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The Employment Law Roundup

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Introduction

Happy New Year and thank-you for joining our annual Rubin Thomlinson LLP “Employment Law Roundup”.

As we hope you know, we have been doing roundups as part of our breakfast seminar series for our clients for many years. In each new year, we review the employment law cases that have jumped out at us, and which we think you should know about. If any of the cases we discuss today are of particular interest, please let us know and we would be happy to send you a copy.

When we start to prepare for the Roundup, we ask ourselves, what are the cases that you should know about from this past year? This year, we have focussed exclusively on Ontario, and we have considered cases that are a bit unusual. What we found was an eclectic mix of cases covering a diverse set of workplace circumstances.

In our effort to be practical, we have not only given you a quick review of each case, but we have identified a “Client Takeaway”. We hope that our comments, along with our Roundup discussion this morning, will help you to stay up-to-date, and assist your ability to manage your own workplace effectively.

Claim for Intentional and/or Negligent Infliction of Mental Distress

In *Amaral v. Canadian Musical Reproduction Rights Agency Ltd.*¹ the Ontario Court of Appeal was asked to determine whether there is a free-standing tort of negligent infliction of mental suffering available, absent a claim for wrongful dismissal.

¹ [2009] O.J. No. 1934.

Here are the facts: the plaintiff went into a downward spiral of performance and attendance issues after she was informed that she was not the successful candidate for a promotion. The employer was not aware that the plaintiff had been diagnosed with acute depression. Instead it assumed that the plaintiff was a disgruntled employee who was acting out because of the promotion denial.

While the plaintiff had medical-related absences, her doctor did not disclose the reasons for her absences from work. The plaintiff's last absence was supported by a doctor's note indicating only that she was ill and would be unable to work for a month. The employer tried to contact the plaintiff to inquire of her absence, without success. After the plaintiff's one month absence, the plaintiff did not return and the employer received another doctor's note which stated, "This patient continues under my care". The employer continued in their attempts to contact the plaintiff. Finally they indicated to the plaintiff that her duties had been permanently re-assigned and that she would be given work appropriate to her abilities and condition upon her return. The plaintiff then sued for wrongful dismissal.

The Court of Appeal found that, while there had not been a case in which the Court had found negligent infliction of mental suffering as an independent actionable tort, whether such a free-standing cause of action exists was not necessary in deciding the case at hand. It was held that absent any knowledge of the plaintiff's disability or medical condition, the employer's responses to the employee's declining performance and punctuality were proportionate and reasonable and therefore the employer could not be held liable for negligent infliction of mental suffering (if there was, in fact, an independent tort of this nature).

Client Takeaway:

- An employer does not have an unlimited right to know the nature of an employee's disability. However, absent any medical evidence of an illness or disability and/or a need for an accommodation, an employer will not be held liable for intentional or negligent infliction of mental suffering if they engage in proportionate and reasonable discipline for declining performance.

A New Type of Enforceable Contractual Provision

In *Renaud v. Graham*², the employer and employee negotiated terms whereby the employee was trained while receiving a salary notwithstanding the fact that he had no experience in the real estate industry. They agreed that if he left his employment and commenced working as a real estate agent in competition with them, he would repay a pre-estimate of the training costs. The parties negotiated some of the terms of the employment contract, including a term about repayment if the employee voluntarily left the company to work in competition with them. This, the Court found, negated any argument that there was unequal bargaining power.

The Court distinguished this type of repayment provision from a restrictive covenant. The Court found that it is not a restraint of trade if there is an agreement where a former employee must forgo a benefit if he terminates his employment. The Court explained that, in this situation, the employee is in fact not restrained from competing. Instead, there are financial consequences if he chooses to do so before a specific period elapses.

² [2009] O.J. No. 597.

The Court warned that in order for a provision of this type to be enforceable, it must be reasonable and must be a “genuine pre-estimate of damages”, instead of a “penalty clause”.

Client Takeaway:

- In some specific circumstances, employers may be able to include provisions which require employees to pay damages if they terminate their employment to work for a competitor. However, the damages must be a genuine pre-estimate of the damages the employer would face should the employee terminate his or her employment.

Whether a Mishandling of Sick Leave Will Trigger Constructive Dismissal

In another case, *Patterson v. Lee Munro Chevrolet Ltd.*³, the plaintiff worked for the employer for over 11 years. One day, the plaintiff’s wife called into his job to indicate that he was not well and would not be in to work that day. Later that evening she called to indicate that he would not be in the following day or the day after that.

On the third day, the employer arranged for an advertisement to run for the plaintiff’s position. On that day and the following day, there was a verbal confrontation between the plaintiff’s wife and the employer. The plaintiff’s wife faxed a doctor’s note to the employer in order to support her husband’s absence from the workplace.

At trial, the employer testified that he thought that the absence had been pre-meditated as a part of a scheme for making a claim or claims of wrongful dismissal and/or disability. He did not feel that the plaintiff’s claim of illness was credible.

³ 2009 CanLII 23113.

The plaintiff's wife received long-term disability payments and as a result, the plaintiff's employer thought she was a "schemer" who wanted her husband out of his job and onto a disability plan as well.

The Ontario Superior Court of Justice found that the plaintiff was genuinely ill and unable to work during the relevant period of time. The employer's belief to the contrary was based on "speculation, gossip and water-cooler conversation" and was supported by nothing of evidentiary value.

The Court found that,

"the placing of the advertisement for the position without providing any explanation or even informing the plaintiff that it would be published was conduct rendering the continuation of [the plaintiff's] employment untenable. At that point, the plaintiff was constructively dismissed by the defendant."

Client Takeaway:

- Running an advertisement for an employee's position without any explanation or without informing an employee may amount to constructive dismissal if the employee has reason to believe that the advertisement was issued in order to replace him or her.
- An employee cannot be held accountable for the acts of their family members. It is an employee's own circumstances that are the focus of a legal dispute.
- Constructive dismissal cases often conclude in surprising ways, and lawyers must be particularly prudent when advising clients with these cases.

Whether a Privacy Breach Will Trigger Constructive Dismissal

In *Colwell v. Cornerstone Properties Inc.*⁴, the Ontario Superior Court of Justice ruled that an employer who secretly installed a hidden camera in an employee's office without her knowledge and without a plausible explanation, had constructively dismissed the employee. This is the first case in Ontario where a judge has ruled that an employer is liable for constructive dismissal of an employee based on a privacy violation.

The plaintiff, a commercial manager, learned that a hidden camera was installed in her office by her immediate boss. The plaintiff found out about the existence of the camera when she saw the image of her office on a monitor in the presence of her immediate boss and the vice-president of her company.

The plaintiff confronted her immediate boss, who indicated to her that the camera had been installed approximately nine months prior to her being aware of its existence and was the only hidden camera installed in the office area. He also indicated to her that she was not considered to be involved in any alleged thefts – either as a victim or a suspect. The camera, she was told, was to assist in detecting theft by the maintenance staff. However, even though the plaintiff was the person directly responsible for the maintenance staff, she was never advised of any thefts or of the existence of the camera installed to capture them. Therefore, it was unclear, and remained unclear to the Court, why the only camera installed was installed in her office, without her knowledge. The Court stated,

“A secret camera installed in a trusted manager's office, and without her knowledge, although perhaps acceptable employer conduct in itself, coupled with a totally implausible explanation, renders the actions unacceptable.”

⁴ 2008 CanLII 66139.

The judge found that the plaintiff's contract of employment contained an implied term of good faith and fair dealing, throughout the existence of the contract, which was breached by the actions of her employer. As such, the judge held that the plaintiff was constructively dismissed and was accordingly justified in leaving her employment.

As a result of her treatment at Cornerstone and the stress-related medical issues that flowed from it, the plaintiff was not obligated to continue her employment with Cornerstone to mitigate her damages, as the work atmosphere was no longer conducive to a healthy working relationship. She was awarded reasonable notice.

Client Takeaway:

- A right to privacy can be part of an employer's obligation of good faith and fair dealing in an employment contract. Employers should therefore consider all other less intrusive means of combating workplace issues before secretly invading an employee's privacy.
- In some circumstances, employees will not be required to mitigate job loss by staying in a constructively dismissed position.
- Privacy issues in general continue to be a major concern for employees in the workplace. Policies with respect to surveillance, computer use, social networking and the like, need to take into consideration privacy expectations of the employee population.

Overtime Class Action Lawsuits – What is the Latest Word?

In *Fresco v. Canadian Imperial Bank of Commerce*⁵, the Ontario Superior Court of Justice refused to certify a class action lawsuit for current and former front-line workers for Canadian Imperial Bank of Commerce claiming amounts owed for

⁵ 2009 CanLII 31177

unpaid overtime. The Court's reasoning was that the action lacked the essential element of commonality.

Fresco is a teller with CIBC and started a class action lawsuit against CIBC, stating that she worked many hours for the bank for which she had not received any payment. To succeed on this certification motion (i.e., to proceed by way of class action), there is a five-part test which Fresco had to satisfy. It was the third part of this test that Fresco failed, that is the requirement to show that the claims of the class action members raise common issues. The Court was not satisfied that there existed a "common issue" capable of determination in the absence of a consideration of any individual facts. Although it seemed clear that there were individual CIBC employees (Fresco included) who may have worked hours for which they were not paid overtime, the judge said that each case needed to be looked at individually in order to determine CIBC's liability.

The judge examined CIBC's overtime policy and found nothing illegal in the requirement that overtime be pre-approved. There was also no evidence that CIBC had any systemic policy or practice which was depriving eligible employees of overtime pay. Rather, these were individual claims and the judge held that there needed to be an "individual examination of the specific circumstances that underlie each class action member's claim".

Client Takeaway:

- Many employers have been very concerned about the use of class actions to obtain unpaid overtime pay. This decision illustrates the potential obstacles the potential class has in bringing their claim in this fashion. In addition, the case suggests that an individualized approach to assessment of liability and damages may be preferred. However, employers still need to keep in mind the following:

- The decision does not change the law which requires employers to pay employees for overtime which they were “required or permitted” to work;
- If employers incorrectly designate as ineligible for overtime employees who, by law, would be eligible, such cases could still be open for class action certification;
- Similarly, where employers have a policy or practice of not paying employees for overtime hours worked this could still leave them vulnerable to a class action certification; and
- Pre-approval requirements contained in overtime policies can still be used, but they must be applied and enforced.

Whether a Workplace Sexual Relationship Can be Cause for Termination

In *Cavaliere v. Corvex Manufacturing Ltd. et al.*⁶, the Ontario Superior Court was asked to determine if a with cause termination because of an “inappropriate relationship with a female subordinate” was wrongful.

The plaintiff had a consensual, sexual relationship with a “vulnerable female subordinate” after receiving a demotion for similar conduct a few years earlier and a written warning and demotion for sexual impropriety only a few months prior. After the incident a few months prior, the plaintiff was warned that another relationship of this type would lead to his termination with cause. Despite this warning, the plaintiff engaged in a further sexual relationship with a female subordinate.

After the female subordinate’s husband found out about the affair, he sent a letter to the employer. The plaintiff was suspended with pay pending an investigation.

⁶ 2009 CanLII 28395

He was told not to have any contact with any employee of the company. He was also expressly told that he was not to have any contact with the subordinate. Despite that direction, the plaintiff and the subordinate continued their affair. They also met collectively with the husband of the subordinate to try to have him withdraw his complaint in order to thwart the company's investigation.

The Court found that the company had cause to terminate the plaintiff without notice based on:

- 1) the consensual sexual relationship with the female subordinate following previous warnings and demotions for similar conduct;
- 2) the insubordination of continuing the relationship with the subordinate, despite being expressly told not to; and
- 3) the attempted obstruction of the investigation by speaking with the husband of the subordinate and trying to have the complaint withdrawn.

Client Takeaway:

- This case demonstrates how important a clearly documented trail of discipline, warnings and directions will be in assisting an employer in a final termination with cause, should the need arise.
- Increasingly, courts are reviewing the conduct of workplace investigations. Here, the fact that the employee had attempted to interfere with the investigation, having been expressly warned not to, was another ground for the cause termination.

Workplace Investigations

In a very important decision from the Ontario Court of Appeal, *R. v. Bruce Power Inc.*⁷, the Court found that internal employer investigations can be protected from use in prosecutions by solicitor-client and litigation privilege if appropriate steps are taken to assert privilege over the documents.

In this case, there was a serious injury which took place at Bruce Power. The company conducted an internal investigation and was advised by their counsel to claim solicitor-client and litigation privilege over the applicable documents. An investigation report was prepared and was clearly marked, “Confidential”. All members of the team, including a representative of the union, were provided copies of the report. After reading the report, they were asked to return or destroy it.

The union representative did not destroy the report and instead, provided it to the investigator who had sworn information against Bruce Power which alleged breaches of the *Occupational Health and Safety Act*. The Crown then produced the report as a part of their disclosure obligations to Bruce Power.

Bruce Power brought a motion for a stay of proceedings. The Court of Appeal found that the document was protected by solicitor-client and litigation privilege. The Court also found that when the Crown comes into possession of a defence document that is protected by solicitor-client and litigation privilege, prejudice to the defence will be presumed (although it is rebuttable). As a result of the prejudice to the defence, the Court ordered a stay of the proceedings on the charges against Bruce Power.

⁷ 2009 ONCA 573.

Client Takeaway:

- Work produced from a workplace investigation may be privileged in some circumstances.
- However, in order to maintain this privilege, and to ensure that documentation from internal investigations cannot be used in a prosecution against the employer, it is critical that employers assert solicitor-client and/or litigation privilege on the investigation documents.

Conclusion

We hope that our brief summary of these cases, along with our discussion, will assist you in analyzing the employment law issues that come up in your workplace. From our perspective, 2009 produced a very interesting mix of employment law cases. Will 2010 be more of the same or will the cases follow a particular theme? It will be interesting to see what the courts have to offer us in the next twelve months. We look forward to what 2010 has to bring.