

When Will Inadequate Performance Provide Just Cause To Dismiss A "Senior Manager"?



An Ontario court recently awarded a dismissed employee wrongful dismissal damages in spite of findings to the effect that the high-level employee had persistently failed to satisfy the employer's reasonable performance standards and had also been provided with repeated warnings and resources to assist him in meeting those standards.

The Ontario Superior Court of Justice's decision in *Kurtz v. Carquest Canada Ltd.*, 2015 ONSC 7997 should be of interest to all employers who are faced with a high-level employee with deficient job performance.

Background

At the time his employment was terminated in January 2011, Thomas Kurtz was 50 years of age and had approximately five and a half years of service with the defendant. Kurtz's position as Director of Operations was a senior position. It involved a high degree of responsibility over a distribution centre with an annual budget of approximately \$100 million.

Kurtz was transferred to his employer's Rexdale, Ontario location from California by way of an intra-company transfer on or around May 1, 2009, one and a half years before the termination of his employment. At the time of his transfer, the Rexdale location had pre-existing labour relations issues. Shortly after the transfer, the defendant sought to implement a new electronic inventory management system at its Rexdale operation.

Following Kurtz's transfer to the Rexdale location, his job performance was repeatedly assessed (in June 2009, in February 2010 and again in April, 2010) and he was notified that he was failing to meet employer's company-wide "Gold Standards" performance measure.

In September 2010, Kurtz was issued a final warning notifying him that there were "items [which] require[d] immediate attention and remarkable improvement as soon as possible" and cautioning him that failure to satisfactorily respond to the warning would result in immediate termination of his employment for just

cause.

In September 2010, shortly after issuing this warning, the employer began to search for a replacement for Kurtz and, in January 2011, the company proceeded to discharge him from employment for cause.

Over the period of time between September and December 2010, the business position at the defendant's Rexdale distribution centre had in fact worsened.

Reasons of the Court

The Superior Court of Justice accepted that the defendant had valid business reasons to terminate Kurtz's employment, that its performance standards were reasonable and that those standards were repeatedly communicated to the affected employee. Similarly, there was no serious contention by Kurtz that he was in fact meeting his employer's standards.

However, where the Court took issue with the employer's decision to terminate Kurtz's employment was with respect to the time afforded to him in order to improve his job performance. The Court found that in light of the nature of the performance deficiencies, which were linked in part to rather longstanding, systemic issues, Kurtz was not provided sufficient time to improve his performance and his ongoing performance problems did not amount to just cause for dismissal:

This is not a case where an individual simply had to abide by rules in order to satisfy the employer. As a senior manager, Mr. Kurtz had to make significant changes in many areas of the operation of the Rexdale distribution center. He had to instruct, counsel and ultimately rely on others to put changes into effect.

Each of those issues, to a greater or lesser extent, is indicative of long-term problems that needed time, care and attention to resolve.

Simply providing that the items mentioned required immediate attention and remarkable improvement as soon as possible does not give a proper time frame for improvement. Clearly the issues were of significance and in many instances were long-standing. It is unreasonable for the company to simply expect "remarkable improvement" with nothing further offered by way of assistance or strategies for change.

The Court's reasons emphasized that the employer's search for a replacement commenced in September 2011, shortly after Kurtz was issued a final warning.

Takeaways

- Just cause is a high standard and any employer which is considering discharging an employee for cause as a result of performance deficiencies must clearly communicate to the employee in question the standard to be met, that his or her performance is wanting and that the deficient performance, if it continues, will result in termination of employment.
- An employee must be afforded a reasonable amount of time to improve his or her performance after a warning is given. What constitutes a "reasonable amount of time" will depend on the nature of the employee's position, the nature of the inadequate performance and what is required in order to

improve the performance, e.g. does the improvement require the involvement of other employees? Where problems are longstanding, a court may determine that an employee must be afforded more time in order to correct the problem or problems.

- Searching for a replacement before an employee is afforded time to improve performance alleged to be deficient may be interpreted by a court as evidence that the employer did not provide the employee a reasonable amount of time to improve his or her performance.

Article by Matthew Larsen