First Resort
Your research starts here

Employment Standards Law

April 21, 2011, Issue No. 45

Jailed worker's failure to notify employer of absence did not disqualify him from entitlement to statutory severance and termination pay, labour board rules

A worker who breached his employer's policy by failing to contact it within three days to explain his absence from work because he was in jail and was unsuccessful in trying to telephone the company was not disentitled to termination and severance benefits under the provincial Employment Standards Act when he was fired for the breach, the Ontario Labour Relations Board has ruled. The Board held that, in the circumstances of the case, the employee's failure to contact the employer within the specified time limit was not misconduct that was wilful or sufficiently serious to trigger the employer's statutory exemption from having to pay the benefits.

The Facts:

Employed by Atlas Fluid Systems in Brampton, Ontario since October 2002, the complainant went home after completing his shift on September 8, 2008 and was arrested by police and charged with an offence in relation to his wife. The complainant remained incarcerated at Toronto's Metro West Detention Centre until October 10, 2008.

Atlas's employee handbook stated that "[an] employee, who remains absent and fails to call in after three consecutive working days and has not substantiated the absence to the satisfaction of the company, will be deemed to have voluntarily resigned from his/her employment."

The complainant had limited access to one telephone at the detention centre and was unable to use it for the first two days of his incarceration because several large inmates told him not to touch the phone. When he was finally able to use the phone on September 11, the third day of his absence from work, it turned out to be a payphone that permitted only collect calls. The complainant repeatedly called the employer that day and the next, but the collect charges were not accepted by the employer and he was unable to reach the company.

The complainant finally managed to speak with a cousin on Sunday, September 15, who telephoned the employer's human resources manager the following morning to explain her cousin's absence. However, the human resources manager had already sent a letter to the complainant earlier that morning terminating his employment, in accordance with the company's policy, for having been absent for more than six days without an explanation. The explanation provided by the cousin did not change the employer's position, and it refused to rehire him after he emerged from jail, promptly reported for work, and learned of the dismissal.

The complainant did not receive any termination or severance pay. Section 54 of Ontario's *Employment Standards Act* provides employees who have been continuously employed for three months or more with a right to notice of termination or termination pay. Similarly, section 64 of the Act provides employee who have a minimum of five years of service with a right to severance pay. Sections 55 and 64(3) provide that certain prescribed employees are not entitled to termination pay and severance pay respectively. Sections (2)(1) and 9(1) of Regulation 288/01 identify prescribed employees, which include "[a]n employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" and "[a]n employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance."

The employee filed a complaint with the Employment Practices Branch of the Ontario Labour Relations Board, challenging the employer's failure to provide termination and severance pay.

The Arguments:

The complainant argued that his absence from work was not wilful and that his failure to call the employer within three days had been explained. He emphasized that he otherwise had a clear employment record, with no other instances where he had failed to follow the employer's rules.

LancasterHouse
www.lancasterhouse.com

The employer maintained that the complainant's loss of employment resulted from his own wrongful act, the consequences of which prevented him from fulfilling the obligations of his employment or even to call the employer as required by its rules. The company submitted that, while its policy permitted it to forgive a failure to call about an absence if the reasons were substantiated to its satisfaction, an employee could not rely on his own misconduct to excuse his inability to fulfill his job obligations.

The Decision:

Ontario Labour Relations Board Vice-Chair Ian Anderson upheld the complaint and ordered the employer to pay the complainant termination and severance benefits pursuant to the Act, amounting to $6,584.93.

Anderson began by citing the Employment Practices Branch Policy and Interpretation Manual, which he read as suggesting that failure to follow an employer policy was sufficient to constitute wilful misconduct and disobedience provided the employer's policy was clear and unequivocal, had a substantial bearing on the employment relationship, was communicated to the employee, did not require the employee to do anything illegal or unsafe, and the employee knew (or ought to have known) in advance that the conduct could result in his or her termination.

With regard to these "company rules" criteria, Anderson held that the manner in which the manual addressed the question of intent was problematic. He disagreed with the manual's suggestion that simply failing to follow a company rule or policy was sufficient to show wilful misconduct, and, after an extensive review of the caselaw, held instead: "The failure must be the result of an intentional action. Moreover, it must be conscious, deliberate and indeed defiant of the employer's authority. That intention may, in a proper case, be inferred from the employee's action itself, notwithstanding any protestations to the contrary. But the requisite intention must, at the end of the day, be established."

In addition, noting that the conduct must be "serious," Anderson quoted Adjudicator Dana Randall in *VME Equipment of Canada Ltd.*, [1992] O.E.S.A.D. No. 230 (QL): "That is conduct that seriously interferes with either the performance of the employee's job duties or that of his or her co-workers." He noted that this concept had been codified in the Act in that it requires that the employee be guilty of wilful misconduct "that is not trivial."

Regarding the issue of whether the employer was exempt from providing severance pay under the Act because the employment contract had been frustrated, Anderson observed that it was not the fact of incarceration but its length that was the relevant consideration, stating: "The employee's resulting period of absence from employment must cause more than 'mere hardship or inconvenience' to the employer so as to strike at the 'root' of the contract. There must be no reasonable prospect that the employee will be able to return to work within a reasonable period of time."

While pointing out that the Board was limited to deciding whether an employee's conduct disentitled him from termination or severance pay under the Act and had no power to engage in a "just cause" inquiry regarding the termination, Anderson held that a finding of wilful misconduct or disobedience required that the employer establish two things:

[T]hat the employee's failure to comply with the rule seriously interferes with either the performance of the employee's job duties or those of his or her co-workers; and that the employee purposefully breached the rule knowing that doing so was serious misconduct, neglect of duty or was disobedient, and deliberately and consciously disobeyed the authority of the employer.

In Anderson's view, Atlas had failed to establish either of these things. First, the employer had presented no evidence showing that the complainant's absence and failure to call in for three consecutive days had interfered with its operations. Second, the element of wilfulness was absent in this case. Anderson noted that the complainant had been fired, not for his absence, but because of his failure to contact the employer to advise it of this absence and that his inability to do so was not deliberate. In the Vice-Chair's words:

[The complainant's] inability to contact his employer arose not from the fact that he was incarcerated but from the fact that he had limited access to a telephone, the telephone only permitted collect calls and, as I have found, the employer did not accept those collect calls. He did not purposefully breach the rule. His failure to call was not deliberate. He did not consciously disobey the authority of his employer. On the contrary, he attempted to comply with the rule but was thwarted in his ability to do so.

In the result, Vice-Chair Anderson ruled that the complainant was entitled to termination and severance pay pursuant to the Act, amounting to five weeks' termination pay and 5 and 11/12 weeks' severance pay, for a total amount of $6,584.93.

Comment:

The outcome of this case is consistent with past Ontario Labour Relations Board jurisprudence, which has held that a finding of "wilful misconduct" under Ontario's *Employment Standards Act* is not equivalent to "just cause" for termination in common law, but requires a deliberate or intentional act by the employee. In *Wal-Mart Canada Corp. v. Glenford Gray and Ministry of Labour*, [2002] O.E.S.A.D. No. 219 (QL), which likewise dealt with an employer's denial of termination pay to an employee who breached company policy regarding absence notification and which was extensively cited by the adjudicator in the present case, the Board adopted the following standard set out in *VME Equipment*:

In addition to proving that the misconduct is serious, the employer must demonstrate ... that the conduct complained of is 'wilful'. Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose.

See also *Convergys Customer Management Inc. v. Luba*, [2005] M.J. No. 51 (QL), reviewed in Lancaster's *Employment Standards Law Reporter*, July/August, 2005, in which the Manitoba Court of Appeal held that a finding that an employee was dismissed for "just cause" – being late 78 times over a two-year period – did not necessarily relieve the employer of the obligation to pay an amount in lieu of notice under the province's *Employment Standards Code* and that the employer had to prove that the employee had committed "wilful" misconduct, disobedience, or neglect of duty.

Case Name: *HS v. Rea International Inc. (c.o.b.) Atlas Fluid Systems*

Jurisdiction: Ontario

Tribunal: Labour Relations Board

Judges: Ian Anderson, Adjudicator & Vice-Chair

Date: November 18, 2010