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26 weeks severance added to 54 weeks working notice

Severance is separate compensation, regardless of whether notice is working or paid out: Court

BY RONALD MINKEN

THE ONTARIO Small Claims Court has reinforced the importance of providing statutory severance in strict accordance with the terms of the province's Employment Standards Act, 2000. The decision provides that since the legislation indicates that severance must be provided in a lump sum — unless the employee agrees to receive the payment in installments — statutory severance must be paid in addition to any working notice provided to the employee. As a result, the employee in this case, who received 54 weeks of working notice — well in excess of all statutory payments owed — was awarded an additional lump sum payment of 26 weeks for severance.

EMPLOYMENT STANDARDS

The employee, Shirley Mattiassi, worked for Hathro Management Partnership and Toronto law firm Thomson, Rogers, for 26 years. On Nov. 16, 2009, Mattiassi received notice of termination indicating that she would be provided with 54 weeks of working notice, ending on Nov. 30, 2010. Mattiassi worked the 54 weeks of notice, during which time she received her regular pay.

On Nov. 19, 2010, Hathro provided Mattiassi with a letter reminding her that her employment would officially come to an end on Nov. 30. Additionally, this letter included a cheque for $8,041.67, representing an amount equal to about two months of her regular pay. This gratuitous payment brought the total amount of notice provided by Hathro to 62 weeks.

On Nov. 30, Mattiassi completed her last day of work with Hathro. She later brought an action against Hathro seeking payment of her severance pay in accordance with the Employment Standards Act, 2000.

Severance pay independent of notice

Mattiassi argued that she was entitled to both termination pay and severance pay in accordance with the Employment Standards Act, 2000. However, Hathro argued that the total amount of notice provided to her — 54 weeks working notice and an additional two months' pay in a lump sum — were in excess of the combined legislative requirements for termination pay and severance pay, and should therefore disentitle Mattiassi to any further payments.

The court did not accept the position argued by Hathro and stated that the Employment Standards Act, 2000 "has clearly set up two distinct and separate entitlements," and that "each provision stands on its own, serves a different purpose and provides different and distinct benefits or entitlements to the employee."

Additionally, the court indicated that the Employment Standards Act, 2000 "requires payment in lieu of notice only in the event of failure to give the required notice of termination. On the other hand, payment of severance pay is mandatory. It cannot be avoided by giv-

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In This Issue

Meat worker cut for carving pictures

AN EMPLOYEE at an Ontario meat processing plant who carved messages and symbols into pieces of meat was deserving of discipline but didn't deserve to be fired, the Ontario Arbitration Board has ruled.

A Meat Processing Company (AMP) operates a mechanized facility that breaks down livestock into cuts of meat. On Valentine's Day, 2011, a piece of meat was found with "I heart u" carved into it, and pieces of fat were inserted into the carving. The supervisor showed it to all employees working and told them it was unacceptable. Other employees testified that they expected doing such a thing would warrant discipline such as a warning or a suspension, though AMP had no specific policy covering such an incident.

During the last week of February, a co-worker of the employee received a cut of meat with a piece of fat

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Ask an Expert

with

Brian Kenny

MacPherson Leslie and Tyerman, Regina

Have a question for our experts?
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PRIVACY: Checking up on employee's required counselling

Question: An employee must attend counselling after a harassment incident and keep the employer notified of his progress. Failure to do so could result in dismissal. Can the employer do its own checking up to see if the employee is following through or would it be a privacy violation?

Answer: While it is not clear from the question itself what authority ordered the employee to attend the counselling, it does appear that the circumstances surrounding it are similar to a "last chance agreement." "Last chance agreements" are a type of settlement agreement whereby the employer agrees not to terminate an employee for serious misconduct in exchange for the imposition of stipulated conditions the employee must meet to continue in her employment. Generally speaking, such agreements will be enforced according to the employer's terms, provided that those terms are not contrary to any legislation, such as human rights statutes. For example, the agreement must be consistent with the employer's duty to accommodate any disability to the point of undue hardship.

It is perhaps best to approach this problem from the point of view that the employer is entitled to the information regarding the progress of the counselling treatment as a condition of the continued employment of this particular employee, provided that this is consistent with the terms of the order. If that information is not provided, or if the employee does not attend the required counselling, then the employer may be entitled to terminate the employment or to impose other discipline.

The counselling records and related treatment information would be seen as the employee's private and personal information. In the absence of the employee's consent, the counsellor would most likely refuse to share it with the employee, which would be justifiable. The best approach is to ask the employee directly for the information, and to ask her to include confirmation from the counsellor of the dates of counselling sessions as well. It would also be reasonable to impose a deadline for the provision of the requested information, to maintain an orderly process.

HARASSMENT: Using internal investigator

Question: Are there circumstances where it would be okay for an employer to use an investigator or mediator from within the company to deal with employee conflict or serious misconduct? What are the potential liabilities?

Answer: The short answer is yes. In fact, an employer may often have certain obligations, particularly under occupational health and safety legislation, to its employees to protect them from the harmful effects of such misconduct on the part of another employee. In these circumstances, an employer is required to take immediate and effective steps to offer that protection, to exercise reasonable care in doing so, and to correct the situation promptly. Employers thus have a legal duty to prevent, reduce or limit misconduct such as harassment. An employer who moves quickly to undertake an investigation of a complaint or incidence of misconduct in order to remedy the situation will be taking active steps to fulfill that obligation, even if the investigation is conducted internally.

However, there are potential liabilities associated with such a decision. The employer has an obligation to conduct an investigation in a thorough, fair and impartial way. Often an external investigator, such as lawyer or private investigator, will be equipped with the knowledge, training and professional responsibility to meet these obligations without question. However, an employer who opts to conduct an internal investigation must be careful to ensure that the investigation meets the standards for procedural fairness, or else it will open itself up to liability. The employee who is the subject of a faulty investigation could potentially pursue a court action, such as an action for wrongful dismissal, or initiate a human rights complaint. In other words, it is possible to conduct an internal investigation into misconduct, but employers should be fully aware of the elements required in order to ensure it meets procedural fairness standards.

The definition of "fair" may change, depending on the situation, but, in the end, the investigation may result in the investigated party being adversely affected. That means, at the most basic level, that she must be informed of the complaint against her and be given the opportunity to respond to it. There are certain specific elements which should also form part of the employer's approach to the investigation, including:

•Adherence to the policy: If the employer has a policy regarding the alleged misconduct, such as harassment, then the investigation should follow the guidelines therein. The accused and the complainant should have been provided with a copy when they began their employment, but should receive one at the time the complaint is lodged in any event. If no policy exists, it is advisable to put one in place. If the involved parties have prior notice of the type of misconduct that will not be tolerated and the standard procedures that will be followed, then it is more likely the ensuing investigatory process will be considered fair.

•Timeliness: Once the employer has become aware of the misconduct, it is important for it to act promptly and effectively. In general, investigations should be launched immediately after

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Progressive discipline, not firing for failure to follow policy

Aerospace employee fired for concealing errors in production of expensive components deserved another chance: Arbitrator

| BY JEFFREY R. SMITH |

A BRITISH COLUMBIA employee's termination for repeated mistakes in manufacturing expensive equipment has been rescinded by the B.C. Arbitration Board.

Roman Niedbalski, 49, worked as a machinist for Asco Aerospace Canada, an aircraft components manufacturer in Delta, B.C., for 22 years. Asco was certified to have parts go directly to aircraft builders after its own inspection, without further inspection. As a result, the company had strict quality control measures in place. If there was an error in the production of a part, the machinist was required to inform Asco inspection or his team leader. Any problems were to be brought to the foreman immediately so a decision could be made to repair or inspect the part.

WRONGFUL DISMISSAL

In performance reviews in 2009 and 2011, Niedbalski received good overall ratings, with most of his individual skills rated as good with a few satisfactory.

Asco became concerned that productivity was being effected by employees who weren't following break schedules, and using Blackberrys at work. The company sent out a memo to employees that outlined new "house rules," implemented on Dec. 1, 2010, that emphasized the need to focus on production. The house rules included instructions to report quality issues to supervisors.

Series of production errors

On July 14, 2011, Niedbalski loaded an incorrect program into his machine that damaged the component he was making beyond repair. He didn't follow the verification process and started the next part without checking the first part, which was submitted to quality control. Both parts had to be scrapped, costing Asco $1,600 for each one. Niedbalski was issued a written warning stating that such errors couldn't be tolerated and verification was very important.

On Oct. 5, 2011, a part for the F-35 military jet was identified as having a false cut. The error was attributed to Niedbalski and he was reported for failing to tag it. After the error, Niedbalski had continued his work and tried to resolve it without telling anyone. He mentioned it to the shift operator but said it would be "OK to go," and failed to tell his foreman. It was determined the extent of the damage could only have happened if Niedbalski had been away from the machine while it was running. Niedbalski was given another written warning.

On Oct. 31, 2011, Niedbalski asked his foreman to look at his setup, and the foreman noticed debris on the machine. He told Niedbalski to clean it up and advised that it would have created a serious problem and such a lack of performance could not be tolerated. The next day, Asco terminated Niedbalski's employment for poor work quality and a lack of responsibility, with the Oct. 5 failure to report an error as the main factor in the termination. The company felt it had lost all trust in him to do his job.

Niedbalski claimed he wasn't given a chance to explain his side of things at the termination meeting. He said he wasn't aware he had to talk to the supervisor for "every little issue" if he spoke to his partner. He admitted he made mistakes sometimes but his scrap ration was below the industry standard. The union also pointed out that other similar incidents by employees resulted in warnings and a one-day suspension. Asco countered with the argument that Niedbalski's position was one of the most responsible in production, and his mistakes, which happened over a short period of time, cost the company thousands of dollars. His attempts to downplay his errors showed his refusal to take responsibility, said Asco, though he was aware of the "house rules."

Consistent progressive discipline needed: Arbitrator

The arbitrator found that there was a history of "limited discipline for employee discrepancies." Other employees had received lesser discipline for similar incidents, though Asco claimed Niedbalski's attempts to cover up his errors made his misconduct more serious. In addition, he wasn't given an opportunity to explain his actions.

"A critical component of the corrective discipline approach is that the employee is told of the corrected expectation and is advised of the consequence of not correcting the behaviour or work performance," said the arbitrator. "Without such knowledge an employer is not free to impose the ultimate employment penalty except for certain quite serious employment offences."

The arbitrator also found that Niedbalski didn't completely hide his discrepancies, as he told his partner in most cases. Given that the primary reason for his termination was hiding discrepancies, that fact should lessen the discipline since it cast doubt that he fully intended to conceal, said the arbitrator.

The arbitrator found Niedbalski violated the procedure on reporting errors but he did not fully realize the seriousness of his misconduct. As a result, a more progressive approach to discipline was more appropriate to make him understand the consequences. Asco was ordered to reinstate Niedbalski with a 10-day unpaid suspension. See *ASCO Aerospace Canada Ltd. v. I.A.B.S.O.I., Local 712*, 2012 CarswellBC 210 (B.C. Arb. Bd.).

CASE IN POINT: IMMIGRATION

Work permit dispute a non-union matter

Foreign worker complained of employer's lack of support for 3rd certification attempt; employer terminated him after 2nd failure

BACKGROUND

Discretionary duty of representation

WHEN foreign workers apply for a work permit in Canada, it is usually to work in a specific job for a specific employer, who may help the worker in getting the permit. The work permit usually only permits the worker to work for that employer. As a result, the job is often already in place and the details have been worked out before the permit is approved.

If the foreign worker is unionized, to what extent does the union have to protect the worker's status? This question was raised when an Alberta foreign worker complained his union didn't meet its duty of fair representation by helping him convince his employer to let him take a trade exam — for a third time — that he needed to maintain his eligibility under his work permit, as well as address a change in his schedule in his original employment offer. Immigration lawyer Sergio Karas discusses the case and what employers with foreign workers should take from it.

| BY SERGIO KARAS |

IN A short but interesting decision, a panel of the Alberta Relations Board dismissed a grievance by a foreign worker alleging that the union representing him breached its duty of fair representation. The worker claimed that the union refused to enforce his work schedule as previously agreed with the employer, and by failing to assist him to force the employer to request a further opportunity to qualify for trade certification in his profession.

In *De Bruyn v. U.M.W.A., Local 2009*, a foreign worker from South Africa came to Canada after the employer assisted him to obtain a work permit as an industrial electrician, presumably obtaining a Labour Market Opinion (LMO). As is customary, the conditions set out in the work permit were that the employee was only authorized to work for his specific employer, in the occupation described and at the location specified. Prior to commencing work, the foreign worker accepted an offer of employment that provided details of his shift rotation and hours of work. Employment was conditional upon his obtaining provincial trade certification.

The foreign worker accepted an offer of employment that provided details of his shift rotation and hours. Employment was conditional upon his obtaining provincial trade certification.

New collective agreement changed shift schedule

Shortly after the hiring, the union entered into a first collective agreement with the employer and a new work schedule was adopted. The foreign worker took issue with the new schedule, arguing that he would have made more money under his agreement with the employer. He wanted the union to take action, but it refused to do so, advising him that his work schedule as originally agreed upon with the employer was a non-union matter.

At the same time, the foreign worker twice failed his provincial trade examination, and his application for trade certification with Alberta Apprenticeship and Industry Training was cancelled. The employer terminated his employment, noting that he was no longer eligible to work as he had failed to obtain the requisite trade certification. The foreign worker asked the union to grieve his termination and force the employer to request the regulatory body to allow him to write his trade examination for a third time. The union declined to grieve and took the position, after seeking legal advice, that a grievance aimed at forcing the employer to support another exam for the foreign worker or to continue employing him with a work permit when he had twice failed to establish his qualification was not viable. Instead, the union contacted Apprenticeship and Industry Training in support of the foreign worker's request to write his trade examination a third time, without involving the employer.

The board held that the duty of fair representation included requiring unions to act in good faith without acting arbitrarily or discriminatorily. It summarized the features of that duty as set out in the jurisprudence. The board agreed that unions enjoy a considerable amount of discretion when

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CASE IN POINT: IMMIGRATION

Employee wanted to file grievance allowing third trade exam

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they deal with grievances, and that they may settle or drop them, even if the affected employee disagrees.

Schedule under work permit a non-union matter: Board

After examining the legal requirements of the duty of fair representation, the board concluded that the union's refusal to grieve the work schedule promised to the foreign worker prior to the existence of the collective agreement fell within the discretionary scope of the duty of fair representation, and dismissed that part of the complaint on the basis that it had no jurisdiction to address it as it was a non-union matter.

With regards to the union's handling of the foreign worker's termination of employment, the board noted that the employee twice failed his trade examination and that his score on the second exam was lower than on the first. The foreign worker wanted the union to file a grievance that would force the employer to provide support for him to be tested a third time. The union took the position that a grievance was not viable in the circumstances. The board concluded that the duty of fair representation does not require a union to bring a grievance merely because an individual asks it to do so. The union is entitled to assess the merits of a grievance and its chances of success at arbitration. The complaint filed by the foreign worker did not suggest the kind of conduct necessary to prove a breach of the duty of fair representation, and there was no evidence to indicate that the decision not to grieve his termination was arbitrary, discriminatory, seriously negligent, or made in bad faith, said the board.

Interestingly, under the terms of an LMO, employers are obligated to provide wages and working conditions agreed upon with the foreign worker at the time of extending the offer of employment. In fact, Service Canada has auditing policies in place based on its encompassing regulatory power to monitor whether employers are abiding by the terms of LMOs. This policy has been in force since April 2011 to ensure that employers do not take undue advantage of foreign workers.

Under an LMO, employers are obligated to provide wages and working conditions agreed upon at the offer of employment. However, the worker was unable to perform his duties, so he couldn't argue that the employer failed to do so.

It is noteworthy that in *De Bruyn*, there was no mention of this policy, which appears to collide directly with the collective agreement. In any event, the employee was no longer able to perform his duties as an industrial electrician given his failure to obtain trade certification, so he could not argue that the employer failed to provide the wages and working conditions agreed upon. In other circumstances, however, that discussion may lead to a different result.

Employers should be aware that employing foreign workers entails a number of obligations that include providing specific wages and working conditions agreed upon and reflected in either an LMO or work permit. They must abide by all conditions set out in the LMO to avoid potential penalties. Employers should always seek legal advice before terminating a foreign worker, or changing wages, duties, location of employment, or other working conditions.

For more information see:

■*De Bruyn v. U.M.W.A., Local 2009* (February 9, 2012), Doc. GE-06224 (Alta. L.R.B.).

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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. Recent topics include not-so-independent contractors, differentiating between harassment and personality conflicts in the workplace, resignations, safety-sensitive workplaces, the aging workforce, frustration of contracts, and last-chance agreements. Each blog includes a tool open to anyone to write a comment and start a discussion, so comments are welcome.

You can get to the blog by visiting www.employmentlawtoday.com and clicking on the employment law blog banner. Come and join the conversation.

Notice and severance serve different purposes: Court

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ing notice."

Therefore, the court determined that Mattiassi was entitled to receive the 26 weeks of severance pay claimed, indicating that the working notice provided to her could not reduce the severance pay owed. Severance pay must be paid separately from any working notice provided, given that working notice is "earned pay" and severance pay is provided as "compensation."

Tips for employers

Despite an employer's attempt to provide an employee with her full notice obligations upon termination through working notice, *Mattiassi* highlights the necessity to ensure that both the correct amounts of statutory payments are made and that such payments are provided in the correct manner upon termination. As demonstrated above, failure to do so can result in costly litigation to determine whether the requirements under employment standards legislation have been fulfilled, and may result in the employer being obligated to provide more notice than otherwise required had the severance been paid correctly.

In many instances, employers may be able to avoid this otherwise expensive landmine by having the employee sign a termination letter indicating that the working notice being provided includes her statutory entitlements. By doing so, the employee may be found to have agreed to receive her severance in installments, such as permitted by Ontario's Employment Standards Act, 2000. However, without such an agreement with the employee, an employer may be left exposed to possible litigation. Employers should be aware of the *Mattiassi* decision, the possible implications that may result if severance is not provided in the proper form, and the need to ensure that the requirements under the legislation are always fulfilled. See *Mattiassi v. Hathro Management Partnership* 2011 CarswellOnt 1431 (Ont. Small Cl. Ct.).

Ronald S. Minken

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ASK AN EXPERT

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receiving a complaint or becoming aware of the misconduct, where possible. The investigation should also be concluded as soon as possible.

•Thoroughness: The investigator should make efforts to interview all of the relevant witnesses, on a face to face basis, and balance the interests of the complainant and accused. The accused should be given the opportunity to properly respond to each complaint that is advanced against her.

•Impartiality: The employer needs to conduct the investigation in a fair and unbiased manner, and cannot carry any pre-conceived notions into the investigation. This makes the choice of investigator important as well. The reasonable apprehension of bias is also a potential issue. An employer could be liable even if it is possible that a reasonable person would perceive impartiality in the process — for example, if the investigator was related to the complainant. If bias was found, it would undermine the validity of the investigation and, for this reason, this element is significant.

•Confidentiality: An employer should ensure that all aspects of the investigation are kept confidential. Only those who need to know about the investigation should know. It is important to maintain the view that the accused person is innocent until proven guilty. Additionally, privacy laws may be applicable to the distribution of information in this context, and should be considered.

An additional area of potential liability for an employer conducting an internal investigation surrounds the choice of investigator. To avoid any actual or apprehension of bias, an employer should not choose the individual who received the complaint, the supervisor of the accused or the complainant, or a close friend of the complainant or accused. The investigator should not possess any characteristics that would create the appearance of favouritism. Investigators should have skill and experience in interviewing, credibility, sensitivity towards cultural differences, an impartial approach, and knowledge and understanding of the type of misconduct or area in issue (such as occupational health and safety or harassment).

It is possible to conduct an internal investigation in the workplace. However, an improper or unfair investigation could expose the employer to significant liability. If an accused person loses her job or is otherwise adversely affected as a result of an unfair investigation, that employee could be successful in an action for wrongful dismissal, for example. Similarly, any form of bias or discrimination could result in a human rights complaint against the employer. The most effective way to limit this liability is to consider whether the employer is capable of ensuring that the necessary elements of an investigation can be met internally. If not, the prudent course of action may be to go with an external or professional investigator.

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MORE CASES

COMPILED BY JEFFREY R. SMITH

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placed on it shaped to say "I heart you." She didn't know who had done it, though another worker saw the employee pushing a piece of fat onto a piece of meat. The employee initially denied doing this as well as the Valentine's Day carving, but eventually admitted to both.

AMP interviewed another worker on March 3, and the worker said he saw the employee carving a sad face on a piece of meat. The worker said he pulled it off and the employee then carved a happy face. The co-worker noted the carving was on a cut of meat that was usually discarded as scrap. AMP terminated the employee for misleading it and for his misconduct.

The arbitrator found that there was enough evidence to conclude the employee had patched fat onto a piece of meat in addition to his meat carving and he should have known it was unacceptable conduct that could lead to discipline, even if it was scrap. However, the arbitrator also found there was no indication that such misconduct would lead to discipline as serious as termination.

"There is no evidence before me that at any time, including when (the supervisor) circulated on Feb. 14, employees were ever made aware that patching fat onto a piece of (meat) or carving a piece of (meat) destined to be scrap would be a cause for discipline let alone discharge," said the arbitrator. "Further, there was no shared expectation on the part of employees that such conduct, or even the more serious misconduct of carving a saleable cut of meat, would result in discharge."

The arbitrator determined a suspension would be appropriate discipline and ordered AMP to reinstate the employee with no loss of service or seniority for the nine months since his firing, but with no back pay. See *U.F.C.W., Local 175 v. A Meat Processing Co.*, 2011 CarswellOnt 14384 (Ont. Arb. Bd.).

WRONGFUL DISMISSAL: Termination for serious safety violation inconsistent with past discipline: Court

THE TERMINATION of an Ontario machinist was disproportionate to his misconduct, despite the seriousness of his safety violation, the Ontario Superior Court of Justice has ruled.

John Plester worked for plastic manufacturing company Polyone in Orangeville, Ont., for 17 years. Over the years, Plester worked his way up to the position of line supervisor, which involved supervising several employees running the manufacturing of plastic pellets. Plester had a few minor instances of discipline, but nothing serious.

Polyone emphasized safety at its workplace, as heavy machinery and chemicals were used in its manufacturing process. It provided regular safety training to employees and had "cardinal rules" that included the requirement that any machinery being worked on should be locked out and tagged so it couldn't start up unexpectedly. Another rule required employees to report any safety violations, no matter how minor.

On Sept. 23, 2009, Plester was doing paperwork in the supervisor's office when he heard a particular machine, called a dicer, wasn't running. He went out to help get it going again. Two of the employees working at the time were men Plester didn't get along well with.

Plester shut off the dicer and flipped the switch of the machine's dryer to test it. He then vacuumed plastic dust out of the dryer's bottom. However, as he did so, one of the employees told him he had to lock out the dryer before opening it. Plester was annoyed because he felt the two employees weren't helping, and he told them he didn't have to because he was just vacuuming the bottom. When he was done, he realized one of the others had locked out the dryer. According to the employees, Plester told the others to get the lock off and get to work, acting upset and harsh towards them.

Plester was embarrassed that he had forgotten to lock out the dryer, but didn't want to admit it. He felt he needed to "get his head around" what he did and didn't report it to the health and safety co-ordinator. However, one of the employees called another supervisor to report it.

The next morning, Polyone interviewed Plester and the employees. Plester was sent home after his interview and, a week later, he was told he was being dismissed for wilful misconduct, which eliminated his right to statutory notice of termination.

The court found there was no question Plester's violation of the safety protocol was serious. Failure to lock down the dryer on the dicer could have caused serious bodily harm if someone flicked the power switch while he was vacuuming it. The employees and even Plester himself were shocked at what he did, and Plester's reason for not immediately reporting it was that he knew he would be in serious trouble, said the court.

The court also found Plester's position as a supervisor was another concern for Polyone. Failure to follow the "cardinal rules" increased the chance they wouldn't be followed by other employees, after his example.

However, it was found that previous instances of an employee failing to lock out a machine did not result in termination but instead one-week suspensions. As a result, Plester's dismissal was not consistent with established discipline for such misconduct and was not proportional to normal practice by the company, said the court. The court also noted that Plester didn't plan to violate the rules. and his misconduct was not wilful. Polyone was ordered to pay Plester 14 months' salary in lieu of notice.

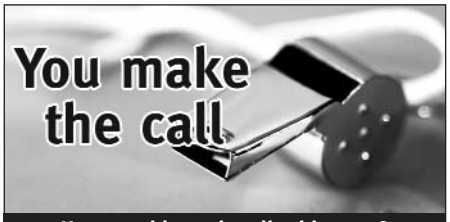
"There was an element of spontaneity in the act itself and at most a 'deer in the headlights' freezing of intellect in the delay in reporting," said the court. See *Plester v. Polyone Canada Inc.*, 2011 CarswellOnt 15516 (Ont. S.C.J.).

Public works director walks off job

THIS EDITION of You Make the Call features a public works director who walked off the job during a busy time.

Kenny Sam was hired by the Tl'azt'en Nation, a First Nations community in north central British Columbia, in 2006 to be its public works director. He was responsible for the maintenance and operation of community infrastructures and capital projects, as well as supervising public works employees and preparing budgets and reports.

The Tl'azt'en Nation had a policy employees had to sign that stipulated any absence for more than five consecutive days without permission or a good reason would be considered a voluntary resignation. Employees were also required to call their supervisor first thing in the morning if they were going to be absent or late, and formal approval was required for leaves. In the case of medical leaves, a medical note was required for absences of more than three days.



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

In January 2010, the Tl'azt'en Nation's water supply was found to contain e.coli bacteria amounts greater than safety standards. Sam was the only staff member who had a water treatment plant operator designation, so the Tl'azt'en Nation relied on him to be a leading figure on the team dealing with the crisis. It was a hectic time for the Tl'azt'en Nation council, and the executive director had to manage three departments after staff left.

On Jan. 29, 2010, Sam left work and told the chief and a band councillor that he was going to go on "stress leave or WCB" so he wouldn't be fired. On Feb. 8, he faxed a medical note to the executive director that stated he was off for medical reasons. He didn't fill out a leave application form because, though official procedure was to submit a form approval in advance, employees often did it when they came back. He also felt the medical note explained his situation enough. Sam applied to WorkSafeBC for benefits but was denied. He was later granted medical employment insurance.

The executive director did not consider the medical note to be sufficient due to its lack of information on why Sam couldn't work or his expected return date. He didn't hear from Sam, but made no attempt to contact him, feeling the onus was on Sam to inform the employer of his situation. The executive director drafted a letter on Feb. 15 that had no letterhead, but didn't know if it was sent. Sam denied receiving it.

On March 29, the Tl'azt'en Nation issued a termination letter to Sam indicating that since it had received no communication since he "walked off the job," it considered him to have violated its policies and procedures for leaves and abandoned his employment. An email to him several months later clarified that he had voluntarily quit.

You make the call

☑ Did Sam abandon his employment?
OR
☑ Was he unjustly dismissed?

IF YOU SAID Sam was unjustly dismissed, you're right. The adjudicator found there were no subjective or objective elements that suggested Sam intended to quit. The Tl'azt'en Nation did not have any idea whether Sam intended to return to work, but didn't make any effort to communicate with him during his absence. Though it didn't consider the medical note to be sufficient, it didn't advise Sam of this and didn't make any attempts to obtain the information it needed, said the adjudicator, noting that the executive director felt the onus was on Sam.

Since Sam didn't receive any word indicating otherwise, from his perspective he had done enough to show he was on medical leave and had not abandoning his employment, particularly since he had told the chief and a councillor that he was going on stress leave, said the adjudicator. With the medical note submitted, Sam assumed he could fill out a leave form when he returned.

The adjudicator also found the employment relationship was not irreparably damaged, other than some difficulty between Sam and the executive director, which already existed and may have contributed to the lack of communication. The Tl'azt'en Nation was ordered to reinstate Sam to his former position, with all back pay from his termination date. See *Tl'azt'en Nation v. Sam*, 2011 CarswellNat 5255 (Can. Adj. under the Canada Labour Code). CELT

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