

The Punishment Did Not Fit the Crime

by Philip R. White

An employee's return from a medical leave of absence can be fraught with difficulties. The employee may be unresponsive to the employer's attempts to communicate or may not provide the necessary medical documentation required to support his or her continued absence from the workplace. In response, the employer may set a compliance deadline and inform the employee that failure to either return to work or provide supporting medical documentation will result in termination for cause. However, even if an employer has set a deadline for an employee to respond, the courts will continue to apply the principle of proportionality when determining whether or not the employer had cause to summarily dismiss the employee. A clear warning that an employee will be terminated for cause may not be sufficient to establish that the employer had cause to terminate the employment.

This was the result in *Yellow Pages Group Co. v. CO.P.E.* (2012), 351 D.L.R. (4th) 534, 2012 C.L.L.C. 220-046 (Ont. C.A.). Mr. Ferreira joined Yellow Pages as a sales consultant in January 1999. He was a unionized employee. Twenty years later, Yellow Pages terminated his employment for just cause on the basis that Mr. Ferreira had abandoned his position after he failed to provide a doctor's note to support his medical leave of absence by a date set by Yellow Pages.

The events that led to Mr. Ferreira's dismissal began on January 12, 2009, when Mr. Ferreira began a short-term disability medical leave. On January 20, 2009, Mr. Ferreira attended a medical assessment with his doctor, who filled out a medical form and faxed the form to Yellow Pages. Yellow Pages then provided the form to its insurance provider, Medisys.

Medisys, requiring more information, sent Mr. Ferreira's doctor a follow-up questionnaire on February 4, 2009. However, the doctor did not complete the questionnaire. As a result, Medisys wrote to Mr. Ferreira on February 16, 2009, advising him that as of January 23, 2009, his disability benefits had been terminated on the basis of insufficient medical evidence. The letter also stated that if the additional information was not received by March 3, 2009, Medisys would close Mr. Ferreira's file.

On February 18, 2009, Yellow Pages sent a letter to Mr. Ferreira advising him that, since his disability claim had been denied, he was obligated to return to work by February 20, 2009. Yellow Pages also advised Mr. Ferreira that his employment would be terminated unless, by March 3, 2009, he returned to work or provided the required medical evidence to support his absence.

Mr. Ferreira promptly made an appointment with his doctor on February 25, 2009. The doctor wrote a letter to Medisys, dated March 2, 2009, in which he expressed his view that Mr. Ferreira was unable to return to work. He sent this letter by regular mail on March 2 or 3. The letter was not received by the deadline, so on March 5, 2009, Yellow Pages terminated Mr. Ferreira's employment. Although Mr. Ferreira immediately faxed a copy of his doctor's letter to Yellow Pages when he was advised of the termination, this had no impact on Yellow Pages' decision.

Mr. Ferreira, a unionized employee, grieved the dismissal through his union. The arbitrator upheld the dismissal, finding that Mr. Ferreira failed to meet a clearly articulated expectation, with clearly articulated consequences. As a result, Yellow Pages was able to conclude that he had accepted the consequences – his dismissal for just cause. When Mr. Ferreira left the delivery of the doctor's note in the hands of his doctor, he did so at his peril.

Considering the question as to whether there were any mitigating factors, the arbitrator found that Mr. Ferreira attempted to mislead Medisys when he misrepresented his blood pressure. The arbitrator also found that lack of candour during the arbitration process pointed to Mr. Ferreira not being a good candidate for reintegration back into the workplace.

The union sought judicial review of the arbitrator's decision. The majority of the Ontario Divisional Court upheld the arbitrator's decision. However, the Ontario Court of Appeal allowed the appeal of the Divisional Court's decision. In allowing the appeal, the Court of Appeal stated [at para. 18]:

In McKinley v. BC Tel, 2001 SCC 38, [2001] 2 S.C.R. 161, the Supreme Court made it clear that the principle of proportionality is the focus in the determination whether termination of an employment relationship is the appropriate sanction in response to employee misconduct. The requisite balancing of the severity of the conduct in issue with the severity of the penalty reflects an acknowledgment of the importance of work to a person's life and

identity. The analysis is a contextual one with the unique facts of each case ultimately informing the key issue whether the employee's misconduct is reconcilable with sustaining the employment relationship. [Emphasis added.]

The Ontario Court of Appeal found that the Divisional Court had erred when it:

- failed to examine whether the arbitrator's reasons demonstrated a consideration of the context of the situation and balanced the nature and seriousness of Mr. Ferreira's misconduct with the severity of the sanction imposed; and
- relied on the arbitrator's finding that Mr. Ferreira had been less than completely honest.

With respect to Mr. Ferreira's honesty, the Court of Appeal held that the arbitrator's concerns about Mr. Ferreira's lack of candour during the arbitration process was not relevant to the determination as to whether just cause existed because it played no part in Yellow Paves' decision to terminate his employment and could not be used retroactively. In addition, Mr. Ferreira's misrepresentation to Medisys about his blood pressure was a conversation that did not involve Yellow Pages and was not a factor in its decision to fire Mr. Ferreira. Therefore, it could not be relied upon to support the dismissal.

This case is a reminder that the courts will continue to look at the surrounding circumstances when determining whether cause exists to terminate an employee. The Court of Appeal did not believe that a 20-year employee's employment could be terminated for cause because a third party, Ferreira's doctor, was a few days late providing a medical note. The punishment was too severe.

Normally, an employer would be expected to take an employee through the stages of progressive discipline before the employee could be terminated for cause. This involves providing the employee with a number of escalating written warnings that clearly set out the employer's expectations, providing the employee with an opportunity to comply and informing the employee of the consequences of not complying.