

## You Raise the Issue

KENT BROWN

**Question: About 6 months ago one of our employees acted in a grossly insubordinate way toward his supervisor. We didn't do anything at the time, but we want to fire him now. Is there any problem with firing him?**

You may have condoned the employee's behaviour, and therefore may not be able to terminate him for that behaviour. The company should have acted at the first reasonable opportunity to reprimand or otherwise discipline the employee for insubordination. Now that you have waited for six months, it may be too late.

The concern is that the employee may believe that he has "gotten away" with the behaviour and he will not be punished. Attempting to punish him now may be viewed as unfair to the employee. He has governed his behaviour since then according to your reaction. If you did not take any remedial action, he can properly assume you never intend to.

However, if it is truly possible to say that you required the six months to investigate the situation, or that you were unaware of the behaviour when it first occurred, you may be able to terminate him now. Be aware that a court would closely scrutinize your investigation to determine why it took so long. A court would also want to know if you ever questioned the employee, made him aware of the allegations, or gave him a chance to explain. A court would also closely scrutinize your behaviour toward the employee in the past six months. If the employee received a positive employment review or a raise in the interim, you can be assured that the court will weigh that evidence in favour of the employee.

It is always in the company's best interest, and in fact in the employee's best interest, to act on inappropriate behaviour as soon as you are aware of it and are sure the allegations are true. It is in the company's best interest because acting right away prevents the employee from arguing that you condoned his behaviour. It is in the employee's best interest because it provides the employee with feedback on his behaviour and affords him the opportunity to improve his performance.

If you have not acted on the behaviour for six months, and you were aware of the allegations when they occurred, you would be taking a considerable risk in terminating the employee now. This matter should be thoroughly reviewed by your lawyer before you act.

**Question: We are considering terminating our employee and paying him monthly payments instead of giving him working notice or a lump sum payment of notice in lieu. Is there any reason why we can't pay the employee over time?**

A recent decision of the British Columbia Supreme Court addressed this issue.

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In the decision *Albach v. Vortek Industries Ltd.*, the Court determined that an employer can pay notice in lieu by way of periodic payments instead of a lump sum, as long as the employer provides a total payment that would be at the high end of the scale for the particular employee.

In the *Albach v. Vortek* decision, the employer attempted to force the employee to take salary continuation instead of a lump sum payment. When the employee rejected the offer, they ended up in court. The B.C. Supreme Court determined that salary continuation was not in itself inappropriate. However, in this particular case, the Court determined that the offer of salary continuation did not fit within the higher end of the scale, and required the employer to pay the judgment out by way of a lump sum.

What constitutes the high end of the scale is always a question of fact, and will consider the usual combination of length of service, age of the employee, the employee's education, the job market and the employee's prospects for re-employability, as well as other factors.

It will be interesting to see if other courts across Canada decide to follow the B.C. Supreme Court. Until it is clear what direction other courts will follow, it is wise to obtain legal advice before requiring an employee to accept salary continuation instead of working notice or payment in lieu of notice.

**DISCLAIMER** this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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