Employment Law

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

Caution: Employer Fails to Discharge Duty and Employee Awarded $85,000 in Human Rights Damages and Moral Damages

In a recent decision of the Superior Court of Justice, a 48 year old employee with nine years of service was awarded $25,000 for human rights damages and $60,000 for moral damages, in addition to a notice period of ten months.

The employee was subjected to repeated physical and verbal harassment by her boss. She received little to no support from upper management, who were well aware of what was transpiring in the workplace and the fact that the employee suffered from clinical depression. It was found that the employer turned a blind eye to what was happening because the harasser was a key employee.

In light of the ongoing issues between the employee and her boss, the decision to terminate the employee's employment was made and she was to be replaced with a male employee in order to avoid future issues. The employee filed a sexual harassment complaint against her boss before the scheduled date of her termination. A senior accounting executive with no training or experience in human rights issues conducted a one day investigation. In the course of the investigation the "investigator" told the employee to stop being so sensitive and emotional, and that crying made her look weak. The employee subsequently had to take a few days off work as the employer's conduct triggered her depression. The court held that the investigation was flawed, biased and carried out in a cavalier manner, which warranted an award of human rights damages.

The termination was carried out five days after the employee made her sexual harassment complaint. She was offered a take it or leave it termination package of six months. The court found that the termination package not only attempted to deny the employee's common law entitlements on termination but also denied her of her statutory severance amounts.

As a result of the employer's conduct, including the manner in which the investigation was carried out and the termination of the employee's employment, the employee was required to access her short- term disability benefits, as she spiraled into depression. Her diagnosis was confirmed by the employer's doctor but despite this, the employer opposed the employee's receipt of short-term disability benefits, which were self-funded, and later opposed the employee's application for long-term disability benefits.

The court found that the employer's actions warranted a finding of moral damages, as the employer engaged in conduct during the course of dismissal that could be said to be unfair or carried out in bad faith, conduct that was untruthful, misleading and unduly insensitive. Such conduct included, failing to use progressive discipline, alleging after acquired cause, attempting to get the employee to sign a release, which would preclude her from pursuing her discrimination and disability claims.

This case is a reminder to employers of their heighten duty to carefully and thoroughly address complaints of workplace violence and harassment by establishing detailed policies and procedures for reporting complaints and carrying out investigations of same and the risk of attempting to sweep known issues of sexual harassment under the rug by terminating the victim of the harassment.

It would be prudent for employers to review their policies and procedures in this regard, especially in the face of recent amendments to their statutory obligations as discussed in our blog post **here**.

Doyle v Zochem Inc et al (2016 ONSC 3188)

Court of Appeal for Ontario Affirms that "Acceptance" Referenced in Non-Solicitation Covenants will Transform them into Non-Competition Covenants

The Court of Appeal has re-affirmed the principle arising from the series of employment insurance broker cases of *J. G. Collins Insurance Agencies*, *H.L. Staebler and Shafron*, all of which addressed the interpretation of non-solicitation covenants in employment contracts. In *Donaldson Travel Inc. v. Murphy*, the employer was a travel agency.

The employee moved to a competitor, and her former employer commenced an action against her as well as her new travel agency employer and its principal. The Defendants brought a motion for summary judgment to dismiss the claim on the basis that the non-solicitation covenant was unenforceable, that

allegations of breach of confidentiality had not occurred and accordingly, there was no foundation for the claim to proceed.

The covenant in issue provided as follows:

> "[The employee] agrees that in the event of termination or resignation that she will not solicit or accept business from any corporate accounts or customers that are serviced by [the employer], directly, or indirectly."

The Court considered what appeared on its face to be a non-solicitation covenant, and found it to be non-enforceable as it was in reality a non-competition provision. Further, because it contained no temporal limitation, the clause was unreasonable and unenforceable. This finding was upheld on appeal.

The former employer alleged the employee had taken confidential information and had given it to her new employer. The Court went on to consider whether to also dismiss these allegations of breach of confidentiality. In the absence of any evidence being put forward by the former employer, the Court held that this claim should also be dismissed, finding there to be no factual foundation illustrated by the new employer in response to the motion.

The actions against the new employer then had to fall. The first claim related to inducing the employee's breach of contract, and no breach of contract having been found to have occurred, the new employer could not have induced same. Similarly, as the employee had not disclosed any confidential information, her new employer could not have participated in such disclosure, and accordingly no grounds existed upon which to maintain that second cause of action either.

This decision re-affirms that restrictive covenants continue to be an important and hotly litigated matter before the Courts in Ontario, and caution should be exercised (i) when acting for employees in deciding what covenants should be entered into; (ii) by employers in hiring new employees who may have existing contractual obligations; and (iii) by employers in the appropriate drafting of non-competition and non-solicitation covenants.

It should be noted that this decision does not say that non-competition covenants are always unenforceable. There is a very strict test for enforceability, and most certainly, such covenants should be thought of as the exception rather than the rule.

Donaldson Travel Inc. v. Murphy, 2016 ONCA 649

HRTO will no longer treat family status discrimination differently

In a recent decision, *Misetich v. Value Village Stores Inc.*, the Ontario Human Rights Tribunal ("HRTO" or "the Tribunal") clarified the correct legal test for discrimination on the ground of family status. The decision recognizes that the requirements for establishing discriminatory treatment based on family status should be the same as those for other grounds protected under Ontario's *Human Rights Code*, such as race, sex, or citizenship.

The facts in this case are relatively straightforward. The applicant employee worked at Value Village. After she was diagnosed with repetitive strain injury, the employer accommodated her by moving her to a less physically demanding retail position. However, the new position required the employee to work evening shifts, which conflicted with her obligation to care for her elderly mother. The employee's request to have her eldercare commitments accommodated led to a protracted back-and-forth with Value Village. The employer wanted evidence that no reasonable care alternatives were available. When the employee provided none and failed to show up for her scheduled shifts, the employer terminated her employment.

The HRTO took the employee's discrimination complaint as an opportunity to revisit the muddied waters relating to claims of family status discrimination. By way of background, different courts and tribunals across the country have applied different legal tests for family status. One of the leading tests, established by the Federal Court of Appeal in *Canada (Attorney General) v. Johnstone,* 2014 FCA 110, required a parent to show that he or she could not neglect their parental obligations without risk of legal sanction. The *Johnstone* test also required applicants to show that he or she made reasonable efforts to meet childcare obligations through reasonable alternative solutions – a requirement that effectively asks the applicant to "self-accommodate."

The HRTO held that the same legal test applicable to all other grounds of discrimination protected under the *Human Rights Code* should also apply to family status. Adjudicator Scott, writing for the Tribunal, stated that while family status case law developed from a legitimate concern that not every work-family conflict should be viewed as a potential discrimination complaint, this concern could not justify a different legal test. She provided several reasons for rejecting an alternative test:

- Different tests for family status discrimination have resulted in inconsistency and uncertainty in the law (e.g. some tests are more stringent than others);
- The use of different tests has resulted in a higher test for family status;
- There may be many obligations that caregivers have that do not emanate from a legal responsibility (contra *Johnstone*) but which are nevertheless essential to the parent/child relationship; and
- The test of legal responsibilities is difficult to apply in the eldercare context.

Consequently, the standard discrimination test will apply to family status complaints at the HRTO: the applicant must show that he or she is a member of a protected group, has experienced adverse treatment, and that the ground of discrimination was a factor in that adverse treatment.

In terms of proving discrimination, Adjudicator Scott stated that the negative impact of one's family

status must result in real disadvantage to the parent/child relationship and the responsibilities flowing from it. Assessing the impact should be a contextual analysis that may include consideration of the other supports available to the applicant.

After clarifying the new approach, Adjudicator Scott held that the employee had not established discrimination. The employee provided almost no evidence to support her eldercare obligations, despite repeated requests from the employer. The Adjudicator emphasized that bold assertions of discrimination will not pass muster; rather, evidence as to the nature of one's family responsibilities is required. Only when such evidence in support of the claim is provided will the onus shift on to the employer to show that it accommodated the employee up to the point of undue hardship.

As the reality of eldercare responsibilities increase in today's society, this decision provides needed guidance by clarifying the appropriate legal test for discrimination on the basis of family status. However, one outstanding question remains: Will Adjudicator's Scott's statement that the assessment of negative impact "may include consideration of the other supports available to the applicant" lead to a "self-accommodation" requirement entering into the analysis through the back door? Future litigation is likely to address this unanswered question. Stay tuned.

Misetich v. Value Village Stores Inc., 2016 HRTO 1229

Summary Judgment and Notice Awards

In a recent case, a Judge of the Ontario Superior Court of Justice outlined the appropriate procedure to be used where summary judgment is awarded to a Plaintiff seeking a notice period which would not expire until after the summary judgment motion.

The Plaintiff, a 54 year old Project Manager and Senior Water Resources Engineer, was employed for 17 years before being terminated without cause. The issues for the motion, which was heard almost six months after the termination, were whether the termination provision in the Plaintiff's employment contract was enforceable; the appropriate notice period and the value of the Plaintiff's employment benefits. The Judge found that the issues were appropriate for a summary judgment motion and ultimately held that the Defendant had repudiated the Employment Agreement. As a consequence, the Judge found that the Plaintiff was entitled to common law notice. However, as the common law notice period awarded of 18 months had not yet been exhausted, a lump sum payment of damages would have the effect of removing the Plaintiff's obligation to mitigate.

The parties agreed to follow the approach taken in *Markoulakis v. SNC-Lavalin Inc.*, 2015 ONSC 1081 (Ont. S.C.J.), being the Continuing Payment Approach. The Judge therefore ordered that in addition to being subject to a deduction for termination payments made by the Defendant up to the time of the motion, the notice award was also subject to the Plaintiff's continuing duty to mitigate and a deduction in the

monthly payments to be made by the Defendant for any earnings from employment or business. Further, the Judge ordered that if there was any challenge by the Defendant as to the Plaintiff's mitigation efforts or re-employment earnings, such that it ceased the monthly payments, there should be a procedure determined by the parties to resolve the dispute. The Judge remained seized of any future proceedings in the matter in the event of any future issues.

The method chosen by the parties in this case to address the future notice period was to continue the notice payments, (and presumably benefits), on a monthly basis. This was in the alternative to the Trust Approach, whereby the plaintiff receives a lump sum award but it is impressed with a trust to repay amounts to the Defendant to account for any future mitigation (as in *Correa v. Dow Jones Markets Canada Inc.* (1997), 35 O.R. (3d) 126 (O.C.J.) and *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (Ont.C.A.)), the Partial Summary Judgment Approach, whereby partial judgment is awarded for the portion of the notice period up to the time of the motion then the Plaintiff returns to court at the end of the notice period to determine the balance owing, less mitigation, or the Contingency Approach, whereby the Plaintiff's common law notice period is discounted to take into account the likelihood of future mitigation.

It appears however, that the parties did not make any submissions regarding the specifics of the process, which resulted in the Judge allowing for the potential unilateral cessation of payments by the Defendant in the event of a dispute relating to mitigation or calculations and further, the Judge remaining seized to address ongoing disputes, rather than an arbitrator being appointed or some other mechanism to deal with disputed matters on a more expeditious basis than the Court process.

It is noteworthy that the Judge's procedural ruling allowing the potential for the unilateral suspension of payments is inconsistent both with the *Markoulakis* decision and with the 2009 Report of the Ontario Bar Association Task Force on Wrongful Dismissal which, while recommending the Continuing Payment Approach taken in this case, also provided that the Defendant employer could not unilaterally suspend payments prior to returning to the Court to seek an amended Order.

It remains to be seen whether the Continuing Payment Approach outlined in this case becomes the universal standard for summary judgment motions heard prior to the expiry of the notice period and whether this Approach will have a material impact upon the pre-litigation negotiations between an employer and a terminated employee who desires a free and clear lump sum payment for RRSP tax sheltering purposes, or otherwise.

***Holmes v. Hatch Ltd.*, 2017 ONSC 379 (Ont. S.C.J.)**

Fast Food Employee's Wrongful Termination Results in Aggravated Damages

On February 9, 2017 the British Columbia Supreme Court released its decision in *Ram v Michael Lacombe Group Inc.*, which made national headlines due to egregious facts and the quantum of damages awarded to a low-level employee.

The Employee worked as a cook at Burger King for over 24 years when she was terminated without notice due to a single incident. She was 55 years old at the time of termination, and had a grade 8 education. She was the primary breadwinner for her family, as her husband was disabled. The Employer argued that it had just cause for dismissal due to the theft of a fish sandwich meal, notwithstanding the fact the Employer conceded she was a good and valuable employee with no record of discipline.

The Employee characterized the situation as a misunderstanding. The Employee immigrated to Canada from Fiji when she was 28 years old, and communicated in English at a basic level. At the end of her shift on December 27, 2013, she asked a manager if she could take a fish sandwich, and proceeded to take the sandwich, fries and a soda in plain sight. The Employer conceded she had permission to take the sandwich, but not the entire meal, constituting just cause.

When confronted by her manager, the Employee indicated she was told she could take the food, but offered to pay for the food in tears. The manager interpreted this action as an admission of theft and ultimately terminated her employment. With her employee discount, the theft of the soda and fries came to a value of fifty cents.

The Court determined that the employer wrongfully dismissed the Employee, and the particular manner of her dismissal warranted aggravated damages. In the result, the Employee was awarded general damages of $21,000 which reflects 12 months' salary in lieu of notice, and an additional $25,000 in aggravated damages due to the Employer's unfair and insensitive treatment.

Crucial to this award, the Court found that the Employer could not prove that the Employee actually intended to steal. She asked what she thought was permission, did not conceal her meal, and made an apology when confronted. Length of notice was an issue at trial, due to the fact the Employee worked at a number of Burger King locations in the Vancouver area during her 24 years of service. The Court applied the officious bystander test to find that an implied term in the Employee's employment contract was that the Employer would recognize her service at all locations and treat her as a long-term employee and in doing so determined the Employee was entitled to 12 months' notice considering her years of service, age, fluency in English, education, and health.

In assessing aggravated damages, the Court applied a two stage test:

1. Whether the plaintiff established that the defendant's conduct in effecting the termination was unfair or in bad faith because, for example, it was untruthful, misleading or unduly insensitive; and
2. Whether the plaintiff established she suffered mental distress as a result of the manner of dismissal and not just as a result of the dismissal itself.

The Court found the Employee satisfied this two part inquiry. It was unfair and unreasonable for the manager to have characterized her apology as an admission, and to accuse her of theft in the presence of another employee. Further the allegation and embarrassment caused her mental distress over the normal distress and hurt feeling resulting from termination.

This case represents a cautious warning to employers that a common sense and proportionate approach to any perceived employee misconduct should always be pursued and that a mechanical application of any employer policy, including a zero tolerance policy for theft, regardless of circumstance can result in a significant adverse damages award where circumstances warrant.

Ram v. The Michael Lacombe Group Inc., 2017 BCSC 212 (CanLII)

Alternative Offer of Employment Must be Objectively Reasonable

In *Evans v. Paradigm Capital Inc.*, Justice Gans of the Ontario Superior Court of Justice addressed a senior executive's duty to mitigate following her constructive dismissal, and specifically whether she was required to accept an alternative position from the employer to mitigate her damages.

The Employee was hired by the Employer, an institutional investment dealer, in 2004 as an equity salesperson. The Employee earned a significant compensation package with the Employer, which included a base salary, participation in a quarterly bonus pool, and shareholder rights. In 2006 the Employee demonstrated her commitment when she continued to work after she was diagnosed with cancer, through her treatments and recovery.

In early 2009 the Employer decided to 'recast' the Employee's job in the form of a new position. Under the revised position, she would have fewer large institutional clients, and manage a retail account base which would require her to obtain a retail broker's license. The Employee would have a higher fixed base salary, but a reduced ownership interest in the Employer, and participation in an inferior bonus program. In the alternative to accepting the revised role, the Employee was offered a termination package.

The Employee refused the offer, and sued for wrongful dismissal. At trial, there was no dispute that the revised job offer to the Employee amounted to a constructive dismissal. The main issue was whether the

Employee's refusal to take on the revised role amounted to a failure to mitigate her damages. The Employer took the position that the Employee acted unreasonably in not accepting the revised role even on a temporary 'wait and see' basis while searching for new employment.

The Court was not persuaded of the Employer's position, and held that the Employee was not obliged to accept the revised offer as part of the mitigation process. First, a number of the tangible aspects of the revised position, including compensation, were ill-defined and the position offered amounted to one of form, not substance. Second, the non-tangible elements associated with the revised position – atmosphere, stigma, loss of dignity – supported the conclusion that the Employee was not obliged to accept the job. The judge stated: "in my view, such a move would be akin to moving a heretofore starting pitcher to the bullpen while asking him to be the set-up man for the 'hot-shot' closer."

The Court underscored that the onus is on the employer to prove that an alternative offer of employment is objectively reasonable in the circumstances, which the Employer failed to discharge in this case.

Evans v. Paradigm Capital Inc., 2016 ONSC 4268 (CanLII)

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