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JUSTICE MATTERS

Employment Law

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

Precedent Setting Sexual Harassment Award

In a decision of the Human Rights Tribunal of Ontario ("HRTO") released May 22, 2015, an applicant was awarded $150,000 in general damages against her former employer and its principal. The co-applicant was awarded $50,000. The decision represents a new high-watermark for damage awards.

The HRTO found that owing to the fact that the actions of the respondent were those of the directing mind of the company, it was sufficient to form the basis for imposing equal liability on the corporate respondent (this has been the law for some time but bears mention as a reminder).

The facts giving rise to the application were, with particular reference to the first applicant, gravely troubling and far from "typical". The applicants are sisters who were in Ontario on temporary foreign worker permits from Mexico, brought in to work for the respondent, a fish processing plant. The applicants were subjected to unwanted sexual solicitations and advances by the principal. As well as, in the case of the first applicant, sexual assault (including both rape and various incidents of touching), a poisoned work environment, discrimination in respect of employment because of sex and reprisals for turning down sexual advances. The applicants were threatened that if they did not comply with the principal's advances they would be sent back to Mexico.

The first applicant gave evidence that she felt compelled to do what she was asked. She, at first, attempted to reject the respondent's solicitations and advances but felt she was under constant threat. She as a result had been subjected to a greater amount of offensive conduct including repeated sexual assault. The second applicant had been more successful in her attempts to rebuff the advances of the respondent and had escaped the same level of assault.

The HRTO went on to review the case law and stated that owing to the seriousness of the conduct found to have occurred, which had not been seen in the prior case law, an unprecedented damage award was justified. The HRTO especially considered the fact of the particular vulnerability of the migrant workers, the threats of repatriating them to their home country, thereby causing significant loss of economic and

financial advantage, the observed impact on the applicants, and the repeated and serious nature of the sexual assaults.

$150,000 in general damages was awarded to the first applicant. The second applicant received $50,000, which was noted to be above what was typically awarded for the type of conduct at issue (past awards stated to be in the range of $35,000-$45,000).

This decision stands as a stern statement that sexual harassment, discrimination and creation of a poisoned work environment will not be tolerated. Still, one question, is it high enough given what was found to have happened here . . .

O.P.T. v. Presteve Foods Ltd. 2015 HRTO 675

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

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)

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)

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

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.

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