KOSKIE MINSKY

JUSTICE MATTERS

Employment Law

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

Disabled Employees Cannot be Given Working Notice

In a recent decision of the Ontario Superior Court of Justice, a judge ruled that a working notice period does not apply to an employee who is on disability leave from his employer.

In this case, a 43 year old employee with 18 years' service commenced a disability leave in January, 2016 for a non-work related accident. The employer terminated the employee's employment with working notice at the end of January, 2016, while the employee was still on disability leave, as a result of the pending closure of the business scheduled for July, 2016. The employee attempted to return to work for two shifts before the business finally closed in July, 2016.

In granting summary judgment in favour of the employee, the Court held that employers cannot provide working notice to employees on disability leave as they are incapable of working.

The Court awarded the employee damages in an amount which was equivalent to the salary he would have earned had he actually worked during the notice period until he started new employment (nine months), which was within the 12 months' notice period the judge assessed as appropriate, less the wages earned for the two shifts he worked and less the amount already paid by the employer for statutory notice under the *Employment Standards Act* (the "*ESA*").

In doing so, the Court rejected the employer's assertion that the employee could have returned to work earlier; either with the employer or by mitigating earlier with a new employer, as the employee had obtained a letter from his family doctor attesting to his incapacity. The judge stated that the employee could not have searched for new work until he was medically able.

Presumably, working notice was given so that the employer could take advantage of the notice period running while the employee was not at work and therefore not earning wages. However in doing so, the employer prevented the disabled employee from the benefit of a transition period to look for new employment, which the notice period is meant to provide. Had the employer terminated the employee at

the time of the actual closure of the business, and not tried to gain the benefit of a working notice period from a sick employee (which would have effectively resulted in no wages to the employee until he recovered), it would have paid significantly less in damages; being only from the date of the closure in July, 2016 to the date the employee recovered and found alternate employment in October, 2016.

This case emphasizes that employers should be very cautious not only with the quantum of notice they provide to terminated employees but also with the manner in which notice is given and seek legal advice prior to the termination notice being sent.

***McLeod v. 1274458 Ontario Inc.*, 2017 ONSC 4073**

Ontario Court of Appeal rules again on termination provisions in North v. Metaswitch

The Court of Appeal has again ruled on the issue of terms in employment contracts which purport to limit an employee to minimum notice under the *Employment Standards Act, 2000* ("ESA") upon termination. In *North v. Metaswitch*, the Court of Appeal held that it is improper to use a severability clauses to remove portions of an invalid termination clause in an employment contract.

The *ESA* is minimum standards legislation, providing basic minimum entitlements for employees in Ontario. In line with this, section 5 of the *ESA* prohibits employers and employees from contracting out of any provisions of the *ESA*. Courts have repeatedly held that any contractual provisions which provide an employee with less than the minimum standard under the *ESA* are void. The court is often called upon to apply this principle in the context of termination provisions, wherein the employer attempts to limit an employee to *ESA* minimum notice upon termination, disallowing the employee from claiming for their common law notice period, which is generally more valuable. The court considers whether the provision is in fact not enforceable as drafted.

In *North v. Metaswitch*, the termination provision in the employee's contract provided that the employer could terminate the employee for any reason, and provide notice in accordance with the provisions of the *ESA*. However, the termination provision also stated, "in the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement."

As the employee also earned a commission, he took the position that the termination provision was in violation of section 5 of the *ESA* because it disentitled him to compensation for his commission during the notice period. The application judge agreed with the employee, finding that commissions were wages under the *ESA*, and all wages must be paid to the employee during the notice period. Therefore, the termination provision violated section 5 of the *ESA*. The application judge went on to then find that the

words "base salary" could be severed leaving the employer free to terminate in accordance with the*ESA*.

However, the Court of Appeal overruled this finding.

The Court of Appeal held "where a termination clause contracts out of one employment standard, the court is to find the entire termination clause to be void, in accordance with s. 5(1) of the ESA. It is an error in law to merely void the offending portion and leave the rest of the termination clause to be enforced."

The Court of Appeal found that the correct approach in reading severability clauses with regard to termination provisions is to first assess the termination clause to determine whether there is any contracting out of an employment standard. If there is, the termination clause is void. The severability clause is inoperative vis-à-vis the termination provision, but is not itself void.

The Court of Appeal articulated a key policy reason behind their decision – courts have long recognized the inequality of bargaining power in employment contracts. Employers have the ability and resources to draft contracts that comply with the *ESA.* If they violate the *ESA* in drafting a termination provision, they should not then be able to benefit from their error by the application of a severability clause, which a judge would use to make the provision *ESA* compliant and nevertheless limit the employee to their minimum *ESA* entitlements. In other words, the Court does not want to incentivize employers to draft illegal contracts, or to be careless as to whether the contract is illegal.

North clarifies the law in this area, and reaffirms what many employment law practitioners see as the correct way to analyze termination provisions in contracts. While it did not expressly refer to "blue penciling", the removal of a few words from a contractual provision was held to be inappropriate by the Supreme Court of Canada in the case of *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6.

***North v. Metaswitch*, 2017 ONCA 790**

It Turns Out Probation Means Exactly What you Thought!

In an unprecedented decision released by the Court of Appeal recently, the Court has found the use of the word "probation" in an Employment Agreement has the meaning that during the stated period of time, employment may be terminated with payment only as is required by the Employment Standards Legislation.

Notwithstanding requirements that contracts be drafted clearly and unambiguously, and the Rules of *contra proferentum*, which construe any ambiguity against the drafter of the agreement, in a surprising decision, released by a three judge panel of the Ontario Court of Appeal this summer, it was held the use of the simple word "probation" was all that was required to insert a probationary period into any

Employment Agreement. The contract in question contained the words "probation.....6 months". While the *Ontario Employment Standards Act* only permits a probationary period of three months during which someone can be terminated without any payment at all, the Court concluded that the use of these words would give probation the ordinary meaning as it clearly misrepresents the plain intention of the parties to incorporate that period as a true probationary term.

The Court held:

> "The trial judge's decision to treat the term "probation.....6 months" as having no meaning was wrong. The parties agreed to a probationary contract of employment, and the term "probation" was not ambiguous. The status of a probationary employee has acquired a clear meaning at common law. Unless the Employment Contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability".

The Court went onto conclude that since it is not possible to contract out of the minimum notice entitlements provided for in the *Employment Standards Act, 2000*, probationary employees are entitled to receive statutory notice or pay in lieu of that notice after the initial three month period. In this case therefore, the employee was entitled to notice of one week, which the employee had in fact received.

This decision certainly shows a willingness by the Court to read in a significant amount into a very bare provision in an Employment Agreement and may signify a shifting direction in terms of interpretation of contract by this Court.

Notwithstanding the decision, clarity is always encouraged and Employment Contracts should be drafted so on a clear reading, it is certain to an employee what notice the employer is going to be obliged to provide, and that such notice of course, comply with at least the minimum requirements of the applicable legislation.

Nagribianko v. Select Wine Merchants Ltd., 2017 ONCA 540

Contractor of Employer Can Be Held Liable in Human Rights Complaint

On December 15, 2017 the Supreme Court of Canada ("Supreme Court") delivered a significant decision in the area of human rights law. According to the Supreme Court, employers are not the only ones who are prohibited from committing discriminatory harassment against employees.

British Columbia Human Rights Tribunal v. Schrenk concerned claims of discrimination in the workplace that

were not laid against the Complainant's employer, an engineering firm (the "Employer"), but rather, against a foreman of a contractor hired by the Employer. The Complainant was a civil engineer working for the Employer. The Employer contracted with the municipality of Delta in British Columbia to supervise a road improvement project. The Complainant was required to supervise the construction contractor (the "Contractor") as part of his duties.

The Contractor's foreman (the "Foreman"), engaged in discriminatory behaviour against the Complainant. He directed racial epithets and homophobic comments at the Complainant while on site and via work-related emails. The Complainant brought a claim of discrimination "regarding employment" pursuant to the BC *Human Rights Code* (the "BC *Code*") against both the Foreman and the Contractor (collectively the "Respondents"). The Complainant did so despite the fact that he was not in an employment relationship with the Respondents. In fact, the Complainant's role provided him with supervisory authority over the Foreman.

The BC *Code* prohibits a "person" from discriminating against someone "regarding employment". The Respondents argued that the prohibition against discrimination under the BC *Code* had no application because the Complainant was not in an employment relationship with them. At first instance, the BC Human Rights Tribunal (the "Tribunal"), held that it had jurisdiction to deal with the complaint. This ruling was affirmed by the BC Supreme Court and subsequently quashed on appeal to the BC Court of Appeal.

By a narrow margin of 5-3-1, a small majority of the Supreme Court affirmed the Tribunal's ruling that it had jurisdiction to hear the complaint, stating that the prohibition against discrimination "regarding employment" is not limited to protecting employees from discriminatory harassment by their superiors in the workplace. The Supreme Court held that this was consistent with a broad, remedial and purposive reading of the BC *Code*. Accordingly, the Court declared that the BC *Code* prohibits discrimination against employees whenever that discrimination has a sufficient nexus with the employment context. This includes discrimination by a co-worker, or another worker on the job site that has a different employer.

In arriving at its decision, the Supreme Court developed a test to determine whether discriminatory conduct has a sufficient nexus with the employment context to be captured by the prohibition under the BC *Code*. The test is a contextual analysis that considers several non-exhaustive factors, including, (1) whether the respondent was integral to the complainant's workplace; (2) whether the impugned conduct occurred in the complainant's workplace; and (3) whether the complainant's work performance or work environment was negatively affected. The Supreme Court reasoned that the contextual analysis furthers the purposes of the BC *Code* by acknowledging how employee vulnerability stems not only from economic subordination to their employers, but also from being a captive audience to other perpetrators of discrimination such as site forepersons, customers, co-workers, and employees employed by other employers at or in their workplace.

In this case, the Supreme Court took a broad view of the statutory protection against discrimination in

employment under the BC *Code*. The Ontario *Human Rights Code* (the "ON *Code*"), similarly provides a broad grant of protection for employees from discriminatory harassment in the workplace perpetrated by "*the employer or agent of the employer or by another employee*". In light of this decision, the quasi-constitutional nature of human rights legislation, the generous approach to interpretation which such statutes attract, and the remedial purpose of the ON *Code* described in its preamble, it seems quite possible that despite the different wording in respect of discrimination in employment between the BC and ON *Codes*, the prohibition against discriminatory harassment in Ontario may also extend to an employer's contractors (and their employees) acting in close nexus with an employer outside of a traditional agency relationship. Also query whether this will encourage a further expansion of the definition of "employer" in Ontario human rights law. We shall wait to see how the ON *Code* will be interpreted by the Ontario Human Rights Tribunal, Ontario adjudicators and Ontario Courts in light of the Supreme Court's recent ruling.

***British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62**

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