

THE PLAINTIFF'S EMPLOYMENT HISTORY

[4] The plaintiff was 51 years of age in October of 2012. She started work at OLG in July of 1999 in the security department and had been promoted to the position of security manager by 2004. She supervised some 55 employees. She agreed that she held a position of trust based on the amount of cash that was routinely involved at casinos. She testified that she had an excellent work record. She had received bonuses and incentive payments based on how the business was doing and customer satisfaction reports. She has no criminal record.

[5] From early in 2011, Brenda Dennis reported to General Manager, Tina MacMillan. Tab 4 is a document entitled "2012 Year End Review – People Manager for Brenda Dennis". This document is dated May 31, 2012 and appears to be a record of a meeting between Ms. MacMillan and Ms. Dennis to review her performance and plans for the future. The overall rating indicated on that document for Ms. Dennis by Tina MacMillan was "fully contributing".

[6] The plaintiff testified that in the spring of 2012 she was the subject of an unfounded harassment complaint at the workplace. Tab 6 is a letter dated June 15, 2012 signed by Tina MacMillan. The investigation did not support evidence of harassment but there were some areas of concern to be addressed.

[7] Tab 56 are copies of medical records related to the plaintiff. She testified that for over 20 years she had suffered from depression which ran in her family. She is still under care for that condition.

TERMINATION WITHOUT CAUSE – OFFER AND ACCEPTANCE OF PACKAGE

[8] Tab 8 is a document entitled "CASE REVIEW – TERMINATION WITHOUT CAUSE" dated September 14, 2012. By this document the General Manager recommended that the plaintiff be terminated without cause relating to concerns about her performance. Ms. MacMillan testified that if she had known of the shortfall in funds related to the social committee she would have recommended termination for cause. Tab 9 is a letter dated October 2, 2012 from Tina MacMillan to Brenda Dennis. This was confirmation of termination of employment without cause. In return for a full and final employment release OLG was prepared to offer a severance payment in the amount of 53 weeks' salary. In addition, OLG offered an outplacement service to assist in finding alternate employment to a maximum of \$3,500.00. Ms. Dennis was given the option of receiving the severance payment in the form of a salary continuance or a lump sum payment. She would also receive payment of all outstanding vacation minus applicable deductions.

[9] On October 12, 2012, Brenda Dennis accepted the terms of the letter dated October 2, 2012. She also signed a document electing the salary continuance and a release of OLG.

[10] Tab 14 is an email dated October 14, 2012 from Brenda Dennis to Anne Gervais who was the Director of Human Resources at OLG. Ms. Dennis indicated that she preferred the

option of a lump sum payment at the end of November 2012 rather than the salary continuance. OLG was agreeable to that.

[11] Tab 54 is a document dated June 19, 2013 confirming that the plaintiff had been employed at OLG from July 19, 1999 to October 2, 2012 and her last annual salary was \$80,694.00.

ARRANGEMENT FOR WONDERLAND TICKETS

[12] For many years Canada's Wonderland had an arrangement whereby OLG employees could purchase admission tickets for half price through the social committee. Brenda Dennis had been involved for some time in the process of receiving the tickets, selling them to employees and ultimately returning unsold tickets and the cash receipts to Canada's Wonderland in November of each year.

[13] The plaintiff had received two free tickets to Wonderland as a result of her work on this project and she donated them to the social committee. The evidence at trial disclosed a rather informal arrangement in regard to tickets that involved reconciliation of unsold tickets and cash being returned to Wonderland in November of each year.

[14] Tab 5 are documents with the heading "2012 Canada's Wonderland Company Ticket Program Contract" and also "Ticket Order Agreements" for the same arrangement. These documents contain signatures of Lisa Shanahan who signed as the authorizing consignee on behalf of OLG. Brenda Dennis also signed the contracts in her capacity as security manager. Tab 13 is copy of an email exchange between Anne Gervais and Brenda Dennis on October 12, 2012. Ms. Gervais inquired about the status of the Wonderland Ticket initiative and where the cash was stored. Ms. Dennis replied that the money, tickets and inventory list were in a brown envelope in the security safe. She also advised that she had four tickets that she was going to pay for that day.

[15] The plaintiff testified that all of the money related to the Wonderland initiative was the property of Wonderland and not OLG or the social fund. She admitted that in her email of October 12, 2012 to Anne Gervais she failed to advise that there was a shortfall in cash related to the Wonderland tickets in excess of \$1,000.00. She agreed it was her duty to tell the truth to the staff at OLG. She said she did not lie but she may have left out some information. It is evident that in fact she failed to disclose both the shortfall in cash and why there was the shortfall. Those issues will be addressed further on in these reasons. At the time that she sent the email on October 12, 2012 she had just concluded a termination settlement with OLG. She was concerned that if she disclosed to OLG the shortage in funds they might initiate charges against her. At all times she indicated her intention was to pay the money back to Wonderland since she felt it was her responsibility to deal directly with them.

[16] The plaintiff disagreed when it was suggested to her that OLG would be on the hook for any shortage of funds owing to Wonderland.

[17] Tab 11 is an exchange of internal emails at OLG wherein they determined that there was in fact a shortfall of \$1,268.00 in the funds related to Wonderland tickets. The email indicates that Wonderland would be expecting a payment from OLG and the issue should be followed up with Brenda Dennis.

WITHHOLDING SETTLEMENT PACKAGE

[18] At the request of OLG, the OPP became involved in the investigation of the missing funds related to the Wonderland tickets. On October 23, 2012 the plaintiff was interviewed by police and then charged with theft and breach of trust.

[19] On October 25 and 26, 2012 the plaintiff inquired by email to OLG as to when she would be receiving her severance package.

[20] Tab 21 is a letter dated October 26, 2012 from Anne Gervais of OLG to the plaintiff. She advised Ms. Dennis that OLG had been informed of the criminal charges. The separation payment and related benefits offered to her in the termination letter dated October 2, 2012 would be held in abeyance until such time as the criminal matter was resolved and she was cleared. Her pension contributions and dental plan would end effective immediately and her health benefits would end on October 31, 2012.

NIGERIAN FRAUD SCAM

[21] The plaintiff testified that in the summer of 2012 she had accessed a dating website that over time led to her being contacted by parties who claimed they were in Nigeria. The communications escalated with requests and then demands for money from Ms. Dennis to be sent to parties in Africa. Over the summer of 2012 she unfortunately was duped to send between \$12,000.00 and \$15,000.00.

[22] Tab 7 is a series of emails from July through September of 2012 that reflect her involvement in this scheme as a victim including her ultimately reporting matters to police agencies. In August of 2012 she used an amount in excess of \$1,000.00 from the proceeds of the Wonderland tickets towards funds that she was sending to parties in Africa. She at all times intended to repay the amount that was owing to Wonderland by the reconciliation date in November of 2012.

[23] Tab 15 is a copy of the notes of Detective Constable Sue Devine of the OPP who interviewed the plaintiff on October 23, 2012 before the laying of criminal charges. Ms. Dennis had referred in the interview to the communication she had had with parties in Nigeria and that she felt under pressure to send money. It is interesting to note that at page 55 of the notes Officer Devine mentioned to Ms. Dennis that a money draft receipt had been found in her office by OLG staff after she had left her employment that appeared to be forwarded to a party in Nigeria. Officer Devine asked Ms. Dennis about that and specifically asked whether it was possible she was the victim of a scam herself.

CRIMINAL CHARGES LAID AGAINST THE PLAINTIFF

[24] Tab 19 is a copy of the handwritten statement dated October 23, 2012 based on the police interview of Brenda Dennis.

[25] She told the police that in May of 2012 she had ordered tickets from Wonderland to sell on behalf of the social committee at OLG. The tickets and money received were kept in a safe in the security office. She referred to the dating site scam that she was drawn into and to which she sent in excess of \$12,000.00. She indicated that she borrowed approximately \$1,000.00 from the Wonderland ticket money with the full intent of repaying before the due date which would be the end of October 2012. Her employment was terminated without cause on October 2, 2012. She had used four Wonderland tickets and brought the cash for those into the OLG site on October 4, 2012.

[26] She planned to pay back the balance owed to Wonderland directly on October 25, 2012. However, before that occurred she was being interviewed by the police and was not able to complete the repayment.

[27] Ms. Dennis told the police that she always intended to repay the money related to the Wonderland tickets. She did not steal the money and she felt she was responsible to return the tickets and cash to Wonderland. She had never been in trouble with the law. She acknowledged that it was a mistake and that she should not have borrowed the money but that she also was in fact a victim of a scam and felt pressured to send money to Africa.

[28] Ms. Dennis indicated that she had borrowed the money from the Wonderland fund in August 2012. She thought the amount was about \$1,000.00 and it had only occurred one time. She did not tell OLG early on because she felt "they would not look favourably on it". She described herself as an idiot for having been duped by the scheme and sending such large amounts of cash overseas.

[29] Tab 26 is a copy of the Information sworn alleging the offence of theft against the plaintiff. She is charged with theft of money being the property of Canada's Wonderland of a value not exceeding \$5,000.00.

[30] Ms. Dennis attended at criminal court on December 13, 2013 for the first appearance on the charge that she faced. She met with duty counsel who had discussed the matter with the Crown. Duty counsel advised Ms. Dennis that the charges would be withdrawn and would not involve any admission by her that she had committed a theft. Ms. Dennis made clear then and throughout that she had not stolen these funds and would not under any circumstances admit that she had done so. She agreed to write an apology letter for anyone who may have been inconvenienced by what had occurred in relation to the missing funds from the Wonderland tickets.

[31] Tab 31 is a transcript of the proceedings in the Ontario Court of Justice on December 13, 2012. The record indicates that the charge was withdrawn at the request of the Crown. There was no admission of any criminal liability and none was sought by the Crown.

[32] At the request of Ms. Dennis a copy of the note from the duty counsel confirming that the charges had been withdrawn was sent to OLG. In response, OLG indicated that they would be having an internal investigation conducted.

RESTITUTION

[33] On October 26, 2012, Ms. Dennis requested that a friend of hers, John Murray, deliver a cheque in the amount of \$1,024.00 payable to the social committee at OLG in satisfaction of the outstanding funds related to Wonderland tickets. Ms. Dennis testified that she had borrowed money from her sister to make this restitution and that she had given the cash to Mr. Murray who then delivered a cheque on his own account. There is no suggestion by OLG that in fact full restitution has not been made in regard to the Wonderland ticket issue.

THE INTERNAL INVESTIGATION

[34] Tabs 34 and 35 contain internal email exchanges within OLG relating to a request for an internal investigation into the issue of the shortfall on funds related to the Wonderland tickets. Tina MacMillan testified this internal investigation was the due diligence being done by OLG related to a suspected incident of dishonesty by an employee.

[35] Tab 33 contains an email exchange dated December 16, 2012 wherein Ms. Dennis confirmed that the criminal charges were unfounded and were withdrawn. She was seeking payment of the severance in accord with the agreement of October 2, 2012. OLG advised that they would get back to her. On December 18, 2012, OLG sought confirmation from Ms. Dennis that the charges had in fact been withdrawn. It is on this date that OLG first mentions a possible “for cause” termination and also the first mention of an internal investigation. Ms. Dennis was advised that she may be contacted by the investigators and she was urged to cooperate with them. On the same date, Ms. Dennis replied that she would be glad to speak to the investigative team in order to resolve the issue. She repeated her denial of having committed a theft in regard to the funds. She was never contacted by the investigators for an interview.

[36] Tab 36 is a copy of an internal email dated December 24, 2012 related to the investigation following the withdrawal of criminal charges on December 13, 2012. The email of the December 24, 2012 includes reference to the fact that Ms. Dennis had been charged with theft after providing an “inculpatory statement”.

[37] Tab 40 is a further email related to the internal investigation dated January 2, 2013. It includes reference to Ms. Dennis having admitted taking the funds and providing “an inculpatory statement”.

[38] Tab 49 is a copy of the internal investigative report dated January 7, 2013. It was prepared by Steven Byrd who was the director of investigative services for OLG.

[39] The conclusion of the three-page report includes the following information:

Brenda Dennis readily admitted to the theft of the missing social committee funds and further after an admission of guilt before the Court and restitution having been made in full, the charge of theft under was withdraw and the matter went through the diversion process which is consistent with “Justice on Target” for first time offenders. Restitution of the total amount of missing funds had been made. [emphasis added]

[40] On January 3, 2013 counsel for Ms. Dennis sent a letter to OLG demanding payment of the settlement package and referred to the fact that OLG had until then reneged on the signed settlement agreement. Tab 50 is a letter dated January 9, 2013 from counsel for OLG to counsel for Ms. Dennis. The letter indicates that the internal investigation had been completed and determined that in fact Ms. Dennis had stolen the funds from the social committee account. Therefore, the OLG confirmed that they would not pay out any employee severance monies when it had been demonstrated that the employee had stolen funds from the Crown corporation.

TERMINATION FOR CAUSE

[41] While principles of contract law apply in the employment context, the power imbalance between employer and employee differentiates employment contracts from ordinary commercial contracts.

Just Cause: The Law of Summary Dismissal in Canada, Echlin and Certosimo, at 1-3.

Wallace v. United Grain Growers Ltd. [1997] 3 S.C.R. 701, at paras. 91 and 92.

[42] The employer bears the onus of demonstrating that cause exists for an employee’s discharge. This must be proven on a balance of probability based on findings of real incompetence or misconduct rather than simple dissatisfaction with performance or concern about potential misconduct.

Geluch v. Rosedale Golf Assn., Ltd. [2004] O.J. No. 2740 (S.C.) at para. 85 and 153.

[43] The summary dismissal of an employee is “capital punishment” in the employment relationship.

Echlin and Certosimo (supra), at 1-1.

[44] The onus on the employer to demonstrate that an employee's alleged dishonesty or theft justifies dismissal should be somewhat higher than the usual civil standard of balance of probabilities having regard to the gravity of the consequences of proof of such an allegation.

Geluch (supra), at para. 88.

[45] The Supreme Court of Canada dealt with the applicable standard for assessing whether and in what circumstances dishonesty provides just cause in *McKinley v. B.C. Tel*, 2001 SCC 38 at paras. 48-57. The Court held as follows:

- (i) Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. The test is whether the employee's dishonesty gives rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamental or directly inconsistent with the employee's obligations to his or her employer.
- (ii) Assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced.
- (iii) A contextual approach is required to assess whether an employee's dishonesty provides just cause for dismissal.
- (iv) Cause for dismissal on the basis of dishonesty exists where an employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature and the circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus that it sufficed to justify dismissal without notice.
- (v) There may be lesser sanctions for less serious types of misconduct.
- (vi) An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is best understood by considering the sense of identity and self-worth individuals frequently derive from their employment.
- (vii) Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled

“dishonest” would further unjustly augment the power employers wield in the employment relationship.

- (viii) The Court favoured an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee would be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential of dismissal for just cause.

[46] Employers may have an obligation to properly investigate serious allegations such as theft and fraud and to provide the employee with an opportunity to respond to any such allegations prior to dismissing the employee.

Geluch (supra), at para. 98.

Simpson v. Consumers Association of Canada (2001) 57 O.R. (3d) 351 (C.A.) at para. 90.

[47] Allegations of cause for termination provided only after the fact can be relied on but the fact they were not alleged at the time of termination will affect their weight.

Levitt, *Law of Dismissal in Canada*, at 6-10

ANALYSIS

[48] The plaintiff casts this matter as enforcement of a settlement rather than an employment issue. The defendant submits that material nondisclosure and theft of the funds by Brenda Dennis were a basis to render the termination for cause after the settlement had been agreed on.

[49] The offer to terminate without cause was made at the instance of OLG. They came up with the settlement package. There is no evidence that the plaintiff induced OLG to make the settlement offer.

[50] OLG received valuable consideration for the settlement package in the form of a final release signed by Brenda Dennis foregoing any claim for wrongful dismissal or related causes.

[51] The arrangement between Wonderland and the employees at OLG was relatively informal. There was to be a reconciliation of outstanding tickets and cash receipts by a date in November of 2012 (presumably the end of the season at Wonderland). There was no evidence of an ongoing and current accounting requirement.

[52] Brenda Dennis voluntarily assumed carriage of the arrangement wherein OLG employees could obtain Wonderland tickets at a discount. This was an unpaid function and was distinct

from her employment relationship with OLG. She was not required to report on the conduct of the ongoing arrangement to her supervisors at OLG, nor was she required to account to OLG for cash receipts on ticket sales.

[53] The plaintiff's role in selling discount Wonderland tickets to OLG staff was not part of her employment duties. Her conduct of this arrangement did not involve an essential condition of her employment contract with OLG. The arrangement with Wonderland did not involve a customer of OLG.

[54] Brenda Dennis believed that she was responsible for the final reconciliation and had signed contracts as consignee for that purpose. She may well have reasonably believed that her use of some of those funds for personal reasons was ill advised but not criminal. She maintains she always intended to repay the amount outstanding. The police interview on October 23, 2012 and laying of charges occurred before her planned repayment happened.

[55] On any view the cash related to Wonderland tickets was not the property of OLG or of the social committee. The criminal charge specified Canada's Wonderland as the victim on the Information.

[56] The plaintiff acknowledged to the OPP on October 23, 2012 and in her testimony that her decision in August 2012 to "borrow" some of the ticket proceeds was a mistake. She was embarrassed that she had sent over \$12,000.00 of her own money to parties in Africa as part of a scam. She maintained throughout that she intended to repay the money.

[57] On October 11 and 12, 2012 the plaintiff was specifically asked where the cash and outstanding Wonderland tickets were kept. Her failure to advise of the \$1,200.00 shortfall was a nondisclosure. She testified that she had grown to distrust management in the time leading up to the termination settlement of October 12, 2012. She was understandably concerned that OLG would not approve what she had done and that it might upset the settlement.

[58] OLG submits there was a material and fraudulent nondisclosure of the cash shortfall by the plaintiff at the time of the severance settlement. OLG claims in retrospect that such a disclosure would have made the termination "for cause".

[59] The decision of OLG to treat the termination as "with cause" was premised on the finding of the internal investigation that Brenda Dennis stole funds from the social committee account.

Tab 50, letter of January 9, 2013 from counsel for OLG.

[60] The internal investigation reach its conclusion based significantly on the following:

1. that Brenda Dennis readily admitted to theft of the missing social committee funds; and
2. that Brenda Dennis admitted her guilt in Court. [emphasis added]

[61] OLG was not well served by the internal investigation conducted in this matter. The final report dated January 7, 2013 was superficial and inaccurate. It appears they relied solely on a review of reports prepared by the OPP and drew unsupportable conclusions, including the following:

- (a) “Brenda Dennis readily admitted to the theft of the missing social committee funds” [emphasis added] and
- (b) “After an admission of guilt before the Court and restitution having been made the charge of theft under was withdrawn”. [emphasis added]

[62] In fact, Brenda Dennis never admitted to theft of the funds. She admitted taking the cash with the full intent to repay Wonderland before the returned tickets and cash were due in late October or November of 2012. She never admitted to anyone that she had the requisite intent for theft.

[63] It is clear that the OLG investigation did not take the time to order and review the one page transcript of proceedings in the Ontario Court of Justice dated December 13, 2012. If they had done so they would have seen that the sole criminal charge was withdrawn at the request of the Crown. There was no acknowledgment by Ms. Dennis of any criminal wrongdoing. The reference in the report to “an admission of guilt before the Court” was totally inaccurate and led OLG to step away from the settlement reached in October of 2012.

[64] Where theft by an employee is suspected the outcome of criminal charges is not determinative for employment purposes. An act of theft by an employee may be provable on a civil standard that falls short of proof beyond a reasonable doubt.

[65] In the particular circumstances of this case, including the following:

- (a) her stated intent throughout to repay the cash before it was due to Wonderland;
- (b) conduct of the arrangement with Wonderland not being part of her employment duties at OLG; and
- (c) the inadequate and inaccurate internal investigation.

I find that it is totally disproportionate for OLG to view her conduct as support for termination with cause.

RESULT

[66] The plaintiff is entitled to enforcement of the termination without cause settlement of October 12, 2012 plus interest.

[67] I will consider brief written costs submissions to be received from the plaintiff within 14 days and from the defendant, 7 days thereafter.

B. P. O'Marra J.

Released: July 15, 2014

CITATION: Dennis v. Ontario Lottery and Gaming Corporation, 2014 ONSC 3882
COURT FILE NO.: CV-13-476264
DATE: 20140715

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BRENDA DENNIS

Plaintiff

– and –

ONTARIO LOTTERY AND GAMING
CORPORATION

Defendant

REASONS FOR JUDGMENT

B. P. O'Marra J.

Released: July 15, 2014