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## **EMPLOYMENT NOTES AND NEWS**

*Dear Friends;*

*Happy Spring! These articles may assist as you meet the daily challenges of management. Selected past issues of this newsletter are available on our web site. Hard copies are available upon request.*

*Sincerely;*

*Jay Josefo*

### **I**

#### **HR POLICY LEADS TO “JUST CAUSE” DISMISSAL**

Employee Mr. Daley, age 58 with almost 13 years of service, was dismissed for just cause in December 2002. Starting in August 2000 Daley's many shortcomings were the subject of progressive discipline pursuant to a well communicated and well applied HR policy. In a recent judgment of the Ontario Superior Court of Justice, Daley lost his wrongful dismissal suit against Depco International Inc., and was also ordered to pay \$11,000.00 in costs to the employer.

Why was Depco so successful at trial? Because long before this case Depco created, trained their employees upon, and properly applied a comprehensive human resources policy. The *Daley v. Depco* decision demonstrates the benefit of having and properly applying a comprehensive HR policy.

## **THE FACTS AND DECISION**

Daley was an assembly line worker. Between August 2000 and December 6, 2002 Depco relied upon nine incidents to establish “cumulative just cause” for the dismissal. These included five instances of negligence when performing employment duties resulting in costly assembly line stoppages, failing to call in when not attending work, attempting to start a fight with a co-worker, and the likely consumption of alcohol on the job.

Depco provided an Employee Handbook to all employees. The Handbook included what is commonly called a “sunset provision”, which provided that disciplinary action is removed from an employee’s record after one year. At trial the plaintiff relied upon the sunset provision to argue that the first four incidents occurred more than one year before the dismissal, and should not count toward the accumulated cause.

Mr. Justice Echlin of the Ontario Superior Court of Justice found that he need only consider the last four incidents during the final year of employment involving the plaintiff. These incidents were:

- 1) attempted instigation of a fight with a co-worker;
- 2) attending work under the influence of alcohol;
- 3) negligent performance of work duties leading to a shut-down of the assembly line; and,
- 4) lateness and absence without reasonable excuse.

The judgment endorsed the “contextual” approach established by the Supreme Court of Canada. Mr. Justice Echlin, using a contextual analysis, concluded that the four offences in the final year of Daley’s employment were sufficiently serious that, cumulatively, just cause was established. The Court found that the incidents, “when not viewed in isolation”, clearly fall below any reasonable standard of conduct that an employer was entitled to expect.

At trial the Human Resources Manager of Depco described the progressive discipline steps before termination. These consisted of:

- 1) counselling;
- 2) verbal warning;
- 3) formal written warning; and,
- 4) suspension.

Following that fourth step there could be termination for just cause.

In her evidence the Human Resources Manager said that she would “skip steps” if she concluded that a transgression was particularly egregious. The Court found that the HR policy manual did not provide her with such discretion. While cautioning that the HR policy manual ought to be re-written if it was desired that the HR Manager should have such discretion, the Court also observed:

“...While the wording of Depco’s manual may not reflect the company’s current professed intention, this employer ought not to be unduly chided for taking the time and trouble it did to create a corrective discipline regime containing five progressive steps. This is particularly so in a non-union work environment. It is also notable that documentation was routinely provided to the employee upon the occurrence of an incident meriting discipline.

Depco took care to clearly lay out the facts, the penalty if any, and notably, as the employee proceeded through the various progressive discipline steps, specific reference was made to the prior warnings given, the dates of the offences, and the prior transgressions. By doing this, the employee was clearly reminded of prior warnings, while at the same time advised as to the consequences of future violations of company policy. The employee was also asked to acknowledge receipt of copies of such notices in writing, while not necessarily being asked to admit an error. The employee’s additional comments were also solicited.

**This Court encourages employers to adopt clear and forthright disciplinary procedures and to apply them fairly.** By clearly setting out employer expectations and creating a fair and clearly documented regime of discipline, fewer misunderstandings will occur. In short, such a process is more transparent. However, in this instance, if the employer intends that its policies be interpreted in a fashion different than I have found, then it ought to immediately revise and properly give notice of such changes to their policy to provide further clarity. I should observe that there was an element of rigidity and self-granted discretion in the way [the HR Manager] administered her policy [emphasis added].”

Accordingly, the Court praised the employer for creating a progressive discipline system in a non-union environment. That the policy was well publicized and consistently applied also, I suggest, found favour with the Court. Instead of succeeding in his wrongful dismissal suit, Mr. Daley ended up owing the employer \$11,000.00 towards its legal costs.

## **LESSONS TO BE LEARNED**

There are five lessons that emerge from this recent decision:

1. The time taken to develop a Human Resources policy manual, including staff training and awareness, is time well spent. Employers who communicate expectations to all employees in a clear and consistent fashion will likely experience fewer problems, and will also have a solid paper trail if ever required.
2. “Just cause” need not be only one event. Rather, ongoing poor performance and disciplinary failures that are not condoned may become “cumulative just cause”.
3. For a “sunset provision”, consider how long past transgressions should remain on the record. It would be unreasonable to rely upon events of many years past in the absence of intervening problems. Deleting a past event prematurely from the record is also problematic. In Ontario motor vehicle offences remain on one’s driving record for two years. Should past employment transgressions be expunged after two years?
4. When applying the HR policy manual it is essential to follow the specific steps. In this case it may well be that the Court was more lenient than would be another Judge. There is nothing wrong with providing for reasonable discretion in the application of progressive discipline steps, so long as the policy specifically provides.
5. This case involved a civil action, wrongful dismissal claim in a non-union environment. In a collective bargaining relationship, with Daley’s union representative alleging a breach of the Collective Agreement, the outcome could have been different. Arbitrators have been known to take more lenient positions regarding progressive discipline than the courts.



## **II**

### **BLOWING THE WHISTLE – “WHISTLE BLOWER” PROVISIONS NOW PART OF CRIMINAL CODE**

The *Criminal Code* provides that it is an offence for an employer to engage in “reprisal” action against employees, which action is intended to prevent employees contacting authorities about a potential or existing

contravention of law, or to retaliate against employees for providing such information. The specific section is 425.1 of the *Criminal Code*.

The section provides that no employer or person acting on behalf of an employer shall take disciplinary measures against an employee in order to prevent the employee from providing information to enforcement officials. The potential contravention of law includes federal and provincial law, including the provincial *Occupational Health and Safety Act*.

This new provision of the *Criminal Code* in essence states what is already found in most provincial Acts governing employer-employee relations. For example, the *Human Rights Code* of Ontario prohibits reprisals against persons who exercise their rights under the Code. The *Employment Standards Act*, also, has anti-reprisal provisions. Breaches of such provisions can lead to serious sanction.

The criminalization, however, of reprisal, it can be stated, “*kicks this up a notch*”. In addition to being compelled to defend against a breach of reprisal accusation for a provincial Act, an employer, including an officer, director or other person in authority, could face criminal charges and, if convicted, imprisonment up to five years. Criminal charges are not only laid by the police. In Ontario, individuals can try to initiate a criminal prosecution by swearing an Information before a Justice of the Peace. There may be the potential for retaliatory criminal charges being initiated, by disgruntled former employees, for example. Justices of the Peace will have to scrutinize any such private Information with care.

When preparing the HR policy manual, as part of a “due diligence” review, a prudent employer may include an “anti-reprisal” provision. Reviewing corporate officer-director insurance coverage in light of this *Criminal Code* amendment may also well be a prudent move.



### III

#### **ONGOING FALL-OUT FROM THE GIANT MINE EXPLOSION**

In September 1992 nine miners were killed when an explosion tore through the Giant Mine in Yellow Knife, Northwest Territories. The survivors of the nine miners were awarded over \$10 Million in damages for wrongful death by Mr. Justice Lutz of the Northwest Territories Supreme Court in a December 2004 decision.

The background included a bitter labour dispute with the employer locking out its regular employees and engaging replacement workers. Pinkerton's security was engaged to safeguard the entrances to the mine because of the escalation of violent incidents preceding the September 1992 explosion.

The defendants to the litigation included Royal Oak Ventures Inc., the owner of the mine, the Canadian Auto Workers which represented the workers, and Pinkerton's. They all were found, in differing degrees, liable for the judgment. Mr. Justice Lutz found plenty of blame to share, including blame assigned to the territorial government.

The court found Roger Warren, the individual convicted and sentenced to life imprisonment for setting the bomb, responsible. The employer was criticized for escalating tensions and worsening the labour dispute by its determination to continue operating the mine during the strike with replacement workers, thus inflaming tempers. The Court found also that the CAW failed to control its membership; and that an act such as was committed by Warren was "logical and foreseeable" as a result of the encouraged escalation of criminal activities. Pinkerton's was found to have failed to safeguard the many entrances to the mine, while the territorial government was deemed to have failed to ensure that a safe workplace was maintained.

Twenty-six per cent of the liability was assigned to striking worker Roger Warren. Twenty-three per cent of the liability was assigned to Royal Oak, twenty-two per cent to the CAW, fifteen per cent to Pinkerton's, nine per cent to the territorial government and five per cent to three individual union members.

This decision demonstrates, in a compelling and tragic way, that there are few if any winners in a strike. Sometimes a strike is inevitable. Yet, if both employers and workers could, occasionally, step back to regain perspective, it might be remembered that each party needs the other, and that they will work together in the future.

Maintaining on-going communications, even during labour disputes, is thus essential for both workplace parties. This Court decision demonstrates the tragedy of what the Court noted was demagoguery on the part of the union, a "might is right" attitude on the part of the employer, and various other failings that are well categorized in the over one hundred page judgment.



**DID YOU KNOW?**

- many have asked, so let me confirm that I was re-appointed as a Vice Chair (part-time) of the Workplace Safety and Insurance Appeals Tribunal, for a third three year term. I am delighted to continue legal practice at Ricketts Harris, assisting my valued clients, and also adjudicating interesting cases at the WSIAT.
- that Ricketts, Harris is a full service “boutique” law firm located in downtown Toronto. With fixed operating costs, the firm offers first class legal service for reasonable fees.
- in addition to servicing business needs, the firm also offers personal legal services, including wills, estates and family law assistance.
- in addition to my interest in employment law, I also offer civil and commercial litigation services. Other members of the Ricketts, Harris team are also available to advocate before all Ontario Courts and tribunals.

For information or assistance regarding your legal needs, please contact Jay Josefo at (416) 364-6211, extension 244.  
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