

Cyber-sacking and Severance Liability

By Graeme McFarlane

BLACKBERRIES, REMOTE COMPUTER access, voice mail, Twitter, Facebook; the list keeps growing. Instant communication and information sharing is now the norm both personally and professionally. Managers are increasingly using these technologies to interact with their employees. Unfortunately, although these tools help us communicate more quickly, they bring with them potential risks.

Due to the fact that these information-sharing tools are fast and easy, much of the human touch is removed. In certain situations this lack of personal involvement may create liability for organizations.

Take, for example, recent reports of “cyber-sacking”. In these stories, mainstream media report of individuals dismissed from their employment via Facebook or email. It’s hard to picture a less personal way of conveying potentially devastating news.

In 1997 the Supreme Court of Canada issued a wake up call for employers. In its decision in *Wallace v. United Grain Growers Ltd.* the Court warned that employers could face increased severance pay liability if terminations were made in an “unduly insensitive” manner. Courts were to fashion these awards by extending the notice period. Since that decision, courts have awarded additional damages up to six months pay for this type of conduct.

Over the years, this approach attracted criticism from practitioners because of the inability to determine what, among other things, was “unduly insensitive.” This summer, the Supreme Court of Canada attempted to clarify employer responsibilities upon termination in its

decision in *Honda Canada Inc. v. Keays*. In this case, the Supreme Court was examining lower court decisions that had awarded Mr. Keays an additional nine months of severance pay and \$100,000 in punitive damages (The original trial judge had awarded Mr. Keays \$500,000 in punitive damages, but this was reduced by the Ontario Court of Appeal).

The Supreme Court of Canada made some important findings in this case. It confirmed an important principle that individual contracts of employment may be terminated by employers with appropriate notice (or pay in lieu). Accordingly, employees are not entitled to compensation for the usual shock and upset that is associated with losing a job. Potential job loss is a term of all employment contracts and employers are not required to pay extra damages if they choose to end an individual’s employment and perform that termination properly.

Also, in an important reversal, the Court did away with many of the *Wallace* doctrines. It held that it was inappropriate to provide additional compensation by an “arbitrary increase in the notice period.” It quashed the lower court awarding of nine months of additional severance pay and any amount for punitive damages. The Court went on to say that an individual is only entitled to receive compensation for “actual” damage.

However, not all of the principles set out in *Wallace* were discarded. The Court confirmed that employers must act in good faith when dismissing employees. Unless stated otherwise, a court will expect that employers treat departing employees with

dignity and respect. Specific examples of disrespectful conduct include making false claims of just cause for dismissal or dismissing an employee to intentionally deprive them of an earned benefit.

Could “cyber-sacking” lead to increased damages?
The answer is – yes.

The analysis does not end at this point. Under the restated principles, an employee must suffer actual damage. This damage must be greater than the usual upset associated with losing a job. In all instances, a claimant will have to provide medical evidence that she has suffered unduly because of the employer’s conduct. If they are unable to provide this evidence, a court will not award any additional damages.

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Being informed about your termination in such a callous and informal fashion may indeed make an employee feel undervalued and disrespected. This mental anguish could go beyond the normal feelings of rejection one experiences at times of job loss. On the other hand, it is possible to conceive of situations where such a communication may not be offensive. For example, many high tech companies use email, Twitter and Facebook as every day communication channels for all types of messaging. In these instances, “cyber-sacking” may be acceptable.

So where does this leave employers? Unfortunately, each case will depend on its specific facts, but an overriding general extension of respect will serve employers well. When the decision is made to terminate an employee, careful thought must also be made with respect to how that message will be delivered. Speed and convenience may be at your fingertips, but with them comes the likelihood of increased liability. **◆**

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