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Terminate with Care or Beware

Inappropriate comments and ignoring a request for a Letter of Reference can result in a finding of bad faith against an employer, thereby increasing the reasonable notice period awarded to an employee for wrongful dismissal.

The Ontario Superior Court of Justice's decision in *Defaria v. XTRA Canada* [2008] O.J. No. 377 ("Defaria") on February 6, 2008 highlights the impact an employer's bad faith conduct can have in determining an employee's entitlement to damages for wrongful dismissal. Specifically, the ruling indicates that the use of inappropriate language by an employer when terminating an employee, as well as any actions committed by the employer after the dismissal that may obstruct the employee's opportunity to obtain new employment, can lead to a finding of bad faith against the employer.

Defaria involved an employee who did not have a good relationship with his supervisor. The employee felt as if he was being treated unfairly in comparison to the other employees and filed two complaints against the supervisor with the employer's ethics committee. In response to both complaints, the ethics committee determined that the complaints did not involve an ethical matter, but were more of a business nature. The Vice-President of the Human Resources Department suggested that the

supervisor hold a meeting with the employee in the supervisor's office to try and remedy the situation. During the meeting, the employee claimed that the supervisor questioned him in regards to the complaints that were filed against him, swore at him many times calling him a "f...ing low life" and claimed "You have a bulls-eye on your back and I have the gun." The supervisor then fired the employee and told him "If you say anything about me I'm going to kick the f...ing guts out of you" and "...you quit, I didn't fire you."

Following his termination, the employee had his lawyer send a letter addressed to the supervisor requesting a Letter of Reference. This letter was received by the supervisor, however, he never forwarded it to the Human Resources Department to have the Letter of Reference written. The Court decided that the employee had been wrongfully dismissed and a notice period of nine months was awarded. However, the Court increased this amount by one month due to a finding that the supervisor had acted in bad faith towards the employee by terminating him in a "very nasty and disrespectful way"

and by barring the employee from obtaining a Letter of Reference, thereby making it more difficult for the employee to obtain new employment.

The decision in *Defaria* demonstrates that an employer's conduct while terminating an employee, as well as those actions following the dismissal, can be of importance in determining and possibly increasing, an employee's notice period. If the employer's conduct is either inappropriate or compromises the employee's future employment opportunities, then a finding of bad faith may be found and the notice period will likely be increased. For this reason, both employers and employees should pay special attention to these aspects of the termination process.

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