

**ONTARIO COURT FINDS SUSPENSION WITHOUT PAY AND DEMOTION OF NON-UNION
EMPLOYEE WAS CONSTRUCTIVE DISMISSAL**

Christina Carscallen v. FRI Corporation, [2005] O.J. No. 2400 (Ont. S.C.J.)

The Plaintiff, Christina Carscallen, was a 43-year old Vice-President of Marketing for FRI. Carscallen commenced an action for constructive dismissal after she was suspended without pay and demoted. In June 2005, the Ontario Superior Court of Justice issued its decision and agreed that Carscallen had been constructively dismissed.

Carscallen was employed with FRI for 14 years. In May 2003, Carscallen was required to ship an exhibit booth and marketing materials to employees in Barcelona, Spain. When the booth and materials did not arrive in time for the exhibition, the President and CEO of FRI, Eligio Gaudio, chastised Carscallen. Carscallen and Gaudio exchanged numerous heated emails. Following the email exchange, Carscallen was suspended without pay indefinitely. One week later, Carscallen was summonsed to a meeting wherein she was advised that she was being demoted to manager of marketing, she was no longer entitled to flex time hours and she was being relocated from her office to a cubicle that she would share with one of her subordinates. Carscallen left the meeting without accepting or rejecting the new terms and conditions of her employment. Carscallen never returned to work for FRI. At trial, FRI argued that Carscallen had abandoned her job, or alternatively, that she had been dismissed for just cause due to neglect of duty.

The Court found that absent an express agreement providing FRI with the right to suspend employees without pay, FRI was not entitled to impose such a suspension upon Carscallen. The Court also noted that the FRI corporate policies provided no such authority. The policies required that a progressive discipline system be applied, which was not followed in the circumstances. Specifically, the Court found that the sanctions relating to Carscallen's office, title and work hours as well as the unpaid suspension were punitive, mean spirited and were designed to humiliate her.

The Court also stated that while terms can be implied into contracts, the terms must be necessary to give business efficacy to the contract. The Court determined that a term providing FRI with the right to suspend employees without pay could not be justified in the circumstances, particularly since the term would contradict the express terms of FRI's own policies and procedures.

The Court also considered whether FRI had just cause to impose the unpaid suspension. The Court determined that while Carscallen missed deadlines, failed to properly monitor her duties and communicated in an appropriate tone in e-mails with Gaudio, her misconduct was insufficient to support a finding of just cause. In making its decision, the Court emphasized that summary dismissal without notice or pay in lieu thereof is the most severe punishment known to Canadian employment law, which can only be justified by the most severe misconduct. The Court also noted that in cases involving long service and senior employees, such as Carscallen, the misconduct must be even more serious to substantiate a finding of just cause. Significantly, the Court emphasized that FRI failed to provide Carscallen with warnings and did not allow her

to explain her position. Nonetheless, the Court also stated that FRI could have dismissed Carscallen without cause with proper notice or pay in lieu thereof.

Based on FRI's conduct, the Court found that Carscallen was constructively dismissed. FRI was ordered to pay Carscallen nine months' notice and an additional three months' notice based on punitive damages given FRI's unduly insensitive conduct.

The decision confirms that an employer is not entitled to impose an unpaid suspension upon an employee unless the right is expressly stated as a term and condition of the employee's employment. For example, the term and condition could be stated in the employee's employment contract or in a company policy that has been brought to the employee's attention. In addition, the decision cautions employers to avoid rash or knee-jerk reactions to an employee's transgressions. Progressive discipline must be followed in all but the most serious cases of employee misconduct. Even greater care must be taken when dealing with a senior long-service employee.