

# WL UPDATE



Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

## OUR LAWYERS

DAVID WHITTEN DANIEL LUBLIN

CÉDRIC LAMARCHE – ELLEN LOW – AARON ROUSSEAU – DANIEL CHODOS

## WHERE EMPLOYEE DISCIPLINE CROSSES THE LINE

Most employers think that disciplining employees accused of harassing their subordinates is an appropriate and even required measure under the law. This line of thinking is certainly justified where the circumstances call for it, but a recent decision from the Ontario Court of Appeal, *Chandran v. National Bank*, might make some employers think twice before taking action.

Adrian Chandran was a senior manager for National Bank's Commercial Banking Centre, with 11 employees reporting to him and more than 18 years' service. In an informal survey of employees reporting to Chandran, almost all of them complained about his conduct toward them. They commented that Chandran made condescending remarks, embarrassed employees in front of others, exhibited "volatile" behaviour, and even drove some employees to seek advice about their legal rights.

After receiving this feedback, Chandran's superior, Gary Flowers met with Chandran to discuss the results of the employee survey. Shortly thereafter, Chandran received a disciplinary letter advising him that he was being stripped of his supervisory duties and offered him what the Bank believed were two alternate positions, allegedly at the same level and salary. The letter warned Chandran that further behaviour of this kind would result in his termination for cause.

Nobody at the Bank told Chandran about any specific examples of his alleged disrespectful treatment of employees and no formal investigation was conducted.

Chandran did not accept either offer. He resigned from his position and sued the bank for constructive dismissal.

Both at trial and before the Court of Appeal, the parties argued about the impact of the Supreme Court of Canada's 2008 decision in *Evans v. Teamsters, Local 31*, a case which was hailed as a victory for employers across the country. In *Evans*, the Court emphasized that a constructively dismissed employee is not necessarily allowed to simply abandon employment. The determination of

## UPCOMING EVENTS

### March 6th

Daniel Chodos will be speaking at the HRPA's program, HR Certificate for Accounting Professionals (CMA) on the topic of Advanced Terminations, where he will discuss employers' potential legal strategies designed to minimize and eliminate liability associated with the termination of employees.

### March 7th

At the CGA's Controllers' Congress, David Whitten, Employment law expert will discuss the Ontario's Employment Standards Act, 2000, by reviewing essential sections and dissecting often overlooked nuances including properly calculating vacation pay on total earnings; termination and severance pay for employees with irregular compensation; requirements during protected leaves of absence; and exclusions from various provisions of the legislation.

### March 15th

David Whitten will be conducting a seminar on employment agreements for the clients of Feldman Daxon Partners, Canada's longest-standing national provider of Executive Search, Career Transition, and Coaching/Talent Development services.

## IN THE MEDIA

Daniel Lublin, a Partner at Whitten & Lublin, was interviewed by Canadian HR Reporter regarding the legal implications of dating at work. The Video can be watched here:

<http://www.hrreporter.com/videodisplay/301-relationship-woes-in-workplace>

Cédric Lamarche, Senior Associate at Whitten & Lublin was interviewed by HRInsider.ca for their article *HR and Workplace Romance* where he was asked to give an insight about workplace romance and how to address it.

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whether it is reasonable to mitigate one's damages by remaining employed involves a consideration of both tangible and non-tangible elements of the employment relationship, such as workplace atmosphere, stigma and loss of dignity.

In the wake of *Evans*, employers have used an offer of reemployment as a legal weapon, relying on the employee's supposed unreasonable refusal to return to work to reduce its potential exposure. In *Chandran*, the employer took a similar approach, but as pointed out by the Court of Appeal, it overlooked a key distinguishing feature of its case.

The Bank presumed that Chandran was guilty of harassment on the basis of the complaints received from employees about him, but failed to review the circumstances in which these complaints were made. Moreover, Chandran was being asked to work in an inferior position and, due to the lack of an investigation, was being unfairly saddled with a serious disciplinary record going forward.

For this reason, the Court of Appeal held that Chandran's situation was distinct from that of Mr. Evans and other cases where the employee was expected to remain in his or her position. He was compensated for the 14-month period before he found another job.

The *Chandran* case provides a number of important lessons for employers who receive a complaint from employees about the bad behaviour of one of their colleagues, particularly a superior. We recommend the following considerations in these circumstances:

- Ensure that any allegations against an employee are fully and carefully investigated;
- Ask the aggrieved employee(s) to provide specific written examples of the behaviour which forms the basis for their complaints, and provide the respondent employee with an opportunity to give his or her side of the story;
- Where a change of position is deemed necessary, engage in a broad, comparative analysis of the former position and the position being offered, including issues related to suitability, compensation and status in the organization; and
- Consider specifically whether the change will cause any embarrassment or humiliation for the employee, in light of the surrounding circumstances..

## LAW BLOG

How far can your tweets take you?

Forced to use your vacation time?

Read more at  
<http://blog.toronto-employmentlawyer.com/>

## LATEST NEWS ON TWITTER

Excellent insight into how legal costs work in our system: Rob Ford asks for \$116,000 in legal fees on conflict case <http://soc.li/4G5rS9g>

#Rona to cut 200 full-time #jobs ! Not sure what to do when your #job is eliminated? <http://bit.ly/15xR87s> <http://bit.ly/WctAhu>

Appeal Court says serious error at work not "just cause" for firing bc discipline was not applied consistently. See: <http://canlii.ca/t/fvtn1>

supervisor deleted for inappropriate emails. Was there a "culture" of humour or was it harassment? you make the call <http://canlii.ca/t/fv78k>

How to create an effective office romance policy? Consult with an expert <http://bit.ly/UlvJHb> <http://bit.ly/VU4ycl>

Love in the workplace-is it illegal and can it be cause for dismissal? See what our blog post says <http://bit.ly/Zap5u1>

Court says employers must accommodate staff's child-care requests. I don't see anything new about this... <http://soc.li/cUBy3Fe>

Social media gaffes are easy to make, hard to defend - see my comments in today's Windsor star ( <http://www.windsorstar.com/Social+media+gaffes+easy+make+hard+defend/7903150/story.html...>

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