Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers

Emond Harnden

2011 YEAR END WRAP UP

An Employer's Guide to the Year's Most Compelling Legislative and Employment Law Developments

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Session Overview

- Employment Law Update
- Bill 168 Update
- Legislative Update

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EMPLOYMENT LAW UPDATE

Perspective patronale en droit de l'emploi et relations de travail
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The Employment Contract
Restrictive Covenants

- Limits the right of former employees to:
  - Compete with the employer (non-compete);
  - Solicit its employees or clients (non-solicit); or
  - Disclose confidential business information (non-disclosure)
    - Limited geographic area
    - Limited period of time
    - Cannot eliminate competition in general

Mason v. Chem-Trend Limited (2011 – Ont. C.A.)

Facts:

- Mason employed as a technical salesperson
- On hire required to sign agreement which contained a restrictive covenant
- Terminated after 17 years
- Mason brought an application to declare restrictive covenant unenforceable
- Lower Court found covenant reasonable
- Mason appealed

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Mason v. Chem-Trend Limited (2011 – Ont. C.A.)

Court's Findings:

- Worldwide one-year restrictive covenant too broad, unworkable in practice, unreasonable and unenforceable
- Court considered 3 factors:
  - Did the employer have a proprietary interest entitled to protection?
  - Are the temporal or spatial limits too broad?
  - Is the covenant overly broad in the activity it proscribes because it prohibits competition generally and not just solicitation of the employer's customers?
- Leave to appeal to S.C.C. denied January 12, 2012

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Creating an Enforceable Restrictive Covenant

- Be reasonable
- Be clear
- Personalize – no “standard” clause, no “boiler plate”
- Legitimate need for scope of protection
  - Scope of business
  - Temporal scope
  - Geographic scope

Creating an Enforceable Restrictive Covenant

- Demonstrate danger from unfair competition by former employee
- Do not go further than necessary
- Do not use “cascading” or “in the alternative” clauses
- Acknowledge that the employee had the opportunity to obtain legal advice
- Indicate manner of dismissal does not affect operation of restrictive covenant

Working after Constructive Dismissal Acceptance or Mitigation?

***Russo v. Kerr Bros. Limited* (2010 – Ont. SCJ)**

Facts:

- Kerr, a candy manufacturer, experienced financial difficulty
- Russo, warehouse manager, employed for 37 years
- Russo's compensation reduced from $114,000 to $60,000
- Russo informed employer he did not consent to unilateral change, continued to work and filed claim for constructive dismissal
- Employer did not dispute Russo was constructively dismissed but argued by continuing to work Russo accepted or condoned new terms

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Russo v. Kerr Bros. Limited (2010 – Ont. SCJ)

Court's Findings:

- Court considered *Wronko* and dismissed employer's argument
- Russo clearly communicated his rejection of the new terms to the employer
- Russo entitled to elect to stay in workplace as a means of mitigating his damages, but only for the period of reasonable notice
  - If elects to remain in workplace under new terms beyond period of reasonable notice, with consent of employer, then new terms accepted
- Court awarded 22 months notice

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Practical Implications

- Court discussed options available to employer:
  - Could have told Russo to leave the workplace
  - Could have kept old terms and conditions in place for a period of reasonable notice
- Where unilateral change to a fundamental term of employment contract is rejected by an employee employer must take additional action to implement the change
  - Provide employee with reasonable working notice that employment contract will terminate and then offer employee re-employment on new terms as of termination date

Damages Update

Altman v. Steve's Music Store (2011 – Ont. SCJ)

Facts:

- Long-term employee diagnosed with cancer
- Took a significant medical leave and required to work reduced hours
- Steve's counsel had bailiff deliver letter stating she was required to work full hours or would be terminated
- Returned to work but subsequently had to take further medical leave
- Steve's terminated Altman claiming her position had been abolished. At trial, Steve's argued contract was frustrated

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Altman v. Steve's Music Store (2011 – Ont. SCJ)

Court's Findings:

- Altman's employment contract at the time of termination was not frustrated
  - Uncontradicted evidence from treating physicians, Altman was able to work
  - Prior to medical leave, Altman had worked at reduced hours
  - Altman advised Steve's she would be returning to work
  - Steve's terminated without inquiring about her ability to perform her job
    - No one contacted Altman. No one contacted her physician, despite invitation to contact

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Altman v. Steve's Music Store (2011 – Ont. SCJ)

Court's Findings:

- Awarded 22 months reasonable notice
- $35,000 for mental distress, employer's bad faith
- $20,000 in punitive damages
- $88,000 in costs
- Altman adduced substantial evidence regarding impact of employer's conduct on her health and mental state

Practical Implications

Frustration of Contract

- Obtain a clear prognosis from the employee's medical practitioner with respect to ability to return to work in the reasonably foreseeable future before considering termination
- If medical evidence is vague, obtain more conclusive reports
- Prognosis seems to be more determinative than how long an employee has been absent
- Examine details of the employment contract and its specific elements to see if it has been frustrated
- Entitled to ESA termination notice and severance pay even where contract is frustrated

Practical Implications

- Termination for frustration does not attract punitive damages in and off itself
- Steve's conduct attracted punitive damages:
  - Refused to pay statutory minimum termination pay until Altman brought an application for summary judgment, 20 months after employment was terminated
  - Improperly withheld wages earned contrary to ESA
  - Used Altman's vacation bank to reimburse itself for time Altman was absent
  - Failed to comply with an order of the Court to provide Altman with an accounting of her share of the deferred profit sharing plan
  - Altman required to obtain counsel to obtain her ROE to permit her to receive EI benefits
  - Failed to complete form to allow Altman to receive disability benefits she had paid for until more than 1 year after Altman went on leave and more than 6 months after it terminated her employment

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Damages and Disability During Notice Period

Brito et al. v. Canac Kitchens **(2011 – Ont. SCJ)**

Facts:

- 24-year employee dismissed without cause at age 55 due to restructuring
- Provided minimum statutory notice and severance pay
- LTD coverage was terminated at end of 8 weeks statutory notice
- Employee obtained alternate employment with another kitchen manufacturer
- Nearly 16 months after dismissal, employee underwent multiple cancer surgeries

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Brito et al. v. Canac Kitchens (2011 – Ont. SCJ)

Court's Findings:

- Awarded 22 months reasonable notice
- Rejected employer's argument that employee failed to mitigate damages by purchasing a replacement disability policy
- $194,664 for lost LTD benefits to age 65
- $15,000 in punitive damages for "hardball approach"
  - Court noted Canac had a track record of paying dismissed employees only statutory minimum and litigating wrongful dismissal cases
- $125,000 in costs

Practice Tips

- Clarify extent of LTD coverage ceases at end of ESA notice period in employment contract
- Request ongoing LTD coverage from insurer prior to termination
- Provide access to alternate plan of coverage

Practical Implications

- Benefit coverage – how long is required by law?
  - Statutory notice period – required by ESA
  - Common law reasonable notice period
  - Risk of not extending – becoming self-insured for the claim
- Address with termination package and release
  - Confirm understanding LTD benefit coverage ceased
  - Provide compensation in lieu of benefit coverage/alternate coverage
  - Provide reasonable notice
    - Easier to obtain a release

Reasonable Notice Update

Just Cause v. Wilful Misconduct

***Oosterbosch v. FAG Aerospace Inc.* (2011 – Ont. SCJ)**

Facts:

- Employee terminated pursuant to progressive discipline policy
- Culminating incident, unsatisfactory work performance and falsification of records
- Filed claim for wrongful dismissal damages and ESA termination pay and severance pay

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Oosterbosch v. FAG Aerospace Inc. (2011 – Ont. SCJ)

Court's Findings:

- Court found just cause for termination – persistent misconduct despite ongoing coaching and warnings
- Not entitled to common law reasonable notice
- Behaviour was not "wilful misconduct, disobedience or wilful neglect of duty"
  - Incompetence, "apparent attitude problem" does not necessarily equate to "intentional"
- Entitled to ESA notice of termination and severance pay – $25,031

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Love v. Acuity Investment Management (2011 – Ont C.A.)

Facts

- Love, a Senior Vice President, was responsible for managing company's institutional investment clients
- 50 years old with 2.5 years service at the time of termination. Total compensation was $633,548, with 2% ownership of the company
- Dismissed without cause and without notice
- Sued for wrongful dismissal
  - Trial judge awarded 5-month notice period
- Love appealed

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Love v. Acuity Investment Management (2011 – Ont C.A.)

Court's Findings

- Court of Appeal substituted a 9-month notice period, ruling that the trial judge had made 3 mistakes:
  1. Too much emphasis on employee's short service
  2. Underemphasized character of Mr. Love's employment
  3. Failed to consider the *Bardal* factor relating to availability of similar employment (due to high salary and possibility of equity)

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Love v. Acuity Investment Management (2011 – Ont C.A.)

Court's Findings:

- Court highlighted the importance of considering all the *Bardal* factors, not just length of service
- Interpretation of when Love "ceased to be an employee" for purposes of the Investment Agreement under which Love acquired his shares
- Leave to appeal to S.C.C. denied September 22, 2011

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Di Tomaso v. Crown Metal Packaging (2011 – Ont C.A.)

Facts:

- 62-year old mechanic with 33 years service terminated
- Days before expected termination date, employment was extended by several weeks
- Over period of 5 months, employer repeatedly extended employment. Plaintiff received 5 separate written notices of termination, containing 4 different termination dates
- On last day employer provided severance pay but no pay in lieu of notice
- Employer claimed first notice of termination was valid and temporary employment constituted "working notice"
- Employer argued cap of 12 months for unskilled worker

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Di Tomaso v. Crown Metal Packaging (2011 – Ont C.A.)

Court's Findings:

- Extension of temporary employment
  - Employment cannot be extended more than 13 weeks from the original notice, fresh notice must be provided
  - Extensions viewed cumulatively
  - Multiple extension of less than 13 weeks inconsistent with ESA
- Upheld motion judge's award of 22 months notice
  - Rejected notice was capped at 12 months because employee was "unskilled worker in a non-managerial position"
  - All *Bardal* factors must be considered
  - Recognized 22 months was on the upper end

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Practical Implications

- Temporary employment beyond original notice
  - Monitor extensions (total number of weeks)
- Courts admit there is no magic formula for determining appropriate notice
  - Short service does not mean short notice
  - No cap for unskilled, non-managerial
  - No one *Bardal* factor should be given disproportionate weight
  - Employers should consider all *Bardal* factors when crafting notice periods (factors – position, age, length of service, availability of similar employment)
  - Be on the lookout for factors that make the job in question unique

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Bill 168 Update
OHSA Workplace Violence and Harassment Provisions

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Bill 168 Update: Workplace Violence and Harassment

- The Ministry of Labour (MOL) is enforcing Bill 168
- MOL Inspectors are determining if policies meet standards, taking a collaborative approach
- Employers facing orders under s. 55.1 to comply
  - Since June 15, 2010
    - 1,574 orders issued re workplace harassment
    - 814 orders issued re workplace violence
- Recent Bill 168 jurisprudence

City of Kingston and CUPE
(Arbitrator Newman – August 2011)

Facts:

- 28-year employee with a long history of disciplinary issues, many related to anger issues
- Terminated for culminating incident, allegedly threatened life of union's Local President
- Grievor had just returned from attending an anger management course as part of a grievance settlement

City of Kingston and CUPE
(Arbitrator Newman – August 2011)

Findings:

- Arbitrator considered effect of Ontario's workplace violence legislation (Bill 168)
- Workplace safety trumps personal privacy
- Threatening language is workplace violence
- Employers required to fully investigate and react appropriately
- Seriousness of incident given greater weight
- "Workplace safety" an additional factor when assessing reasonableness and proportionality of discipline
- Termination upheld

OLRB Defines Scope of Bill 168's Workplace Harassment Obligations

- *Conforti v. Investia Financial Services* (2011)
  - Employee filed a reprisal complaint under OHSA alleging he was dismissed for making complaints of harassment, contrary to Bill 168 amendments
- *Harper v. Ludlow Technical Products Canada* (2011)
  - Employee claimed employer failed to investigate her complaint of harassment in accordance with its Bill 168 harassment policy
- OLRB dismissed both complaints
  - Defined what powers given to Board under Bill 168

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OLRB Defines Scope of Bill 168's Workplace Harassment Obligations

OLRB Findings:

- OHSA's workplace harassment provisions are limited
  - Only require employer to put a workplace policy and program in place and provide further information and instruction to employees as appropriate
- Board does not have the authority to adjudicate workplace harassment complaints
  - May be dealt with by grievance procedure (if unionized) or through court action

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OLRB Defines Scope of Bill 168's Workplace Harassment Obligations

Practical Implications:

- Only recourse employees have before OLRB is whether employer has put in place workplace harassment policy and program
- Board's decisions do not impact workplace harassment obligations under other legislation, i.e. *Human Rights Code*
- Unlike workplace harassment, OHSA does impose obligations on employers to prevent workplace violence

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LEGISLATIVE UPDATE

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Family Caregiver Leave Act (Employment Standards Amendment), 2011

- Bill 30 introduced December 8, 2011
- If passed, in effect on July 1, 2012
- Purpose
  - To provide care or support for family members and relatives suffering from a “serious medical condition”
  - Specified family members, relative dependent on employee for care or assistance, any individual prescribed as a family member
- Duration
  - 8 weeks unpaid job protected leave for each individual in each calendar year
  - Can be taken in 1 week blocks

Family Caregiver Leave Act (Employment Standards Amendment), 2011

- Notice to employer
  - No specific working notice requirement
  - In writing before taking leave or if not possible ASAP after
- Documentation
  - Medical certificate required from qualified health practitioner if requested by employer
- In addition to
  - Family Medical Leave (8 weeks, care for terminally ill relatives) Personal Emergency Leave (10 days, 50 or more employees)
- Rights and reinstatement obligations apply

Bill C-13 Keeping Canada's Economy and Jobs Growing Act

- Federal omnibus bill
- Received Royal Assent December 15, 2011
- Amends *Canadian Human Rights Act*
  - Eliminates the mandatory retirement age for federally regulated employees unless there is a BFOR
- Amends *Canada Labour Code*
  - Repeals provision that denies federally regulated employees the right to severance pay for involuntary termination if they are entitled to a pension
- In force December 15, 2012

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Accessibility for Ontarians with Disabilities Act, 2005 (AODA)

- AODA enacted in 2005
- Goal: Make Ontario totally accessible by 2025
- Applicable to EVERY employer in Ontario (even it there is only 1 employee)
- AODA and Standards – 5 general areas
  1. Customer Service
  2. Transportation
  3. Information and Communications
  4. Employment
  5. Built Environment

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AODA and Standards

- **Customer Service Standard (effective January 1, 2008)**
  - Compliance deadlines
    - Designated Public Sector Organizations – January 1, 2010
    - Private and Not-for-Profit Organizations – January 1, 2012
    - Private and Not-for-Profit (20 or more employees) file accessibility reports – December 31, 2012
- **Integrated Standard (effective July 1, 2011)**
  - Combines Transportation, Information and Communication and Employment Standards into one
  - Compliance deadline – January 1, 2012 – emergency response requirements
  - Other compliance deadlines range from 2013 to 2021

Integrated Standard Emergency Response Requirements

Compliance Deadline January 1, 2012:

- Employment
  - Provide individualized workplace emergency response information to employees with a disability
- Information and Communication
  - Organizations that prepare emergency procedures, plans or public safety information and make information available to the public
    - Must provide the information in an accessible format or with appropriate communication supports, as soon as practicable, upon request


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