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COURT OF APPEAL FOR ONTARIO

RE: **CHRISTINA CARSCALLEN (Respondent (Plaintiff)) – and – FRI CORPORATION (Appellant (Defendant))**

BEFORE: **O'CONNOR A.C.J.O., CRONK AND LANG JJ.A.**

COUNSEL: **Kimberly T. Morris**
for the appellant

Carole McAfee Wallace
for the respondent

HEARD & RELEASED ORALLY: **September 12, 2006**

On appeal from the judgment of Justice R. Echlin of the Superior Court of Justice dated June 10, 2005.

E N D O R S E M E N T

[1] In our view, this appeal must be dismissed for the following reasons.

[2] First, on our reading of his reasons, the trial judge did not fail to recognize, nor did he reject, the proposition that an employer enjoys the authority to impose reasonable employee discipline short of termination of employment in a proper case. To the contrary, the trial judge expressly directed himself concerning the principles enunciated in *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161, including the principle that disciplinary measures short of dismissal may be appropriate for less serious types of employee misconduct.

[3] Given the absence of a specific agreement between the parties regarding employer-initiated suspensions, the issue before the trial judge was whether an implied term authorizing unpaid suspensions should be read into the employment relationship between the parties. The trial judge concluded that it should not. In our opinion, he did not err in so holding.

[4] The historical discipline of the employee did not include unpaid suspensions from work of uncertain duration. In addition, the suspension at issue was inconsistent with the rehabilitative and progressive disciplinary measures contemplated under the employer's human resources policies. As well, the trial judge found that the imposition of the

proposed term was unnecessary to ensure the business efficacy of the employment relationship. That finding was open to the trial judge on the evidence in this case.

[5] Nor do we accept the appellant's submission that the trial judge erred by failing to hold that the discipline imposed was proportionate and reasonable. The trial judge made the following critical factual findings:

> (i) the respondent was suspended without pay indefinitely;
>
> (ii) the respondent was not told of the duration of the suspension or whether her salary would be continued;
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> (iii) the suspension was the result of what the trial judge considered to be an "*ad hoc*/knee jerk reaction" by an angered chief executive officer;
>
> (iv) the additional sanctions imposed in the form of the indefinite demotion of the respondent were "punitive" in nature, "mean-spirited and designed to humiliate" the respondent, and intended to punish and embarrass the respondent in the workplace.

[6] These factual findings, which were supported by the evidence, are dispositive of this ground of appeal.

[7] Finally, we are not persuaded that the trial judge erred in his application of the governing legal principles to the facts of this case or that he failed to consider the entire context of the employment relationship. In our opinion, these contentions are simply not supported by this record.

[8] The trial judge considered the actions of the employer, the course and history of the employment relationship and the employee's conduct throughout that relationship. Although the employee's challenged actions, including her dealings with the chief executive officer of the appellant company, were less than laudable, the trial judge concluded that her conduct, viewed objectively, did not afford just cause for dismissal and that, in the circumstances, she had been constructively dismissed. We agree.

[9] Accordingly, the appeal is dismissed. The respondent is entitled to her costs of the appeal on the partial indemnity scale, fixed in the amount of $12,000, inclusive of disbursements and GST.

"Dennis O'Connor A.C.J.O."
"E.A. Cronk J.A."
"S. E. Lang J.A."