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Bad Behaviour 2.0: Part 2 – Employees Getting Away With . . .

November 1, 2017*(2017-11-01T08:37:20+00:00)* By Peter Bowal*(Posts by Peter Bowal)* and Lindsay Thorburn*(Posts by Lindsay Thorburn)*

Introduction

We looked through the judicial and arbitral decisions and found ten more random instances of appalling employee behaviour that Canadian courts and arbitrators excused. The first five cases can be found in Part 1 of this article. In these cases, the employer fired the employee, but the court or arbitrator found no legal basis to do so, and ordered the employer to pay damages for wrongful dismissal and court costs.

6. *Hendrickson Spring – Stratford Operations v United Steelworkers Local 8773*

Avey (20-year employee) and Illman (5-year employee) used very harsh, profane and demeaning remarks to a co-worker at work (such as "you are a nobody to me" and "Brian is a fag"). Avey was accused of throwing a helmet at him and threatening physical harm against him. In one outburst, Illman shrieked: "[y]ou are nothing but a fucking big baby and a whining cry baby. I will take you out you fucking asshole, any place, any time. I will kick the fucking shit out of you right here, right now, so keep your fucking mouth shut." They showed no remorse. After they were fired in 2015, the arbitrator considered their dismissal too severe and they were both reinstated.

7. *Ontario Nurses' Association v Sunnybrook Health Sciences Centre*

An unidentified registered nurse and was fired for stealing different narcotics from her hospital employer and related breaches of trust and professional standards. She even had them in her jacket when she was being investigated and interviewed by the hospital. She falsified patient records to cover up the thefts which took place over 3 years. Her union said she did it because she was addicted to the drugs. The arbitrator reinstated the nurse to her job. One is reminded of Elizabeth Wettlaufer who admitted to killing eight senior patients in her care between 2007 and 2014 by administering lethal doses of insulin.

> The arbitrator found his comments had created a poisoned work environment and his conduct was sexual harassment in law and under the employer's policy. One might think this would be enough to justify the employer firing Doyle. However, the arbitrator concluded in this case these actions alone did not warrant summary dismissal.

8. *Kim v. International Triathlon Union*

Kim, in the sensitive position of communications manager for the headquarters (located in Vancouver) of world triathlon unleashed her inner frustrated voice a little too much and too often on social media. She was highly critical of her boss and went off on personal derogatory and defamatory outbursts which caused public relations problems for her employer. She continued to post and even acknowledged she could get in trouble for doing so. This case was the subject of an earlier tandem of *LawNow* columns (here and here). Kim's firing in 2012 was found to be wrongful two years

later. Although she had worked less than 2 years, she was awarded 5 months of wages and benefits by way of damages, or about $30,000.

9. *Geluch v. Rosedale Golf Assn.*

Geluch, the General Manager of the Rosedale golf club, was accused of treating employees badly, abusing expenses and charging his employer for personal purchases. It was alleged he took a folding table, ski racks, cabinets and other items from his employer. He was fired in 1997 when he was earning $129,000 because the golf club claimed that he shouted at, berated and swore at staff, whose health was affected; he took food and liquor; he had employees do work for him personally, for which he didn't pay; he used the club's credit card for personal expenses; and there was improper recording of accounts receivable. The Ontario court in 2004 would have none of that and determined that Geluch was entitled to a 15 months of wages, benefits and other damages (subject to offset for mitigated earnings for the last 2 months) of $267,662.50.

10. *Emergis Inc. v. Doyle*

At an office Christmas party at a local restaurant in 2002, Doyle pointed to three female employees and said, "[o]ne of the new girls would have to show everyone their titties." Then he turned to one of them and said, "you're exempt dear because your titties are too small." At the same party, Doyle asked one of them "have you ever seen a plate come?" and upon seeing a male employee under the table near one of the women's shoes asked, "are your hands wet under there?" Two months earlier, Doyle told a female employee who had recently started work and who had recently undergone oral surgery, "…you know how you can take care of that, give your boyfriend some oral sex. If it doesn't reduce the swelling, it will certainly reduce his." On another occasion when some employees were talking about purchasing an exercise bike so that they could exercise instead of going outside to smoke cigarettes, Doyle said "we had a bike once, but she left."

An unidentified registered nurse and was fired for stealing different narcotics from her hospital employer and related breaches of trust and professional standards. She even had them in her jacket when she was being investigated and interviewed by the hospital.

Doyle was a senior manager. The arbitrator found his comments had created a poisoned work environment and his conduct was sexual harassment in law and under the employer's policy. One might think this would be enough to justify the employer firing Doyle. However, the arbitrator concluded in this case these actions alone did not warrant summary dismissal. The employer's harassment policy contemplated an alternative to dismissal and the employer did not have just cause to fire Doyle. The sexual harassment misconduct needed to be more serious than it actually was to justify dismissal. There was no "physical or criminal assault or threat of assault, no promise of advancement in return for sexual favours, no propositioning for sexual favours and no discussion or description of pornographic materials." Doyle could be rehabilitated. The investigation of Doyle was flawed and employers must consider and propose an alternative to firing.

Doyle had seven years of service and was 43 years old, earning an annual salary of $113,000, when he was fired in 2002. Five years later, the Ontario Court of Justice upheld the arbitrator's original decision. Terminating Doyle's employment was without cause. Doyle was awarded ten months' notice and a further two months' notice to punish the employer for speaking to one of Doyle's prospective employers (interfering with a subsequent employment opportunity) for a total of $113,000 damages, plus $7,500 in costs (and perhaps more costs for earlier proceedings).

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