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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

SEPTEMBER 5, 2012

Fired long-term employee gets more than \$800,000

Jury gives largest punitive damages award in Canadian employment law history

| BY RONALD MINKEN |

A JURY of the British Columbia Supreme Court has awarded an employee more than \$800,000 in damages after he was terminated without notice after 34 years of service.

In *Higginson v. Babine Forest Products Ltd.*, the employee, Larry Higginson, was employed at a sawmill operated by Babine Forest Products for more than 30 years when the sawmill was purchased by Hampton Lumber Mills. After the sale, Higginson continued to work at the sawmill for three more years until he was terminated, allegedly for cause, in October 2009. At the time of termination, Higginson was not provided with any notice. As a result, he commenced legal proceedings against both Hampton Lumber Mills and the former owner of the sawmill, Babine Forest Products, for damages for wrongful dismissal as well as punitive damages.

A three-week trial unfolded and a jury determined that Higginson had been wrongfully dismissed from his employment and that there was no merit to the allegations of cause raised by the employers. The jury awarded Higginson approximately \$809,000 in

damages, including \$236,000 for pay in lieu of reasonable notice and \$573,000 in punitive damages due to the employers' improper conduct in terminating Higginson's employment. The punitive damages were for Hapton's misconduct in the dismissal, such as making unsupported allegations of cause and using those allegations to justify the lack of notice for dismissal. The damages awarded in this case represent the largest punitive damages award in an employment law case in Canada.

Jury trial unusual in employment law

This case is noteworthy not only for the large amount of damages awarded to the former employee, but also due to the fact that the decision was determined by a jury rather than a judge. Most employment law cases are heard and decided by a single judge or a panel of judges at

the higher levels of court. It is rare for a party to request that an employment law matter be heard by a jury. The reason for this is due to the high level of risk associated with having a jury of peers evaluate evidence and render judgments as compared to experienced members of the bench. As jury

A request for a jury in an employment law matter is rare, due to the high level of risk associated with having a jury of peers evaluate evidence and render judgments as compared to experienced members of the bench.

WRONGFUL DISMISSAL

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Last chance agreement doesn't apply outside of work: Arbitrator

A TORONTO transit employee's last chance agreement only applied to his behaviour while at work, not outside of the workplace, an arbitrator has ruled.

Boyd Byron was an operator with the Toronto Transit Commission (TTC). After some incidents where Byron displayed unprofessional and aggressive behaviour at work, his employment was terminated. However, the union negotiated with the TTC and Byron was reinstated under a last chance agreement. The agreement stipulated that if he showed in any further unprofessional and aggressive behaviour towards "supervisory staff, employees/co-workers or customers" or contravened the TTC's workplace violence policy, code of conduct, or the Ontario Human Rights Code, he would be immediately fired.

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Ask an Expert

with **Brian
Johnston**



Stewart McKelvey, Halifax

Have a question for our experts?
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HEALTH AND SAFETY: Drug and alcohol testing following accident

Question: If an employee who operates machinery and other equipment requiring a certain level of skill is involved in a serious accident at work, can the employer order the employee to be tested for drugs and alcohol? If the workplace is unionized and the collective agreement doesn't address the situation, what can the employer do?

Answer: The first response to this question is another question: does the employer have a policy in place with respect to drug and alcohol testing? If so, and if the policy is reasonable and has been effectively communicated to employees, the employer will likely be able to test.

Even with a policy, however, an employer must be careful not to require a test unless there are reasonable grounds. Fortunately, reasonable grounds can be established as part of the policy. In *Imperial Oil Ltd. v. C.E.P., Local 900*, for instance, a policy indicated that the occurrence of a serious accident at the workplace (which was a safety-sensitive environment) was reasonable grounds for conducting testing.

An employer must take care to follow its own policy. In *Weyerhaeuser Co. v. C.E.P., Local 447*, a female employee was taken in the back of a van (which

had child-proof locks) to a hotel to provide a urine sample. Four men waited outside the bathroom for her to produce the sample, which was then couriered to an American laboratory (contrary to the policy, which stated that the sample would be sent to a Canadian laboratory). The way in which the testing was conducted was not in keeping with the policy, nor with any respect for the employee's dignity. Damages against the employer were awarded.

Unionized workplaces can also have policies, even if the collective agreement is silent. Therefore, if the employer of a unionized workplace has a reasonable policy in place which does not otherwise contravene the collective agreement — which does not expressly address the situation —, the employer will likely be able to require the employee to submit to testing following a serious incident.

Even with a policy, an employer must be careful not to require a drug and alcohol test unless there are reasonable grounds. Fortunately, reasonable grounds can be established in the policy.

If there is no policy in place, an employer will have a difficult time requiring a drug or alcohol test, particularly if there are no reasonable grounds to suspect that the employee has ingested a prohibited substance. Employers who attempt to require a test without having a policy in place risk the employee taking action through a labour standards or human rights application, a grievance, or a lawsuit.

As author Clarissa Pearce points out in her 2008 Alberta Law Review article, "Balancing Employer Policies and Employee Rights: The Role of Legislation in Addressing Workplace Alcohol and Drug Testing Programs," the jurisprudence surrounding drug and alcohol testing policies has emerged from a large variety of scenarios and is, therefore, largely unsettled. Very

recently, the Supreme Court of Canada granted leave to appeal in the case of *Irving Pulp & Paper Ltd. v. C.E.P., Local 30*. The question in that decision revolved around random alcohol testing (as opposed to testing post-accident). However, some basic principles, such as whether, or to what degree, a workplace must be considered dangerous before testing can be imposed, will hopefully emerge.

Overall, an employer's best policy is to:

- Have a reasonable policy in place
- Make sure the policy is communicated to all employees and applied fairly and consistently in the workplace.

HUMAN RIGHTS: Longer salary continuance for top employees

Question: Our company rewards better workers with higher salaries. Is there any liability risk if we reward these employees with longer salary continuance payments if they are laid off with a disability?

Answer: This is an interesting question without any reported decisions that can guide us in our answer. The potential liability arises as if there is an allegation of discrimination based on disability. However, on one level, the employer can say that it is providing disability coverage to all employees and that, therefore, it is not discriminating against employees based upon their disability. The employer can then say that any differentiation among employees with respect to the duration of the disability benefit period does not arise due to any distinction based on disability, but rather is based upon one employee being a "better worker" than another. We know that the amount of disability benefits depends on the employee's compensation. Therefore, workers with higher salaries receive more money from disability than

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Felling tree on co-worker warrants suspension, not firing

Forestry worker didn't follow exact safety procedure but did care about safety: Arbitrator

| BY JEFFREY R. SMITH |

A **LENGTHY** suspension was more appropriate discipline rather than termination for a British Columbia forestry worker who didn't properly check to see if his partner was clear of a tree he felled, an arbitrator has ruled.

Cliff Cyr, 49, was a certified tree faller for Western Forest Products, a lumber and forest management company based in Vancouver. Cyr started working for Western in 1982, becoming a faller in 1997. Between 1992 and 2002 — a period during which Cyr had problems with drugs and alcohol — Cyr received several warnings and a three-day suspension for unsafe work practices and unauthorized absences. Cyr overcame his problems, though he had a relapse in 2010 when he received another three-day suspension for harassing other employees and damaging equipment. He attended counselling following that incident.

On March 29, 2012, Cyr and two other Western employees were assigned to an area to fall a tree that had been reported as dangerous to operations. When they arrived at the site, Cyr and one of the others walked up to the tree and worked out the best way to cut it down. Cyr began cutting with a chainsaw and the co-worker helped by tapping in wedges, then moved into a pre-cut getaway trail.

Tree fell on worker

The two workers stepped away and the tree fell into two other leaning trees, so Cyr cut those as well. The co-worker thought they were done as he didn't see any other damage caused by the original tree. Cyr, however, noticed another tree that leaned over an area where there could be workers, so he told the

co-worker he was going to fell that tree as well. Cyr thought the co-worker said "OK" and watched him walk away along the getaway trail for several seconds.

However, the co-worker hadn't heard Cyr and he only walked partway up the trail around some debris and then headed back towards Cyr, when he heard Cyr yelling. Cyr had cut the tree and noticed the co-worker was walking back, so he yelled at him to get out of the way. The tree fell and knocked the co-worker down, injuring his ankle. Fortunately for the co-worker, the tree didn't fall all the way and he survived.

Following the incident, WorkSafeBC issued orders against Western, Cyr and the co-worker for not following proper falling procedures. Cyr acknowledged that he should have cut a second getaway trail and should have made sure the co-worker understood what Cyr was doing and had moved to a safe area before starting to cut. He accepted responsibility and admitted the accident was preventable.

Cyr was suspended indefinitely pending an investigation. Since Cyr had not properly set up escape trails, created two leaning tress with his initial felled tree, and hit his co-worker with a tree, Western decided to terminate Cyr's employment for acting in a "reckless manner" and violating company rules and WorkSafeBC regulations. Western claimed it had lost faith in his ability to do the job safely, particularly since he had undergone progressive discipline with previous warnings and suspensions.

Conduct was careless but not reckless: Arbitrator

The arbitrator acknowledged that there was sometimes a culture in West-

ern's workplace where procedures were not always followed to the letter, which seemed to be the case when Cyr thought his co-worker was aware of his decision to cut down the last tree. However, the arbitrator also noted that "when two fallers are in the same area, the faller with the saw is responsible for the situation." Since Cyr made the decision to cut down the last tree because it may have been dangerous, it was his responsibility to ensure the proper safety procedures were followed and his co-worker understood what was happening, said the arbitrator.

Even though Cyr thought his co-worker heard him and understood Cyr was going to cut down the tree, they should have agreed upon a safe zone and Cyr should have waited until he knew for sure the co-worker had reached the safe zone. However, he assumed the co-worker would continue walking and began cutting before he saw the co-worker was safe.

The arbitrator disagreed with the company's assertion that Cyr was reckless, as Cyr was concerned with safety and didn't "deliberately disregard" where his co-worker was. However, the arbitrator found Cyr made several serious errors that didn't follow safety procedures. This was particularly concerning because Cyr had been disciplined several times in the past for unsafe practices. The arbitrator also noted that Cyr owned up to his mistakes and was remorseful for his conduct.

The arbitrator found it was possible for Cyr to return as a productive and safe employee and, given his 30 years of service, termination was too harsh. Western was ordered to reinstate Cyr to his position with four-month suspension. See *Western Forest Products Ltd. v. U.S.W., Local I-1937*, 2012 CarswellBC 2085 (B.C. Arb. Bd.).

WRONGFUL DISMISSAL

Foreign worker must establish language ability

Insufficient language skills and no incentive to leave were reasonable justifications for visa officer to refuse work permit: Court

BACKGROUND

Speaking the same language

FOREIGN workers who are applying to work in Canada — and employers who are applying to have a worker come to Canada to work for them — have to prove a certain number of things before the worker will be allowed to take a job. The worker's skills must be appropriate for the specific duties of the job, the worker must be able to speak functional English or French, and Citizenship and Immigration Canada must be confident the worker will return to his or her country when the work permit expires.

When an employer offers someone overseas a job in Canada and invests in an effort to bring her to Canada, it better make sure that candidate will meet the requirements for a work permit, or it might find that investment wasted.

| BY SERGIO KARAS |

THE ABILITY to speak, write and understand English or French has recently become a lightning rod in the debate of who can come to Canada. While the focus of government efforts has been primarily on the language ability shown by potential applicants for permanent residency, employers should take note of the fact that language skills are also important in the recruitment of temporary foreign workers and the granting of temporary work permits.

In a recent Federal Court case, a foreign worker applicant sought judicial review of the decision made by a visa officer at the Canadian High Commission in New Delhi, India, refusing his application for a temporary work permit as a kitchen helper, due to the fact that he failed to establish his language ability.

In *Singh v. Canada (Minister of Citizenship and Immigration)*, the worker secured a job offer to work full-time as a kitchen helper at the Hotel North in Goose Bay, N.L. He submitted a posi-

tive Labour Market Opinion and provided the visa officer with a supporting letter from his former employer in the Indian army, another from his current employer confirming that he understood English sufficiently well to perform his duties in Canada, and a third one from the his prospective employer in Canada indicating that she had personally spoken to the applicant and found his language abilities to be sufficient.

In addition to documentation supporting his language skills, the applicant also provided an explanation indicating that he had no close family ties in Canada; his wife, two children, parents and sibling all resided in India; he and his wife had a combined \$56,000 in assets in India; and he would receive half of his father's estate, totalling a further \$53,000. His current employer also provided confirmation that he would be able to return to his job when he came back from Canada.

Worker's grasp of English not sufficient: visa officer

After reviewing the documentation

the worker provided, the visa officer rejected the application on the basis of two main factors: First, he found that the worker had insufficient language skills and, second, he found that the applicant would have no incentive to return to India, given the disparity in earning power between the two countries. The worker sought judicial review of that negative decision.

In its reasons, the Federal Court relied on two important cases. First, it referred to the 2011 decision of *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, where the Supreme Court of Canada clarified the approach to be taken in judicial review of the reasoning behind an administrative decision. In that case, the court noted that every reason, argument, or other detail, need not be contained in the reasons, nor is a "decision-maker... required to make an explicit finding on each constituent element... leading to its final conclusion." The reviewing court must simply be able to understand why the decision was made. The reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."

Second, the court relied on *Chhetri v. Canada (Minister of Citizenship & Immigration)*, where the same court held that the provisions of the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations had the combined effect to require visa officers to be satisfied that individuals are not inadmissible and that they will leave Canada on expiry of their visa. The court found that it is often overlooked that it must

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CASE IN POINT: IMMIGRATION

Visa officers must be confident worker will leave Canada

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be “established” that the foreign national will leave at the end of the visa. Therefore, the combined effect of the statutory provisions does not leave much room for officers to give the applicant the benefit of the doubt; rather, there is a positive obligation that it be established that the foreign national will leave before the visa can be issued.

Similarly, an applicant must establish that he meets the requirements of the job for which he seeks to come to Canada. In *Singh*, the court noted that the worker did not meet the burden of establishing that he met the language requirements of the job description and, while there was some evidence regarding his language ability — including letters from his superiors, and from his prospective employer — those letters did not confirm his ability to speak or write, but rather only his ability to understand English. That was a crucial deficiency in the evidence presented.

The court ruled that, even if the visa officer's reasons did not explicitly indicate that the letters were deficient because they did not mention the worker's written or oral English skills, it would be contrary to the guidance of the Supreme Court in *N.L.N.U.* to require such a statement in the reasons. The officer considered the letters, but concluded that the applicant's

English ability was insufficient to grant the work permit. The court held that based on a review of the record, that conclusion was reasonably open to the officer, and therefore judicial review could be dismissed.


Erroneous assumption not only reason for work permit refusal

While the court agreed that the visa officer erred by relying on the disparity in earnings potential between India and Canada to conclude that the applicant was not a temporary worker in good faith and that he might remain after the expiry of his work permit, the difference in earnings was not the only component of the officer's decision.

Visa officers must be satisfied that individuals are admissible and that they will leave Canada on expiry of their visa.

The court noted that the refusal letter also indicated a concern regarding the applicant's travel history, and that the appropriate notes were made by the officer in the computer system to support that conclusion. Because the officer reasonably found that the applicant did not meet the necessary language requirements, any error in considering the disparity of earnings between Canada and India was not crucial to the decision and did not alter the outcome of the application. The court

refused judicial review and upheld the visa officer's decision.

It is important to note that employers who intend to hire foreign workers should satisfy themselves that the candidates meet all the requirements of the position including language ability. If the position offered by an employer to a foreign worker requires understanding, oral and written language skills, then it is prudent to request that the applicant provide proof of that ability. Otherwise, employers risk investing considerable time and resources in the application process only to find that, despite obtaining a positive Labour Market Opinion, the visa post abroad will refuse the work permit application on the grounds that the candidate does not meet all the requirements for the job. 

For more information see:

- *Singh v. Canada (Minister of Citizenship and Immigration)*, 2012 CarswellNat 1025 (F.C.).
- *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 CarswellNfld 414 (S.C.C.).
- *Chhetri v. Canada (Minister of Citizenship & Immigration)*, 2011 CarswellNat 2726 (F.C.).



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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 off-duty misconduct, health and safety liability, accommodation and return-to-work programs, reasonable notice when the employer is struggling, monitoring employees on social media and notice of resignation. The blogs are meant to raise topics for discussion, so comments are welcome.

You can get to the blog by visiting www.employmentlawtoday.com and clicking on the employment law blog banner or go to www.hrreporter.com/blog/Employment-Law.

Jury more likely to draw on personal experiences

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members are not fully versed in legal issues and points of law, unlike judges, they may not fully appreciate the nuances being raised by counsel, which may in turn lead to unexpected and perhaps even extreme results, as in the *Higginson* case.

Further, it is possible that a jury may not view the facts in the same manner and with the same legal perspective as a judge. This can in turn contribute to an award that is either at the lower or upper limits of what would be expected had the matter been decided by a judge. Jury members are more likely to draw on their own personal experiences or those of loved ones which may cause them to relate more easily to one party or the other and to make a decision based on subjective facts rather than objective ones. Moreover, there is a higher likelihood of such an award being appealed on the basis of a misinterpretation or error of facts and law. For this reason, parties and their coun-

sel should carefully consider whether it is appropriate to have a matter heard by a jury versus a judge.

Lessons learned


This decision has many valuable lessons for employees, employers and their in-house counsel.

The \$573,000 in punitive damages were for Hapton's misconduct in the dismissal, such as making unsupported allegations of cause and using those allegations to justify the lack of notice for dismissal.

From an employee perspective, long term employees should be aware that their notice entitlements may be quite significant providing they are not bound by a termination clause restricting, or potentially eliminating, their common law notice entitlement. Employees should consult with an

employment lawyer to have termination packages reviewed before signing off on a release. This will ensure they receive a fair package which takes into consideration the employee's length of service, position and age, among other things.


From an employer perspective, employers and their in-house counsel should ensure that they treat employees respectfully during the termination process. They should carefully consider an employee's notice entitlements and should not withhold notice on the basis of cause allegations that are without merit and made for the purpose of trying to minimize an employee's notice entitlement. The *Higginson* case demonstrates that significant punitive damages may be awarded to employers who improperly allege cause and refuse to provide any notice on the basis of those improper allegations. It is always recommended that employers and their in-house counsel obtain legal advice with respect to the termination process and appropriate package to be provided to the terminated employee, when they are considering terminating an employee.

When it comes to deciding whether to serve a jury notice or to object to it, the parties should carefully consider whether they wish a jury to decide the case and the inherent unpredictability that may result from this. 

ASK AN EXPERT

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employees with lesser salaries. That has never been challenged successfully.

Therefore, likely there is no liability risk if a company rewards better employees with long salary continuance payments; whether that approach makes sense from a human resources perspective is, of course, up to the company to decide. 

For more information see:

- *Imperial Oil Ltd. v. C.E.P., Local 900*, 2006 CarswellOnt 8621 (Ont. Arb. Bd.).
- *Weyerhaeuser Co. v. C.E.P., Local 447*, 2006 CarswellAlta 1859 (Alta. Arb. Bd.).
- *Irving Pulp & Paper Ltd. v. C.E.P., Local 30*, 2011 CarswellNB 356 (N.B. C.A.).

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MORE CASES

COMPILED BY JEFFREY R. SMITH

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In December 2011, the TTC received a complaint from a member of the public. The woman claimed Byron drove by her in a parking lot in his own car and gave her the middle finger, then turned his car around and yelled a profanity at her. The woman said she ran into a store for safety but Byron followed her. Later, when she left the store the woman claimed Byron glared at her as he drove away.

The TTC felt this behaviour, which Byron didn't deny, violated his last chance agreement and terminated his employment on Dec. 30, 2011.

The union objected to the termination, arguing Byron's behaviour didn't fall within the scope of the last chance agreement and shouldn't be used as the basis for termination. The union said the agreement set out the "specific classes of people" with whom Byron must display professional behaviour and avoid aggressive confrontations. Since the person who complained about the behaviour was a member of the general public outside of TTC property, she wasn't supervisory staff, a co-worker or a customer at the time of the incident. Nor did it happen in the workplace, so it wasn't subject to TTC policies, said the union.

The union also argued that the workplace violence policy and code of conduct weren't incorporated into the collective agreement, so any violation of them shouldn't mean immediate dismissal because they were separate from the last chance agreement.

The arbitrator agreed with the union that the workplace violence policy and code of conduct didn't apply to the incident, because it happened outside of the workplace. Byron's behaviour did breach the standard set in the last chance agreement, but the person to whom he directed it was not someone specified in the agreement, said the arbitrator.

The arbitrator found that the last

chance agreement referred to the code of conduct and workplace violence policy, but only those two policies. Since those policies specifically stated they applied to conduct in the workplace, they didn't apply in this incident and the TTC could not use the last chance agreement as a reason for terminating Byron's employment. See *Toronto Transit Commission v. A.T.U., Local 113*, 2012 CarswellOnt 9024 (Ont. Arb. Bd.).

SUSPENSIONS: Privacy commissioner employee given 10-day suspension for insubordination

THE OFFICE of the information and privacy commissioner of Canada (OIPC) had reasonable grounds to suspend an employee for 10 days after repeated insubordinate behaviour, a labour arbitrator has ruled.

Lynne Chauvin was a paralegal in the legal services directorate for the OIPC. Initially hired for administrative work in 2007, she was considered a good employee and stuck to timelines. However, when she was appointed as a paralegal a few years after her hiring, the OIPC began having problems with her.

In 2010, Chauvin was disciplined for not co-operating with her supervisor, for which she was suspended for one day. On another occasion, she served a five-day suspension for not allowing her colleagues in the office to access the records and documents information management system. She also submitted unfinished work and didn't work well with co-workers on projects. Each time Chauvin was suspended, the OIPC gave her a letter warning that further misconduct could lead to more severe discipline, including termination of employment.

In November and December 2010, Chauvin didn't provide basic information to a new paralegal in the office after it was requested, she was absent at ses-

sions during the OIPC's information management week that she had been encouraged to attend, she didn't provide information for a training session and she arrived late to a training session. On Jan. 11, 2011, she was suspended for 10 days.

Chauvin filed a grievance, claiming she was often treated with disrespect by lawyers in the office and her supervisor screamed at her in December 2009. She said she often felt "verbally abused, threatened and harassed."

The arbitrator found all the incidents that the OIPC used as a basis for the suspensions constituted insubordination, which the arbitrator defined as "when an employee refuses to do what he or she has been told to lawfully do by the employer." The instances that Chauvin pointed to that she claimed were harassing or disrespectful to her were unrelated to the misconduct, said the arbitrator.

Since the instances of insubordination happened over a relatively short period of time and she had been suspended and warned before, the arbitrator found the OIPC was justified in imposing a longer suspension. The grievance was denied.

"(The OIPC) was justified in imposing a more severe suspension. (It) chose to impose a 10-day suspension. There was nothing unreasonable in the (OIPC) progressing from a five-day to a 10-day suspension in applying the principle of progressive discipline," said the arbitrator.

See *Chauvin v. Canada (Offices of the Information and Privacy Commissioner of Canada)*, 2012 CarswellNat 2386 (Can. Pub. Service Lab. Rel. Bd.). ■

MORE CASES

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U.S. consulate expels Canadian employee

THIS INSTALMENT of You Make the Call features a Canadian employee of a U.S. consulate who was fired.

Nadia Zakhary was a cashier at the Consulate General of the United States of America in Toronto. Zakhary, a native of Egypt, began working for the U.S. in its Agency for International Development in Cairo in 1983, where she worked for 13 years. She immigrated to Canada in 1996, became a Canadian citizen, and began working at the U.S. consulate in 1998. As a cashier, she greeted and helped U.S. citizens who came to the consulate to obtain or



renew passports, report the birth of a child in Canada, or register themselves.

On July 29, 2010, the consulate claimed Zakhary left her cash register unlocked while she went upstairs to get change. There was \$150 in the register, but nothing went missing during her absence. Zakhary admitted she left the register, but not for very long. However, she ignored an order to stop cashiering duties for the day. She also made two mistakes in transactions that required the consulate to give refunds. Zakhary apologized to her manager, though her regular supervisor was absent.

The consulate considered these incidents and also looked at the fact Zakhary had received a written reprimand in March 2009 for leaving a safe unlocked. She had also been counselled in June 2010 over eight sick days she had taken before or after a weekend and had been absent without authorization in March 2008. It decided to terminate Zakhary's employment on Aug. 3, 2010, with no pay in lieu of notice.

Zakhary filed a complaint of unjust dismissal under the Canada Labour Code, claiming her misconduct was not serious enough to warrant dismissal of such a long-term employee. The U.S. argued Canadian labour law did not apply to its employees and the Canada Labour Code had no jurisdiction in its consulate.

IF YOU SAID the U.S. was not immune to Canadian labour laws and Zakhary was unjustly dismissed, you're right. The labour adjudicator noted that Canada's State Immunity Act stated that "proceedings that relate to any commercial activity of the foreign state" constituted an exception to state immunity. Zakhary was under "an individual contract of employment in a purely administrative position" that wasn't related to anything diplomatic that would lead to diplomatic immunity. An individual contract of employment should be viewed as a commercial activity, said the adjudicator.

The adjudicator found the U.S.'s belief that employees of its embassy and consulates may fall under U.S. employment laws rather than Canadian ones was problematic, because "it suggests Canadians working in Canada in a clerical or administrative capacity at a foreign country's embassy or consulate do not have the protection of Canadian law in their employment relationship." The adjudicator felt this should not be the case and determined the Canada Labour Code applied to Zakhary's employment relationship with the U.S. consulate.

The arbitrator also found the allegations of misconduct by the consulate were not serious enough to warrant dismissal, particularly for someone who had been recognized as a good employee for more than 25 years. In addition, he noted that her regular supervisor — who might have been more aware of her pattern of performance — was absent on the day of her errors. Since there was no record of Zakhary making any previous errors or leaving the register open, the adjudicator found there should have been progressive discipline to deal with that misconduct, rather than going right to dismissal.

The U.S. consulate was ordered to reinstate Zakhary to her position, with compensation for lost pay and benefits since her unjust dismissal. See *Zakhary v. United States*, 2012 CarswellNat 839 (Canada Labour Code Adj.).

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Was Zakhary subject to Canadian labour law and unjustly dismissed?
OR
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