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Escorted ex-employee escorts employer to court

Employee claimed employer acted in bad faith in dismissal following unrelated investigation

| BY TOM GORSKY |

IT IS the practice of many employers to escort a dismissed employee out of the workplace. Particularly when dismissal is for cause, it can be prudent to ensure the employee leaves under the employer's watchful eye. However, sometimes this common practice can result in a claim the employer acted in bad faith.

This was the issue in a summary judgment motion before the Ontario Superior Court of Justice in *Brownson v. Honda of Canada Mfg.* The case has yet to be decided at trial, but the court's preliminary decision is a timely reminder that in this post-*Wallace* era employees are more likely to file a complaint about — and courts to evaluate — not only why, but also how a dismissal is carried out.

WRONGFUL DISMISSAL

Prior to Gerry Brownson's dismissal, his employer, Honda Canada, conducted an investigation into workplace misconduct. Brownson was one of 23 employees interviewed and Honda learned of certain issues about Brownson that were not related to the investigation.

Honda decided to terminate Brownson's employment. Significantly, Honda did not attempt to use the results of the investigation against Brownson to claim just cause. Rather, in the letter of termination, no explanation was given and Brownson was offered eight months' pay. He was also escorted off the Honda premises.

Dismissed employee felt humiliated

Brownson was not satisfied with the offer nor the circumstances of his dismissal, in which he alleged Honda acted in bad faith. In the context of the major investigation that had taken place, Brownson claimed:

- The decision to terminate him meant he had in fact been dismissed for cause
- Honda's selecting him to be terminated carried a stigma
- Being escorted out the door implied he had committed wrongdoing and this was the implicit message sent to his colleagues.

Brownson claimed to have been humiliated, produced evidence he had suffered mental distress, and sought monetary damages as a result.

Honda brought a motion for summary judgment asking the court to dismiss Brownson's claim on the basis it raised no reasonable cause of action. Honda argued, as a "without cause termination," it had the legal right to terminate Brownson at any time with reasonable notice. As such, was no legal basis on which Brownson could ask a court to consider Honda's underlying reasons for the termination, or to examine its termination procedures in detail.

Unfortunately for Honda, the judge hearing the motion found Honda had not satisfied the established legal test for granting summary judgment, which required Honda to prove there was no genuine issue requiring a trial.

"The juxtaposition of the termination with a contemporaneous investigation of misconduct colours the ordinary proce-

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Worker still employee despite being labelled a contractor: Adjudicator

A BRITISH COLUMBIA worker was in an employment relationship and entitled to reasonable notice of termination, despite the existence of a contract labelling him an independent contractor, an adjudicator has ruled.

Matthew Rennie was a helicopter maintenance engineer for VIH Helicopters, an aviation service provider based in North Saanich, B.C. Rennie was hired in 1993 as a sole proprietorship under the name Matt Rennie Engineering. Three years later, VIH told Rennie he must incorporate in order to remain working for the company. VIH told him the same thing in 1998, with the stipulation VIH would make payments to his new company through invoices.

Rennie's father incorporated a new company under the name Blue Stone

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Employees who cause trouble after being fired are rare

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dures, such as escorting the terminated individual out of the workplace, with an innuendo that could give rise to the mental suffering alleged by (Brownson) particular to the circumstances of the termination rather than the fact of being terminated," said the judge.

Lessons for employers

It seems likely Honda's investigatory findings led to concerns about Brownson's conduct and the termination was not a total coincidence. Honda may have also assumed that by offering a severance package and not claiming just cause, it was taking the high road. If Brownson turned down the offer, a resolution of their differences would involve minimal controversy. Further, in the continuum of potential bad faith conduct on the part of an employer — which can range up to false accusations of criminal conduct and arrest by the police — having Brownson escorted out may have seemed fairly innocuous.

In fact Honda may ultimately prove to have acted in a reasonable manner. The case is far from over and continues to wind its way to trial.

Still, the recent trend suggests escorting out a dismissed employee carries with it an increased risk of a claim of bad faith conduct against an employer. While there will always be occasions where escorting out an employee is appropriate, a safer course for employers is to evaluate the need to do so an individualized basis. To this end, keep in mind once an employee has been informed of termination, it is rare for that employee to attempt to make trouble, and most employees will be eager to leave the premises on their own.

That said, when choosing to carry out a termination of employment, there is a range of approaches for consideration:

- Often an employer has the option of meeting an employee outside regular office hours to conduct a termination. If an employee is escorted out, there will be no witnesses and little reason to complain.
- If a workplace operates 24-7, consider whether there is a location at which termination and departure can take place out of the view of other employees.
- If there is simply no part of the workplace at which a termination can be discreetly effected, consider meeting the employee somewhere off-site.
- Where none of the above possibilities is available, consider the degree to which it is necessary to closely accompany an employee out the door. One option may be to maintain a reasonably discreet distance as an ex-employee leaves the workplace. Further, if an employer has already taken the precaution of cutting off an employee's electronic access to company property, and keys and a security pass have been surrendered, it is less likely the employee will pose a security risk or require close supervision.
- Offering outplacement counselling at the time of termination is advisable as a means of support to the employee, as well as indirect supervision as she leaves the premises.

In all cases, establishing and adhering to a termination protocol can help mitigate the risk of a disgruntled former employee launching a claim of expensive, time-consuming side-issues. See *Brownson v. Honda of Canada Mfg.*, 2013 CarswellOnt 1232 (Ont. S.C.J.).

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