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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.

Provincial Court Adopts Federal Standard for Family Status Claim

In a recent decision of the Ontario Superior Court of Justice ("Superior Court"), the test with respect to family status accommodation pronounced by the 2014 Federal Court of Appeal ("FCA") in *Attorney General of Canada v. Johnstone* ("*Johnstone*") was applied to a like claim made pursuant to the *Ontario Human Rights Code, R.S.O.* 1990, c. H.19.

In this Superior Court case, the employee was employed for approximately seven (7) years. The Superior Court found that the employee was initially hired as a Dental Hygienist but spent the last four years of her employment in the position of Office Manager. As the Office Manger the employee enjoyed a flexible work schedule that allowed her to tend to her childcare needs.

Prior to the end of the employee's second maternity leave, the employer advised her that when she returned to work she would resume her role as a Dental Hygienist and not the position of Office Manager, although the position was still available. The employee reminded the employer of her statutory right pursuant to section 53 of the *Employment Standards Act, 2000 ("ESA")* to be reinstated to her former position. As a result of the employee demanding that she be reinstated to her position as Office Manager, the employer changed the employee's hours of work, knowingly causing a conflict with the employee's childcare responsibilities. The employee was terminated for cause shortly after the end of her maternity leave.

The employee sued and was awarded the sum of $42,517.44 as damages for wrongful dismissal and $20,000 for discrimination based on family status accommodation under the *Ontario Human Rights Code.*

Debatably, the Superior Court's decision could have been restricted to a finding that the employee was wrongfully dismissed as an act of reprisal because she exercised her section 53 rights. However, the reasons for judgment, which were delivered after a written endorsement, opted to examine the full scope

of the employer's infringement and found that the employer's actions also amounted to discrimination based on family status. In so doing, the Superior Court applied the FCA test articulated in *Johnstone.*

The test for determining discrimination on the basis of family status with respect to childcare responsibilities requires the employee to show:

1. that a child is under his or her care and supervision;
2. that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
3. that he or 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.

If the employee makes out a *prima facie* case of discrimination, the employer can refute the employee's case by showing that the applicable workplace rule is a bona fide occupational requirement.

Although the facts, as set out in the Superior Court's reasons for awarding the employee's family status claim are limited, the decision remains a critical one for the simple fact that the FCA test has broad reaching application to provincial human rights legislation and signifies the court's commitment to hold all employers accountable for recognizing the importance of family status accommodation.

This latest decision of the Superior Court should serve as a reminder to both federally and provincially regulated employers about their duty to properly investigate and evaluate an employee's request for family status accommodation. As well, the decision stands as a sharp reminder about an employee's rights under section 53 of the *ESA.*

Partridge v. Botony Dental Corporation, 2015 ONSC 343

SCC Finds Indefinite Suspension with Pay = Constructive Dismissal

On March 6, 2015, the Supreme Court of Canada unanimously overturned the New Brunswick Court of Appeal and the trial judge's decisions which had concluded that the Employee, the Executive Director of the New Brunswick Legal Aid Services Commission, was not constructively dismissed. The Supreme Court seized the opportunity to provide some guidance on the application of the doctrine of constructive dismissal in the context of an administrative suspension of a supervisor.

During the course of the Employee's seven year contractual term, there was a breakdown in the employment relationship. The Employer entered into negotiations with the Employee to buyout his

contract. During this process, the Employee took a sick leave. Before negotiations were complete, the Employee was indefinitely suspended with pay. The evidence at trial revealed that the Employer concealed its intentions to terminate the Employee for cause. All of the Employee's powers and responsibilities were transferred to another person. The Employer provided no reason for the indefinite suspension and the parties did not resolve the terms for exit.

The Employee took the position that he was constructively dismissed and commenced a lawsuit. The Employer argued that the Employee's conduct constituted a voluntary resignation. The trial judge found for the Employer, as did the Court of Appeal, holding that the Employee had resigned.

In assessing whether an administrative suspension is wrongful, the Court will consider a number of non-exhaustive factors including whether the suspension:

(a) resulted in someone replacing the suspended employee;
(b) is for a limited, lengthy, or indefinite duration;
(c) is with or without pay and benefits;
(d) is defensible by legitimate business reasons;
(e) was undertaken in good faith.

These factors assist the court to determine if in context the suspension was reasonable and justified. In this case, the Supreme Court of Canada held that the Employer's unilateral decision to indefinitely suspend, *without supplying any reasons to the Employee,* was not justified and was undertaken in bad faith. The Employer failed to adhere to the basis requirement of good faith contractual dealings to be honest, candid, and forthright.

The Employee was replaced during his suspension, and therefore, lost all of his duties and responsibilities as an Executive Director. The indefinite suspension was a wrongful breach of the employment agreement which represented a substantial change to the essential terms of the employment agreement, namely, the duty to provide work. As such, the Employee was wrongfully dismissed and was entitled to damages representing his salary and benefits that would have been received but for the constructive dismissal.

An employee should seek legal advice whether to treat the employment agreement as repudiated, and sue for constructive dismissal. In circumstances where it is unclear whether the Court will find that an employee has been constructively dismissed, it is important to canvass whether an employee should continue working under protest thereby also mitigating his or her damages if the constructive dismissal lawsuit is ultimately unsuccessful. This is a factually specific determination that must be carefully considered on a case by case basis.

Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10

Supreme Court of Canada's Recent Decisions Change the Legal Landscape for Unions Across Canada

In the span of two weeks at the beginning of 2015, the Supreme Court of Canada (SCC) has issued two decisions that will undoubtedly change the legal landscape for organized labour across the country.

The first case involved a dispute between the Mounted Police Association and the Attorney General of Canada. At stake was the legality of legislation which limited the Mounties' right to choose to be represented in their employment by a bargaining agent of their own choosing. More specifically, the SCC was asked whether the exclusion of the Mounties from the right to be represented by an exclusive bargaining agent that was arms' length from management and their exclusion from the right to bargain collectively (which all other federal employees are entitled to under the *Public Service Labour Relations Act*) constituted a violation of the Mounties' freedom of association as guaranteed in section 2(d) of the Canadian *Charter of Rights and Freedoms* (*Charter*).

The SCC determined that the Mounties' freedom of association had, in fact, been violated. Although the facts of the case did reveal that the Mounties did have access to an internal grievance procedure "scheme" to address workplace disputes, it was a scheme found to represent the interests of the employer rather than the employees. The scheme did not provide the Mounties with the ability to engage in collective bargaining and be represented by a bargaining agent of their own choosing that had a sufficient degree of independence from the employer. In coming to its conclusions, the SCC stated:

> *The s. 2(d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests.*

The second decision pitted the Saskatchewan Federation of Labour (Federation of Labour) against the Saskatchewan Provincial Government. At stake was the Federation of Labour's challenge to the Province's enactment of two statutes back in 2008 – the first, the *Public Service Essential Services Act* (PSESA) which took away the right to strike for essential service workers in the Province and the second, the *Trade Union Amendment Act* (TUAA) which did away with card-based certification and also introduced further legislative changes which made workplace certifications more difficult to achieve while at the same time making the ability to terminate a union's bargaining rights much easier.

The SCC's decision in the Federation of Labour case can, in some ways, be viewed as a split decision. The SCC upheld the Province's amendments set out in TUAA despite clear empirical evidence that the types of legislative changes the Province had enacted significantly reduced the likelihood of workplace organization. Although this aspect of the decision is disappointing for organized labour, it is somewhat overshadowed by the positive aspect – that being the SCC's decision to strike down the PSESA. In doing

so, the SCC made it clear that section 2(d) of the *Charter* not only provides the right to engage in meaningful collective bargaining with constitutional protection, but that constitutional protection extends to protect a union's right to strike when an impasse is reached in the collective bargaining process. The SCC stated:

> *The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.*

Over the past few years, decisions of the SCC have favoured federal and provincial legislation intended to limit the ability of employees to organize or exercise rights once organized. However, these decisions are a significant departure from earlier decisions of the same court.

The SCC's recognition that the *Charter's* guarantee of freedom of association extends to include the right to engage in meaningful collective bargaining is significant. It provides the legal basis upon which organized labour can and likely will challenge existing and future legislation which seeks to limit this right. Further, the SCC's recognition that the right to strike forms such a fundamental part of the collective bargaining process that it too is worthy of constitutional protection and has the ability to put an end to any government's ability to lawfully enact back to work legislation that artificially ends otherwise lawful strikes.

These two decisions are, without question, victories for the Mounties and the Saskatchewan Federation of Labour and, in many ways, victories for organized labour as a whole. However, these decisions may also signal a shift in the current court's perspective and result in a more liberal and employee friendly court in both the unionized and individual employment context.

Mounted Police Association v. Canada (Attorney General) 2015 1 SCC (CanLII)

Saskatchewan Federation of Labour v. Saskatchewan 2015 4 (CanLII)

"Unjust Dismissal" Pursuant to the Canada Labour Code Permits Dismissals on a Without Cause Basis

In a surprising decision of the Federal Court of Appeal released January 22, 2015, the Court has held that s. 240 of the *Canada Labour Code*, R.S.C.C. L-2 (the "*Code*") permits dismissals on a without cause basis.

On Appeal from the Federal Court, the Federal Court of Appeal considered a complaint which had been decided by a labour adjudicator appointed under the *Code*. The adjudicator determined that the employee had been "Unjustly Dismissed" under the *Code* when he was terminated by his federally regulated employer without just cause and held that the employee was entitled to an appropriate remedy. The

employer applied to the Federal Court for judicial review on the basis that an "Unjust Dismissal" under s. 240 of the *Code* permitted it to terminate the employee without cause and that the employee was not entitled to a remedy for that reason alone.

On the merits, the Federal Court determined that the adjudicator's interpretations of s. 240 of the*Code* was unreasonable; quashed the adjudicator's decision and remitted it back to the adjudicator to determine whether the terms of the dismissal were "unjust".

On appeal to the Federal Court of Appeal it noted that the employee had been employed for 4 ½ years and was a Procurement Supervisor, Tooling, a non managerial position, at the time of the termination. He had been offered a severance package by the employer equivalent to approximately 6 months' pay in exchange for a full and final release; well in excess of the minimum statutory requirement under the*Code* totaling 18 days' pay. While the employee rejected the sufficiency of the offer, he remained on payroll and benefits for approximately 6 months; receiving the full amount of the offer. The employee had also argued that he was terminated because he had complained about improper procurement practices by the employer.

The Federal Court of Appeal held that a dismissal without cause is not automatically "unjust"*per se* under the *Code* and that an adjudicator must examine the particular circumstances to make that determination. In so concluding, the Federal Court of Appeal relied upon the concept of common law employment whereby an employee who is given reasonable notice is not wrongfully dismissed and stated that the*Code* did not oust the common law. It rejected a number of previous adjudicator and Federal Court decisions, as well as academic articles, which had interpreted s. 240 as bestowing a right to employment akin to a unionized employee, rather than simply a right to reasonable notice.

The Federal Court of Appeal concluded by emphasizing the fact that an employer paying an employee severance does not preclude an adjudicator from granting further relief where there is a finding that the dismissal was "unjust". However, it further stated that the term "unjust" cannot be found on any basis and must "gather much, if not all, of its meaning from well-established common law and arbitral cases concerning dismissal" and principals of statutory interpretation.

Wilson v. Atomic Energy of Canada Limited, 2015 FCA 17 (CanLII)

The ESA in 2015 – The times they are a changing……

Ontario has passed legislation which will bring about key changes to the*Employment Standards Act, 2000* ("ESA"), amongst other important changes:

- Minimum wage will increase annually in accordance with the Consumer Price Index:
  - Effective October 1st and each October thereafter;

  - Will be reviewed in 2020 to determine whether this mechanism has been effective;
  - This change is intended to effect increases to minimum wage in a more timely fashion.

- The $10,000 cap on wages which can be awarded by Employment Standards Officers is removed.
  - Effective February 20, 2015;
  - The time limit for filing a complaint to recover wages is increased from 6 months to 2 years;
  - This represents a significant broadening of powers and will likely result in more complaints being filed with the Ministry of Labour which would otherwise have been filed as claims in Small Claims Court.

- Employment Standards Officers will have the power to require an employer to conduct a self-audit of its records and/or practices as to whether it is in compliance with the ESA:
  - Effective May 20, 2015;
  - The employer will be required to report these findings to the officer;
  - Knowingly reporting false or misleading information in response is prohibited and will be subject to fines;
  - This will eliminate the need to be audited by an Employment Standards Officer who may or may not find non-compliance and will shift the cost of this audit from the Ministry of Labour to employers.

- The ESA poster required to be posted in every workplace must be provided by hand to all new staff within 30 days of the date of hire:
  - Effective May 20, 2015;
  - This will require an update to hiring checklists as another box to tick off.

- Temporary help agencies and their clients shall be deemed jointly and severally liable for unpaid wages to assignment employees:
  - Effective November 20, 2015;
  - Including regular wages, overtime and holiday pay;
  - Additional and joint record-keeping requirements also come into effect;
  - This will no doubt operate as a significant incentive for clients to ensure they deal with reputable agencies and that they understand the true cost of the assignment employees they take on.

Poorly Drafted Employment Contract Proves Very Costly

The Ontario Superior Court recently issued a decision in an action for damages for wrongful termination awarding fourteen months' pay in lieu of notice to an employee with less than three years' service.

The plaintiff employee accepted an offer of employment with the defendant employer, a trucking company, in 2009 to become its "country manager" responsible for 500 employees at a starting annual salary of $276K. The employee left secure employment as the president of a courier company to take on this new position after being recruited by another employee of the employer. The employment agreement included a $40K signing bonus and a requirement that the employee purchase approximately $102K worth of shares in the employer through a "Long-Term Incentive Plan". With respect to termination, the employment agreement provided:

Your employment may also be terminated by our providing you notice, pay in lieu of notice, or a combination of both, at our option, based on your length of service and applicable legal requirements.

The employer argued that the employment contract limited the employee's entitlement upon termination to a determination of notice based solely upon his length of service with the employer, which was less than three years. The employer also denied any inducement.

The court found that the termination provision set out in the employment contract entitled the employee to reasonable notice determined in accordance with *all* applicable legal principles – those being the classic *Bardal* factors and the law of inducement. The court stated that if the employer intended for the employee's length of service to be accorded more weight than any other factor, it was incumbent on the employer to make that point clear to the employee. Based on the evidence, the court determined the employer failed in this regard. Further, the court viewed the share purchase agreement to be an implied representation that the employee was about to embark upon long-term employment. According to the court, the share purchase agreement evidenced that both the employee and the employer contemplated the employment to be a long one and neither party thought the employee's employment could be terminated upon the payment of two weeks' salary.

Although the evidence confirmed the employee never raised any concern about job security when he accepted the employment offer, the court was still satisfied there was some measure of inducement by the employer which led to the employee leaving his previous employment. For this reason, the court viewed it as a factor "tending to increase the period of notice".

After weighing all relevant factors, the court set the appropriate period of notice at 14 months. This translated into an award of over $428K (when all other forms of regularly monthly remuneration were factored in), less mitigation.

This decision underscores the importance of drafting employment agreements with straight forward and unambiguous contractual language that clearly set out entitlements upon termination. Failing to do so, especially with top executives, can prove very costly.

Rodgers v. CEVA Freight Canada Corp. [2014] ONSC 6583 (CanLII)

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