Employment Law

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

Appeal Court Upholds Award of Damages to Wrongfully Dismissed Executive for Loss of Employee Shareholder Bonus and Value of Shares

An employee employed by an engineering company for 18 years was terminated for just cause without notice in November 2010 for improper expense claims. The Supreme Court of British Columbia found that the employee was wrongfully dismissed and awarded the employee 18 months' pay and benefits in lieu of reasonable notice, including an annual bonus and shares enjoyed by the employee as a shareholder which would have continued during the notice period. The Court held that the employee's status as shareholder and employee were intertwined and that it was "an implied term of the employment contract" that the employee would be entitled to share in the benefits accruing to shareholders during a period of reasonable notice.

The employee's Shareholders Buy/Sell Agreement (BSA) contained a clause which gave the employer a right to buy back a shareholder's shares within 60 days of him ceasing to be an employee. Notwithstanding the terms of the BSA, the trial judge ordered the employer to purchase the employee's shares at their value as at the end of the 18 months' notice period on the basis that the measure of damages for breach of an employment contract is what the employee would have received if the contract had been performed according to its terms.

On appeal to the British Columbia Court of Appeal, the Court dismissed the employer's appeal on the grounds that the shares should have been valued as at the day of termination and that the employee should not have been awarded damages for the loss of bonus; and also dismissed the employee's appeal on the grounds that the shares should have been valued as at the age of sixty-one; the date upon which the BSA required an employee to start divesting shares.

However, in doing so, the Court of Appeal held that the trial judge had erred in holding that the employee was entitled to share in the benefits accruing to shareholders during the period of notice by virtue of an

"implied contractual term of the employment agreement". Rather, it held that the employee was entitled to "the benefits he would have received if he had remained as an employee until the expiration of a period of reasonable notice", including participation in the bonus pool and the retention of shares. However, the trial judge's error was not seen to impact upon the correctness of the trial judge's judgment or the damages awarded.

The finding by both the trial judge and the Court of Appeal to include the bonus and share value in the wrongful dismissal damage award is consistent with the jurisprudence. Absent clear and unambiguous language to the contrary, where the bonus scheme is an integral part of an employee's compensation structure such that it gives rise to a reasonable expectation and where the employee's shares are those to which he would have continued to be entitled during the notice period, a wrongfully dismissed employee will recover damages for their loss.

***Hawkes v. Levelton Holdings Ltd.*, 2013 BCCA 306 (CanLII) (BCCA)**

Nunavut Court finds Employee could not allege Constructive Dismissal without it amounting to a Resignation

A trial level decision from Nunavut released last year held that an employee's attempts to negotiate a separation package by way of a demand letter from her legal counsel to her Employer indicating that she had been constructively dismissed but that she was prepared to continue working while terms of a package were negotiated, amounted to a repudiation of the employee's employment agreement.

The employee at issue relocated from Toronto to Nunavut to take on the position of Executive Assistant to the CEO of the Employer. Following a reorganization thereafter, the employee's responsibilities had been redistributed such that she was no longer exclusively providing assistance to the CEO. Shortly after this reorganization, the Employer issued a job posting for a corporate secretary position, which the employee perceived to be her old job. The Employer then asked the employee if she wished to apply for the position.

In response, the employee's legal counsel sent a letter to the Employer indicating that the employee was in a position to pursue a constructive dismissal claim but that she was willing to enter into negotiations for a separation package. The Employer responded by alleging the demand letter amounted to insubordination, and then summarily terminated the employee's employment. The employee commenced an action for constructive dismissal.

The court dismissed the employee's claim finding she had not been constructively dismissed. Surprisingly, however, the court did not go on to conclude that the actions of the Employer in summarily terminating the employee's employment amounted to a wrongful dismissal. Rather, the court found that employee counsel's demand letter amounted to a repudiation of the employment relationship. The court

held:

"While clearly the cases are fact-driven,.... It must be clear from the circumstances, viewed objectively, that the employee intends the employment relationship to end. Whether or not it is reasonable to expect that the employee can return to the workplace, even for a short time, will depend on the position held by the employee and the harm done to the employment relationship."

In reaching this conclusion, the court considered the following facts:

- by the time the letter was sent, the employee's discontent in the workplace had been made known to the employer;
- the letter did not attempt to resolve differences;
- it was not an available option that the employee would return to her role indefinitely;
- the employee had decided she no longer wished to be employed there;
- the letter was copied to numerous people including members of the board and the Ministry in an attempt to politicize the matter and exert external pressure on the company;
- the employee was privy to sensitive and confidential information; and
- the position required a high level of trust and required a high level of confidence from her superiors.

This decision is a marked departure from existing practice and law. Not surprisingly, an appeal of this decision is expected to be heard this fall. In the interim, this decision, although highly fact driven, is a sobering reminder to employee counsel that issuing a demand letter on behalf of an employee client alleging constructive dismissal is not without risk. Caution and conservatism when issuing any such letters should always be considered to avoid a similar unintended and unexpected results for employee clients.

***Kucera v. Qulliq Energy Corporation* 2014 NUCJ 2 (CanLii)**

Workplace Accommodation for Childcare Obligations Upheld by the Federal Court of Appeal

The recent unanimous decision of the Federal Court of Appeal in *Attorney General of Canada v. Johnstone**[1]***, makes it clear that family status within the *Canadian Human Rights Act* (the "*CHRA*") includes parental childcare obligations, which requires accommodation by employers. This decision serves to illustrate the need for flexible and inclusive work environments for employees with restrictive childcare obligations.

Fiona Ann Johnstone ("Johnstone") alleged that she was discriminated against by her employer, the Canadian Border Services Agency ("CBSA"), on the basis of family status, specifically due to her parental obligations. Johnstone was employed as a border services officer and worked rotating shifts. However, in

order to allow Johnstone to arrange childcare for her young children, she requested full-time employment which would afford her fixed day shifts. In 2010, the Canadian Human Rights Tribunal (the "Tribunal") found that Johnstone had proven a *prima facie* case of discrimination on the basis of family status and furthermore, that the CBSA failed to prove that accommodating Johnstone's request would create undue hardship.

The Attorney General of Canada applied for judicial review of the Tribunal decision on the following issues: (a) whether "family status" includes parental childcare obligations; (b) whether the Tribunal applied an incorrect test for finding *prima facie* discrimination based on family status; and, (c) whether the remedial orders of the Tribunal were appropriate.

On judicial review, the Federal Court found in favour of Johnstone and dismissed the application with only a slight variation to the remedy granted. On appeal by the Attorney General, the Federal Court of Appeal (the "FCA") considered whether the Tribunal committed a reviewable error in concluding that family status includes childcare obligations. In addition, the FCA considered whether there was a reviewable error in: (a) identifying the legal test for finding a *prima face* case of discrimination on the ground of family status, (b) finding a *prima facie* case of discrimination on the basis of family status was made out in this case; and, (c) in respect to its remedial orders.

In a unanimous decision of the three judge panel of the FCA, written by Mainville J.A., the Court found that
"[p]rotection from discrimination for childcare obligations flows from family status in the same manner that protection against discrimination on the basis of pregnancy flows from the sex of the individual."**[2]** The FCA rejected a more narrow interpretation advocated for by the appellant, stating that human rights legislation must be interpreted broadly to ensure that the objects and purposes of the legislation are fulfilled.**[3]** However, the FCA made it clear that not all childcare responsibilities are to be accommodated under the *CHRA*. The FCA stated that the childcare obligations that are contemplated under the category of family status in the *CHRA* "should be those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and a child."**[4]** A parent cannot leave a child at home without supervision in order to attend at work; accordingly, this would have an immutable characteristic. This is to be contrasted with personal family choices such as "participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities."**[5]** The FCA notes that human rights legislation should not be trivialized to extend protections to personal family choices such as these and as such, they would "not normally trigger a claim to discrimination resulting in some obligation to accommodate by an employer."**[6]**

The FCA noted that the *prima facie* discrimination test is the correct legal test to be applied, stressing that the test should not be defined in more precise terms as it must be sufficiently flexible to advance the broad purpose of the *CHRA* and is to be applied in a contextual way.

After analyzing the relevant jurisprudence, the FCA noted the following factors that an individual

advancing a claim under family status must establish, as follows:

1. that a child is under his/her care and supervision;
2. that the childcare obligation engages the individual's legal responsibility for that child, as opposed to a personal choice;
3. that he/she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
4. that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.**[7]**

The FCA found that there was no reviewable error in the Tribunal's determination that Johnstone had made out a *prima facie* case of discrimination on the basis of family status. As the appellant had not asserted any *bona fide* occupational requirement or an undue burden in providing Johnstone with fixed shifts, the Tribunal's ruling was upheld.**[8]** The FCA made two slight variations on the remedial award; however, Johnstone was largely successful on the appeal.

The Johnstone case should serve as a warning to employers that all requests for accommodation, including those for family status, must be properly considered and responded to. In evaluating requests for accommodation on family status, employers should consider the factors set out by the FCA, and respond in accordance with their obligations under the *CHRA*. Failure to do so may result in liability to employers.

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[1] *Attorney General of Canada v. Johnstone* 2014 FCA 110.

[2] *Ibid*, at para. 73

[3] *Ibid*, at para. 61.

[4] *Ibid*, at para. 70.

[5] *Ibid.* at para. 69.

[6] *Ibid*, at para. 72.

[7] *Ibid*, at para. 93.

[8] *Ibid*, at para. 109.

Mandatory Worker and Supervisor Awareness Training

Following an expert advisory panel review of Ontario's occupational health and safety system, a new *Ontario Health and Safety Act* (OHSA) regulation has been passed and comes into force on July 1, 2014 making worker and supervisor health and safety awareness training mandatory in all workplaces.

The new awareness training requirements of the regulation will apply to all workplaces covered by OHSA, regardless of workplace size or sector and includes the construction industry. After July 1, 2014, employers will need to ensure workers complete the training as soon as practicable. For supervisors, the training will have to be completed within one week of performing work as a supervisor.

The minimum content of the worker training program set out in the regulation requires instruction on:

- the duties and rights of workers under OHSA;
- the duties of employers and supervisors under OHSA;
- the roles of health and safety representatives and joint health and safety committees under OHSA;
- the roles of the Ministry of Labour, the Workplace Safety and Insurance Board as well as health and safety partners;
- common workplace hazards;
- the requirements set out in Regulation 860 relating to Worplace Hazardous Materials Information System (WHMIS); and
- occupational illness, including latency.

The minimum content of the supervisor awareness training program set out in the regulation requires instruction on:

- the duties and rights of workers under OHSA;
- the duties of employers and supervisors under OHSA;
- the roles of health and safety representatives and joint health and safety committees under OHSA;
- the roles of the Ministry of Labour, the Workplace Safety and Insurance Board as well as health and safety partners;
- how to recognize, assess and control workplace hazards and evaluate those hazards; and
- sources of information on occupational health and safety information.

The Ministry of Labour has developed products, such as printed workbooks and e-learning modules, which are available for free and can be used to comply with the new regulatory requirements. These materials can be found through the Service Ontario of Ministry of Labour websites and are available in English, French and a number of other languages. The Ministry's materials are designed to be delivered in approximately one hour. Use of the Ministry's materials is not, however, mandatory.

Although employers will not be required to submit records of completion of the training to the Ministry of Labour, employers are required to keep records confirming that workers and supervisors have completed the awareness training program for up to six months after the employment of the worker or supervisor

comes to an end. As a practical matter, employees may want to consider completing both the worker and supervisor training modules, regardless of their current workplace role. Employees should also print a copy of their "proof of completion" certificates for their own records.

Employee Constructively Dismissed By Being Forced To Take Disability Leave

In a recent decision of the Manitoba Court of Appeal, the Court found that an employer car dealership that forced an employee to take an indefinite leave of absence due to vision related symptoms of diabetes, had constructively dismissed him.

The employee, a 19 year senior managerial employee, was diagnosed with diabetes in 2005 after experiencing deteriorating eyesight. By 2007, he was blind in one eye. In May of 2009, the employer called a meeting with the employee to discuss his eyesight and its impact on his work. After the meeting the employee left the dealership and never returned other than to retrieve his personal items. Two days later the employer circulated a notice to all staff that the employee was taking a leave of absence due to his health. The employer thereafter paid the employee for two weeks and filed forms with its disability insurer in support of an application for long term disability benefits for the employee. The employee never made the application. The next month, the employer promoted another individual to the employee's position.

The employee commenced an action for wrongful dismissal against the car dealership in August 2009. In October 2009, the employee obtained employment with another car dealership as a salesman and his former employer removed him from its employee list. The employee's new employment only lasted 8 months.

The employee asserted that at the May 2009 meeting, he was told to go on long-term disability or he would be terminated. The trial judge found as a fact that the evidence of the employer was more probable; being that the employee was advised to take time off, convalesce and apply for disability insurance and that when he recovered, his job would be waiting for him.

The judge also held that the employee's health had deteriorated to the point that he was unable to perform his employment duties and that the employee was in a state of "self-denial". The judge commented upon the lack of any medical evidence being called at the trial to support the employee's contention that he was medically able. In conclusion, the trial judge found that the employee had quit and dismissed the action.

The Court of Appeal held that the trial judge erred in failing to address the issue of constructive dismissal; being "any act on the part of an employer which repudiates the essential obligations imposed on it by the

contract of employment".

The Court of Appeal noted that "a forced leave of absence may constitute a constructive dismissal, particularly where it is an unpaid leave of indefinite duration, with no guarantee of eventual employment". It also stated that the onus is on an employer to show that an employee is medically incapable of performing his job (i.e. to show that the employment contract has been frustrated); and that frustration due to illness depends upon a number of factors, including the terms of the contract, how long the employee is likely to remain ill, the nature of the employment, the nature of the illness, the availability of sick leave and pay, the length of employment, and how long the employer should reasonably be expected to await the employee's return.

The Court of Appeal held, on the facts as found by the trial judge, that the employer imposed a forced leave of absence at the May 2009 meeting without first investigating the employee's prognosis and filled his position within one month and that therefore, on any objective assessment, the employer had imposed a "fundamental change in the employment relationship going to the root of [the employee's] employment contract." The Court further found that the employer did not satisfy its onus to prove frustration based upon a permanent disability. The employee was held to be entitled to damages in excess of $340,000, together with interest and costs.

This decision is a caution to employers when dealing with an employee's medical issues. Inquiries should be made of the employee's medical prognosis to determine, on an objective basis, whether the employee is permanently disabled or as stated in other decisions, whether there is any reasonable expectation that the employee will recover in the foreseeable future. Only armed with that evidence will an employer be able to assess whether, after careful consideration of all other relevant factors, frustration is a viable ground for termination.

Irvine v. Gauthier (Jim) Chevrolet Oldsmobile Cadillac Ltd., 2013 MBCA 93 (CanLII)

Employee Terminated Due to Disability Compensated $20,000

The plaintiff ("employee") worked as a Business Analyst, a middle management position with modest responsibility, at the defendant food services company (the "employer"). The employee was terminated without cause after only 16 months of employment, purportedly because a division of the employer's business had been sold and which rendered the employee's position redundant.

In the four month period leading up to her dismissal, the employee had complained about back pain from working long hours and was absent for a number of days. Doctors notes were provided when requested by the employer, including one in which a gradual return to work was suggested. However, the employer

insisted on a full recovery prior to returning. There was no discussion or offer of any accommodation for the employee at any time.

The employee brought an action for damages for wrongful dismissal. She also alleged that she was terminated due to her back pain, constituting discrimination due to disability, contrary to Ontario's *Human Rights Code.*

The Court noted that a decision to terminate an employee based in whole or in part on the fact that the employee has a disability is contrary to the *Code*. The Court concluded that the employee's ongoing back problem was an important factor in the decision to terminate. This was evidenced by a change in attitude toward the employee after the initial complaints about back pain, the insistence on full recovery prior to returning to work, and the lack of any communication about the divestiture to the employee before it happened. The Court noted, "The plaintiff's condition enabled the defendant to nudge the problem across the divestiture finishing line and provided the defendant with an excuse to terminate her."

In the result, the employee was awarded with three months of pay in lieu of notice, and $20,000 in compensation under the Code, recognizing the importance of the right that was infringed and the impact of the employer's conduct on the employee.

***Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799 (CanLII)**

Appeal Court: No Constructive Dismissal Based Solely On Employee's Subjective View of Poisoned Work Environment

The Employee worked for the Employer as a production supervisor in the body shop of General Motor's Oshawa plant for approximately eight years. The Employee, a black man, was scheduled to train another worker, but the trainee did not attend the training session. The Employee took the position, based on information he received from others in the workplace, that the trainee's failure to attend the training was racially motivated (the "Incident"). The Employer ultimately commenced three internal investigations into the Employee's complaint of racism. The Employee was dissatisfied with the outcome of the third investigation. He then took a two year medical leave arising from what he believed was discriminatory treatment arising from the Incident and the subsequent investigations.

After two years on medical leave, the Employer's physician determined that the Employee was fit to return to work. The Employer offered an accommodation for the Employee to work in similar supervisory roles in a different building than the body shop. The Employee refused the accommodation. The Employer then took the position that the Employee resigned. In response, the Employee brought a claim for constructive dismissal alleging that his work environment was poisoned.

At trial, the lower Court awarded $160,000.00 in damages to the Employee making findings of fact that the trainee's failure to attend the training session was "solely racially-based". On the basis of this one Incident, the Court found the Employee was wrongfully dismissed because the Employer created a poisoned work environment which made it intolerable for the Employee to continue employment.

The Court of Appeal allowed the appeal holding that there was no evidence to support that the Incident was racially motivated, nor was there any objective evidence to establish that a poisoned work environment actually existed. The Court of Appeal concluded that the trial judge made palpable and overriding errors when finding that racism was the sole basis concerning the Incident.

In issuing this decision, the Court of Appeal confirmed that the Employee had the onus to prove that there was objective evidence to support a conclusion that the alleged poisoned work environment was caused by "persistent and repeated" incidents that made his continued employment intolerable. The Employee's subjective feelings or "genuinely-held beliefs are insufficient." Further, "stand alone incidents" of racism are generally not sufficient to create a poisoned work environment unless the behaviour is sufficient to establish a hostile/intolerable work setting which results in the essential terms of the employment contract being substantially changed.

In summary, the Court of Appeal concluded that a single trainee's failure to attend a training session fell well short of the type of misconduct required to establish a poisoned work environment and a constructive dismissal.

Employees should carefully canvass with their lawyer whether they have sufficient evidence to demonstrate persistent and repeated incidents of offensive conduct in order to establish a poisoned work environment before taking the position that they have been constructively dismissed.

General Motors of Canada Limited v. Johnson, 2013 ONCA 502

Bill 146 – Protecting Workers and Increasing Fairness?

Just before the December holidays, the Minister of Labour tabled a bill for parliamentary debate entitled: "Strong Workplaces for a Stronger Economy Act", which is described as "an act to protect the province's most vulnerable workers and increase fairness for both employees and businesses." A lofty goal to be sure.

Bill 146 poses the following 8 major changes to labour rights in Ontario:

The *Employment Standards Act, 2000*:

1. to remove the current $10,000 cap on awards which can be made by the Ministry of Labour for unpaid wages thereby removing the necessity to litigate larger claims in court;

2. to increase the time limit for recovery of wages to two years;

3. to require employers to provide a handout about employee rights to their employees;

Foreign workers:

4. to extend the protection prohibiting employers from:

(a) charging fees for recruitment and placement; and,

(b) withholding personal documents such as passports of all employees who come into Ontario under an immigration or temporary foreign worker program;

Co-Op Students:

5. OHSA extended to protect co-op students, trainees and other unpaid learners;

Construction Industry:

6. a decrease to the "open period" from three months to two;

Temporary help agency workers:

7. making agencies and their clients jointly and severally liable to pay wages to workers; and,

8. attaching WSIB ratings to the client where there is a temporary worker injured at work, as opposed to assignment to the agency.

It is unclear as to what is in Bill 146 for employers or, whether it will actually strengthen our economy. However, what this will do is communicate information to the most vulnerable employees about their rights and make justice more accessible (though not necessarily more speedy as cases start to pile up).

What will this mean for employers? It will possibly mean more cases before the Ministry of Labour and possibly more appeals where rapid justice does not necessarily reach correct results.

Will it pass....stay tuned.

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