Employment Law

This is a summary of employment law matters of interest, from a litigator's point of view.

Termination Without Cause Includes Lay Off

The employee signed an agreement at the start of his work, which included a clause limiting his entitlement if his employment was terminated without cause. The contract stated: "*... unless an employee is terminated for cause, an employee's entitlement may be terminated at the sole discretion of the Employer and for any reason whatsoever upon providing the employee with one (1) weeks [sic] notice or pay in lieu thereof, subject to any additional notice, pay in lieu thereof or severance that may be required to meet the minimum requirements of the Employment Standards Act...*"

The employee worked for the employer for approximately seven years, and was then purportedly "laid off" from work. Within a couple of months the employer paid to the employee his termination pay entitlement under the *Employment Standards Act.* The employee brought an action for damages for constructive dismissal against the employer.

There was no dispute that the purported lay off constituted a constructive dismissal, which in law is the same as a termination without cause. There was also no dispute that the employee had received his minimum statutory entitlement and the amount required under his employment agreement. The employee asserted, however, that because the employer laid him off rather than outright terminating him, it was not entitled to rely on the termination provision as limiting the employee's entitlement. Further, the employer defended the action on the basis that it had cause to terminate the employee and since it failed in that defence it could not rely on the agreement's termination provision. The employee was partially successful at trial.

A unanimous three-member panel of the Ontario Divisional Court disagreed with the employee. The panel held that even though the employment agreement did not address lay-off of the employee, a lay-off is tantamount to a termination without cause which the agreement explicitly addressed. The employer was entitled to the benefit of the negotiated termination provision.

On the question of whether the employer was precluded from relying on the termination provision

following an unsustained allegation of cause for dismissal, the panel had no hesitation concluding that the failure to establish cause meant a finding of termination without cause, and this was directly addressed in the contract. The appeal was dismissed.

Simpson v. Global Warranty, 2014 ONSC 6916 (CanLII)

Quantum of Human Rights Code Damage Awards Remain Uncertain After Recent Divisional Court Decision

In 2008, the Ontario Human Rights Code was amended to give the Court jurisdiction to award damages with respect to infringement of human rights, and the $10,000.00 cap with respect to mental distress damages was removed. It left the human rights landscape in Ontario in a state of great uncertainty as to where damages would progress.

However, a recent case heard by the Human Rights Tribunal of Ontario ("HRTO") awarded a mere $5,000.00 in damages against an employer for engaging in discriminatory termination. When the employee appealed, and the Divisional Court was called upon to review this decision, the Divisional Court held unanimously that the award of $5,000.00 was not so far outside the range of awards with respect to non-wage loss for disability related discrimination in employment such as to be demonstrably unreasonable. The Court refused to interfere with the decision of the HRTO.

The employee had been employed by a retirement residence, which provided both assisted and independent living units, for over 23 years. The position was a unionized one. She commenced an extended sick leave prior to recovering sufficiently some fourteen (14) months later such that she was capable of returning to modified work. The employer made attempts to find suitable work and made her an offer of a position in the laundry unit. The employee advised that she was not capable of performing the job as its duties were not within her medical restrictions. Her position was supported by medical evidence. The employer terminated her saying it could therefore not accommodate her. The HRTO found that the employer had failed to meet its procedural obligations under the duty to accommodate, and so had infringed the employee's rights in prematurely terminating her employment. The HRTO held that an award of $5,000.00 for injury to dignity, feelings and self-respect was appropriate considering the seriousness of the conduct and the effect on the employee.

In considering the decision the Divisional Court noted that the damage award of the HRTO did not stand in the place of other damages which might have been available to the employee and noted that it was less than what might have been awarded on a successful claim for wrongful dismissal. The employee had been unionized and had grieved her termination, but the grievance process had been discontinued by the

Union. The Court found that the employee's loss of income was not attributable to the discrimination as it appeared no accommodation was available. Further, the Tribunal did not have authority to award "severance pay" (an award the employee could have sought civilly (if not unionized), under the *Employment Standards Act* (*ESA)* or through her grievance). The Court stated that the employee should have continued her grievance to seek the losses attributed to her termination. Further, the Court stated that the employee also had available to her *ESA* remedies to argue that her position had not been abandoned. In other words, the HRTO was not the best forum for the employee given the ultimate findings of fact.

In short, while the employer in this case may have simply failed to utilize the correct process in terminating the employee's employment, a finding of discriminatory conduct and an award of $5,000.00 does little to send a message to prospective human rights offenders that their conduct will be taken seriously and not condoned. Of course there are other decisions emanating from the Courts which are awarding human rights damages. However the direction in which those decisions will ultimately take as to the appropriate quantum has yet to be seen.

Campbell v. Revera Retirement LP, 2014 ONSC 3233 (Ont.Div.Crt.).

Limitation Period did not Expire for the Employee to Sue on Unpaid Commissions

The Employee worked as a mechanical engineer for the Employer. The Employer agreed to pay commissions for products the Employee sold to the government of Iraq in accordance with terms set out in an agreement ("Commission Agreement").

In early December, 2006, the Employee successfully sold products to the government of Iraq. On December 12, 2006, the Employer unilaterally changed the Commission Agreement, advising the Employee that it would be paying a lower rate of commission, thereby breaching the original Commission Agreement.

The Employee promptly took the position that he was entitled to compliance with the Commission Agreement, and retained a lawyer who wrote a demand letter to the Employer in August, 2007, insisting that it comply. By letter dated September 7, 2007, the Employer reiterated its position that it would not abide by the Commission Agreement. In November, 2007, the Employer paid commissions to the Employee at the lower rate. A Statement of Claim was issued on September 16, 2009, seeking damages for breach of contract and *quantum meruit*, alleging that the Employer failed to honour its contractual obligations to pay commissions in accordance with the Commission Agreement.

On a motion for summary judgment, the Employer persuaded the court to dismiss the claim on the basis

that the applicable two year limitation periodhad expired. The lower court held that the Employee did not bring the action within two years of the date that the commission structure was changed on December 12, 2006, and that the breach of contract at that time was sufficient to trigger the commencement of the limitation period. Since the action was not commenced until September 16, 2009, the Employer successfully argued that the action was dismissed as statute barred.

The Court of Appeal unanimously overturned the lower court's decision, finding that the limitation clock only started to run from the date that the Employer remitted the reduced commission payment in November, 2007. As the lesser commission was tendered within two years of the Statement of Claim being issued, the claim was not statute barred.

The Court of Appeal held that in response to the Employer's anticipatory breach of the Commission Agreement by unilaterally decreasing the commissions payable, the Employee treated the contract as subsisting and continued to press for performance and was only required to bring the action when the promised performance (i.e. the proper commission) failed to be paid. Further, the Court held that the Employee did not "discover" his claim for outstanding commissions until the date that he first knew that damages had occurred, namely the date that the deficient commissions were paid.

Employees should seek legal advice in a timely manner to ensure that claims are brought within any statutory limitation periods. The complexities of this case reinforce the need for ongoing legal advice when an employee believes that the employer is depriving him or her of a material contractual right.

Ali v. 0-Two Medical Technologies Inc., 2013 ONCA 733

After Acquired Cause = No Entitlement to Termination Package Already Agreed Upon

The Ontario Superior Court recently issued a decision refusing to exercise its discretion to enforce the settlement of a wrongful dismissal claim when the employer discovered cause to terminate the employee shortly after signing the settlement.

The plaintiff employee worked as an estimator for the employer. The employee was terminated for alleged poor work performance but cause was not alleged. The employee commenced legal proceedings, seeking damages of $138,000. The parties agreed to settle the claim for $22,500 and partial payment of the settlement was issued.

Shortly after the minutes of settlement were signed, the employer was advised by a "whistleblower" that the employee had been doing work on the side for a competitor with some of the employer's clients during work time while using the employer's computer. The employer retained a forensic computer analyst that discovered the employee had in fact done the work on his work computer and then attempted

to delete the files by using bootleg computer software. The employer then repudiated the settlement and refused to pay any further settlement money to the employee. In response, the employee filed a motion seeking to have the court enforce the minutes of settlement.

The court stated that as a matter of public policy, all settlements ought to be enforced unless enforcement would "create a real risk of clear injustice".

The court concluded that the "cause" was not easily discoverable and a routine inspection of the workplace computer would not have revealed any basis for concern. The court further concluded that the employer never would have entered into the minutes of settlement had it been aware of the employee's conduct. In the court's view, the uncontroverted evidence of the employer that the employee was doing work on the side with the employer's resources, when he should have devoted his time and efforts to the employer, coupled with the fact that the employee covered his tracks and then sued for wrongful dismissal, created a real risk of injustice to the employer if the court were to exercise its discretion to enforce the settlement. In refusing to enforce the settlement, the court also awarded costs to the employer on the motion.

This decision establishes that entering into minutes of settlement in a wrongful dismissal claim does not always mean finality in terms of escaping accountability for conduct that is otherwise worthy of cause for termination.

Ruder v. 1049077 Ontario Limited o/a Crowntech Aluminum & Glass 2014 ONSC 4389 (CanLII)

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