



Dismissed Employees: Keep the Reasons for Dismissal on a "Need to Know" Basis

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Employers often ask what can they say internally about the reasons for dismissing an employee. Who has the right to know, and what do they have the right to know? A decision last week from the BC Court of Appeal serves as a reminder that an employer is entitled to have a candid communication internally about the reasons for dismissing an employee. However, such communications should be limited only to those who "need to know". In the case, the court awarded damages, albeit nominal damages, for defamation arising from a post-termination report on the reasons for dismissal of an employee. The basis for the award was that the report was sent to a person who did not need to know.

In *Dawydiuk v. Insurance Corporation of British Columbia* 2010 BCCA 35, Ms. Dawydiuk's position was eliminated during her maternity leave. Her employer offered her two alternate positions. Over several months, her manager pressed her several times to choose. When she failed to make a decision, the manager dismissed her.

In accordance with company procedures, the manager completed and submitted an email form report required by the human resources department describing the circumstances leading to the dismissal. In the report, the manager selected from a list of potential answers three reasons for the dismissal, including "inadequate performance". In addition, the manager advised that he considered Ms. Dawydiuk as "not re-hireable" and rated her as "unsatisfactory". The manager submitted the report to the human resources department and sent a copy of the report to three other individuals: a member of the human resources department, the manager's own manager, and a third person whose role and title was not identified.

Ms. Dawydiuk commenced litigation. She alleged that the report was defamatory, and sought additional damages. The Court of Appeal found that the report was defamatory, since the reason for her dismissal was not her performance but her failure to make a decision on the new positions offered. The Court, however, accepted that the manager had an honest belief in the contents of the report: his view that her failure to respond was an aspect of "performance".

The Court of Appeal also found that insofar as the report was sent to the human resources department and to a senior manager, the report was protected by qualified privilege. In that regard, the manager had an interest in making the report, and the human resources department and senior management had a duty to receive the report. The Court, however, did not extend the defence to the third person who received the report. Since there was no evidence about that person's position or status within the employer, the Court found that it could not conclude that person had a duty to receive the report.

Employers should, therefore, carefully consider who should receive post-termination reports and ensure that the reports are limited to those who need to know.