Employment Law

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

Duty to Mitigate Damages: Does that include returning to the employ of your prior employer?

When an employee is terminated from their employment, whether it be by constructive dismissal or otherwise, the employee has a duty to mitigate his/her damages by seeking alternative employment. However, does an employee have a duty to accept employment with the very same employer who terminated his/her employment in order to fulfill the duty to mitigate his/her damages? This is a question that many terminated employees struggle with.

The Ontario Court of Appeal recently considered an appeal from a trial decision wherein the trial judge found that the terminated employee had failed to mitigate his damages when he declined to return to work for his former employer and, therefore, he was not entitled to damages.

The employee in this case was laid-off and two weeks thereafter commenced an action seeking damages for constructive dismissal. The employer had mistakenly believed that they could legally lay-off the employee and in fact, later admitted that the employee had been constructively dismissed. However, upon realizing their error, the employer offered the employee his job back only days after the commencement of his claim. The employee refused to return to his position, alleging amongst other things, that by returning to work for his prior employer he would be subjected to an atmosphere of hostility, embarrassment or humiliation.

The trial judge applied the principles enunciated in the leading Supreme Court of Canada decision in *Evans v. Teamsters Local Union No. 31* [2008] 1 S.C.R. 661, which outlines when a dismissed employee must return to work for the same employer to mitigate his/her damages. In the circumstances of this case, the trial judge determined that the terminated employee's refusal to return to work for his prior employer was unreasonable.

On appeal, the employee argued that simply because he left the company when he was laid-off and

thereafter sued the company for wrongful dismissal, the employment relationship between the parties "was acrimonious and infused with animosity" thus justifying why he could not return to work for his prior employer. However, this argument was rejected by the Ontario Court of Appeal, based on the record before the Court. The Ontario Court of Appeal affirmed the trial judge's decision, which resulted in no damages being awarded to the terminated employee based upon his failure to mitigate his damages.

This case is important for terminated employees in two respects: firstly, it stresses to terminated employees the need to take a contextual approach in evaluating whether or not it would be reasonable for them to return to work for their prior employer, if offered, in order to mitigate their damages; and, secondly, it serves as a strong reminder to all terminated employees that the duty to mitigate their damages should be taken very seriously. If a terminated employee is found to have failed to mitigate their damages, they may not be awarded any damages, even if they are found to have been wrongfully dismissed.

Chevalier v. Active Tire & Auto Centre Inc. [2012] O.J. No. 3414, affirmed [2013] O.J. No. 4092 (C.A.)

Terminated 70 year old Machine Operator Awarded 22 months' Notice on Summary Judgment

An employee brought a motion for summary judgment after being terminated without cause from his twenty year employment as a machine operator with an auto parts manufacturer. At the time of his termination, the employee was 70 years old and his employment was not governed by an employment contract. The employee's evidence on the motion detailed his unsuccessful efforts to find alternative employment, which included visits to more than 225 companies looking for any type of employment. His lawyer referred to a number of wrongful dismissal decisions with comparable facts where the Court awarded lengthy notice awards to elderly, relatively unskilled workers.

In awarding the employee 22 months' notice, the Court took into account the traditional Bardal factors of age, character of employment, length of service, availability of similar alternative employment as well as training and qualifications. In doing so, the Court specifically rejected the suggestion that the character of his employment, that of a machine operator, should result in a reduced notice period. The Court reasoned that the empirical validity of the assumption that unskilled workers have an easier time finding alternative employment cannot be taken for granted in today's world. The Court also noted that the employee's advanced age was a factor that denied him the "flexibility of the young" when it came to finding alternative employment.

This decision reflects the Court's increasing willingness to take notice of current demographic and economic labour market realities: older workers want, and often need, to continue to work; and, work of any kind – skilled or unskilled – is hard to come by. This decision also underscores the usefulness of

employment contracts. Employers and employees alike should turn their minds to entering into employment contracts, regardless of the character of employment, in order to secure entitlements and/or limit liability in the event the relationship is eventually terminated without cause.

***Kotecha v Affinia [2013]* ONSC 4817 (CanLII)**

Reinstatement After Eight Years? Ontario Human Rights Tribunal Says Yes.

In a recently released decision of the Ontario Human Rights Tribunal ("OHRT") dated March 14, 2013, the employee Applicant was awarded reinstatement to her employment as Supervisor, Regulated Substances, Asbestos, with the Hamilton-Wentworth District School Board (the "Respondent School Board") after being away from work since July 8, 2004.

The Applicant had filed a Complaint with the Ontario Human Rights Commission on November 24, 2004 alleging discrimination due to disability contrary to Sections 5 and 9 of the Code. The Complaint was thereafter transferred to the OHRT by way of an Application filed in 2009.

In a decision on the merits issued by the OHRT in 2012, the Respondent School Board was found to have violated the Code by failing to accommodate the Applicant's disability-related needs from April 2003 and thereafter, by terminating her employment on July 9, 2004.

In the decision on the remedy to be awarded to the Applicant, the Tribunal Adjudicator focused on the Applicant's request for reinstatement, stating that the remedial objective of human rights legislation is to make an applicant "whole".

The Tribunal adopted the remedial principles outlined in the Supreme Court of Canada decision of *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 which held that "reinstatement is clearly the most effective way of righting the wrong that has been caused…".

The Tribunal held that the Applicant had searched diligently for alternative work but had only managed to find casual and part-time employment. It also held that on the balance of probabilities, the Applicant would have continued in the employ of the Respondent School Board had her employment not been terminated contrary to the Code.

The Tribunal found that there was no impediment to reinstatement as the Applicant held no animosity towards the School Board and the individuals who were responsible for her termination were no longer in the School Board's employ. Given the size of the School Board, it was also found that the reinstatement of the Applicant would not cause any hardship.

In respect to the lengthy passage of time, the Tribunal held that while it had been 8 ½ years since the Applicant was terminated, the delay was not attributable to the Applicant, but rather was due to the Commission and OHRT process. It found that the delay by the HRTO in processing the Application since 2009 was not unreasonable given the complex issues.

In any event, the Tribunal held that the passage of time, in and of itself, was not sufficiently prejudicial to the School Board to justify refusing reinstatement.

In addition to reinstatement, the Tribunal ordered lost wages to be paid by the School Board in the sum of $419,283.89, based on the full-time wages the Applicant would have earned with the School Board from June 26, 2003 (when an alternate appropriate position was posted) to the date of reinstatement, less any income and non-repayable benefits she received. The Tribunal also ordered the School Board to make all employer pension contributions and to pay any additional costs related to buy-back of pensionable service; to make retroactive payments to the Canada Pension Plan; to reimburse the Applicant for out-of-pocket medical/dental expenses; and to compensate the Applicant for any tax consequences as a result of receiving the wages as a lump sum rather than as continuing salary. The Applicant was not awarded compensation relating to increased spousal life insurance premiums due to the Applicant's spouse's declining health since the termination as the Tribunal found such was too speculative and unmitigated.

Finally, the Tribunal also awarded the Applicant compensation for injury to dignity, feelings and self-respect under the Code in the sum of $30,000.00, as well as prejudgment interest on all damages from the date of the original Complaint to the date of the decision and postjudgment interest thereafter.

This decision is a significant one in human rights jurisprudence. It reveals the willingness of the Tribunal to award reinstatement as a viable remedy for a breach of the Code irrespective of the passage of time as well as a significant lost wages award. Employers should be aware of these risks while employees should be mindful to claim such relief in their applications.

***Fair v. Hamilton-Wentworth District School Board*, 2013 HRTO 440**

The Intersection of Disability and Wrongful Dismissal Claims:

Appeal Court Allows Wrongful Dismissal Claim to Proceed

Mr. Spiers (the "Employee") worked for Canon Canada Inc. (the "Employer") for approximately 19 years. In May 2006, he stopped working due to illness and was approved to receive short-term disability benefits by the Employer. The disability payments were terminated after approximately seven and a half weeks.

The Employee brought an action against the Employer for payment of additional short-term disability benefits and against Manulife Financial for long-term disability benefits. The claim against Manulife Financial was settled at mediation.

On January 13, 2010, the Employee wrote a letter to his Employer advising that he was able to return to work. The Employer did not respond to the Employee's request. As a result, in May 2012, the Employee brought a motion to amend his Statement of Claim to allege constructive dismissal because the Employer failed to respond to his return to work letter.

The lower court held that the proposed claim for wrongful dismissal was statute barred because the Employee did not bring a claim within the two year limitation period which started to run on January 13, 2010, when the "employee knew or ought to have known" that he had a claim for wrongful dismissal.

The Court of Appeal overturned the lower court's decision because it was "not tenable that merely by sending a letter saying he (the Employee) was prepared to go back to work, Mr. Spiers would know that Canon was refusing to take him back. Some response from Canon was required either expressly or by inference."

It was conceded on appeal that at least some reasonable time period must elapse from the date of the Employee's letter where it could be reasonably found either "expressly or by silence" that the Employer was rejecting the Employee's request to return to work. However, in this case, there was no evidence to support exactly when the Employer refused to permit the Employee to return to work, and accordingly, when the two year limitation period started to run. As a result, the Court of Appeal held that the limitation issue should be determined at trial after examinations for discovery, and after the Court has an opportunity to hear evidence of the parties' intentions on the limitation issue.

In this case, the Employee was fortunate that there were no cross-examinations on the affidavits filed in support of the motion to amend the Statement of Claim, as it may have resulted in a different outcome if the Court had evidence regarding when the Employer rejected the request to return to work.

Employees should be aware of the relationship between a disability and wrongful dismissal claim, and ensure that a claim for wrongful dismissal is initiated within two years from the date that the employee knew or ought to have known that he or she has a wrongful dismissal claim against the employer. If there is uncertainty when the limitation period starts to run, legal advice should be obtained to ensure that the employees' rights are protected.

***Spiers v. The Manufacturers Life Insurance Company (Manulife Financial)*, 2013 ONCA 200 (CanLII)**

Can an Employer Lay-Off an Employee Without a Term in the Employment Contract to that Effect?

In the recent case of *Sandra Trites v. Renin Corp*, the Ontario Superior Court of Justice considered whether an employer could unilaterally impose a temporary lay-off upon an employee when there was no expressed or implied term to that effect in her employment contract.

The Plaintiff Employee in this case had worked for the Defendant Employer (and its predecessor), for just under seven years when she was told in a meeting that she had been selected to be placed on lay-off.

The Court found that while the Employee may have been copied on internal e-mails regarding a lay-off policy, she did not read the policy and was unfamiliar with her rights relating to it. The Employer had failed to properly explain it to her and did not obtain her consent to any policy.

Upon the Employee leaving the lay-off meeting, having not signed the consent document presented to her, the Employer stopped paying her salary; terminated her long term disability benefits; and stopped making contributions to the Canada Pension Plan on her behalf. The Employee was then issued a Record of Employment which indicated that she was on lay-off. Prior to the 35 week lay-off period ending, the Employee brought an action against the Employer alleging that she had been constructively dismissed.

The Employer argued that the Employee had been placed on temporary lay-off as contemplated by the *Employment Standards Act, 2000* (the "ESA") and as such, she had not been constructively dismissed or terminated, either under the ESA or at common law.

The Employee argued that the temporary lay-off provisions of the ESA operate separately from her common law rights. She stated that the ESA lay-off provisions operate to provide protection for those employees who were laid off pursuant to an expressed term in their contracts. As she had no employment agreement which provided for lay-off, the ESA provisions did not apply to her.

The Court ultimately found that the Employer had not satisfied the requirements of a temporary lay-off under the ESA as the Employee had not continued to receive substantial payments from the Employer and/or supplementary unemployment benefits and she had not been offered ongoing entitlement to medical and dental benefits as a term of the lay-off. The Court therefore found that the Employee had been constructively dismissed. The Court further stated that "there is no room remaining in law for a common law claim for a finding of constructive dismissal in circumstances where temporary lay-off has been rolled out in accordance with the terms of the ESA".

There is an argument that as the Court's pronouncement on temporary lay-off under the ESA and its relation to common law was not required to determine the facts of the case, that its comments on the relationship between the ESA temporary lay-off provisions and the common law is not binding authority.

As well, such a pronouncement appears to contradict a 2011 ruling of the Ontario Court of Appeal in *Elsegood v. Cambridge Spring Service, 2001 Ltd.* [2011] O.J. No. 6095, which held that at common law, an employer has no right to lay-off an employee absent a valid contractual agreement to the contrary and that a unilateral lay-off amounts to constructive dismissal as of the first day of the lay-off.

However, both employers and employees must still take note of this case. While it suggests that employers may no longer need to include the right of temporary lay-off in their employment contracts or manuals to allow them to effect a temporary lay-off of an employee without a termination or constructive dismissal being triggered, employers are still required to fully comply with the lay-off provisions under the ESA. Failure to do so would likely result in a finding that the employee was constructively dismissed and entitled to damages. Further, the decision remains a lone wolf in the case law and may or may not indicate the start of a movement in the direction of acknowledging the right of lay-off at common law. Therefore, prudent practice for employers is still to ensure that the ability to effect a temporary lay-off in accordance with the ESA is included in the employment contract or the employee manual and in the case of policy, that there has been clear communication.

***Trites v. Renin Corp*, 2013 ONSC 2715** (CanLII)

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