

WHAT COULD GO WRONG WHEN AN EMPLOYER REHIRES A FORMER EMPLOYEE IT PREVIOUSLY TERMINATED, WITHOUT CAUSE, BUT UNDER THE CLOUD OF A SEXUAL HARASSMENT COMPLAINT?

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It's surprising that the question in the title of this article even needs to be asked. However, in the case of Colistro v. Tbaytel, 2019 ONCA 197 the Ontario Court of Appeal upheld a lower court decision that considered just that scenario. The Court of Appeal's distaste for the Employer's conduct is apparent from the opening words of the decision:

This appeal considers the consequences that flow from a company's decision to place its business interests above the expectations and concerns of a valued, long-time employee by rehiring an executive dismissed in part due to allegations of harassment of that same employee and others a decade earlier. It raises two main questions: (1) whether this decision constituted intentional infliction of mental suffering on the appellant, Linda Colistro; and (2) whether it resulted in her constructive dismissal.

Ultimately, Tbaytel was found to have constructively dismissed Ms. Colistro (although the court rejected the claim that it engaged in intentional infliction of mental suffering). In addition to damages in lieu of reasonable notice, Tbaytel was also required to pay \$100,000 in damages flowing from the manner in which it ended Ms. Colistro's employment.

The trial judge concluded that Ms. Colistro had been constructively dismissed, in part, because "[it] was impossible for Tbaytel to employ [Ms. Colistro] and Mr. Benoit [her abuser] without the two of them potentially coming into contact with one another", something Ms. Colistro found "unacceptable", and because she vehemently objected to [Mr. Benoit] being rehired. The court found that by doing so, Tbaytel "re-victimized [Ms. Colistro] and minimized the past conduct of Mr. Benoit in the eyes of [Ms. Colistro] and other Tbaytel employees". It is an understatement to say that the employer's case was not helped by the fact that when the President of Tbaytel, wrote to Ms. Colistro to advise her of the decision to rehire Mr. Benoit he stated:

I have come to the decision that there is no legal or other reason not to go forward with hiring Mr. Benoit...You may find that you are unable to accept my decision and, in that case, you will have to proceed as you see fit.

Nor did it help that the President apparently told Mr. Benoit that what was done to him when he was previously let go was "a [f%\$&] travesty".

Not surprisingly, the court concluded that the employer had acted "with blatant disregard for the interests of [Ms. Colistro]" and that the hiring of Mr. Benoit resulted in a very significant negative reaction by her (she suffered from PTSD and depression). The trial judge found that "an objective reasonable bystander, aware of all the facts, would find that [Ms. Colistro's] continued employment with Tbaytel in these circumstances was intolerable." The Ontario Court of Appeal agreed.



The consequences for the employer could have been easily avoided if it put itself in the shoes of Ms. Colistro (who by all accounts had been an excellent employee for over twenty years) and other employees who also voiced concerns regarding Mr. Benoit's rehiring. Instead, it suffered a stinging rebuke from the court and a significant damage award against it.

A further take-away for employers from this case is that there is great value in making a reasonable settlement offer in the course of litigation. In this case, Tbaytel did that. It made significant settlement proposals, which Ms. Colistro turned down. Regrettably for her, she did worse at trial than if she had accepted the offers. As a result she was ordered to pay a portion of her former employer's legal fees (in the neighbourhood of \$200,000) effectively making her worse off financially for having commenced the claim. So too, this is a lesson for all litigants. When a reasonable settlement offer is made, failure to accept it could result in financial hardship if the result at trial turns out to be less than the offer. This was a costly situation for both parties. For the employer, however, not only did it incur unnecessary costs, its reputation was marred and it lost the services of an excellent employee. This was true case where there was no winner at the end of the day.



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