Employment Law

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

Hardball Tactics by Employer Results in Significant Costs Awards

An employee sued for wrongful dismissal alleging he had been terminated without cause and that he had a 5 year minimum term contract guarantee. The employer denied any such guarantee existed and alleged the employee had resigned.

The trial judge found the employee to have been terminated, but that no 5 year minimum guarantee existed. The mention of 5 years was found to be outside of and after agreement was reached on the contract terms, and in the context of assisting the employee to secure a mortgage. The judge concluded there was no reason to think a jewelry salesman was "in the category of professional athletes, actors and similar roles" associated with typical minimum contract guarantees.

The trial judge found the reasonable notice period to be only 2 months, amounting to $13,520, which falls under the small claims court monetary jurisdiction (under $25,000). The employer took the position that the employee should not receive his costs, and be ordered to pay the employer's costs which after a 7 day trial were $140,000 on a substantial indemnity basis.

The trial judge concluded it was not unreasonable for the employee to bring his claim under the ordinary Superior Court procedure rather than in the small claims court. If persuaded of the existence of a 5 year guarantee, damages would have been assessed at $175,000. The trial judge went on to criticize the employer for failing to make any reasonable offer to settle (it had only offered $3,000 inclusive of interest and costs). The employer was characterized as having 'played hardball throughout the litigation' including bringing a motion for security for costs.

The trial judge awarded the employee costs in the total sum of $92,030.98.

This decision should stand as a serious warning to employers that a failure to be reasonable can be costly.

Tossonian v. Cynphany Diamonds Inc., o/a Symphony Diamonds, 2014 ONSC 7484, costs at 2015 ONSC 766.

Human Rights Tribunal Reinstatement Award After Eight Years Upheld on Judicial Review

The Ontario Superior Court of Justice upheld a 2013 decision of the Human Rights Tribunal of Ontario (2013 HRTO 440) where an employee was awarded reinstatement to her employment as a Supervisor with the Hamilton-Wentworth District School Board (the "School Board").

The Complaint had been filed with the Ontario Human Rights Commission (the "Commission") on November 24, 2004 alleging discrimination due to disability contrary to sections 5 and 9 of the Ontario *Human Rights Code* (the "*Code*"). The Complaint was thereafter transferred to the Human Rights Tribunal (the "OHRT") by way of an Application filed in 2009.

The School Board was found to have violated the *Code* by failing to accommodate the employee's disability-related needs from April 2003, and thereafter, by terminating her employment on July 9, 2004. The OHRT awarded monetary and other remedies, including back wages of $419,283.89 from June 26, 2003 (when an alternate appropriate position had been posted by the School Board) to the date of reinstatement, less any income and non-repayable benefits she received, and $30,000 for injury to dignity, feelings and self-respect, together with prejudgment interest on all amounts to the date of the decision and postjudgment interest thereafter. In addition, the HRTO made an Order for reinstatement; stating that the passage of time, in and of itself, was not sufficiently prejudicial to the School Board to justify refusing reinstatement.

In the Application for judicial review, the School Board argued several grounds, including the inappropriateness of the reinstatement remedy; stating that it was unreasonable due to its uniqueness and the length of time which had elapsed from the date of the events giving rise to the initial complaint.

The Court rejected all of the School Board's arguments. On the issue of reinstatement, the Court stated that while reinstatement is an uncommon remedy in human rights litigation, it was common in labour relations litigation under the provisions of a collective agreement (as was the context in this case). Further, the Court stated that the *Code* provided the Tribunal with broad remedial authority to do what is necessary to ensure compliance with its provisions and that there is no barrier at law to reinstatement as a remedy. Finally, it held that the passage of time ought not to thwart the remedial provisions of the*Code* , particularly where the delay is largely beyond an applicant's control.

While this case must be looked at within the context of the facts and the unionized workplace environment, the Court's conclusion that the lapse of time did not present an automatic barrier to reinstatement has a much wider implication for employers who are respondents to a discrimination

application.

Fair v. Hamilton-Wentworth District School Board, 2014 ONSC 2411

Sexually abused Nanny awarded $50,000 by Tribunal

On April 1 2015, the British Columbia Human Rights Tribunal granted a Filipino domestic care worker ("Employee") subjected to sexual misconduct, harassment and discrimination $50,000.00 in damages for loss of dignity, feelings and self-respect.

The 28 year old Employee is a mother of two children. To provide for her family, she accepted employment as a nanny with a private family ("Employer") who at the time resided in Hong Kong, to act as a live-in caregiver for their two children at the family home. After one year of employment in Hong Kong, the Employer moved to British Columbia. The Employer moved into a two bedroom hotel room in Richmond, British Columbia until a permanent residence was purchased.

The Employer arranged for the Employee's temporary 3 month work permit, and paid her airfare. The agreement stipulated that if the Employee resigned, she would be obligated to repay the visa fee and the plane fare which amounted to approximately $13,600.00. Upon arrival in Canada, the Employer confiscated the Employee's passport. The Employer took the two bedrooms and forced the Employee to sleep on the couch in the living room with no privacy. Her clothes were kept in the Employer's bedrooms. Throughout her employment, the Employee was forced to work seven days a week from 5:30 am to 11:30 pm with no breaks. From the time they arrived in Canada she was not permitted to leave the hotel room. She was verbally abused by the Employer and was deducted pay if she sat down during the day or broke any of the Employer's possessions. She was mistreated by the children with the parent's approval. The male Employer also forced her to rub his penis with lotion 2-3 times a week and threatened retribution, loss of employment, and harm if she revealed this to anyone.

The Employee was only entitled to eat with the Employer's permission, and her food at restaurants with the family was apportioned and restricted to the amount dictated by the Employer, which resulted in malnourishment. The evidence at the Tribunal hearing demonstrated that she was not allowed to associate with other Filipino employees at the hotel or given a phone with data capabilities to call her family in the Philippines.

After being in Canada 6 weeks, she resigned walking out without any money, her passport, additional clothes, or her eyeglasses. She ended up staying at a Vancouver safe house for victims of human trafficking and sexual exploitation and subsequently brought this claim with the B.C. Human Rights Tribunal..

The Tribunal characterized the Employee as a virtual slave and granted a declaration that the Employee

was subject to discrimination based on her sex, family status, age, race, ancestry, and colour contrary to section 13 of the *Human Rights Code.* The Tribunal awarded lost wages of $ 5,866.99 including overtime, and $50,000 in damages for injury to self-dignity taking into account the repeated acts of sexual misconduct, intimidation, and exploitation. Aside from this case, the largest damage award for loss of dignity granted by this Tribunal is $75,000.00.

Employers must be cognizant to maintain a workplace that is free of discrimination and harassment failing which the financial consequences and reputational risks can be significant. Based on financial limitations and other factors in this case, the Employee did not commence a superior court action for wrongful dismissal seeking damages for harassment and punitive damages which damages would likely have greatly exceeded the award made by the Tribunal.

PN v. FR and another (No. 2), 2015 BCHRT 60 (CanLII)

"Postering" and Self-Reporting – ESA May 2015 Deadlines, Building a Stronger Workplace for a Stronger Economy

Earlier this year we updated you about some of the changes to Ontario's employment legislation **https://kmlaw.ca/the-esa-in-2015-the-times-they-are-a-changing/**. This month we are highlighting two of the changes to the *Employment Standards Act, 2000* ("*ESA*"), which take effect as of May 2015.

Employment Standards in Ontario Poster:

Under Ontario's *Stronger Workplace for a Stronger Economy Act, 2014*, SO 2014, C. 10 (the "*Act*"), employers are required to replace version 5.0 of the poster entitled "Employment Standards in Ontario" with version 6.0, which can be accessed at **http://www.labour.gov.on.ca/english/es/pubs/poster.php**, along with key FAQ to help ensure compliance.

Here are some quick compliance points:

- Effective May 1, 2015, employers are required to post version 6.0 of the poster in the workplace in an area where it is likely to come to the attention of employees.
- The poster must be displayed in the English language, unless the majority language of the workplace is one other than English, in which case you can post a Ministry approved poster (see link above) alongside an English language poster.
- The poster must be printed on letter size paper and can be in either colour or in black and white.
- Effective May 20, 2015, employers are required to provide all current employees with a copy of

version 6.0 of the poster by June 19, 2015.

- Employees hired after May 20, 2015, must be provided with a copy of the poster within 30 days of their hire date. The poster can be provided to an employee as a hardcopy or electronically (attachment or link to a database), but only if the employer ensures that the employee has reasonable access to and knowledge of how to use a computer and printer.
- An employer that is obligated to and fails to post and distribute the poster could be subject to enforcement actions by the Ministry of Labour.

***ESA* Self-Audits:**

As of May 20, 2015, employers may be required to self-audit their *ESA* compliance. The amendments allow employment standards officers to order an employer to:

- conduct an examination of the employer's records, practices or both to determine whether the employer is in compliance with one or more provisions of the *ESA* or the regulations; and
- report the results of the examination to the employment standards officer in accordance with the notice and the requirements under the *ESA*.

Key Points to Remember

- Notice of the audit must be provided in writing.
- The notice will identify information to be provided in the employer's *ESA* compliance report, including asking for details on planned measures to become compliant.
- The amendments specifically target wage violations.
- An employer may still be subject to inspections, investigations and enforcement measures even if it has completed the self-audit.

Independent Contractor or Dependent Contractor?

A recent case from Ontario analyzed the employment status of two long-serving workers.

The two plaintiffs worked as installation supervisors for the employer, a kitchen cabinet manufacturer, for 32 years and 26 years, respectively. Up to 1987 both plaintiffs had a formal employment relationship with the employer. In 1987 the employer advised both plaintiffs that they would no longer function as employees but would continue to work as independent contractors. The plaintiffs signed a contract, and carried on work for the next two decades almost exclusively for the employer. Only when work from the

employer slowed down substantially did they take on other work, and they never incorporated a separate business. To the outside world and to the employer's customers, the plaintiffs appeared as employees of the employer, wearing employer t-shirts, carrying employer business cards, and enjoying employee discounts.

In 2009 the employer began winding down its business and soon work stopped flowing to the employees. The employer did not provide notice of termination of employment, and took the position that it was not required to do so because the plaintiffs were independent contractors.

The Ontario Superior Court considered whether the plaintiffs were 'dependent contractors' entitled to reasonable notice of the termination of their employment, or independent contractors who have no such common law rights to notice or pay in lieu. Based on the following facts, the Court was persuaded that the status of the plaintiffs was that of 'dependent contractors':

- The plaintiffs were economically dependent on the employer;
- The plaintiffs worked almost exclusively for the employer, and believed they were required to do so;
- The employer maintained control of the business;
- The employer provided cars, phones, and office space and other 'tools' for the plaintiffs to perform their work;
- The plaintiffs had no genuine opportunity to generate additional profits; and
- The business belonged to the employer with no benefit accruing to the plaintiffs.

On the basis of their status as dependent contractors, the Court awarded each of the plaintiffs 26 months of pay in lieu of notice of the termination of their employment. This case underscores that the determination of the legal relationship between a worker and employer is a matter of substance, not form, and that courts will look at a number of factors to assess employment status.

Keenan v. Canac Kitchens, 2015 ONSC 1055

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

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