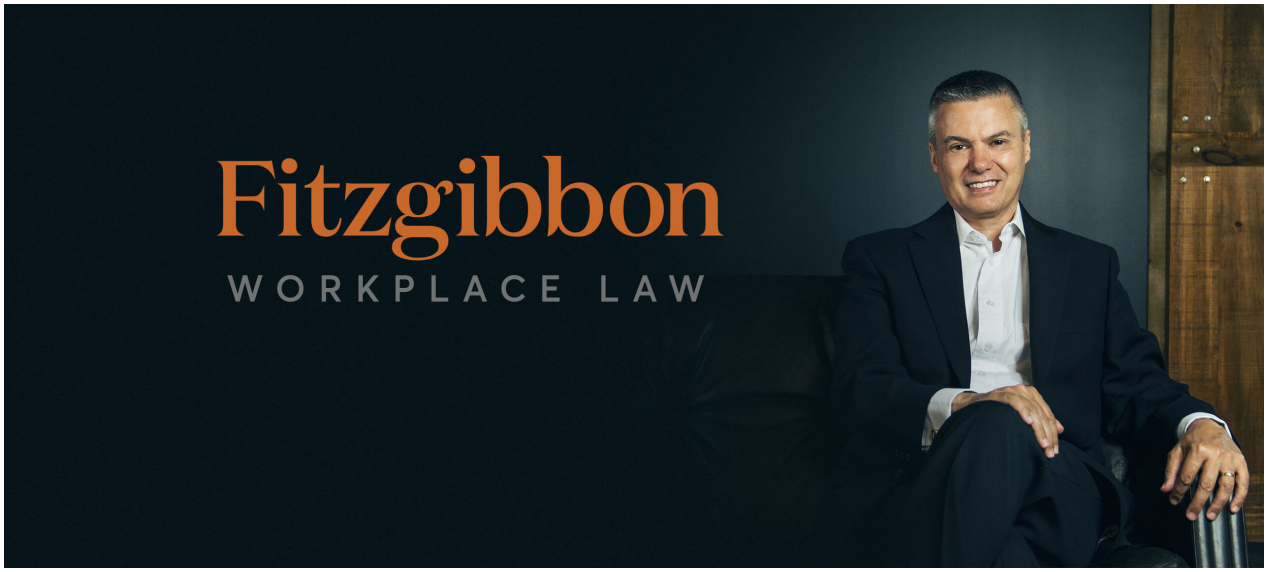

Welcome to this months Fitzgibbon Workplace Law, Legal Alert (March 2018 Issue).

Most Bill 148 amendments to the *Employment Standards Act, 2000* and *Labour Relations Act, 1995* are in force, and employers are working their way through the new reality. Unions are certainly taking full advantage of the Bill 148 changes to the *Labour Relations Act, 1995.* If you're a non-union employer, do not ignore these changes or the new rules which make it much easier for unions to organize.

This *Legal Alert* reviews many developments including in union and non union workplaces, and I hope you find it of some value. A number of these articles are the result of feedback I've received and if you have any suggestions on future topics, please let me know.

For those of you who, like me, are away for the March break, have a safe, relaxing and fun vacation.

Mike

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Court of Appeal Clarifies Bonus Eligibility on Termination

On February 27, 2018 the Ontario Court of Appeal released its much anticipated decision in Bain v. UBS Securities Canada Inc., 2018 ONCA 190 (CanLII). The plaintiff was employed by UBS Securities Canada Inc. ("UBS") as Managing Director and Head, the most senior position in Canada in the mergers and acquisitions division. He was dismissed without cause on February 28, 2013 at which time he had been employed for about 14 years.

The trial judge determined that the period of common law reasonable notice in the circumstances was 18 months. UBS appealed. It is important to understand what was not challenged on appeal:

> … [UBS] does not contest the trial judge's determination of the period of reasonable notice, her finding that Bain's bonus was an integral part of his compensation, the calculation of the annual bonuses that Bain would have earned for 2012 and during his reasonable notice period (and the comparators used), or her conclusion that Bain was entitled to damages for the loss of the cash portion of his bonus for 2012 and the cash bonus he would have received if his employment had continued during the reasonable notice period.

The main issue on the appeal was whether the trial judge erred in awarding the plaintiff damages that included amounts in respect of the loss of the deferred portions of his bonus. According to the Court of Appeal:

> From 2008 onwards, UBS determined the amount of bonus for the year, and if the amount exceeded the equivalent of 250,000 Swiss Francs, 40% was paid in cash and the other 60% was placed into an account in the form of "notional shares" in UBS AG, which would fluctuate over time as the value of global UBS's share price changed, and which would "vest" in equal amounts over a number of years. The deferred portion of the bonus was allocated and paid under UBS's Equity Ownership Plan (the "EOP").

Once the decision was made to terminate his employment, the plaintiff was not allocated or paid any bonus for 2012. UBS contested the inclusion in damages of the amounts that the plaintiff would have been allocated by way of notional shares, which would have vested in the future, after the expiry of the notice period. This amounted to $1.2 million. UBS made two arguments in support of this position:

> First, it asserts that [the plaintiff] was entitled to damages for lost bonus only in respect of amounts he would have received prior to his termination and during the notice period. Second, UBS relies on the wording of certain provisions of the EOP to exclude from [the plaintiff's] damages the deferred portion of his bonus.

UBS agreed that the plaintiff was entitled to recover damages for the cash component of bonus that he would have received during the reasonable notice period. It argued that he was not entitled to the "deferred" portion of the bonus that would have vested *after* the common law reasonable notice period.

The general damage principle in employment law was succinctly stated by the Court of Appeal in Taggart v. Canada Life Assurance Company 2006 CanLII 53345 (ON CA):

> …. where an employer terminates an employee without cause, the employer is liable for damages for breach of contract, measured by the loss of wages or salary and other benefits that would have been earned during the reasonable notice period.

Total compensation is the default measure of damages in wrongful dismissal cases absent a specific agreement to the contrary

The default, as the Court of Appeal noted in Paquette v. TeraGo Networks Inc., 2016 ONCA 618 (CanLII) is to award damages based on total compensation through the common law period of reasonable notice absent some agreement to the contrary. The Court put it this way:

> The basic principle in awarding damages for wrongful dismissal is that the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to give proper notice. The damages award should place the employee in the same financial position he or she would have been in had such notice been given.

The Court in *Bain* relied on these principles and held that "while the notional shares would not have vested before the end of the reasonable notice period, there is no question that the bonus was "earned" by [the plaintiff] during that period." The Court also held that the language of the EOP did not assist the employer.

In the circumstances, the Court of Appeal dismissed UBS' appeal, and upheld the trial judges ruling that the plaintiff was entitled to damages in respect of the deferred portion of the bonus that vested after the conclusion of the common law period of reasonable notice.

Is There a Cap on Common Law Reasonable Notice?

It is generally believed that the upper limit on common law reasonable notice in Ontario is 24 months, but this is not entirely accurate. Courts in this province, including the Court of Appeal, have expressly rejected any sort of "hard cap" on reasonable notice. The Court put it this way in Strudwick v. Applied Consumer & Clinical Evaluations Inc., 2016 ONCA 520 (CanLII):

> This court has rejected the argument that there should be an upper limit on notice periods in wrongful dismissal cases. In Di Tomaso v. Crown Metal Packaging Canada LP, 2011 ONCA 469 (CanLII), 337 D.L.R. (4th) 679, at para. 23, MacPherson J.A. declined to set a cap for the quantum of reasonable notice for clerical and unskilled employees. This court has noted, however, that courts should strive to ensure that notice periods are consistent with the case law: Kotecha v. Affinia Canada ULC, 2014 ONCA 411 (CanLII), at para. 8.
>
> Although it is clear that reasonable notice of employment termination must be determined on a case-specific basis and there is no absolute upper limit on what constitutes reasonable notice, generally *only exceptional circumstances will support a base notice period in excess of 24 months*: Lowndes v. Summit Ford Sales Ltd. (2006), 2006 CanLII 14 (ON CA), 206 O.A.C. 55 (C.A.), at para. 11; Keenan v. Canac Kitchens Ltd., 2016 ONCA 79 (CanLII), at paras. 30-32.

So in Ontario, we have what I refer to as a "soft cap" on reasonable notice that can only be exceeded in exceptional circumstances.

The most recent word on the subject was handed down on February 20, 2018 by the Court of Appeal in Dussault v. Imperial Oil Limited, 2018 ONSC 1168 (CanLII). In this case, two (2) employees claimed that they had been wrongfully dismissed.

Dussault was employed by Imperial for over 39 years, was 63 years of age at the time of his termination and held the position of Manager, Real Estate Development Ontario at an annual base salary of $190,200 along with a number of perquisites.

Pugliese was employed by Imperial for 36 years, was 57 years of age at the time of his termination and held the position of Territory Manager at an annual base salary of $156,700 along with a number of perquisites.

Courts always examine the optics and handling of any termination, but most especially of long-service employees whose years of dedicated service calls for special care.

Imperial operated approximately 497 retail sites across Canada under the Esso brand. All of the retail sites included convenience stores. On March 8, 2016, Imperial held a meeting with the plaintiffs and other retail employees at which Imperial advised the attendees that it had reached a conditional agreement to sell its retail business in Ontario to Mac's. On March 9, 2016, the plaintiffs attended meetings with their respective supervisors at which they were both told that they would be offered employment with Mac's. Both plaintiffs received offers of employment from Mac's in mid-June 2016.

Their pre-sale base salary was guaranteed for 18 months and they were given the salary range for comparable employment at Mac's. In Pugliese's case she was told that the salary range for similar employment at Mac's was from a midpoint of $56,500 to a highpoint of $69,952, and in Dussault's case he was told that it ranged from a midpoint of $85,000 to a highpoint of $102,000.

In addition, both offers included an *explicit* term that Mac's would not recognize their years of service with Imperial. The Court noted:

> Imperial advised the plaintiffs that, if they accepted Mac's offers of employment, Imperial would provide the plaintiffs with "lump-sum payments" to make up for the reduction in value of the benefit plans. However, Imperial did not disclose to the plaintiffs the amount of the lump-sum payment and advised that it would only be disclosed after the plaintiffs accepted Mac's employment offer, resigned from Imperial and signed a release in favour of Imperial.

Both plaintiffs declined Mac's offers of employment because they viewed the terms of employment with Mac's as less favourable than their terms of employment with Imperial.

On August 12, 2016, Imperial notified Pugliese that it was terminating her employment. She was required to work until October 7, 2016 at which time it provided her with severance pay under the *Employment Standards Act, 2000*. On September 2, 2016, Imperial gave Dussault's notice of termination of his employment effective on October 31, 2016 at which time it provided him with severance pay under the *Employment Standards Act, 2000*.

Determining the Period of Reasonable Notice

Absent a legally enforceable termination provision in a written employment contract, an employer may only terminate the employment of an employee employed for an indefinite term in two (2) circumstances:

1. Summarily, without notice or pay in lieu of notice, for just cause; or
2. In the absence of just cause, with reasonable notice at common law or pay in lieu of such notice.

How do we determine the period of reasonable notice of termination? This is the challenging (and frustrating) part. Courts have said in countless cases that determining the applicable period of reasonable notice is more "art than science", and must be determined on an individualized basis. Furthermore, they have expressly rejected any formulas (such as a "month per year of service").

What courts have said is that we need to consider a myriad of factors, and come up, not with a number (because there are no formulas), but a range of reasonable notice. The main factors consider were established by the seminal case of Bardal v. Globe & Mail Ltd., 1960 CanLII 294 (ON SC):

a. The character of the plaintiffs' employment;
b. Their length of service;
c. Their ages; and
d. The availability of similar employment in light of their experience, training and qualifications.

The Court rejected Imperial's argument that the period of reasonable notice ought to be reduced because of the meetings and information shared with the plaintiffs about the impending sale to Mac's. In Prinzo v. Baycrest Centre for Geriatric Care, 2002 CanLII 45005 (ON CA), the Court of Appeal stated that "notice must be clear and unambiguous". In this case it was not.

The Court concluded that the period of reasonable notice at common law for each of the plaintiffs was 26 months whose circumstances were similar to what the Court of Appeal determined was appropriate in Keenan v. Canac Kitchens Ltd., 2016 ONCA 79 (CanLII).

Mitigation

A terminated employee has an obligation to make reasonable efforts to secure alternate employment (mitigate). Any money earned from alternate employment during the common law period of reasonable notice will serve to reduce the damages payable by the employer to the employee. The employer bears the onus of proving that the terminated employee failed to mitigate their damages. The Court commented on this onus in Yiu v. Canada Kitchens Ltd., 2009 CanLII 9412 (ON SC):

> The onus an employer bears to demonstrate that the employee failed to mitigate is "by no means a light one…where a party already in breach of contract demands positive action from one who is often innocent of blame." Accordingly, an employer must establish that the employee failed to attempt to take reasonable steps and that had his job search been active, he would have been expected to have secured not just a position, but a comparable position reasonably adapted to his abilities: Link v. Venture Steel Inc., 2008 CanLII 63189 (ON SC), 2008 CanLII 63189 (ON S.C.), paras. 45 and 46. An employer must show that the plaintiff's conduct was unreasonable, not in one respect, but in all respects: *Furuheim v. Bechtel Canada Ltd.* (1990), 30 C.C.E.L. 146 (Ont. C.A.), para. 3.

Excellent review of mitigation principles in the context of a sale of a business. Purchasers and vendors take note. Communication and substance are important.

The Court in *Dussault* concluded that the plaintiffs had not failed to mitigate when they rejected Mac's offer of employment. This aspect of the decision is important, particularly in sale of a business situations. The following factors influenced the Court to reject Imperial's failure to mitigate argument:

1. The offer from Mac's was made before the plaintiffs' employment was terminated. Neither Mac's nor Imperial approached the plaintiffs after they rejected the offers and after Imperial sent out the notices of termination offering the plaintiffs an opportunity to work for Mac's while they searched for new employment.

2. Given Imperial's requirement that the plaintiffs sign a release in order to get their lump sum payment, it was reasonable for the plaintiffs not to accept the Mac's offers.

3. It was not reasonable to require the plaintiffs to accept an offer that did not recognize their years of service with Imperial. Where there is an express term in the purchaser's offer that refused to recognize prior service, the employee has the choice to accept the offer of employment with the purchaser or sue the seller for wrongful dismissal and damages in lieu of notice. The Court commented that "it is reasonable for the plaintiffs to reject an offer of employment that eliminates their years of service with Imperial in the event of a future dismissal, and it is certainly not reasonable to expect them to accept an offer that contains such a provision in the hopes that it can be successfully challenged at a later date."

4. Having to hide their higher pay from other employees at Mac's would make for a potentially difficult working environment and it was unreasonable to expect them work in such a work atmosphere.

5. There were differences between Mac's offer and what the plaintiffs enjoyed while working at Imperial including with respect to benefits. Certain information was kept from the plaintiffs, including the amount that would be paid to them to make up for any differences in benefits. Furthermore, their base salaries were only guaranteed for 18 months, and no information was provided about what would happen after 18 months. The Court found that these factors alone were sufficient to permit the plaintiffs to reject the offer without having failed to mitigate.

In all the circumstances, the plaintiffs were not required to accept the offer of employment in mitigation of their damages.

Conclusion

The *Dussault* case is important in a number of respects. It confirms that, in Ontario, there is a soft cap on common law reasonable notice of 24 months which can only be exceeded in exceptional circumstances. While not entirely clear "what" the exceptional circumstances are in this case, it can be assumed that length of service and age were important factors along with, perhaps, the senior positions of the employees. One cannot discount the Courts reaction to how long service employees are treated as impacting their assessment of the common law period of reasonable notice (though that should not be a factor). Furthermore, the case is very helpful in outlining some factors to consider in deciding "when" an employee will be required to accept a purchaser's offer of employment, in the context of a sale of a business in mitigation of his or her damages. As such, employers involved in acquisitions or divestitures, should take note of this case and ensure that appropriate terms are included in the Agreement of Purchase and Sale to safeguard their interests along with suitable indemnities as between the vendor and purchaser.

Constructive Dismissal Based on Poisoned Workplace

Constructive dismissal cases are tough for employees. A finding of constructive dismissal is often not the end of the inquiry. Where the employee quits in the face of a constructive dismissal, the court must go on to determine if the employee was justified in leaving his or her employment. Leaving and claiming damages flowing from the constructive dismissal is only justified in limited circumstances.

The leading constructive dismissal case in Canada is Potter v. New Brunswick Legal Aid Services Commission, [2015] 1 SCR 500, 2015 SCC 10 (CanLII) which set out the two (2) branches of constructive dismissal which were recently summarized by the Ontario Court of Appeal in Chapman v. GPM Investment Management, 2017 ONCA 227 (CanLII) as follows:

> The first branch is apt where an employer has, by a single unilateral act, breached an essential term of the contract of employment. The second branch allows for constructive dismissal to be made out where there has been "a series of acts that, taken together, show that the employer no longer intended to be bound by the contract".

The second branch arises, for example, in cases where, by its conduct or by allowing conduct to persist unaddressed, the workplace has become poisoned or the employee has been harassed.

This issue was considered by the Ontario Superior Court of Justice in Lancia v. Park Dentistry, 2018 ONSC 751 (CanLII). In this case, the employee quit and alleged that she had been constructively dismissed because of "repeated improper deductions of vacation pay as well as allegations of sexual harassment." The focus, in other words, was on the second branch of the Potter test which the Court summarized as follows:

> The second branch allows for constructive dismissal to be made out, when viewed in light of all the circumstances, would lead a reasonable person to believe that the employer no longer intended to be bound by the contract.

In terms of the vacation issue, when the employer purchased the dentistry practice, it learned that the prior owner had been paying its employees their vacation pay before the pay was earned. It was calculated based on the assumption that an employee would work 40 hours a week throughout the year which could "result in employees receiving a vacation pay windfall, because it was calculated on the erroneous assumption of hours worked rather than on actual hours worked." Such was the case with the plaintiff.

Park implemented a new employment agreement (in return for a $2000 signing bonus) that changed the way vacation pay was paid and calculated. According to the court:

> In terminating her Old Contract, Park Dentistry provided Lancia with eighteen months working notice, in light of her age, position and years of service. The Cover Letter informed her in writing that, in the event that she chose not to sign the New Contract by the signing deadline of January 14, 2016, her Old Contract would end on February 14, 2016.

Signing the New Contract meant the immediate termination of the old contract.

Ms. Lancia signed the new contract without objection.

On February 9, 2016, Ms. Lancia handed in her resignation and raised the vacation change, not having received a raise, and that Dr. Park "is done with his staff, especially me."

The court found that the new contract was enforceable. Ms. Lancia had been given $2000 as consideration for the contract. In any event she was given 18 months advance notice of the change in vacation policy at which time she could either continue under the new terms or be terminated. See, for example, Wronko v. Western Inventory Services Ltd., 2008 ONCA 327 (CanLII). She chose to sign the new contract and continued to report for work. The court observed:

> In asserting a claim for wrongful dismissal, the jurisprudence provides that an employee may decide to act on a breach of the employment contract committed by the employer and end their employment. Or an employee may opt to continue with the employment. If an employee decides to treat the breach as a constructive dismissal, he or she must communicate that decision to the employer in a reasonable time: Farquhar v. Butler Brothers Supplies Ltd. (1988), 1988 CanLII 185 (BC CA), 1988 CanLII 185 (B.C.C.A.), 23 B.C.L.R. (2d) 89, at paras. 92 and 93.

Ms. Lancia did not complain promptly and the delay, the court noted, was "illuminating". In fact, Ms. Lancia only raised the issue of constructive dismissal 13 months after she resigned.

As noted "an employer has the right to impose fundamental changes to an employment contract, and if so, is required to give reasonable notice of the change to the employee. Park Dentistry did exactly that and they met this requirement by providing 18 months' working notice."

In terms of the claim of sexual harassment and poisoned work environment, the court noted:

> Workplaces become poisoned for the purposes of constructive dismissal only where serious wrongful behaviour is demonstrated. The employee bears the onus of establishing a claim of a poisoned workplace. The employee's genuinely held beliefs are insufficient to discharge this onus. There must be evidence that an objective, reasonable person would support the conclusion of a poisoned workplace environment. Except for particularly egregious stand-alone incidents, a poisoned workplace is not created as a matter of law unless serious wrongful behaviour sufficient to create a hostile or intolerable environment is persistent or repeated.

A leading case is Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R 1252, 1989 CanLII 97 (SCC).

The Court did not find the plaintiff in Lanzia to be a credible witness and the evidence did not support the conclusion of sexual harassment or a poisoned work environment. As the court noted:

> To the objective, reasonable bystander, the evidence presented does not support a conclusion that a poisoned workplace environment had been created, persisted or repeated.

In all of the circumstances, the court determined that most of the claims (except for the claim for reimbursement of vacation monies recovered or withheld by Park Dentistry in 2015 that were due and owing to the plaintiff) be dismissed.

The case is yet another example of the risks associated with constructive dismissal cases on employees. It is also a situation that discusses Branch #2 of the Potter case.

I'm Getting Tired of the Contractual Termination Clause Discussion But I'll Add to it Anyway

Clients are paying good money for advice, so when you have to qualify your advice, even with a good reason, then you aren't helping the way you'd like to. It's frustrating for everyone. But here's why it's difficult, in good conscience, to provide a definitive opinion regarding the enforceability of any termination clause in the current judicial environment.

There's this thing in law called "precedent". Although the law isn't fixed and it evolves and breathes, it is important that like cases be decided in the same way. With some level of confidence we need predictability. But it's tough to reconcile cases involving the interpretation of termination clauses in employment contracts. Why is that? There's lots of reasons, but one is this famous (infamous?) quote from the Supreme Court of Canada case of Reference re Public Service Employee Relations Act (Alberta), 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Work is unique, it isn't a commercial contract. We have to accept that and employment law has developed in a way that recognizes those unique features (sometimes courts have had to pull back the reigns on runaway courts as was the case in Honda Canada Inc. v. Keays, [2008] 2 SCR 362). But, as pertains to termination clauses, we've seen the introduction of "palm tree justice" meaning that decisions are made based on the temperament of the sitting judge rather according to the rules of law. Different results follow in similar cases, and there is no consistency, and that's where we are with contractual termination clauses.

Why is this important?

As the Court of Appeal said in Wood v. Fred Deeley Imports Ltd., 2017 ONCA 158 (CanLII):

> At common law, an employee hired for an indefinite period can be dismissed without cause, but only if the employer gives the employee reasonable notice. In Machtinger v. HOJ Industries Ltd., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 998, the Supreme Court characterized the common law principle of termination of employment on reasonable notice "as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice".
>
> Ontario employers and employees can rebut the presumption of reasonable notice by agreeing to a different notice period. But their agreement will be enforceable only if it complies with the minimum employment standards in the ESA. If it does not do so, then the presumption is not rebutted, and the employee is entitled to reasonable notice of termination.
>
> As important as employment itself, is the way a person's employment is terminated. It is on termination of employment that a person is most vulnerable and thus is most in need of protection: see *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701.
>
> The importance of employment and the vulnerability of employees when their employment is terminated give rise to a number of considerations relevant to the interpretation and enforceability of a termination clause:

- When employment agreements are made, usually employees have less bargaining power than employers. Employees rarely have enough information or leverage to bargain with employers on an equal footing.

- Many employees are likely unfamiliar with the employment standards in the ESA and the obligations the statute imposes on employers. These employees may not seek to challenge unlawful termination clauses.

- The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so.

- Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship.

- A termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees should know at the beginning of their employment what their entitlement will be at the end of their employment.

- Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee

"Palm tree justice" plain and simple.

In any event, including a termination clause in an employment contract is highly recommended and good business. But where "palm tree justice" is at play (as it is here) you never know whether the clause will be enforced and, where it is not, the common law of reasonable notice will apply.

On February 6, 2018, the Ontario Superior Court of Justice released a decision called Bergeron v. Movati Athletic (Group) Inc., 2018 ONSC 885 (CanLII) highlights the problem. Ms. Bergeron was 39 years old and was employed as a General Manager at the Orleans location of Movati's health and fitness facility from August 4, 2015 to December 5, 2016. The plaintiff agreed to the following contractual termination clause:

> Movati Athletic Inc. may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the *Employment Standards Act, 2000* and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the *Employment Standards Act, 2000*, as amended from time to time.

The plaintiff's employment was terminated on December 5, 2016 at which time the employer paid her 4 weeks compensation. Movati's intention had been to pay the plaintiff two weeks of pay in lieu of notice as per the provisions of the *Employment Standards Act, 2000* ("ESA") but it made a mistake and overpaid her. She was also paid her outstanding vacation pay and maintained her group benefits coverage for two weeks.

When I read the termination clause, I honestly thought that this was one that would be enforced, but, I was wrong. The Court said this:

> While it may be true that [the plaintiff] had hired and fired employees on behalf of Movati, she would not have been aware of the implication of the termination clause as it read in her Employment Agreement at the time of signature since at that time, she had less bargaining power than Movati. It is quite common that prospective employees are in a more vulnerable state when signing an employment contract.
>
> In my view, with regards to [the plaintiff's] Employment Agreement, there was not a high degree of clarity in her termination clause. As in *Nogueira*, [the plaintiff's] termination clause did not contain any explanation or warning sign and it said nothing more than Movati will obey the ESA. [Emphasis added]

The court held that the clause was unenforceable, that the common law reasonable notice applied. The judge said:

> In the present case, in order for Movati to have been successful in its argument to exclude common law damages, it would have had to make the language more clear and have stated, for example:
>
> > Movati Athletic Inc. may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, **only** pursuant to the *Employment Standards Act, 2000* and subject to the continuation of your group benefits coverage, if applicable, **only** for the minimum period required by the Employment Standards Act, 2000, as amended from time to time.
>
> The use of the term "only" would clearly indicate to the prospective employee that she would only be entitled to a notice period as per the ESA.

The Court determined that the common law period of reasonable notice was three (3) months in the circumstances.

While I don't want to throw my hands up and give up, it's pretty tough to draft a termination clause in the contract when judges are able to simply do what they want, when they want, and support their conclusions with concepts such as "vulnerability" and "inequality of bargaining power". Those concepts will always allow clauses to be overturned, as in this case.

Do You Have to Provide Job Search Assistance or a Reference Letter?

I was asked recently whether an employer is legally required to provide a terminated employee with a letter of reference or job search assistance (or outplacement counselling). The answer is "no" but there may be consequences in any lawsuit. Here's how it works.

The employee is terminated, let's say without just cause and is offered a severance package. Negotiations ensue, but without success. The employee sues and claims damages for wrongful dismissal. The employer defends on one basis or another (and there are many defences available) and argues, in the alternative, that the employee failed to mitigate his or her damages by making reasonable efforts to secure other work during the common law period of reasonable notice. A typical paragraph in the Statement of Defence is

Providing job search assistance may not be legally required, but doing so may be a helpful defensive practice.

something like this:

> In the alternative, whilst denying any entitlement whatsoever by the Plaintiff in the within action, the Company pleads that the Plaintiff has failed to mitigate any loss or damage arising from the change in his employment status by actively attempting to secure comparable alternate employment and mitigating his alleged damages. The Company calls for an accounting of all post-termination earnings from employment or self-employment.

You get to trial (most employment cases settle, but some don't) and you end up in front of a judge. You argue that the employee failed to mitigate (and as we saw above, the employer bears the onus). The employee argues that he or she did in fact make reasonable efforts to mitigate. The employee also argues (if true) that the employer did nothing to assist the employee in his or her mitigation efforts. The issue was discussed in Drysdale v Panasonic Canada Inc. [2015] OJ No 6324:

> The defendant offered the plaintiff no assistance in searching out these job postings and therefore it does not lie readily in the defendant's mouth to criticize the plaintiff afterwards for not pursuing these specific job opportunities. As stated by Taylor J in Maxwell v United Rentals of Canada Inc., 2015 ONSC 2580 (CanLII), at para 40 '…if an employer intends to argue the failure to mitigate on the part of the former employee, it would be well advised to present evidence of assistance that was offered to the terminated employee during his or her job search.'

The issue was more recently discussed in Ste-Croix v. Al-Hashimi and Jawad Dentistry, 2017 ONSC 7447 (CanLII). The issue of mitigation was expressly discussed, and in particular, the impact of a lack of assistance provided by the former employer as a factor that could undermine the failure to mitigate argument.

Anything that assists the former employee land new employment should, in theory, distract the employer from pursuing a claim against the prior employer. As a practical matter, moving on and turning the page is in everyones interest and, in many cases, the former employer can facilitate this.

The Scope of Documentary Production at Arbitration

An arbitrator in the fairly recent case of ALPA Pre-engineered Panels Inc v Liuna, Local 183, 2017 CanLII 66945 (ON LA) considered the scope or breath of documentary production in an arbitration hearing under a collective agreement. There is some debate in the case law.

In the civil process, the *Rules of Civil Procedure* require pleadings, the discovery of documents, and oral and written discovery of the opposite party. This is not the case in arbitration proceedings under a collective agreement, although the grievance form does, to some degree, set out the scope dispute and the grievance procedure should further clarify the positions.

It is generally accepted that the test for production of documents in an arbitration hearing is arguable relevance, meaning that a party is required to produce, upon request, any arguably relevant documents in its possession save and except for privileged documents. In saying this, in *West Park Hospital v. O.N.A.*, [1993] O.L.A.A. No. 12 (Knopf) applied a narrow approach and stated:

> However, where the disclosure is contested the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the Board of Arbitration should be satisfied that the information is not being requested as a "fishing expedition". Fourth, there must be a clear nexus between the information being requested and the positions in dispute at the hearing. Further, the Board should be satisfied that the disclosure will not cause undue prejudice.

A broader approach was adopted in *Toronto District School Board and C.U.P.E. 4400*, (2002) 109 L.A.C. (4th) 20 (Shime) where the arbitrator considered and compared the judicial approach to production in civil and criminal proceedings to that of arbitration, and held that:

> All documents which are arguably or seemingly relevant or have a semblance of relevance must be produced. The test for relevance for the purposes of pre-hearing is a much broader and looser test than the test of relevance at the hearing stage. A board of arbitration, at the pre-hearing stage, is simply not in a position, and ought not to lay down precise rules as to what may be relevant during the course of the hearing.

The issue of production of documents at arbitration was most recently considered in *ALPA Pre-Engineered Panels Inc.* where the *West Park* approach was found to be most appropriate. In coming to this conclusion, Arbitrator Gee relied on the following comments from Arbitrator Stout in Amalgamated Transit Union and Toronto Transit Commission, 2016 CanLII 87623 (ON LA) where the arbitrator considered the reduced scope of production under amendments to the *Rules of Procedure* and their impact on production in labour arbitrations:

> While I feel that the *TDSB*, *supra*, liberal approach is no longer appropriate, I am also not convinced that a test based strictly on relevance is the answer. I am of the view that some component of discovery must be recognized and arbitrators must exercise their discretion in a balanced and reasonable manner to ensure that the parties receive a fair but expedited hearing. I also appreciate that the production of documents can sometimes lead to discussions to resolve the matter. However, document production should not be a license for a party to engage in a fishing expedition to determine if they have a case. Rather, document production, should assist the parties in organizing their case so that it may be heard in the most expedited manner.
>
> I am of the opinion that the *West Park*, *supra*, approach of Arbitrator Knopf is a more balanced, practical and pragmatic approach to the issue of production. This approach recognizes an element of discovery, but also places limits on broad requests that can cause delay and unnecessary costs.
>
> I agree and adopt the approach of Arbitrator Knopf in *West Park*, *supra*, with the added element of proportionality, which I believe is essential to providing the parties with a fair and efficient hearing.

The case is important when dealing with requests for production of documents in arbitration proceedings. Production of documents should assist in “organizing their case” not in determining if they have one. While arbitration is a less formal process than courts, it is nonetheless critical to the sanctity of the process to ensure that rules are in place that recognize the unique features of arbitration while ensuring fairness to all concerned.

Breach of Privacy through Facebook Posts

I recently read an unreported case called *Cambridge Memorial Hospital and ONA (A.B.)* (2018) 134 C.L.A.S. 106 (Randazzo) that piqued my interest and so I'll let you know about it (though I can't provide a link to the case at this time).

In this case, a Nurse Practitioner was terminated for breach of patient privacy. During her lunch break on March 9, 2017 the grievor posted information on Facebook that was disrespectful to patient she had seen in the Emergency Department. Specifically:

> The Grievor, using a pouting/angry face emoji, started the post by stating that she was feeling annoyed that day. She then describes the patient, including the patient's age, where she works, her duties while at work and the fact that the patient was making a WSIB claim. She then suggests, by using a "thinking face emoji" that she is wondering about the struggles of the patient. The Grievor, again by using the "pouting/angry face emoji", further suggests that she was annoyed or upset by the patient's decision to attend at the ED with, what certainly seemed to the Grievor, to be less than significant ailments.

Ah, emojis, they will be our undoing.

The grievor deleted the post at her first opportunity but, by then, it had been seen and commented upon. The Hospital scheduled a meeting with the grievor at which she initially denied the post, but then, when it was read to her, admitted it. The following day, the grievor's employment was terminated.

She read a statement expressing embarrassment and regret at having written the post and indicated that she was under great family stress, namely that for many weeks prior to incident her niece and daughter had been experiencing serious medical issues and that she was expecting "bad news" in the time immediately prior to the investigation meeting. In fact, it was the grievor's evidence that when she was let to the investigation meeting with the Hospital, she "initially thought that the purpose of the meeting was to inform her of a death of either her niece or her daughter".

Although the arbitrator acknowledged that patient confidentiality is critical in the health care sector, he nonetheless upheld the grievance and substituted a 30 day suspension in place of the termination.

The grievor was a long service employee (17 years) of the Hospital with a "clean disciplinary" record who, according to the arbitrator, "demonstrated sincere and deep remorse for her actions" and attempted to apologize for her actions. The arbitrator put it this way:

> She acknowledges her actions, she recognizes the impact the breach of privacy and trust may have upon her employer, her colleagues, the public and patients. She offers an explanation for her actions, she expresses embarrassment and regret and concludes that they she has learned both personally and professionally from this experience. I find that the substance and intent of the statement was an effective and sincere apology.

Furthermore, the arbitrator accepted that the posting on Facebook was not premeditated nor suggestive of a pattern of inappropriate behaviour and, as such, it was a spontaneous and instinctive act. In addition, the grievor's personal and family circumstances were viewed as a significant mitigating factor.

The case highlights that there is no automatic penalty for even the most serious industrial offence and that a contextual analysis must be undertaken in every case where discipline is being imposed. Where there is "just cause" for the imposition of some sort of discipline, employers must take care to ensure that the punishment fits the crime and is a proportionate response in all the circumstances. This case provides somewhat of a roadmap to mitigation of penalty, though each case turns on its on facts.

Terminating an Employee for Just Cause - Tough, but Not Impossible

Many employers feel that it is simply impossible to terminate any employee summarily, without notice, for just cause. Truth be told, I've found myself thinking this from time to time. But then I come across a case that upholds a termination for just cause, and I remember that while just cause is the capital punishment of employment law, it is possible where the facts are strong and persuasive.

The case was decided on February 20, 2018 by the Alberta Court of Queen's Bench and is called Belyea v. Syncrude Canada Ltd. 2018 ABQB 132 (CanLII). The plaintiff had been employed by Syncrude for 10 years as a crane operator. One day, in the lunch room, he got into an argument with a junior employee who had taken his chair. In the course of this argument, the plaintiff threw a chain at the other employee hitting his hand and spilling his food. The employer carried out an investigation. According to the Court:

> The investigation included hearing [the plaintiff's] account of the story, interviewing multiple witnesses to the argument, and allowing [the plaintiff] to review and respond to the complainant's account. The investigators determined [the plaintiff's] credibility as a witness to be poor and found the incident occurred as described by the junior co-worker. The investigation concluded that [the plaintiff] breached Syncrude's *Treatment of Employees Policy* (TOE Policy) pertaining to a physical act of violence.
>
> Following the investigation, Syncrude held a termination hearing where [the plaintiff] was provided with an opportunity to provide comments about his conduct. [the plaintiff] continued to maintain that he dropped the chain on the floor and that it did not hit the complainant. He was not remorseful and refused to accept responsibility for his behaviour. At the end of the hearing Syncrude decided to terminate [the plaintiff] for cause for breaching the *Treatment of Employees Policy*.

The issue was whether Syncrude properly terminated the plaintiff's employment for just cause? The court considered the contextual approach in McKinley v BC Tel, 2001 SCC 38:

> In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of

> the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake...

The Court considered the credibility of the witnesses and concluded that the plaintiff had "intimidated the junior employee and threw the chain at him. While spilling food on the floor is a minor incident or accident, throwing a chain out of frustration or intimidation -- and hitting a co-worker's hand and breaking his food container, is not." The Court concluded that there was just cause for the imposition of some form of discipline, then turned to consider whether termination was the appropriate penalty in the circumstances.

It considered the plaintiff's disciplinary record. In his ten years of employment at Syncrude, the plaintiff had received many positive performance appraisals, was recognized as a valued employee, prioritized safety when operating cranes, worked well with little supervision, and was seen as a "solid contributor to the team". He did "encounter challenges in relation to managing conflict and appropriate communication at times".

The Court concluded that the plaintiff was clearly in breach of the company's policy, of which he was well aware. The question was whether this breach was sufficiently serious to give rise to a breakdown in the employment relationship? In answering this, all the surrounding circumstances must be taken into account.

In this case, the plaintiff was aware of and had been trained on Syncrude's Policy, on more than one occasion, and had been warned that termination was a possible outcome after his prior corrective action. Furthermore, the Court concluded that the plaintiff failed to accept responsibility and showed no remorse. In the end, according to the Court, "these factors justify a finding that the plaintiff's behaviour violated an essential condition of his employment contract and breached the trust necessary in his work relationship with Syncrude".

Conclusion

The Court upheld the termination for just cause. It's important to understand that maintaining a termination for just cause isn't easy (and it shouldn't be - as mentioned, courts have repeatedly said that termination for cause is the "capital punishment" of employment law). We must go through the contextual analysis discussed in McKinley and look at the surrounding circumstances before jumping to termination, no matter how serious the misconduct.

Things like long service, a clean disciplinary record, a frank acknowledgment of wrongdoing and a prompt acceptance of responsibility will go a long way in mitigating the penalty.

Articles of Interest

The Oscars are now in the books, but, of late, Hollywood has been in the news in the context of the #MeToo movement. Hollywood is again in the news with the release of the UCLA's Hollywood Diversity Report which considered diversity and gender disparity in films and television shows.

With the legalization of marijuana on the horizon, employers are wondering how to deal with this in the workplace. A recent Statistics Canada report released on February 21, 2018 called Analysis of trends in the prevalence of cannabis use in Canada, 1985 to 2015 isn't going to give them much comfort. Among the conclusions in the Report is that:

> From 1985 through 2015, past-year cannabis use increased overall. Analysis of comparable data from the Canadian Tobacco Use Monitoring Survey and the Canadian Tobacco, Alcohol and Drugs Survey for the 2004-to-2015 period suggests that use was stable among 15 to 17-year-old males, decreased among 15 to 17-year-old females and among 18 to 24-year-olds (both sexes), and increased among people aged 25 or older.

I also discovered that there was a recent cannabis conference at which it was recommended that more research is needed (Hamilton cannabis conference highlights need for more studies). I also learned that there is Michael G. DeGroote Centre for Medical Cannabis Research at McMaster University. Who knew?

The MIT Technology Review has a fun article entitled Artists envisioned the future of work, and the results are pure fantasy. Some predictions about the jobs of the future are interesting, others frightening.

Cryptocurrencies such at bitcoin are the big thing these days. The question is Champing At The Bit: Can You Pay Your Workers In Bitcoin? This is a US article, and highlights some issues/challenges (at least from a US perspective).

Have you heard of a "Surf by" lawsuit? Have a read of Protect Your Business From "Surf-By" Lawsuits

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