
Employer hit with significant damages for botched dismissal

A recent Ontario court decision has sent an unmistakable message to employers: the cost of mishandling employee dismissals is steep and growing. (For another recent example, see [“Ontario Court of Appeal upholds and expands lengthy notice award to employee “induced” to leave secure job”](#) on our What’s New page.) *Downham v. Lennox and Addington (County)* (December 5, 2005) is a case involving unusual events that highlights the importance of employers proceeding cautiously when they deal with employee discipline.

A “HUGE COMMITMENT”

The case involved a managerial employee who was terminated at the age of 50 after 12 years of service. Shortly before his dismissal, Downham had been made manager of non-profit housing projects for the employer. He and his wife were also ordained Salvation Army ministers. In this capacity, they had made the acquaintance of Mr. Holmes, a convicted pedophile, who attended the Salvation Army Church.

The Downhams had visited Holmes when he was in prison and agreed to be his support persons when he was released on parole. This, the trial judge noted, involved the “huge commitment” of having Holmes live with them at their home for a time. It was a commitment that was to prove costly for Downham.

One of Holmes’ parole conditions was that he not leave his residence unless accompanied by one of his support persons, except in certain specified circumstances.

After a time, the Downhams wanted Holmes to move out on his own, but he was reluctant to do so. Downham obtained an application for social housing from a colleague at work and gave it to Holmes but Holmes kept putting off taking any action to find other accommodation.

One day, Downham attended at a non-profit housing project called Harmony Home to present Mrs. Beaudrie, the manager, with a funding check from the County. It was his first visit there in his position as non-profit housing manager. While there, he saw a notice indicating that an apartment was available with rent geared to income.

One week later, Downham returned to Harmony Home with Holmes and presented Beaudrie with an application completed by Holmes for the apartment. Holmes also presented a letter in which he described his criminal record and parole restrictions and indicated that Downham was his support person for parole purposes. After reading the letter, Beaudrie became concerned about the prospect of renting the apartment to Holmes. She was also concerned that Downham might use his position to force Harmony Home to accept Holmes’ application, as Holmes met all the eligibility requirements for a tenant. Under the mandatory provincial policy, non-profit housing projects could not reject applicants who met those requirements.

Downham never told Beaudrie that she had to accept Holmes' application nor did he discuss the issue of Holmes' eligibility or mention his own position with the County. He merely suggested that Beaudrie discuss her concern with her board members.

A "TROUBLING DOCUMENT"

On learning of the incident, the employer advised Downham that he should not have gone with Holmes to see Beaudrie and that it could be considered a conflict of interest. Downham was told that Beaudrie might think she had to accept Holmes as a tenant because Downham was the Manager at the County. Downham noted that the law required Harmony Home to accept Holmes as a tenant. The employer acknowledged at trial that this was true.

Beaudrie told the County that she was very upset about the prospect of Holmes being a tenant. She also said that some of her board members were upset and had said that they thought Downham had a conflict of interest. Mr. Williams, the County's Director of Social Services, told Downham that he had a conflict of interest and should have nothing more to do with Holmes' application. Downham complied with this directive.

Several weeks later, senior management held a meeting at which, the trial judge found, a decision was made to terminate Downham. No one spoke to Downham to hear his version of events. He was advised that he was under suspension and should speak to no one at the County. One week later, the County's Social Services Committee met to consider a report provided by Williams. The trial judge characterized this report as a "troubling document" that contained many false statements, including that Downham had told Beaudrie that she could not discriminate against Holmes and should treat his application as a priority. It also stated that Downham had never attempted to discuss the issue with senior management. In fact, the judge noted, it was the County that had never discussed the issue with him.

Soon after, Downham was given a letter of termination that read:

"The County has now completed its investigation with respect to concerns arising out of the use of your position as Manager, Non-Profit Housing, in an effort to secure non-profit housing for a friend.

As a public servant you have a responsibility to conduct yourself in accordance with basic principles of integrity, honest, impartiality and common sense. The County is satisfied that you used your position as Manager, Non-Profit Housing, in an effort to secure preferred treatment and accommodation for Barry Holmes.

Your actions amount to a breach of trust such that the County no longer has confidence in your ability to carry out your duties and responsibilities in an impartial fashion."

Downham filed an appeal, but no one heard his side of the story or re-interviewed any of the persons involved. The appeal was rejected.

AFTER TERMINATION

Devastated by the loss of his job, Downham became depressed and reclusive. He attempted to find new employment, delivering 500 application letters to employers in nine provinces.

Downham also volunteered to serve on the board of a non-profit housing agency operating under the County's supervision and was elected its chair at the first meeting he attended.

Within a month, Williams wrote a letter advising the board of Downham's history at the County. Downham had to go through the embarrassment of sitting out of a board meeting at which Williams' letter was discussed. However, the board rejected Williams' warning and confirmed Downham's appointment.

Eventually, Downham was offered the job of executive director with a local social service agency, which arranged to have a newspaper article printed about the appointment. When Williams saw the article, he visited the executive director of the United Way, which funded the agency. After this visit, the agency, which had offered Downham a permanent position, changed its offer to a one-year contract position at a lower rate of pay. Downham took the position but the contract was not renewed at the end of the year. After this, Downham abandoned the social services field and began working in real estate.

AN ERROR OF JUDGMENT

The Court found in favour of Downham, noting that all he had been guilty of was an error of judgment in failing to consult with Holmes' parole officer about Holmes' housing options and to have the parole officer accompany Holmes when he applied for housing. It was an error that did not justify dismissal, given the lack of any evidence of poor work performance over 12 years of employment. The Court rejected the contention that Downham had been in a conflict of interest, as he had not tried to use his position to further his personal interest. Moreover, Harmony Home was, in any event, legally obliged to accept Holmes.

On the other hand, the Court stated, Williams had "acted with bias and malice throughout this unfortunate story". It found that the employer had ignored its own policy manual in failing to assist Downham to correct his behaviour and in neglecting to apply the principles of progressive discipline. Contrary to what had been stated in the termination letter, the Court held, Downham had not shown any lack of integrity, honesty or impartiality, nor had he committed a breach of trust. He had only failed to exercise common sense.

\$300,000 IN DAMAGES

The court assessed Downham's reasonable notice period at 15 months, having regard to his job position, age, length of service and prospects for new employment. But that was only the beginning.

The court then turned to the issue of damages for bad faith dismissal (see ["Fairly, reasonably and decently": Employers obliged to deal in good faith with dismissed employees, Supreme Court rules](#)" on our Publications page) and set out a long list of aggravating factors. Stating that there was an overlap in this case between the facts supporting *Wallace* damages and those supporting the tort of intentional infliction of mental distress (see ["Stressed bank employee wins Wallace and mental distress damages"](#) on our Publications page), the court awarded \$50,000 for the intangible damage suffered by Downham in the form of humiliation, loss of self-esteem and loss of enjoyment of social activities, and \$20,000 for the damage caused to his physical and mental health. On the subject of the intangible damages, the court stated:

"The intangible damage flowing from wrongful actions of the employer in the case before me resulted in humiliation, embarrassment, loss of self-esteem and loss of enjoyment of social activities. Unlike the routine case, these losses were not temporary. These losses have continued for the better part of 4 years up to the present. I find that the losses will be diminished by this judgment but that there will be a lingering loss. As the plaintiff has already experienced, "clouds" on one's character are difficult to eradicate."

The court then added another five months of damages because the County had stigmatized Downham with its false investigation report and exaggerated dismissal letter and had prevented him from obtaining alternate employment for that period.

As noted above, when Downham did find a job, the County's intervention led to his being offered a contract instead of a permanent position. This led the court to award Downham \$9,000 based on its estimate of the difference between his actual salary for that year and the salary he would have earned but for the County's influence on the new employer.

The court then held that Downham was entitled to \$100,000 in punitive damages, expressing the view that the County's conduct had met the standard of being "harsh, vindictive, reprehensible or malicious" that justified such an award.

In total, the damages awarded against the County were approximately \$300,000, not including pre-judgment interest.

In Our View

One interesting aspect of this decision is the fact that the judge departed from the normal method of determining *Wallace* damages by adding to the notice period. This approach was unfair, the court reasoned, because the humiliation suffered by a lower income employee would be compensated at a lower rate than that of a higher income earner. Accordingly, the court stated, the loss should be assessed by assigning it a monetary value. This is consistent with damage assessment in personal injury cases, where the injury, not the status of the plaintiff, governs the determination of damages.

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