Employment Law

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

Dependent Contractor Entitled to Notice: Not an Employee But…

In a decision of a trial judge in Alberta, a dependent contractor was awarded notice even though she was found not to be an employee. The Plaintiff first started providing services in August 2004 as an assistant area manager to the Defendant corporation through another company which the Plaintiff owned 50% of for a period of time. The Plaintiff then took over as area manager with the Defendant corporation in March 2006, and was paid commission payments to her own wholly owned company. There was no written contract or agreement between the parties.

After being terminated without notice or cause, the Plaintiff sued the corporate Defendant for wrongful dismissal.

The judge reviewed the facts, including the level of control the Defendant exerted over the Plaintiff's provision of services and other factors. The judge concluded that the Plaintiff's relationship with the Defendant was that of a dependent contractor for the period wherein she worked directly for the Defendant and that she was entitled to reasonable notice; albeit less than that which would be afforded to an employee. The Plaintiff received 2 months' reasonable notice, amounting to $25,000 plus GST, less an amount deducted by the Court for the Plaintiff's inadequate mitigation efforts.

The Alberta Court's decision reaffirms what the Ontario Court of Appeal for Ontario held in principle in the 2009 case of ***McKee v Reid's Heritage Homes Ltd.* 2009 ONCA 916**, but did not find in fact; that the legal category of "dependent contractor" exists and they are entitled to "reasonable notice". However, the Alberta Court qualifies "reasonable notice" for this category as being less than that for an employee; something which the *McKee* decision did not disceuss as it did not arise on the facts of that case.

These decisions are a caution to employers. Even though you may not have an employee/employer relationship, the nature of the relationship may give rise to a successful claim for reasonable notice in any

event; albeit potentially in an amount less than what an employee would be awarded. A properly drafted agreement between the parties setting out the nature of the relationship and the specific rights and obligations of the parties may have changed the result.

***Weber v Coco Homes Inc.*, 2013 ABQB 180 (CanLII)**

Waitress Discriminated Against Due to Pregnancy

Ashley McKenna was employed as a part-time waitress at a sports bar. In July 2011, she became pregnant; however, she continued to work her regular three to five shifts per week at the bar without issue.

Then, in November 2011, new management took over the bar and shortly thereafter instituted a number of changes. One of the initiatives implemented by new management was a new dress code which required female staff to wear tight-fitting shirts. Ashley asked management if she could be excused from the new dress code, due to the fact that it would only serve to highlight her already visible pregnancy. Her manager agreed and Ashley's next two shifts were status quo. However, following those two shifts, Ashley was not scheduled for any further shifts.

Ashley dropped by the bar and called many times to ask when her next shifts would be scheduled. However, she was told there was no work available, despite the fact that two new waitresses had been hired. Ashley found her persistent efforts to be demeaning and was perplexed by the fact that new waitresses had been hired. Ashley wrote her manager and asked if she had been terminated. Ashley received a reply stating that she had not been terminated, that her pregnancy was "irrelevant" to her employment and she was then offered her two shifts. After the two scheduled shifts, no further work was extended to Ashley and, within a month, she received a record of employment which indicated that she had resigned.

Ashley brought a human rights complaint alleging discrimination in employment on the basis of sex. Section 10(2) of the *Human Rights Code* specifies that the right to be free from discrimination on the basis of sex includes the fact that the individual is a woman or that she may become pregnant.

The adjudicator had no hesitation in finding that Ashley's pregnancy was a factor in the decision to terminate her, particularly given the respondent's perception that Ashley's pregnancy was both inconvenient and inconsistent with the bar's branding image. In fact, the adjudicator stated that he thought Ashley's pregnancy was the only reason her employment ended. Ashley's pregnancy, coupled with her reluctance to wear a tight uniform, was the reason why she was terminated and therefore, her employer's conduct constituted discrimination, as they had violated her right to equal treatment in employment.

The Tribunal awarded Ashley lost compensation for the period she would have worked until giving birth and, more substantially, $17,000 as compensation for injury to dignity, feelings, and self-respect arising from the employer's offensive conduct and indifference to her well-being.

***McKenna v. Local Heroes Stittsville*, 2013 HRTO 1117** (CanLII)

Mandatory Retirement – A Thing of the Past

81 YEARS OF AGE – BUT NO PRESUMPTION OF AN INTENTION TO RETIRE

Mandatory retirement has gone the way of the Dodo. So what do you owe to employees when they are terminated at age 81? The answer: reasonable notice just like anyone else.

The case before the Ontario Superior Court of Justice in ***Filiatrault v. Tri-County Welding Supplies Ltd.*,** unfortunately did not provide any guidance regarding the length of reasonable notice because the Plaintiffs had agreed to cap their claims at 18 months, notwithstanding having almost 42 years of service with the company at the time of their wrongful dismissal.

The Plaintiffs here were husband and wife and had initially founded the company. They entered into an agreement by which they obtained an option to sell their shares in their company to the purchaser, being the company whose product they were in the business of distributing. The couple exercised this option and the sale of their shares ultimately took place 13 years later thereby completing the sale of the business. That agreement was silent regarding their continued employment at any point in time. While they remained employed for the 13 years preceding the sale, the purchaser terminated their employment after closing, taking the position that it was an implied term of the agreement that their employment would terminate at that time.

The Court refused to accept the purchaser's argument that the plaintiffs' agreement to resign should be implied from, amongst other things, the fact that they were in their 60s when they negotiated the agreement. The Court commented in closing: "I do not think there is a place in this social reality for an automatic presumption that persons should or would naturally retire on reaching senior age". The Plaintiffs only pursued 18 months' notice at their regular compensation rates. It ended up costing the purchaser $1.12 million. The Plaintiffs did not pursue human rights, punitive, benefits or "Wallace" damages. Perhaps the Defendants got off easy.

As mandatory retirement at the age of 65 has been abolished, the Court held that in the absence of an express agreement, employers should be disinclined to ask a court to imply such a term in an employment contract. This goes to show that corporate counsel need to be very careful when drafting agreements not to ignore employment issues but to address them head-on and get the parties to expressly document an agreement on such matters.

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