Employment Law

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

Reminder…You Can't Sue an Employee for Negligence

When acting for an employer we are often asked whether an employee can be sued for damages that the employer sustains as a result of an employee's negligence. The answer is no. A case recently decided by the Alberta Court of Queen's Bench, *Shamac Country Inns Ltd. v. Sandy's Oilfield Hauling Ltd.*, does not purport to change the law in that area. However, the law does bear repeating, as we often see claims being advanced against employees by their employers for damages allegedly sustained as a result of the employee's negligence.

Employees are not liable to their employers for acts of simple negligence. Recent authority for this proposition was cited by the Alberta Court referencing *Douglas v. Kinger*, 2008 ONCA 452, *Kirby v. Amalgamated Income Ltd. Partnership*, 2009 BSCC 1044 and *1746646 Alberta Inc. v. Aman Carrier Ltd.*, 2014 ABPC 270. Employees may be liable for intentional or reckless actions where:

1. They are "skilled" workers, and are held to a reasonable standard of care associated with their roles. This will arise in a case such as a CPA performing duties as an accounting professional. However, as a result of the power imbalance inherent in the employment relationship, the employers generally bear the onus to establish the employee is a "skilled worker" which is a high threshold test;
2. They act fraudulently or commit acts of intentional wrongdoing beyond the scope of their authority; and
3. Those employees who are directors and officers are held to the standard of reasonable business judgment in exercise of their discretion and can be liable where their actions fall below that standard.

The recent decision of *Shamac* considered whether a company could bring an action against a related company and its employee for negligence in causing a fire. The Plaintiff attempted to shift liability for the damages caused by a fire at its premises upon a related company and its employee. The Court

considered whether the defendant employer was vicariously liable for the actions of the employee, as well as whether in fact the plaintiff was a common employer to the employee against which it now sought to attach its claim. The Court drew upon the principal of a "borrowed employee" suggesting that although the relationship may not have been a true employment relationship, it was one like a "transferred employment" relationship where the control lay with the plaintiff who was seeking to sue the employee for the employee's negligence. The Court concluded that whether one looked to the doctrine of common employer, or the concept of 'borrowed employee', the considerations were similar, and the question to be decided was: "who was the employer who exercised control over the employee".

The Court applied the common employer doctrine even though the case was one of vicarious liability and not wrongful dismissal, and held that the doctrine did apply. The Court concluded that the plaintiff and the corporate defendant collectively employed the employee. Accordingly, the Court went on to conclude that the plaintiff employer could not bring an action against the defendant employee for negligence, and that the employee was not liable for the causing of the fire forming the subject matter of the litigation.

While employees are not always liable for the consequences of their negligence, it bears mention that negligence may be grounds for termination of employment for cause.

***Shamac Country Inns Ltd. v. Sandy's Oilfield Hauling Ltd.,* 2015 ABQB 518, 2016**

Employee's Request for Accommodation Amounts to a "Personal Choice" – the Facts Really do Matter

In a recent decision, the Federal Court of Appeal (the Court") upheld a decision that found an employee who requested an accommodation in order to breastfeed her child during working hours failed to meet the test for *prima facie* discrimination. The particular facts of this case lead to the Court finding that the employee's decision to breastfeed was a "personal choice", and not one born out of a legal obligation towards the child in question, as required by the applicable legal test.

By way of background, prior to the employee returning to work after her third maternity leave, she requested that her employer provide her with an accommodation that would allow her to telework from home on a full-time basis. The parties had agreed to a similar arrangement, albeit it was for 1 day per week and for a shorter duration, in the past. The parties exchanged several communications and canvased various options to see if a mutually agreeable arrangement could be reached. In the end, the parties could not agree on an accommodation plan, and the employer denied the employee's request as it was not "operationally feasible".

As the employee was unionized, she filled a grievance claiming that the employer's failure to accommodate her was discriminatory on the basis of sex and family status, contrary to the*Canadian Human Rights Act*

and the collective agreement. The grievance was refused at every level up to the Court.

In reaching its decision, the Court held, *inter alia* that:

- the test from ***Johnstone*** applied in determining if the alleged discrimination was on the basis of sex and/or family status;
- as required by the second prong in the *Johnstone* test, the employee failed to evidence that breastfeeding during working hours is a legal obligation to a child in her care, and therefore the Court concluded it was, in this case, a personal choice; and
- the employee made no reasonable effort to find a viable solution, see third prong on the test in *Johnstone* – specifically, the employee failed to address the employer's reasonable concerns.

The Court, however, was clear to emphasise that its decision was not a blanket statement with respect to the provision of accommodations in the workplace for breastfeeding, nor was it trivializing breastfeeding. It is important to note, **as we discussed in our blog on *Johnstone***, that matters such as these are heavily fact driven, with each case bearing its own unique outcome. As such, employers should approach matters of accommodation with due diligence through open dialogue and the aim of reaching a mutually agreeable solution, up to the point of undue hardship.

Flatt v. Canada (Attorney General), 2015 FCA 250 (CanLII)

A Glass Of Wine At Lunch May Not Be Cause For Termination

The Ontario Superior Court recently held that a car dealership, Wright Auto Sales Inc. (the "Employer"), wrongfully dismissed one of its managers with two years of service (the "Employee"), when it terminated the Employee's employment for consuming alcohol during the work day and allegedly being under the influence of alcohol while at work.

A few months prior to the Employee's termination he was told by his superiors during a weekly manager's meeting that they could smell alcohol on his breath. At that time, the Employee admitted his practice was to have an occasional glass of wine at a local restaurant during lunch prior to attending the weekly meeting. About a month later, the Employer notified the Employee of an alleged customer complaint suggesting the Employee was intoxicated at work. Further allegations regarding the Employee's alleged consumption of alcohol were made a few months later, including an allegation that the Employee had been driving a company vehicle while impaired. Relying on its alleged zero-tolerance policy for the consumption of alcohol and the alleged negative impact the Employee's behaviour had on the Employer's legitimate business interests, the Employer terminated the Employee. In response, the Employee commenced an action alleging wrongful dismissal.

At trial, the Court found that there was little evidence to substantiate the Employer's allegations that the Employee was actually under the influence of alcohol while at work, had consumed alcohol at work or that his consumption of alcohol on lunch from time to time negatively affected the Employer's business interests. The Court also found that the Employer's alleged zero-tolerance policy for the consumption of alcohol was ineffectively communicated to the Employee. Instead, the Court accepted the Employee's evidence that he had never been told that he was not permitted to have a glass of wine when out at lunch. The Court also rejected the Employer's argument that the zero-tolerance policy was an implied term of the employment contract. In the result, having found no evidentiary basis to substantiate the Employer's allegations of alcohol related wrongdoing on the part of the Employee, the Court awarded the Employee $48,557.68 in damages which amounted to five months' pay in lieu of notice.

This decision is another reminder that employers must meet a high threshold in order to demonstrate just cause for termination. If an employer has a zero-tolerance policy for alcohol consumption, that policy should be committed to writing using clear language that explains the policy's application and the consequences for violating it and be brought to the attention of all employees at the time of hire.

***Volchoff v. Wright Auto Sales Inc.*, 2015 CanLII ONSC 8029**

Disabled Employee Awarded Hefty Damages for "Horrendous" Treatment

A recent case shows how an employer's conduct both during employment and in the manner of dismissal may be compensated – and deterred – in court proceedings.

The Employer company carried on business as a recruiter for focus groups. For over 15½ years the Employee worked with the Employer, initially in an administrative support role, and eventually in a more responsible role instructing recruiting staff. The Employee's income was approximately $22,000 per year, and she received a modest benefits package.

In the Fall of 2010, the Employee became deaf. From that point on, the Employee alleged she was subjected to unconscionable conduct, culminating in her dismissal about 6 months later. The Employee made numerous requests for accommodation for her hearing disability, most at no cost to the Employer, and was refused every time. Her direct supervisor required the Employee to reschedule medical appointments on short notice, and encouraged her to "quit and go on disability."

The Employer dismissed the Employee for just cause, ostensibly due to an incident in which she declined to participate in a voluntary, after hours Toastmasters club hosted by the Employer. The Employer failed to pay outstanding wages until a legal clinic intervened on the Employee's behalf, and delayed her entitlement to receive employment insurance by recording that she had been dismissed for wilful misconduct on her record of employment.

The Employee sued. The Employer failed to serve and file a statement of defence and was ultimately noted in default. A refusal to set aside default judgment was affirmed by the Ontario Court of Appeal, and leave to appeal to the Supreme Court of Canada was refused.

On the motion for default judgment, the Court did not hesitate to award the Employee pay in lieu of notice of 24 months, with recognition for salary increases, fringe benefits, and gross-up for taxes, in recognition of the Employer's "horrendous conduct." The Court also awarded $20,000 in damages for discrimination due to the Employee's disability, for injuries to her dignity, feelings and self-respect under Ontario's *Human Rights Code,* and $18,000 in damages for infliction of mental distress (reflecting the projected cost for psychological treatment). Most significantly, the Court awarded $15,000 in punitive damages, to penalize the Employer's harsh conduct and signify the Court's admonishment.

***Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2015 ONSC 3408 (CanLII)**

Correctional Officer's Failure to Disclose Criminal Charges Not Worthy of Termination

The Ministry of Community Safety and Correctional Services (the "Employer") terminated the employment of a correctional officer (the "Employee") with approximately seven years of service after it was discovered that she failed to immediately disclose that she had been charged under the Criminal Code with impaired driving while off-duty. The Employer took the position that the Employee's disclosure of the charge two years after the fact violated the Employer's policies and her standing orders. The

Employee's union, OPSEU (the "Union"), took the position that although the failure to report the charges in a timely manner was a serious breach of policy worthy of some discipline, termination of employment was too severe in the circumstances.

During the arbitration hearing, the Union called evidence establishing that the charge (and accompanying license suspension) did not negatively impact on the Employee's ability to actually perform her job. The Union explained that the charge coincided with a tumultuous time in the Employee's life. She had just transferred to a new correctional facility after being off work on stress leave attributed to unsubstantiated claims of harassment by a supervisor. She was ashamed and embarrassed about the charge and was afraid of everyone in her new workplace finding out. Given the supervisor she complained about had also just been transferred to her new workplace, the Union explained that the Employee was justifiably skeptical of who to trust. She was also hesitant to immediately disclose the charge because she had been told by her lawyer that the charge might be reduced to careless driving. Although the Union did not take the positon that the Employee suffered from an alcohol dependency, it did lead evidence to establish that the criminal charge was an immediate wake-up call for the Employee that resulted in her quitting drinking and smoking and becoming more active in her Church.

The Employer took the position that honesty and trust were fundamental to the employment of a "peace officer" that is responsible for enforcing rules of the criminal justice system and that correctional officers are properly held to a high standard of ethical conduct. The Employer then argued that the Employee's initial and continued failure to make timely disclosure of the charge was so incompatible with her employment that termination was the only reasonable disciplinary response. The Union, on the other hand, argued that termination was disproportionately harsh in the circumstances given the Employee's genuine apology, remorse and positive rehabilitation prior to any discipline ever being imposed.

In coming to his conclusions, the arbitrator noted that any decision required a balancing of competing interests – those being the Employer's legitimate business interests and the Employee's economic well-being and emotional self-worth which were inextricably tied to her employment. Following the Supreme Court of Canada's decision in *Mckinley v. BC Tel,* which requires a trier of fact to assess whether something short of termination can reasonably address instances of workplace dishonesty, the arbitrator concluded that termination was inappropriate. Instead, the arbitrator concluded that the dishonesty was worthy of a twenty day suspension. In reaching this conclusion, the arbitrator reinstated the correctional officer's employment without any loss of seniority and awarded back pay retroactive to the first day of hearing in the arbitration, which amounted to just over one years' worth of wages.

This decision is a further reminder to all employers that they should always give very serious consideration to disciplinary responses short of termination when attempting to address instances of workplace dishonesty because failing to do so can prove costly.

OPSEU (Lunario) v. Ministry of Community Safety and Correctional Services,2015 CanLII 60425 (ON GSB)

Employer's Financial Problems Will Not Affect an Employee's Reasonable Notice

The Court of Appeal for Ontario has now definitively addressed the issue of whether an employer's financial circumstances are relevant to the assessment of an employee's common law reasonable notice period.

In this case, three employee school teachers who were employed on a series of one-year contracts for thirteen, eleven and eight years respectively, appealed a summary judgment award made in their wrongful dismissal action after the motions judge reduced their reasonable notice period from twelve months to six months. The reduction was due to the respondent employer's financial difficulties and the presumed availability of alternative teaching positions for the employees.

The motions judge rejected the employer's argument that the three teachers were employed pursuant to fixed term contracts and held that they were entitled to reasonable notice commencing from the date they were specifically informed that there would be no positions offered to them for the following school year. However, the motions judge noted that if the teachers were given 12 months' notice, the employer would be "unable to reduce its prospective deficit by terminating staff it did not need". The motions judge also stated that "the law does not ignore the dilemma of the employer".

In allowing the employees' appeal, the Court of Appeal emphasized that damages for wrongful dismissal are designed to compensate employees for losses incurred during the period of reasonable notice and that the calculation thereof is fact-specific based upon the relevant factors set out in the*Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), including the "character of employment". The Court of Appeal found that the motions judge erred in finding that the "character of employment" included a consideration of an employer's financial circumstances and clearly stated that "character of employment" referred to the nature of the employee's position in terms of responsibility, expertise and similar elements, and not the position of the employer.

In doing so, the Court of Appeal clarified a passage quoted by the motions judge from the case of *Bohemier v. Storwal International Inc.* (1982), 40 O.R. (2d) 264 (H.C.); (1983), 44 O.R. (2d) 361 (C.A.); leave to appeal to SCC refused, [1984] S.C.C.A. No. 343 and held that an employer's financial position cannot be used to either increase or decrease the notice period. In allowing the employees' appeal and increasing the reasonable notice period to twelve months, the Court of Appeal also found that having concluded that the employees took reasonable steps to mitigate their damages, the motions judge had no evidentiary basis for presuming the future availability of teaching positions and further, found no justification for the motions judge's reduction of the partial indemnity costs sought on the motion by the employees.

In the event there was any doubt, this decision seems to have put a definitive "nail in the coffin" to the

idea of an employer's financial problems being visited upon a terminated employee. While an employer may have legitimate financial reasons for terminating staff, those reasons will not affect the assessment of reasonable notice by the Courts.

***Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801**

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