KOSKIE MINSKY

JUSTICE MATTERS

Employment Law

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

Employee's Failure to Disclose Disability Meant No Duty to Accommodate

In the recent case of *Bellehumeur v Windsor Factory Supply Ltd*, the appellant suffered from various "disabilities", which had been reported to the respondent, and for which the respondent was found to have provided reasonable accommodation. The appellant was thereafter terminated for cause after he made violent threats towards another employee. The appellant alleged that his violent conduct towards the employee was a result of his mental disability, which the respondent had failed to accommodate, as required by the Ontario *Human Rights Code* and disputed that he had been terminated for just cause.

The trial judge concluded, as upheld by the Ontario Court of Appeal, that the respondent was not made aware of the appellant's mental disability and had no indication of the existence of such until after the appellant had been terminated. Accordingly, the Court found that the appellant's disability was not a factor in the termination of his employment and that rather, he was terminated because he made violent threats against his co-worker.

The Ontario Court of Appeal also upheld the trial judge's ruling that there was no duty upon the respondent to accommodate for an unknown disability and that the employee's conduct was serious enough to amount to just cause for dismissal. The trial judge followed the analysis in the*McKinley**[1]* and *Dowling**[2]* and concluded in the particular circumstances of this case that the employment relationship could no longer exist.

While this case had a favourable outcome for the employer, it remains paramount that employer's address reported and unreported accommodation requests, as appropriate, keeping in mind that accommodation issues are fact specific with respect to when a duty to accommodate arises for an employer and when and how an employer must discharge same.

Bellehumeur v Windsor Factory Supply Ltd **2015 ONCA 473**

[1] ***McKinley v BC Tel*****, 2001 SCC 38, [2001] 2 SCR 161**

[2] ***Dowling v Ontario*** **(Workplace Safety and Insurance Board), 2004 CanLII 43692 (ON CA)**

Correctional Officer's Failure to Disclose Criminal Charges Not Worthy of Termination

The Ministry of Community Safety and Correctional Services (the "Employer") terminated the employment of a correctional officer (the "Employee") with approximately seven years of service after it was discovered that she failed to immediately disclose that she had been charged under the Criminal Code with impaired driving while off-duty. The Employer took the position that the Employee's disclosure of the charge two years after the fact violated the Employer's policies and her standing orders. The Employee's union, OPSEU (the "Union"), took the position that although the failure to report the charges in a timely manner was a serious breach of policy worthy of some discipline, termination of employment was too severe in the circumstances.

During the arbitration hearing, the Union called evidence establishing that the charge (and accompanying license suspension) did not negatively impact on the Employee's ability to actually perform her job. The Union explained that the charge coincided with a tumultuous time in the Employee's life. She had just transferred to a new correctional facility after being off work on stress leave attributed to unsubstantiated claims of harassment by a supervisor. She was ashamed and embarrassed about the charge and was afraid of everyone in her new workplace finding out. Given the supervisor she complained about had also just been transferred to her new workplace, the Union explained that the Employee was justifiably skeptical of who to trust. She was also hesitant to immediately disclose the charge because she had been told by her lawyer that the charge might be reduced to careless driving. Although the Union did not take the positon that the Employee suffered from an alcohol dependency, it did lead evidence to establish that the criminal charge was an immediate wake-up call for the Employee that resulted in her quitting drinking and smoking and becoming more active in her Church.

The Employer took the position that honesty and trust were fundamental to the employment of a "peace officer" that is responsible for enforcing rules of the criminal justice system and that correctional officers are properly held to a high standard of ethical conduct. The Employer then argued that the Employee's initial and continued failure to make timely disclosure of the charge was so incompatible with her employment that termination was the only reasonable disciplinary response. The Union, on the other hand, argued that termination was disproportionately harsh in the circumstances given the Employee's genuine apology, remorse and positive rehabilitation prior to any discipline ever being imposed.

In coming to his conclusions, the arbitrator noted that any decision required a balancing of competing interests – those being the Employer's legitimate business interests and the Employee's economic well-being and emotional self-worth which were inextricably tied to her employment. Following the Supreme Court of Canada's decision in *Mckinley v. BC Tel,* which requires a trier of fact to assess whether something short of termination can reasonably address instances of workplace dishonesty, the arbitrator concluded that termination was inappropriate. Instead, the arbitrator concluded that the dishonesty was worthy of a twenty day suspension. In reaching this conclusion, the arbitrator reinstated the correctional officer's employment without any loss of seniority and awarded back pay retroactive to the first day of hearing in the arbitration, which amounted to just over one years' worth of wages.

This decision is a further reminder to all employers that they should always give very serious consideration to disciplinary responses short of termination when attempting to address instances of workplace dishonesty because failing to do so can prove costly.

OPSEU (Lunario) v. Ministry of Community Safety and Correctional Services,2015 CanLII 60425 (ON GSB)

Pocket Dial Busts Moonlighting Employee

The employee was hired in 2010 into a senior sales position with IBM (the 'employer'). Although the employee had access to office space, his role was substantially based out of his home. At the time of his hiring the employee disclosed to the employer that he had a privately held business which designed and sold residential storage units. He undertook to transfer operational responsibilities of the business to his wife.

The employer had a set of Business Conduct Guidelines, which were a condition of employment that the employee understood and agreed to abide by. One of the guidelines required employees to avoid conflicts of interest, which included using the employer's time and assets for outside work.

The employee had regular electronic and phone communication with his supervisor, including a standing weekly call. On January 21, 2011, about 6 months after his hiring, the employee canceled his weekly call, stating that he was overwhelmed with work. The same afternoon, the employee unwittingly pocket-dialed his supervisor two times in a row, during which his supervisor overheard his conversation with a subcontractor related to his private storage unit business. The employee also failed to respond to work emails that afternoon.

Ten days later the employee met with his supervisor, and was reminded of the conflict of interest guidelines. He admitted to working about 3 hours per week on his family business. The employee was subsequently terminated for cause.

The employer bears the onus to establish that an employee's termination for cause is justified. The Court

accepted that the employee spent only 3-4 hours per week on his private business, but also found the evidence established that he solicited business and performed work connected to remuneration for his business during IBM time, and that this was a significant breach of the employment relationship. Further, a breach of this magnitude did not require the employer to give a warning to the employee, and an opportunity to improve his conduct.

Employees should be aware of their workplace policies and expectations regarding outside work, and avoid conflicts which could lead to termination for just cause.

***Ross v. IBM Canada Ltd.*, 2015 ABQB 563 (CanLII)**

Court upholds agreement enforcing fixed term contract for a 25 year employee

The Employee began working for Sony of Canada Ltd. (the "Employer") on June 9, 1989. His employment was terminated on March 31, 2015 just prior to his 26th anniversary of continued employment with Sony. As at the termination date, the Employee was 45 years old working as the Director of Sales in the Professional Solutions Group. He held a high level position in Toronto managing several employees with an impeccable service record.

In the spring of 2014, the Employee advised his supervisor that he intended to move to Ottawa. He requested to work remotely from Ottawa based on a telecommuting structure managing his employees based in Toronto. Sony did not have an office in Ottawa and was not in favour of the proposal for a director-level employee working remotely in another city.

Despite initial disapproval, Sony was prepared to accommodate the Employee's request to work remotely on the condition that his position change from indefinite employment to a contract position with a fixed term.

The fixed term agreement was negotiated for a period of approximately 1 month. The Employee had ample opportunity to seek independent legal advice. The Employee was unable to negotiate and preserve his existing rights to severance and termination pay as a longstanding 25 year employee. He also accepted lesser entitlement to vacation pay and a non-competition clause in the fixed term contract which was to expire on March 31, 2015, unless renewed.

Unfortunately, the Employer undertook a major re-organization of its North American operations which culminated in significant lay-offs in February 2015. The Employee's fixed term contract was not renewed after March 31, 2015. As the fixed term agreement was completed, the Employer took the position that the Employee was not entitled to termination pay after the cessation of the contract.

The Employee commenced legal proceedings arguing, among other things, that his fixed term employment agreement was void and lacked consideration. The Employee brought a motion for summary judgment seeking termination pay predicated upon his 25 year employment tenure.

While sympathetic to the Employee's ''plight'', the Court enforced the fixed term contract holding that there was ample consideration for the fixed term contract. Specifically, Sony permitted the Employee to perform his prior duties from Ottawa with only occasional physical appearance in Toronto. Even though the fixed term contract had a provision which permitted the Employer to terminate the agreement on thirty days' notice, which would violate the minimum standards for termination pay prescribed by 57(h) of the *Employment Standards Act* ("ESA"), this option was not exercised, and therefore had no bearing on the enforceability of the contract.

This case is significant because it demonstrates the importance that employees obtain legal advice before signing or revising an employment agreement which can fundamentally alter their rights and entitlement upon termination.

***Riskie v Sony of Canada Ltd.*, 2015 ONSC 5859 (CanLII) (SCJ)**

Leave to Appeal to the Supreme Court Filed by Koskie Minsky in Constructive Dismissal / Contract Repudiation Case

Koskie Minsky filed materials to seek leave from the Supreme Court of Canada ("SCC") to appeal the Nunavut Court of Appeal's ("NUCA") decision in a case that could impact employees across Canada. This leave application, if successful, will allow the SCC its first opportunity to consider whether an employee who raises concerns about her conditions of employment can be said to have effectively resigned.

Former employee, Sarah Kucera ("Kucera"), is seeking permission to challenge the NUCA decision that by sending a solicitor's letter alleging constructive dismissal to her employer, Qulliq Energy Corporation ("Qulliq"), which is wholly owned by the Nunavut government, she in fact resigned.

In August 2010, Kucera's counsel wrote a letter to her employer, taking the position that Kucera had been constructively dismissed. The letter went on to state that Kucera was prepared to continue her employment while the parties negotiated her termination package. The following day, Qulliq took the position that the letter was grounds for termination for cause. The Trial Judge held that the employee's working conditions did not amount to a constructive dismissal, and the letter from her counsel therefore amounted to a repudiation of the employment contract. That decision was upheld on appeal, although a third judge dissented. Consequently, Kucera was left without a job and without compensation.

This finding has significant consequences for workers across Canada. The NUCA decision means that an employee's expression of discontent regarding their conditions of work, or the assertion of an allegation of constructive dismissal, brings with it the potential consequence of being said to have effectively resigned from one's position with no compensation. We are advised that QEC maintained a very aggressive defence throughout, including pursuit of a Security for Costs motion against Kucera, in February 2012, in which they were unsuccessful.

The decision of the NUCA from which leave to appeal is sought both marks a dramatic departure from existing legal principles and creates conflicting appellate level decisions. We are hopeful that leave will be granted to afford the SCC the opportunity to clarify these issues appropriately.

Kucera v Qulliq Energy Corporation, 2015 NUCA 2 (CanLII)

One Job Entire Life – Consideration in Award of Notice

The Ontario Superior Court of Justice, in a decision rendered by Pollak J. released April 16, 2015, has recognized that a 65 year old employee with over 40 years' service with his employer was "uniquely situated"; a relevant consideration in deciding the length of notice upon termination of employment.

The employee had been employed as a Senior Civil Engineer for over forty years when he was terminated due to a shortage of work. The employee requested a notice period of 30 months; the employer took the position that 36 weeks was appropriate. The court agreed that only exceptional cases warrant an award of damages in lieu of notice in excess of 24 months. It wrote "the fact that the Plaintiff is over 65, has more than 40 years of service with the Defendant, his only employer, is in my view, exceptional". The Court awarded a notice period of 27 months.

The Court then went on to consider the issue of how to deal with the fact that the judgment was being rendered only 8 months post-termination. It declined to find that the Plaintiff would not mitigate and order judgment without qualification. Instead it held that the employer had an obligation to continue to pay to the employee for the balance of the notice period, subject to the employee's obligation to mitigate his damages and to reduce the monthly payments for any earnings by the employee during the notice period.

If the employer wished to challenge the employee's mitigation efforts or earnings made during the notice period, the matter may be brought back before the court. The Judge indicated that she would remain seized of the matter should that be necessary.

Court Finds "Depressed" Employee Abandoned His Employment

In a recent decision, the Ontario Superior Court summarily held that an employee that failed to report to work over a period of 8 months, relocated his residence from New Brunswick to Ontario without approval, and failed to follow the policies and procedures applicable to his short term disability claim had abandoned or resigned from his employment with IBM Canada Ltd. ("Employer").

The employee worked for the Employer for 15 years in Nova Scotia and New Brunswick. In the fall of 2013, the Employee experienced an episode of depression. He ceased reporting to work and informed the Employer that he intended to apply for short-term disability. Shortly thereafter, the employee relocated from New Brunswick to Ontario to live with his fiancée without informing the Employer. This move violated the Employer's policy which required prior approval before an employee could relocate during a convalescence.

The Employee failed to remit appropriate documentation to the insurer to support his request for short term disability. The insurer required a medical physician to assess and diagnose the employee, and provide a plan of treatment. The employee submitted letters from his psychotherapist treating him in Ontario. These letters were rejected because they were not authored by a psychiatrist or medical physician licenced by the Canadian Medical Association as required by the short term disability plan.

The insurer denied the request for short term disability. The Employee made use of the insurer's internal appeals process but did not produce the requisite medication documentation to support the appeal. The Employer sent the employee a series of five letters over the course of eight months indicating that if the employee did not return to work, or alternatively, provide the required medical information to the insurer, the Employer would consider the employee to have resigned or abandoned his job. Following the Employer's fifth letter, the Employer took the position that the Employee had voluntarily resigned because the Employee failed to return to work or submit additional medication documentation to support his appeal by the imposed deadline.

On the motion for summary judgment, the court found that the employee clearly and unequivocally displayed an objective intention to no longer be bound by the employment contract. The factors supporting this conclusion were as follows:

(a) the employee failed to report to work for eight months;

(b) the employee did not follow the policies of the insurer;
(c) without disclosure to the Employer, the employee unilaterally moved to Ontario to live with his fiancée.

The court praised the Employer's numerous clear warnings to the employee before the Employer took the position that the employee had resigned. The Court rejected the employee's argument that the employer was under an independent duty to accommodate the employee under these circumstances.

This case is instructive to employers to provide helpful guidelines concerning an acceptable process to follow before claiming that an employee has abandoned or resigned from his or her employment. It also sounds a note of caution for employees dealing with disability claims that the failure to follow the requirements of a disability application can have dire consequences.

Betts v. IBM Canada Ltd., 2015 ONSC 5298

Employer Faces Vicarious Liability Claim by Employee for Sexual Assault

A defendant/employer unsuccessfully tried to stymie a claim by an employee that it was vicariously liable for violence committed by another one of its employees.

The plaintiff employee ("Employee") was a maintenance worker with a theme park (the "Employer"). The Employee alleges that in the summer of 2013 her supervisor (the "Supervisor") made sexual advances toward her, all of which were rejected, and threatened job action if she reported his behavior. At an end-of season staff party, the Employee claims that she was sexually assaulted by the Supervisor, as well as forcibly confined when he entered her car without consent and forced her to drive around while he assaulted her. On the night of the staff party, the Employee contacted police and the Supervisor was charged criminally with sexual assault and forcible confinement.

The Employee brought a civil action against the Supervisor, but also claimed damages against the Employer for sexual harassment, sexual assault, battery, false imprisonment and intentional and/or negligent infliction of mental suffering. She claimed that the Employer was liable for a number of reasons, including the fact that it hired an employee with a violent criminal history and put him in a supervisory role; failed to supervise employees in general and specifically at staff functions; failed to train and instruct employees on issues of sexual harassment, sexual assault and proper conduct in the workplace; allowed an unstructured and unsupervised party on its premises where it supplied alcohol; and generally enhanced the risk that vulnerable employees could be subject to harmful activity.

The Employer brought a motion for an order striking out the Employee's claim and dismissing the action against it on the grounds that it disclosed no reasonable cause of action.

On the question of the Employer's vicarious liability, the Court analyzed the two-stage test set out in prior case law. The first step required the Court to explore whether factually similar cases established, without a doubt, that vicarious liability should be imposed. The Court found that no such precedent existed here. At the second stage of the test, the Court must ask whether there was a connection between the employment enterprise and the wrong committed that justified imposing vicarious liability on the employer, in terms of fair allocation of the consequences of the risk and/or deterrence. The employer must 'materially enhance the risk' before it is reasonable to hold it vicariously responsible for wrong acts.

On the facts as pleaded, the Court noted that a staff party is obviously connected to the Employer, and because it was held at a large waterpark supervision was difficult if not impossible. The Employer also permitted alcohol consumption, without any controls. Although the Employee at this stage in the court proceeding had not established that the Employer was vicariously liable for the acts committed by the Supervisor, the Court was not prepared to strike the claim on the basis that it disclosed no reasonable cause of action.

The Court did, however, hold that sexual harassment is not an independent tort recognized in law and therefore cannot support a cause of action in the civil courts. Rather, such a claim comes within the exclusive jurisdiction of Ontario's *Human Rights Code*. The Court struck this part of the Employee's statement of claim.

K.L. v 1163957799 Quebec Inc., 2015 ONSC 2417 (CanLII)

Future Base Salary Increases Form part of Employee's Damages Upon Termination

In a recent decision of the Ontario Superior Court of Justice, the Court awarded damages for wrongful termination to an employee based upon the customary salary increase the employee would have received had he been actively working.

The employee, a 56 year old, 22 ½ year Director of Business Development, had been terminated without cause. The employee brought a summary judgment motion seeking damages for wrongful termination and argued that he was entitled to the salary increase and the bonus he would have received during the common law notice period based upon the historic award of salary increases and average bonus for the two years preceding his termination.

The employer did not cross-examine on the employee's evidence in respect to the salary increases, nor present any evidence as to the salary increases received by other employees in the year of the

termination. On the bonus issue, the employer argued that the bonus should be averaged over the preceding three years, as was customary based upon prior decisions, including the bonus he received for the year of termination.

The Court awarded damages based on the employee's base salary as increased to reflect a 2% increase for the next salary increase following the termination. The Court found that 2% was within the range of increases the employee had consistently received and it was also consistent with what the employee believed other comparable employers had received in the year of his termination. The employer did not dispute this evidence.

On the issue of the bonus, in view of the fact that the employer did not provide the information necessary to calculate the bonus for the year of termination, nor provide evidence of what other comparable employees had received, the Court accepted the employee's proposed calculation.

Finally, as the notice period was to extend beyond the date of the decision, the Court exercised its discretion to follow the decision of *Correa v. Dow Jones Markets Canada Inc.* (1997) 1997 CanLII 12268, to hold that any money to be earned by the Plaintiff during the notice period be impressed with a trust and be paid by the Plaintiff to the Defendant upon the expiry of the notice period.

This decision is unusual in that it awards damages based on an increase in salary which would have occurred after the termination date, which is a variance from the more common approach of awarding prospective salary increases only if already granted. The approach taken is similar to how Courts have approached bonus payments and other periodic forms of compensation over the reasonable notice period. While it is unclear as to whether it will be followed by other courts, for now, it leaves open an argument for employees to make even when negotiating termination packages.

This decision also confirms the wide discretion which the Court maintains to impose upon an employer a calculation of damages where the employer fails to present evidence to rebut an employee's allegations as to what the employee would have received but for the termination. An argument by an employer of uncertainty or difficult quantification may well be met with a Court imposing its own view of what is appropriate to "fill in the gaps".

Chen v. Purdue Pharma Inc., 2015 ONSC 1967 (CanLII)

Frustration of contract, it's not just about "time".

An employment contract might be considered "frustrated" when an unforeseeable event occurs that makes it impossible to fulfill the terms of the contract.

This recent Ontario Superior Court of Justice case should give employer's reason for pause and to take a second look at the doctrine of frustration of contract.**[1]** In this case, an employee of 17 years was diagnosed with terminal cancer and commenced a leave of absence on June 7, 2013. Shortly thereafter, the employer encouraged the employee to make long term disability and critical illness claims through the company's benefit provider. The employer also advised the benefit provider that the claims were forthcoming. On August 29, 2013, the employer confirmed in writing to the employee that his employment would continue with the company until such time that he was well enough to return to work. The employee died on September 17, 2013.

The Court addressed two issues:

1. Whether an employee whose employment is severed by frustration on account of illness or injury is entitled to both termination pay and severance pay pursuant to the *Employment Standards Act, 2000* ("*ESA*")?

2. Whether the employee's employment contract was frustrated by his illness, or whether his employment came to an end on account of his death?

Upon review of the *ESA* and O. Reg. 288/01, which fleshes out the termination and severance of employment provisions under the *ESA*, the Court concluded the statute provided a *prima facie* entitlement to termination pay and severance pay when a contract of employment is frustrated due to illness or injury.

With respect to the second issue, the employee's estate argued that the employee's contract had in fact been frustrated due to his critical illness. In short, given the serious nature of the employee's illness, the employer should have known that the chance of the employee being able to fulfill the terms of the contract were near impossible. On this basis the employee's estate argued that the contract had been frustrated due to illness prior to the employee's death, and accordingly termination and severance pay under the *ESA* were owed.

The employer took the view that the employee's contract came to an end upon his death and therefore under the *ESA*, the estate was not entitled to any statutory notice and severance payments. The employer's view was that termination under the *ESA* is a unilateral act by the employer, and in this case, the employer took no steps to terminate the contract but rather advised the employee that his position would be held until he was fit to return to work. Furthermore, the employer argued that the act of submitting disability claims amounted to an intention to continue his employment after his diagnosis.

The Court disagreed with the employer's analysis and concluded that the employee's contract had been frustrated as a result of his illness and therefore his estate was entitled to statutory notice and severance payments. The Court noted that it was impossible to precisely identify the point when the contract became frustrated. However, in its analysis, the Court focused on the severity of the employee's illness, the fact that it was unlikely that he would ever return to his employment given that he has been

diagnosed with terminal cancer, and that the employer was aware of the diagnosis at all material times.

The decision serves as a warning to employers that with frustration of contract the diagnosis may be more important than the duration of time an employee is away from work. Employers should not simply rely on the fact that an employee has been away for an extended absence, as frustration may occur at any point, and notably much earlier than previously thought. The likely distinguishing factor in this case from other cases is that the Court emphasized that the employer had knowledge of the employee's condition and his inability to return to work. As such, each situation must be assessed on its own merit.

[1] *Estate of Cristian Drimba v. Dick Engineering Inc.*, 2015 ONSC 2843

Philip E. Graham, Associate
David Silver, Partner
Arleen Huggins*, Partner
Ernie Schirru, Partner
Nancy Shapiro, Partner

This edition of Employment Law News was produced and edited by the Employment Law Group