KOSKIE MINSKY
JUSTICE MATTERS

Employment Law

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

Termination Clause in Employment Contract Violates Minimum Standards

After receiving a broadcast email posting for a Director of Finance position with ABM Canada Inc. (the "Employer"), Paul Miller (the "Employee") applied for the position. It took a few meetings and some encouragement, but the Employee ultimately accepted a job offer starting in September, 2009, subject to entering an employment contract before starting. Although the Employee received and signed an employment contract, he barely read the document, and some clauses he did not read at all. The contract addressed his 'remuneration,' which included a base salary and matching pension contributions, and had a separate clause for 'fringe benefits,' which included a monthly car allowance. The termination provision stated "*Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation.*" [emphasis added].

By the fall of 2010 the prospects of the Employee's advancement with the Employer were dimming due to concerns about his hours and the accuracy of his work. In early 2011 the Employee was terminated without notice, and provided with two weeks of salary plus vacation pay; but with no provision for his car allowance or pension contributions for the notice period.

The Employee asserted that the termination provision in the employment contract was null and void or otherwise unenforceable because it did not meet the requirements of ss. 61(1)(a) and (b) of the ESA, which require payment to the employee of the amount he or she "would have been entitled to receive" during the notice period. Further, the Employee asserted that he should be entitled to pay in lieu of reasonable notice of the termination of his employment at common law, with a modest enhancement because he was induced to leave his prior job.

The Court held that the termination provision adequately stipulated the length of the notice period, but because it did not provide for the payment of the pension contributions and car allowance over that

period, it was in breach of the ESA and unenforceable. The Court underscored that where one clause in the termination provisions of a contract are void by operation of the ESA, then it is null and void for *all* purposes.

The Court considered the Employee's age, character and length of employment, and the availability of similar employment, and held that a reasonable notice of period of three months was appropriate, without any enhancement as there was no evidence of promises of job security beyond the normal types of persuasive recruitment for a position.

This case serves as a reminder to employers to consult legal counsel before a contract is presented to a successful job applicant to ensure it complies with all minimum standards.

Miller v. ABM Canada Inc., 2014 ONSC 4062 (CanLII)

Co-Worker's Text Messages Form the Basis of Human Rights Complaint: Employer Not Liable

Shortly after finding out she was pregnant, the Applicant exchanged text messages with a friend who worked for the Employer restaurant about potential vacancies. The friend told the Applicant that the Employer was looking to hire a server. The Applicant was interested in the position and met with the friend to discuss it further. The friend was aware of the Applicant's pregnancy; however, advised the Applicant not to mention her pregnancy to her supervisor until the Employer had a chance to see how the Applicant was performing in her new role.

Although the Employer was only advertising for three server positions, the Applicant was ultimately hired as one of five new servers. Subsequent to her hiring, she worked a total of 15 hours for the Employer over the course of two weeks. The Applicant then received a series of text messages from the friend which stated that the owner had found out she was pregnant and did not think she could do her job as she got bigger. Thereafter, the Applicant received a call from one of the co-owners of the Employer informing her that she was being terminated due to performance issues. The Applicant filed an Application with the Human Rights Tribunal of Ontario against the Employer alleging that she was discriminated against based on sex and pregnancy pursuant to the *Human Rights Code* (the "Code").

The Employer maintained that its decision to terminate the Applicant was based on her performance issues including that she was not well suited to the job and was unavailable to work Saturdays. In addition, the Employer asserted that they were not aware that she was pregnant until **after** her termination. In respect to the friend's text messages, the Employer states that the friend was a "rogue" employee with no authority to terminate the Applicant and the contents of her text messages were simply lies.

The Tribunal ultimately dismissed the Application after finding that there was insufficient evidence to establish that the Applicant's pregnancy was a factor in her termination. The Tribunal found that the Employer, along with other employees, had issues with the Applicant's performance. In addition, the Employer had advised all the new servers that the position was not for everyone and many servers did not last very long. Indicative of this fact was that the Employer originally hired five servers to fill three positions, expecting that all five would not work out.

The Tribunal went on to consider whether the friend's texts constituted harassment under the Code; however, ultimately held that even if the friend's conduct amounted to harassment under the Code the Employer could not be held liable. The Employer was unaware of the texts initially but then once aware asked the Applicant to send them the text messages but she refused. The Employer then made inquiries of the friend regarding the texts but she denied knowing what the Applicant was talking about. The Tribunal found that, at that point, there was nothing further the Employer could do.

This decision illustrates the impact new technology can have in the workplace as well as the importance of employers taking positive steps to investigate and address harassing behaviour by its employees in the workplace. The Tribunal was clear that an employer could be held liable for the harassing behaviour of its employees if the employer fails to take reasonable steps to correct the behaviour.

***Baker v. Twiggs Coffee Roasters*, 2014 HRTO 460**

Reinstatement Offer is Mandatory to Establish Employee Failed to Mitigate Damages by Not Returning to Work Following Termination

The Employee was a Manager/Vice President of Operations with thirty eight years of employment tenure with the Employer. The Employer decided to unilaterally change the employee's position from Vice President of Operations to a Purchasing Manager. The Employee declined to accept this new position. He took the position that he had been constructively dismissed by the Employer's attempt to fundamentally change the terms and conditions of the employment agreement by offering a position of lesser status, prestige, and responsibility.

The trial judge held that the Employee was constructively dismissed because the change in positions with the company constituted a demotion which fundamentally altered the employment contract. In applying the test established by the Supreme Court of Canada in Evans v. Teamsters, the trial judge held that the Employee did not have a duty to mitigate his damages by working throughout the notice period in a lesser position as a purchasing manager. This new position would have been humiliating and embarrassing since it required the Employee to report to an individual that was previously the Employee's subordinate.

The Court of Appeal upheld the trial judge's decision. As a general principle, in the absence of a hostile or embarrassing work environment, the Court recognized that an employee's obligation to mitigate his or her damages by agreeing to work for an employer during the notice period, which is referred to as an "efficient breach" of contract, ought not to be discouraged.

However, in this case, even if the Court did find that there was no embarrassment or humiliation which presented a barrier to reinstatement, the Employer fatally omitted to extend an offer to reinstate the Employee in the position of a Purchasing Manager after he was constructively dismissed. In the absence of an offer of reinstatement, it could not be found that the Employee failed to mitigate his damages.

Accordingly, to properly reinstate an employee following termination, or implement an "efficient breach" of contract, an employer must formally extend such offer, ideally in writing, to assert the position at trial that an employee did not mitigate his or her damages by failing to work during the notice period.

Farwell v. Citair, Inc. (General Coach Canada), 2014 ONCA 177

Ontario Human Rights Tribunal Refuses to Defer to the WSIB On Issues Relating to the Duty to Accommodate

The Ontario Human Rights Tribunal ("OHRT") has refused to exercise its discretion to defer consideration of a human rights complaint alleging a failure by an employer to discharge its duty to accommodate despite the fact that the Workplace Safety and Insurance Board ("WSIB") had issued a decision finding the employer could no longer accommodate the employee.

In the OHRT's April 2014 decision, the employee at issue was a packager who sustained an injury when a steel beam fell on his head. After a short absence, the employee returned to work performing modified duties. Despite the employee's fairly quick return to work, an outstanding appeal relating to his claim for non-economic loss remained before the Workplace Safety and Insurance Act Tribunal ("WSIAT") while appeals relating to his claims for compensation for physiotherapy bills and a challenge to his return to work plan remained outstanding with the WSIB.

A little over a year after the employee's initial injury, the WSIB's Return to Work specialist determined that the employer could no longer offer the employee modified work. As a result, the WSIB placed the employee in a work transition program. The employee decided not to challenge this particular conclusion by the WSIB and instead pursued a human rights complaint at the OHRT alleging the employer had discriminated against him with respect to employment on the basis of disability contrary to the*Human Rights Code* by failing to properly accommodate his disability.

The employer argued that the OHRT should defer consideration of the employee's discrimination complaint because there were WSIB and WSIAT appeals being pursued by the employee. The OHRT rejected this argument. In doing so, the OHRT pointed out that both the WSIB and WSIAT appeals being pursued by the employee had nothing to do with the accommodation issue. For this reason, the OHRT concluded there was no basis to defer consideration of the employee's OHRT complaint.

This decision exemplifies the fact that some OHRT Vice Chairs will not be prepared to accept conclusions reached by WSIB staff relating to an employer's ability to offer modified work as determinative of the duty to accommodate issue from a human rights perspective. The decision also confirms that the failure of an employee to appeal WSIB decisions relating to issues of accommodation to the WSIAT will not preclude the employee from seeking redress at the OHRT. The decision does, however, still leave open the possibility that duty to accommodate issues appealed to the WSIAT may provide justification for the OHRT to exercise its discretion to defer consideration of any such complaints or even possibly dismiss them outright.

Leonides v Mevotech Inc. 2014 HRTO 555 (CanLii)

Ontario Court of Appeal Reduces Notice Period by Six Months.

Niranjan Kotecha (the "Employee") worked for Affinia Canada ULC (the "Employer"), a car manufacturer, as a machine operator for 20 years. The Employee was terminated at age 70 without cause, and the primary issue at a summary judgment motion was the length of the reasonable notice period. The motion judge granted the Employee 22 months of reasonable notice, in addition to the 11 weeks of working notice he had already received, for a total of 24.5 months.

The Employer appealed the motion judge's decision, arguing that he erred in disregarding an earlier decision against the same employer which he was bound to follow under the doctrine of "stare decisis." The Court of Appeal rejected this argument, clarifying that courts are required to render decisions consistent with previous decisions of *higher* courts; and that other decisions of the same court are persuasive, but not binding. The case against the same employer involved an employee who had worked for the Employer for 16 years, and was eight years younger than the Employee in this case.

The Court of Appeal underscored that the determination of a reasonable notice period is fact-specific, and dependent upon an assessment of the character of the employment, the length of service, the age of the employee, and the availability of other similar employment. Balancing the factors in this case, the Court held that the 24.5 months of reasonable notice was excessive, with no exceptional circumstances to support such an award. Having regard to two other cases, including the earlier case against the Employer, the Court of Appeal reduced the notice period to 18 months including working notice.

This decision presents a rare intervention by an appellate court to overturn a discretionary order of the lower courts over determination of a reasonable notice period, and a stark reduction for an elderly employee with twenty years' service.

Kotecha v. Affinia Canada ULC, 2014 ONCA 411

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