

# FIRING A LONG TERM EMPLOYEE

## **Consider legal implications before firing long-term employee**

Sonny Warbucks, sole owner of Acme Widget Repairs, has a problem., The work performance of his 55-year-old office manager, Mario Worth, has drastically declined in recent months.

Mario started coming in late at times, and sometimes, even when there were urgent matters at hand, he took overly long lunches or left early. He has been calling in sick a little too much lately, forgetting to do things, causing added expenses to the business.

Six months ago Mario had taken two weeks stress leave, on “doctor’s orders.” Last week he asked for another week off for “stress,” but Sonny said no. Since then Mario has been moody and unco-operative. He has been dragging his feet learning the new computer system and no longer works smoothly with other staff. Yesterday, an increasingly frustrated Sonny signed him up for the computer course anyway and told Mario he had done so. Mario told him he did not want to take the course,

Sonny, who had kept things inside for so long,lost it. He fired Mario on the spot, telling him that he was disobedient and no longer competent to do the job.

“I’m paying you eight weeks termination pay, the maximum under the Employment Standards Act. That’s more than I owe you,” said Sonny. Technically, because of your persistent neglect of duties, disobedience and incompetence, I only owe you wages to date and vacation pay”.

Mario said he was going to a lawyer.

This morning Sonny got a fax from Mario’s lawyer claiming 20 months severance pay, with benefits, and threatening a lawsuit. Sonny does indeed have a problem.

Despite his emotional certainty that he was acting within his rights, Sonny wrongfully dismissed Mario and he now is liable to pay legal compensation to him.

He did not have legal “cause” to fire Mario.

To the extent that Mario’s conduct constituted serious misconduct, habitual neglect or incompetence, conduct which must be present in huge measures to justify firing for cause, that conduct was condoned by Sonny.

During the whole time Mario’s job performance was declining, Sonny failed to give him any written warnings about it, which the law obliged him to do. Verbal warnings would not have been good enough, not unless they were immediately followed up by a confirming memo. And the written warnings would have had to have clearly said that if things did not improve measurably, termination would result.

Having legally condoned Mario’s behaviour by failing to deal with it promptly and in writing, he cannot now rely on Mario’s work shortcomings to justify summary dismissal.

The circumstances in which an employer can instantly dismiss an employee, without notice for “cause” are usually confined to such obvious circumstances as employee theft, fraud or dishonesty as to a material aspect of the employment. Most other situations, even though many employers like Sonny assume otherwise, fall into the grey area where Mario’s situation resides.

And in that grey area the assumption is that the dismissal was wrongful and unjust, and that the employee is entitled to compensation. Sonny was also wrong about the amount of compensation he thought he owed Mario. The Employment Standards Act merely sets out the minimum termination pay an employee is entitled to Le., generally, one week for each completed year of service, up to eight weeks maximum.

Sonny was unaware, as are so many employers, that the judge-made law, the common law, usually imposes an additional obligation to pay severance pay to long-term employees.

If Mario were to sue Sonny for damages for wrongful dismissal and it went to court, the judge, in assessing proper compensation for Mario, would consider 1) the nature of the employment; 2) Mario's age; 3) the number of years he worked for Sonny; and 4) the availability of similar employment.

Applying these factors and the additional factor of Mario's fragile emotional state, and loosely applying a rule of thumb that lawyer's use of "one months notice per year of service," a court could easily award an amount of compensation several times greater than what Sonny thought he was liable for.

So Sonny, in dealing with his problem, would have been much better off had he consulted his lawyer before flying off the handle and firing Mario.

An employer should assume, until advised by his lawyer to the contrary, that any termination of a long-term employee he is contemplating will expose him to significant damages for wrongful dismissal.