps of more concern for employers who are considering charging their employee with breach of trust is the high degree of proof, that of beyond reasonable doubt, adopted in criminal court. In civil matters, the degree of proof is lower than in criminal court. In civil court, however, an allegation of breach of trust will require a higher degree of proof than other allegations, such as the establishment of termination for cause. Even in the most extreme of circumstances involving theft by an employee who is in a position of trust, as in *Guilbert v. Air Canada*, arbitrators will often evaluate the employee's work record, whether there was an admission of guilt, an apology provided and other mitigating factors in lieu of dismissal in rendering a decision.

Although, according to the code, bank employees and professionals are not public officials, they are expected to comply with similar community standards of absolute transparency, integrity and honesty. However, even in matters involving employees in this sector, instances of employee dishonesty or misuse of employer confidential information have warranted progressive discipline and, in some extreme circumstances, dismissal, but rarely criminal charges for breach of trust.

In *Vaillancourt v. National Bank of Canada*, a bank employee's improper and dishonest granting of credit constituted grounds for dismissal, despite the employee's stellar employment record with the bank. In this instance, it was deemed unnecessary for the bank to apply progressive discipline.

In *Tavares v. Canadian Imperial Bank of Commerce*, an assistant accountant was dismissed for falsifying bank records, misappropriation of customer funds and failure to report serious irregularities. The adjudicator found the dismissal was excessive since there were mitigating factors and ordered the bank reinstate the accountant. The employee was helpful and co-operative in the bank's investigation, at the hearing she readily admitted her role in the scheme and did not attempt to justify her actions, and the bank only provided written reprimands for employees below her for their participation in the same offence. The arbitrator ruled the bank should have demoted the employee, rather than resorting to dismissal. Accordingly, a breach of trust is not an automatic ground for dismissal.

Employers should first conduct an investigation and consider disciplinary measures or termination rather than proceeding to charge the employee criminally

Employers who have alleged an employee has committed a breach of trust should first conduct a thorough investigation and then consider appropriate disciplinary measures or termination of employment, rather than proceeding to charge their employee criminally.

In situations involving non-public official employees, including bank employees or professionals, consideration is given to a host of mitigating factors surrounding a decision to terminate an employee for breach of trust. Where an employer has decided to criminally charge an employee for breach of trust and has suspended the employee, the suspension may constitute a constructive dismissal.

There is a clear risk to employers in charging an employee criminally for breach of trust whether a public or non-public official. Courts, thus far, have encouraged employers to conduct adequate investigations and apply disciplinary measures to employees before resorting to criminally charging or dismissing for breach of trust. There may be exceptional circumstances where it is appropriate and advisable for employers to consider charging an employee for breach of trust in situations where, for instance, that employee has a high level of accountability to the public or community. CELT

For more information see:

- *R. c. Boulanger*, 2006 CarswellQue 5739 (S.C.C.).
- *Guilbert v. Air Canada* (January 13, 1986), Ref. No. 552-Que.).
- *Tavares v. Canadian Imperial Bank of Commerce* (May 29, 1985), Ref. No. 474-Que.).
- *Vaillancourt v. National Bank of Canada* (February 29, 1984), Ref. No. 320-Que.).

ABOUT THE AUTHOR

Ronald S. Minken

Ronald S. Minken is a senior lawyer at Minken & Associates P.C., an employment law boutique in Markham, Ont. Ronald gratefully acknowledges Andrea Lim, a summer law student with Minken & Associates P.C., for her assistance with this article.

Mandatory retirement at 65 was not specified in policy

...continued from page 1

Johnson claimed he was "stunned" at the news of the transfer and he wouldn't have a job anymore. He interpreted the arrangement as essentially a severance of eight months. This angered him because he knew the unionized employees he worked with were getting nearly two years' notice as part of their severance.

Johnson told Global he felt his own severance was inadequate considering his years of good work and it shouldn't be assumed he wanted to retire at 65, since he had never been told it was a mandatory requirement.

Global responded by offering to keep him working up to his normal retirement date. Though his old duties wouldn't exist in Victoria, he would be "kept busy on several different projects." Johnson asked for clarification but Global didn't specify.

Johnson met with management on Oct. 6, 2005, when he claimed the vice-president of business operations for Global made "denigrating, unwarranted and unduly insensitive comments" to him, including glib remarks about what Johnson's duties would be.

At another meeting on Dec. 2, Johnson was told it had been decided Victoria would be a backup to the master control in Calgary and Johnson would be ensuring things were ready to go. This would require operating equipment and keeping commercial inventory, things which he had never done before. He would also be reviewing and approving timesheets of two other departments, which the managers of those departments normally did but would give up for the eight months until his retirement. Johnson claimed this was a fundamental breach of his employment contract and constituted constructive dismissal. He also claimed *Wallace* damages for the way he was treated by upper management, specifically at the Oct. 6 meeting which left him angry and offended.

The court agreed with Johnson's argument there was no mandatory retirement at 65. There was only reference to the "normal" retirement date with provisions for working beyond 65.

"(Mandatory retirement) was never an express term of any employment contract between (Johnson and the station)," the court said. "Given the evidence with regard to company documents that referred to early and/or postponed retirement, it cannot be said that mandatory retirement was an implied term in the employment contract."

The court also found the duties Global offered Johnson after Nov. 27 were fundamentally different from his position as the manager of on-air operations. His new work would involved hands-on and "union work" after nearly 40 years of management.

"The duties listed were clearly make-work duties from two other departments, designed to give a deceptive patina shine of management to the offer of continued employment. All of which involved fundamental changes to the terms and conditions of the employment contract and amounted to constructive dismissal," the court said.

The court felt the series of events damaged the employment relationship enough that he couldn't be expected to continue working at the station, particularly performing duties that weren't management duties.

The court felt Johnson was entitled to an award near the upper end of the scale because of his "increased age, decades of service, the character and scope of his management employment functions and the lack of availability of alternative employment." It awarded him 24 months' notice.

The court found though the comments made to Johnson at the Oct. 6 meeting were insensitive and were perceived as insulting because of Johnson's vulnerability at the time, they were not intended as such. As a result, the court found Johnson was not entitled to extra *Wallace damages*. CELT

For more information see:

■ *Johnson v. Global Television Network Inc.*, 2007 CarswellBC 1900 (B.C. S.C.).

ASK AN EXPERT

...continued from page 2

facts, the employer has no more claim to information from the police than any other third party. This is particularly the case given the relatively tenuous nature of the employment relationship in this case.

There may be instances where an employer will be recognized as having an interest in an employee's misconduct off the job, such as a pediatric nurse being investigated for off-duty child abuse or a school bus driver for possession of child pornography. Even in such cases, however, the actual witness statements given to the police during the course of an investigation may well be protected by privacy legislation, depending on their content. In such cases, the police may be precluded from voluntarily disclosing the statements, however co-operative they may wish to be.

If criminal charges are laid, a copy of the indictment can be obtained. If a preliminary hearing is held, an employer can send a representative to the proceedings and ascertain what evidence the Crown has against the accused. However, an employer who does have a basis to claim a right to discipline an employee for off-duty conduct may be under some time constraints in imposing discipline. In such a case, the most expeditious procedure may be to obtain witness names from the victim and conduct interviews independently of the police investigation. CELT

Tim Mitchell is a partner with Laird Armstrong in Calgary who practices employment and labour law. He can be reached at t.mitchell@laidarmstrong.com or (403) 233-0050.

MORE CASES

COMPILED BY JEFFREY R. SMITH

WRONGFUL DISMISSAL: Court awards *Wallace* damages after fitness club fires employee without severance or notice

A WORKER at a fitness club was wrongfully dismissed and is entitled to extra damages due to the way she was dismissed, the Ontario Superior Court of Justice has ruled.

Sharon Budhram worked in several capacities at multiple locations of Fit for Life and Women in Motion health clubs. She usually worked three days a week selling club memberships and occasionally taught fitness classes and performed personal training at night. She was paid on an hourly basis when selling memberships and separately when teaching classes or doing personal training.

On May 28, 2003, Budhram was terminated without cause or notice. Fit for Life argued she was a part-time employee paid by the hour and her night work was as an independent contractor, so she wasn't entitled to severance or notice. It also claimed she had committed fraud by falsifying records of personal training sessions by initaling incomplete sessions after she was terminated.

Budhram argued she started working for Fit for Life as a part-time employee in 1999, but the hours she worked over the years qualified her as a full-timer. She also said the clients in question had signed up specifically for instruction with her in the evening so they were her clients, not the club's, and she had "a proprietary interest" in them. She had initialed her sessions with them in the record book before she had actually provided the services because she viewed them as her clients.

The court found Budhram's actions were "improper" but not sufficient to justify dismissal and since they had happened after she'd been informed of her dismissal, it couldn't be a reason for it. The court also found in order for Budhram to be qualified to provide personal fitness instruction to the club's clients, she had to be considered a full-time employee of the club. The court ruled Budhram had been wrongfully dismissed and was entitled to four months' reasonable notice, equalling $12,654.48.

The court also found Fit for Life's treatment of Budhram by refusing to accept her status as a regular employee and not offering any severance was in bad faith and contributed to her conduct in what the club had called fraudulent behaviour. The court awarded punitive *Wallace* damages of an additional one month's pay, bringing the total award to $15,818.10. See *Budhram v. 1257229 Ontario Ltd.*, 2007 CarswellOnt 2874 (Ont. S.C.J.).

EMPLOYMENT CONTRACTS: Employer changed requirements for time off without informing workers

THE CANADIAN Public Service Labour Relations Board has ruled a government department didn't inform its employees of a change in paid leave policy after an employee was forced to use sick leave credits to go to a dental appointment during work hours despite not having to do so previously.

Sylvain Dubé, an employee for the Department of National Defence (DND) in Valcartier, Que., requested leave for a routine dental appointment on March 9, 2004. His supervisor denied the leave, saying the appointment should be made outside of working hours or Dubé would have to use sick leave credits to take the time off.

Dubé was surprised because he and his co-workers had been granted time off for dental appointments in the past and requiring appointments to be made outside of working hours hadn't been raised before. The paid leave policy stated it was the DND's practice to provide leave for medical or dental appointments for a specific problem or regular checkups, though the Civilian Personnel Administrative Order (CPAO) specified leave for appointments was at "management's discretion" if the employee had already tried to schedule the appointment outside of working hours. The CPAO also stipulated absences of more than a half-day had to be covered by sick leave, vacation leave, unpaid leave or making up the time.

Another employee, Kevin Piton, recieved a similar response from management when he requested time off for a medical appointment. When he was denied, he and Dubé filed a grievance as neither was aware of the change.

"The employer had previously approved requests for leave of the same nature for (Dubé) and other employees," the board said. "It would appear that the employer apparently decided, at some unspecified moment, to change or apply the CPAO requirements. Unfortunately, it did not notify its employees."

The board found Dubé, Piton and other employees weren't aware of the CPAO's requirements for scheduling appointments because they hadn't been informed of them. As far as they knew, previous practice and the regular policy were in effect.

The board ordered the DND to reimburse the sick leave credits Dubé and Piton has been forced to use to cover their absences for the appointments

"It is the employer's responsibility to inform employees of the criteria it uses to assess requests for leave with pay for routine medical and dental checkups," the board said. "The employer exercised its discretionary authority in an arbitrary manner." See *Dubé v. Canada (Treasury Board – Department of National Defence)*, 2007 CarswellNat 2510 (Can. Pub. Service Lab. Rel. Bd.).

MORE CASES ONLINE

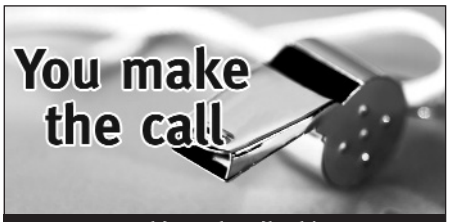
To view articles from past issues, go to www.employmentlawtoday.com and click on "More Cases."

Mail carrier discarded by Canada Post

This instalment of You Make the Call looks at a mail carrier who was fired after bulk admail he was supposed to deliver was found discarded.

Luc Rivard was a mail carrier for Canada Post in Calgary for more than 25 years. There was no door-to-door delivery as all of the residences get their mail through community mail boxes.

Canada Post receives unaddressed commercial admail from clients who pay for it to be delivered to residences, which accounts for 20 per cent of Canada Post's overall revenue. It reminded its employers through letters, e-mails and staff meetings of the importance of admail delivery. It was standard practice to allow carriers three days to deliver all the admail on their route.



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

Management was concerned with low delivery rates of admail and instructed carriers to return surplus admail to the office and report it to supervisors so it could be recorded rather than discarded.

Rivard said he usually didn't report surpluses or shortages of admail as it often was not significant and supervisors were often not available. He would generally discard any extra admail at the end of his route.

On June 12, 2006, Rivard's supervisor marked admail items for ten letter carrier routes in invisible ink. After the carriers left on their routes, the supervisor found several bundles, each containing 50 items, in a discard container. One of the bundles was marked with Rivard's route. In a shredder, the supervisor found another 70 items marked with Rivard's route.

The supervisor audited Rivard's route that day and found 308 deliveries of admail had been made and 177 had not received any. When Rivard returned to the depot, he went through his normal routine and went home without informing anyone he had run out of admail.

The next day Rivard was suspended pending an investigation. He admitted he had put a bundle of admail in the discard container because he always got one bundle too many but denied putting any in the shredder. He claimed he hadn't reported he was short because admail was easy to get around the depot. He also argued he would have completed delivery by the next day but his suspension prevented him from doing so.

Canada Post said he had intentionally discarded the admail and didn't plan on delivering it. Rivard was subsequently terminated.

You make the call

- ☑ Should Rivard have been terminated for not delivering admail and failing to report it?
  OR
- ☑ Was termination too harsh for not delivering all the admail?

IF YOU SAID Rivard should have been terminated, you're right. The board found the amount of discarded admail and the amount he didn't deliver were significant enough to constitute serious misconduct. It found he likely did know of the 70 items in the shredder as there was no other reasonable explanation for how they got there. Denying any knowledge of them compounded his misconduct.

The board found it difficult to believe an experienced carrier such as Rivard wouldn't notice he was short one-third of the items he was supposed to deliver. Since he didn't do anything to find more admail when he returned to the depot, it was also difficult to believe he intended to deliver the rest the next day.

The board also found Rivard knew the importance of delivering admail and his obligation to deliver it was part of his job. Failure to do so was a "major misconduct that goes to the heart of the employer's business." His attempt to cover up the misconduct further breached Canada Post's trust. The board found termination was justified.

"As the delivery of mail is the primary mandate of Canada Post, and the fundamental responsibility of a letter carrier, the employer had just cause for dismissal in these circumstances," the board said. CELT

For more information see:

■ *Canada Post Corp. v. C.U.P.W.*, 2007 Carswell Nat 1183 (Can. Arb. Bd.).

CANADIAN
Employment Law Today

Published biweekly 24 times a year
Subscription rate: $299 per year

Customer Service
Tel: (416) 609-3800 (Toronto)
(800) 387-5164 (outside Toronto)
Fax: (416) 298-5082 (Toronto)
(877) 750-9041 (outside Toronto)
E-mail: carswell.customercare@thomson.com
Website: www.employmentlawtoday.com

THOMSON CARSWELL

One Corporate Plaza
2075 Kennedy Road, Toronto,
Ontario, Canada M1T 3V4

Director, Carswell Business: Ben Wentzell
Publisher: John Hobel
Managing Editor: Todd Humber
Editor: Jeffrey R. Smith
E-mail: jeffrey.r.smith@thomson.com

We acknowledge the financial support of the Government of Canada, through the Publications Assistance Program (PAP), toward our mailing costs.

GST #897176350
Publications Mail Registration No. 7651