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Employment and Labour Webinar

Case Law Update

Tuesday, October 5, 2021

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Waksdale v. Swegon North America Inc.

2021 CanLII 1109 (SCC)

What happened?

- Employee was terminated without cause
- Court found that the “for cause” part of the termination clause was not enforceable
- Court declined to rely on the severability clause in the employment agreement
- Employee found to be entitled to common law reasonable notice

Why should we care?

- Supreme Court declined to hear the appeal – therefore, we're stuck with this law
- This decision invalidated the vast majority of termination clauses

What should we do?

- Update your employment agreement templates asap
- When terminating an employee, be alert that they may be entitled to common law reasonable notice

Nahum v. Honeycomb Hospitality Inc.

2021 ONSC 1455

What happened?

- Employee was terminated without cause when 5 months pregnant
- Ontario court found pregnancy to be an "important factor" in assessing common law reasonable notice period in this case
- Relevance of pregnancy to be considered on a case-by-case basis

Why should we care?

- Pregnant employees may be entitled to longer notice period
- Assessment of reasonable notice is fact-specific

What should we do?

- Ensure that employment agreements contain enforceable termination clauses
- Also consider risk of discrimination or reprisal under human rights legislation

Currie v. Nylene Canada Inc.
2021 ONSC 1922

What happened?

- Employee was terminated without cause
- Key factors:
  - 58 years old
  - 39 years of service – her entire working life
  - Grade 11 education
  - Supervisory position
  - Very specialized field
- Termination was equivalent to a forced retirement
- Awarded 26 months' pay in lieu of notice

Why should we care?

- A rare case where reasonable notice exceeded 24 months

What should we do?

- Ensure that employment agreements contain enforceable termination clauses
- Take steps to help employees secure alternative employment – e.g. meaningful reference letter, outplacement counselling

McGuinty v 1845035 Ontario Inc. (McGuinty v Funeral Home), 2020 ONCA 816

What happened?

- Employee hired as General Manager following sale of business for fixed term 10 years
- Trial Judge ordered employer to pay **9 years** of wrongful dismissal damages when employee dismissed after just 1 year of service
- Court of Appeal upheld Trial Judge's decision
  - $1.27 million awarded in damages against the employer

Why should we care?

- Employer is liable for the balance of a fixed-term agreement if the agreement is terminated early and does not contain a valid and enforceable termination provision
- Court considers **all** of the circumstances in a case to determine whether a constructive dismissal has been established and/or whether an employee has condoned a change to their terms of employment

What should we do?

- Instead of offering fixed-term employment contracts, limit liability by offering indefinite term employment contracts with enforceable termination clauses
- Take appropriate steps to avoid constructive dismissal claims, especially where an employee is not actively at work (on leave or otherwise)

Russell v The Brick Warehouse LP, 2021 ONSC 4822

What happened?

- 57-year old senior supervisor with over 36 years of service was dismissed as a result of COVID-19
- Employee was provided with a termination letter that did not comply with minimum statutory entitlements under the *ESA*
- Several missteps by employer resulted in Plaintiff not being paid *ESA* entitlements until after the start of litigation
- Court awarded $25,000 in moral/aggravated damages due to employer's unfair dealing during and after termination

Why should we care?

- Moral damages can be awarded when an employer breaches its duty of faith and fair dealing during dismissal, notably when an employer fails to:

  - Offer minimum statutory entitlements; and,
  - pay the employee's minimum statutory entitlements within a reasonable timeframe.

What should we do?

- Ensure that any termination letter provides at least minimum statutory entitlements under the *ESA*
- Be honest and forthright when terminating an employee
- Provide statutory minimum payments **forthwith**

Lake v. La Presse (2018) Inc.
2021 ONSC 3506

What happened?

- Employee was terminated without cause
- Did not take steps to find work until 1 month post-termination
- Aimed too high: applied for more senior roles
- Applied for 7 jobs over 9 months
- Court found failure to take reasonable steps to mitigate
- Notice period reduced by 2 months

Why should we care?

- Rare instance in which court found employee's mitigation efforts to be inadequate

What should we do?

- We'll see if this is appealed!
- Don't get too excited – bar to prove failure to mitigate is very high for employers
- Take steps to help employees secure alternative employment – e.g. meaningful reference letter, outplacement counselling
- Keep records of comparable positions available during the notice period

Hawkes v. Max Aicher (North America) Limited

2021 ONSC 4290

What happened?

- Ontario ESA requires payment of severance pay to employees with 5+ years of service when employer has payroll of $2.5 million or more
- Question: should payroll be in Ontario only, Canada or global?
- Historically mixed case law on this point
- Finding: global payroll

Why should we care?

- Additional authority to support that businesses with a payroll of less than $2.5 million in Ontario may now be severance payers by virtue of global payroll

What should we do?

- Consider whether this decision affects your organization's position re: paying severance pay
- Know who to ask to obtain global payroll figures

Alberta Computers.com Inc. v Thibert

2021 ABCA 213

What happened?

- Employer sent letter to clients alleging former employee was breaching fiduciary trust, would receive a cease & desist letter, and was legally obligated to cease all services and solicitation
- Alberta Court of Appeal upheld $60,000 damages award for defamation

Why should we care?

- What was presumably meant to preserve clients' business resulted in a large damages award

What should we do?

- Avoid communications that would lower a departing employee's reputation in the eyes of a reasonable person
  - e.g. accusing former employee of illegal or disloyal conduct
- Seek legal advice before making such statements

Kovintharajah v Paragon Linen and Laundry Services Inc, 2021 HRTO 98

What happened?

- New general manager revoked employee's previous accommodation and instituted a blanket rule forbidding all staff from leaving prior to the end of a shift
- Employee kept leaving early and was ultimately terminated
- Employee was asked to return to work, without any discussion regarding accommodation
- Employee awarded $30,000 in lost wages and $20,000 in general damages

Why should we care?

- Post-termination offer is not sufficient if it does not provide for accommodation
- Failure to engage in any dialogue with employee about accommodation results in a failure to meet duty to accommodate family status need

What should we do?

- Employers that wish to alter previously approved accommodation must engage in a review of existing arrangements, along with the employee's individual needs and possible alternatives
- Communicate openly and in a timely manner about workplace accommodation issues

Aluminerie de Bécancour Inc v Commission des droits de la personne et des droits de la jeunesse (Beaudry et al), 2021 QCCA 989

What happened?

- Employer lowered student pay to 85% of the lowest wage index in collective agreement
- Tribunal found distinction based on prohibited grounds that affected the students' right to equal treatment for work of equal value
- QCCA upheld Tribunal's decision and confirmed that wage distinction between students and other employees constitutes discrimination on the basis of social condition

Why should we care?

- *Prima facie* case of discrimination requires only proof of arbitrary disadvantage
- Student status falls within the notion of social condition under the Quebec *Charter*
- Employers cannot offer distinct wages to different classes of employees, specifically students, without proper justification

What should we do?

- Review pay practices periodically and ensure that all workers are awarded equal treatment for work of equal value
- Ensure that any collective agreement complies with the Quebec *Charter* and does not discriminate against certain classes of employees

Nelson v Goodberry Restaurant Group Ltd dba Buono Osteria and others, 2021 BCHRT 137

What happened?

- Employee identifies as non-binary and uses pronouns they/them
- Bar manager persistently referred to employee using she/her pronoun and gendered nicknames
- Restaurant ordered to pay employee $30,000 for gender identity discrimination

Why should we care?

- Improper use of gender pronouns constitutes discrimination on the basis of gender

What should we do?

- Implement policy regarding use of pronouns
- Train management and employees about human rights in the workplace, particularly in relation to proper use of pronouns, and offer such training periodically
- Respect use of proper pronouns in the workplace

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Imperial Oil Limited v Haseeb, 2021 ONSC 3868

What happened?

- International student applied for job at IO
- IO required that candidates be eligible to work in Canada on permanent basis
- IO rescinded conditional offer made to student due to failure to provide proof of permanent residence status
- Tribunal found that IO's offer was based on immigration status and rescission amounted to discrimination
- Divisional Court quashed HRTO's decision and clarified that permanent residence is **not** a protected ground under the Ontario *Human Rights Code*

Why should we care?

- Standard of review of HRTO decision where decision is based on internally coherent reasons and part of a rational analysis is one of deference
- Citizenship and permanent residence are separate in meaning
- Permanent residence is not a ground of discrimination under the *Code* and there is nothing in the plain and ordinary meaning of the applicable words of the *Code* to suggest so

What should we do?

- Be mindful of hiring practices
- For now, can require that an employee be a permanent resident in Canada

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