Breakfast Seminar Series: 2015 Employment Law Year End Wrap Up

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Session Overview

- Employment Law Update
  - Does an indefinite suspension with pay constitute constructive dismissal
  - Is an employer's financial circumstances relevant to the determination of reasonable notice
  - Update on human rights damages in civil claims for wrongful dismissal involving family status
  - Duty of honesty in contractual relations applied to employment contracts
  - Metron project manager sentencing
  - Are without cause dismissals permitted in the federal sector
- Legislative Update
  - ESA
  - OHSA
  - ORPP
  - AODA

Potter v. New Brunswick Legal Aid Services Commission (2015 – SCC)

Facts:

- Mr. Potter appointed to a 7-year term as Executive Director
- Employment relationship became strained, parties began to negotiate a buyout of the contract
- Mr. Potter commenced an unrelated medical leave before the matter was resolved
- Prior to his return to work, the employer was considering terminating Mr. Potter for just cause
- He was advised not to return to work until further notice and was subsequently suspended indefinitely with pay and his powers and duties were delegated to another person
- 8 weeks after employer's instruction to stay away from the workplace, Mr. Potter commenced an action for constructive dismissal
- Employer took position Mr. Potter resigned
- Trial judge found despite the indefinite duration, Mr. Potter's administrative suspension did not constitute constructive dismissal. Upheld by the New Brunswick Court of Appeal

Potter v. New Brunswick Legal Aid Services Commission (2015 – SCC)

SCC Findings:

- Mr. Potter was constructively dismissed
- Terms of Mr. Potter's employment did not provide the employer with the express or implied authority to suspend him
- Failing to provide reasons, the employer acted unilaterally and failed in its obligation to act in good faith under the employment contract
- Mr. Potter did not acquiesce to the change, it was reasonable for him to perceive the unilateral, indefinite suspension as a substantial alteration of the terms of employment

Potter v. New Brunswick Legal Aid Services Commission (2015 – SCC)

SCC Findings:

- Court clarified the 2-branch test for constructive dismissal
- Constructive dismissal can take 2 forms:
  - a single unilateral act that breaches an essential term of the contract; or
  - a series of acts, that taken together, show that the employer no longer intended to be bound by the contract
- Cases involving administrative suspensions, burden shifts to the employer to show that the suspension was reasonable

Practical Implications

- Consider whether the employment contract permits administrative suspensions
- Employers do not have an unfettered discretion to withhold work
- Administrative suspension must be reasonable and justified – e.g. legitimate business reasons, good faith, duration of the suspension
- Communicate reasons for the administrative suspension
- At a minimum acting in good faith means being "honest, reasonable, candid and forthright"

Calculating Common Law Reasonable Notice

- *Bardal* factors
  - No strict test
  - Main factors:
    - Character of employment
    - Length of service
    - Age
    - Availability of similar employment, having regard to experience, training, and qualifications
- Is an employer's difficult financial circumstances a relevant consideration in assessing reasonable notice?

Michela v. St. Thomas of Villanova Catholic School (2015 – ONCA)

Facts:

- 3 teachers employed by private school on a series of 1-year contracts for 13, 11 and 8 years respectively
- Employer advised contracts would not be renewed due to low enrolment
- Teachers sued for wrongful dismissal
- Employer argued teachers not entitled to reasonable notice as employed on fixed-term contracts
- Motion judge found teachers employed for indefinite periods and entitled to reasonable notice. Teacher's proposed 12 months
- Motion judge reduced period to 6 months based in part on employer's financial position

Michela v. St. Thomas of Villanova Catholic School (2015 – ONCA)

Court of Appeal Findings:

- Reviewed the purpose of reasonable notice – allows employees a reasonable period of time to find replacement work
- Reviewed the *Bardal* factors
- Motion judge erred in law in finding that the financial position of the employer was an aspect of the "character of employment"
- Character of employment refers to the nature of the position held by the employee. Focus is on the circumstances of the wrongfully dismissed employee not the circumstances of the employer
- Employer's financial circumstances are not relevant to the determination of reasonable notice
- Neither justifies a reduction in the notice period in bad times nor an increase when times are good
- Teachers' appeal was allowed, awarded 12 months notice

Practical Implications

- Provides a degree of clarity in the law relating to reasonable notice and an employer's financial position
- Provide for ability to temporarily layoff in employment contract
- A well-drafted employment contract at beginning of employment can reduce employer's risk and costs when ending the employment relationship

Human Rights Damages in Civil Claims for Wrongful Dismissal

- Under 2008 changes to OHRC – courts permitted to award human rights damages for violations of Code rights
- 2015 decisions:
  - *Silvera v. Olympia Jewellery* – $30,000
  - *Bray v. Canadian College of Massage and Hydrotherapy* – $20,000
  - *Partridge v. Botony Dental Corporation* – $20,000

Partridge v. Botony Dental Corporation (2015 – ONCA)

Facts:

- Employee originally hired as dental hygienist, promoted to office manager position, which she held for over 4 years
- One week before her return from pregnancy leave was told position no longer available and she would return as a dental hygienist. Change in position meant reduced hours and pay
- When employee asserted her rights under the ESA, her employer changed her scheduled shifts which were incompatible with her child care arrangements
- One week later, employee dismissed for cause. Employer claimed:
  - It was the employee who requested her former role as a hygienist
  - Employee demanded a change to the business' ordinary hours. When this was refused she began to harass other employees and management
  - Employee removed confidential records in order to compete against the employer

Partridge v. Botony Dental Corporation (2015 – ONCA)

Trial Judge's Findings:

- Employee's evidence preferred over that of the employer
- Employer:
  - Unilaterally demoted Ms. Patridge
  - Breached ESA reinstatement rights
  - Engaged in reprisal under ESA
- Applied contextual approach – isolated incident of removing one or two day sheets which contained confidential patient information was not grounds for summary dismissal
- Court award 12 months reasonable notice

Partridge v. Botony Dental Corporation (2015 – ONCA)

Trial Judge's Findings:

- Applied the *Johnstone* criteria in finding employee made out *prima facie* case of discrimination on ground of family status
  - Ms. Partridge put in place a number of "complex" childcare arrangements so she could work until 6 pm under the new schedule
  - Arrangements were not sustainable
  - Interfered with her fulfilling her childcare arrangement in more than a trivial way
  - Change in hours was reprisal
  - Employer could not show hours were a *bona fide* occupational requirement or that the employee could not be accommodated without undue hardship
- Awarded $20,000 in human rights damages
- Employer's appeal dismissed. Grounds were fact-specific. Trial judge's findings of fact entitled to considerable deference by higher court
- ONCA upheld award of 12 months reasonable notice and $20,000 in human rights damages

Partridge v. Botony Dental Corporation (2015 – ONCA)

Court of Appeal Findings:

- Removal of confidential patient records – although there was misconduct did not justifying termination
  - Accepted trial judge's findings, intentions were not to compete with the employer, but to secure evidence of her reduced hours. Records were not disclosed to any 3rd parties, there was no harm to patients or the employer
- Court skirted around the issue of which test applied to determine a *prima facie* case of discrimination because of family status – noted fact driven analysis

Practical Implications

- Employers must comply with their ESA reinstatement obligations
- Family status accommodation
  - Highly fact specific, individualized assessments
  - Substantial family obligations, needs vs. preferences
  - Reasonable steps to self-accommodate
- Employee misconduct will be evaluated in its overall context
  - Nature and extent of misconduct
  - Surrounding circumstances
  - Whether dismissal is appropriate in the circumstances

Gordon v. Altus (2015 – ONSC)

Facts:

- Gordon sold assets of his business to Altus for millions of dollars. Purchase price was subject to an adjustment based on the company's performance after the sale
- Altus employed Gordon under a separate written employment contract
- As the adjustment deadline approached, disagreements surfaced as to the proper adjustment to the sale price. Gordon gave notice to activate the arbitration clause to resolve the dispute
- Altus began to allege Gordon was not working productively, was a very unpleasant person, spoke of senior personnel in derogatory terms, used excessive profanity, concealed a conflict of interest
- Altus terminated Gordon for cause and terminated his wife on the same day

Gordon v. Altus (2015 – ONSC)

Court's Findings:

- Allegations of cause were examples of Altus "puffing up complaints to justify its peremptory dismissal"
- Although Altus had a progressive discipline policy, it did not follow it
- No process to provide warnings to Gordon about his performance or behaviour with written directions to improve
- Employer's actions referred to as "outrageous", "harsh", "mean and cheap"
- Altus failed to perform honestly under the employment contract
- Awarded $100,000 in punitive damages in addition to Gordon's contractual severance entitlement of $168,845
- Appeal and cross-appeal filed October 2015

Practical Implications

- Consequence of pursuing a case for cause that is without foundation
- Allegations of cause should be based on actual evidence
- Performance management
  - Court found employer should have reviewed conduct with the employee and provided direction for overcoming that conduct
  - Progressive discipline policies should be followed
- Employment law principles are not suspended or amended in a circumstance where a previous business owner remains with the business as an employee post acquisition

Antunes v. Limen Structures Ltd (2015 – ONSC)

Facts:

- Antunes left his position as an independent contractor in the construction industry to accept a Senior Project Manager position with Limen
- At time of hire, Antunes was told company was worth $10 million and that his 5% shares in the company would be worth $500,000. Also promised an additional 5% of the Residential Division within one year of employment
- Antunes was never issued shares
- Rather than working as Senior Project Manager, he spent his time preparing delay claims and found that the company was not in a good financial situation
- Antunes dismissed without notice just after 5 months of employment
- Antunes asserted he was induced and sued for wrongful dismissal, breach of contract and negligent misrepresentation

Antunes v. Limen Structures Ltd (2015 – ONSC)

Court's Findings:

- Antunes was not induced from secure, long-term employment
- Court applied duty of honesty in contractual relationship to the negotiation of the employment contract
- Limen mislead Antunes with respect to the nature of the position, the fact that he would be awarded shares in the company and the financial health of the company
- Took this into consideration in awarding 8 months notice
- Also awarded an additional $500,000 based on the failure to issue shares and misrepresenting the value of those shares
- Notice of appeal has been filed

Practical Implications

- Antunes is an example of how the duty of honest contractual performance applies in the employment relationship
- Employers must honestly negotiate employment contracts
- Be cautious about what is communicated to entice a candidate into accepting a job

R. v. Vadim Kazenelson (2016 – ONSC)

- Metron project manager involved in 2009 swing stage collapse which claimed the lives of 4 workers and injured a fifth, sentenced to 3 ½ years in prison
- Project manager was found guilty of 4 counts of criminal negligence causing death and 1 count of criminal negligence causing bodily harm
- Although he was unaware of the shoddy design and construction of the swing stage, he was aware there were insufficient life lines
- He failed to take reasonable steps as required under s. 217.1 of the *Criminal Code* to protect the safety of workers
- Longest jail term imposed under Bill C-45 amendments to the *Criminal Code*
- Courts will impose significant consequences where organizations fail to ensure safety of their workers
- Appeal filed January 2016

Wilson v. AECL (2015 – FCA)

- Federal Court of Appeal confirms no "right to the job" for federally-regulated non-unionized employees
- *Canada Labour Code* allows for dismissal without cause
- Appeal heard by SCC on January 19, 2016, decision pending

Significant Amendments to Employment Legislation

ESA Amendments

- Effective February 20, 2015
  - Elimination of $10,000 cap on recovery of unpaid wages
  - Increasing limitation period, single 2-year time limit for all wage claims
- Effective May 20, 2015
  - Provide employees with most recent MOL information poster
  - ESOs can order employers to conduct self-audits
- Minimum Wage
  - Subject to automatic CPI adjustment starting October 1, 2015
- Effective November 20, 2015 – Temporary Help Agencies
  - Clients jointly and severally liable with agency for unpaid wages
  - Client and agency to keep record of hours worked by each assignment employee
- Effective June 10, 2016 (Bill 12)
  - Prohibits employers from withholding, making deductions from, or collecting tips or other gratuities from employees, unless authorized to do so under the ESA and its regulations

Bill 132 – Sexual Violence and Harassment OHSA Amendment

- New requirements to prevent and investigate sexual harassment in the workplace
- Addition of "workplace sexual harassment" to current definition of "workplace harassment"
- Clarifies that a reasonable action taken by an employer or supervisor relating to management and direction of workers or the workplace is not workplace harassment
- Employers will be required to update their programs
- Sets out new requirements for employers to investigate complaints of workplace harassment
- Also proposes amendments to the *Ministry of Training, Colleges and Universities Act*
- If Bill 132 is passed, will come into force on the later of July 1, 2016, or 6 months after Royal Assent

Ontario Retirement Pension Plan (ORPP)

- Liberal government is moving ahead with the ORPP
- January 12, 2016 – announced appointment of CEO of the ORPP Administrative Corporation (ORPP AC)
- January 26, 2016 – additional design details released
- ORPP AC will begin contacting all Ontario employers in early 2016 to verify existing pension plans and assess coverage
- Mandatory for employers without a comparable workplace pension plan
- Employers will contribute up to 1.9% on an employee's annual earnings up to $90,000 – equal contributions

Ontario Retirement Pension Plan (ORPP)

Enrollment schedule:

- Wave 1: Large employers (500 or more employees) without registered workplace pension plans. Contributions to start: January 1, 2017
- Wave 2: Medium employers (50-499 employees) without registered workplace pension plans. Contributions to start: January 1, 2018
- Wave 3: Small employers (49 or fewer employees) without workplace pension plans. Contributions to start: January 1, 2019
- Wave 4: Employers with a workplace pension plan that is not modified or adjusted to meet the comparability test, as well as employees who are not members of their workplace's comparable plan. Contributions to start: January 1, 2020

Accessibility for Ontarians with Disabilities Act (AODA) – Compliance

- AODA and 5 Accessibility Standards – various rolling deadlines, e.g.
- Private and not-for-profit (1-19, 20-49 employees)
  - January 1, 2016
    - Training staff on accessibility laws
    - Make it easier for people with disabilities to provide feedback when asked
    - (Was January 1, 2015, for private and not-for-profit organizations with 50+ employees)
  - January 1, 2017 (*January 1, 2016, 50+ employees)
    - Make public information accessible when asked
    - Make employment practices accessible
  - https://www.ontario.ca/page/accessibility-laws

Questions?