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

Emond Harnden

2012 YEAR END WRAP UP

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

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February 6, 2013

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Session Overview

- You will receive an overview of the most important developments of 2012
- For each topic you will receive:
  - Highlights of the important features of the development
  - A "bottom line" analysis of the impact of the development on your workplace

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EMPLOYMENT LAW UPDATE

Perspective patronale en droit de l'emploi et relations de travail
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Constructive Dismissal

- Unilateral change to a fundamental term of an employment contract
- Does it amount to constructive dismissal if the employer provides employee with reasonable notice of the change?
  - Leading case *Farber v. Royal Trust* (1997 – SCC)
  - *Wronko v. Western Inventory* (2008 –ONCA)
    - Found Wronko constructively dismissed even though Employer provided 2 years notice of change to essential terms of employment contract

Kafka v. Allstate Insurance Company (2012 – Ont. Div. Ct.)

Facts

- Allstate announced a new business model and changes to compensation structure for agents
- Employees were notified 2 years in advance by form letter and video presentation
- Employees informed that changes would be implemented regardless of employee acceptance
- Allstate argued that it provided "working notice" of the changes
- Agents who refused to accept changes resigned and commenced class action for constructive dismissal

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Kafka v. Allstate Insurance Company (2012 – Ont. Div. Ct.)

Court's Findings

- Employees must condone or reject contractual changes within a "reasonable period of time"
- "Reasonable period of time" started the day the changes were announced
- There was a clearly understood transition period of 2 years
- Employees were not permitted to continue working as though nothing was changing
- Distinguished from the *Wronko* decision

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Distinguishing the *Wronko* Decision

- In *Wronko*:
  - Can reject an anticipated change within a reasonable time
  - Rejecting the change and continuing to work during notice is not condoning the change
  - The Employer failed to make it clear that changes would take effect after the notice period
- In *Kafka*:
  - Reasonable notice was provided
  - Employees knew changes would be implemented after the notice period regardless of acceptance

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Practical Implications

- Length of reasonable notice depends on each case
- Fundamental changes may not amount to a constructive dismissal if reasonable notice of the change is provided
- Inform employees that conditions will change at the end of reasonable notice whether there is acceptance or not

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The Duty to Mitigate

- Generally, a former employee must take steps to mitigate damages
  - Implied duty to find reasonable comparable employment
- A former employee need only take "reasonable steps" to mitigate damages
- Any remuneration earned from new employment reduces damages
- Is there a duty to mitigate where the employment contract provides for a fixed notice period?

Bowes v. Goss Power Products (2012 – ONCA)

Facts

- Bowes was terminated without cause
- The employment contract provided for 6 months' notice or pay in lieu
- The employment contract was silent with respect to mitigation
- The termination letter included a requirement to seek new employment
- Bowes found employment 2 weeks after termination
- Bowes only provided with statutory minimum notice

Bowes v. Goss Power Products (2012 – ONCA)

Court's Findings

- The employment contract was silent with respect to mitigation
- By agreeing to fixed notice, the parties opted out of the common law including obligations to mitigate
  - Payment was to be treated as liquidated damages or contractual amount
- Nothing unfair about requiring explicit references to mitigation if an employee is required to mitigate fixed damages
- Bowes was entitled to the entire 6 months of notice

Practical Implications

- Employees presumed not to be subject to common law duty to mitigate damages under contracts with fixed notice periods
- Fixed notice contracts should include an employee's obligation to mitigate
- Offer new consideration in exchange for adding a mitigation requirement into current contracts

Bennett v. Sears Canada (2012 – ONCA)

Facts

- Sears offered post-retirement health and welfare benefits
- Employees were required to have 20 years or more continuous full-time service
- Bennett had a combination of part and full-time service
- In 2005, Head Office informed Bennett by e-mail that her part-time service would be prorated and added to her full-time years with the result she was then at 17 years
- Bennett told she needed to work another 3 years to qualify
- Upon termination in 2009, Bennett informed by another human resources representative that mistake made and she did not qualify

Bennett v. Sears Canada (2012 – ONCA)

Court's Findings

- The dispute was contractual in nature
- An agreement was reached at the formative discussion stages
  - E-mail from Head Office
- Sears indicated that the part-time service would entitle Bennett to benefits if she work 3 additional years
- Bennett was entitled to have the contract performed
  - Sears was bound to provide post-retirement health and welfare benefits

Practical Implications

- Employers may be bound to their misinterpretation of a policy
- Ensure that policies are clear and unambiguous especially with respect to qualifying factors
- Ensure that all decisions are approved prior to communicating to employees
- Do not make any representations to employees until clarifications are received
- Consider centralizing communications regarding benefit entitlements to reduce likelihood of misinterpretations

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Tremblay v. 1168531 Ontario Inc. (2012 – HRTO)

Facts

- Tremblay signed a confidentiality agreement as part of a human rights' settlement
- During and post mediation, Tremblay posted comments related to the mediation on Facebook
- The employer became aware of the postings and refused to pay the settlement amount
- Tremblay claimed that she did not breach confidentiality as no monetary amounts were revealed

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Tremblay v. 1168531 Ontario Inc. (2012 – HRTO)

Tribunal's Findings

- Tremblay's posts were related to the mediation
- The posts were not "private" and were accessed by the employer
- The confidentiality provisions of the settlement were breached
- The employer breached the settlement by failing to pay, ordered to pay interest
- Ignoring confidentiality serves as a disincentive for employers to settle
- Original amount owing to Tremblay was reduced by $1000

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Practical Implications

- Confidentiality is important and must be respected by both parties
- General comments may breach confidentiality
- An appropriate remedy will be based on the nature of information revealed
- Include a provision in a settlement/release prohibiting commentary on settlements either on-line or through social media
- Consider including a remedy for a breach of confidentiality in the settlement

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Rubin v. Home Depot Canada (2012 – Ont. S.C.J.)

Facts

- Rubin, a 20-year employee, terminated without cause and without prior warning
- He received 28 weeks' notice, and benefits continuance
- Rubin signed the release during the meeting
- Soon after, Rubin realized he made a mistake and sought advice from legal counsel
- Rubin argued that the release should not be enforced

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Rubin v. Home Depot Canada (2012 – Ont. S.C.J.)

Court's Findings

- The notice period was grossly inadequate based on "community standards" for a 20-year employee
- There was a significant power imbalance between the parties
- Providing an ambiguous and misleading termination letter exacerbated the power imbalance
- The way in which the offer was presented – sign or do not get paid – took advantage of Rubin's vulnerability
- The release was unenforceable, awarded 12 months notice

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Practical Implications

- Provide a reasonable period of time to allow an employee to review a release
- Include a provision in the release stating that the employee has sought independent legal advice (if he/she chooses)
- Separate and state the amount of statutory notice and common law notice being provided
- Do not make statutory notice contingent upon signing a release

Fasullo v. Investments Hardware Ltd. (2012 – Ont. S.C.J.)

Facts

- The parties entered into an oral agreement on the essential terms (salary, responsibilities and start date)
- A written contract was signed soon after stating that notice would be limited to Employment Standards minimums
- Fasullo was later terminated
- Employer claimed that Fasullo had agreed that he was entitled only to Employment Standards minimum notice
- Fasullo denied agreeing to such a term

Fasullo v. Investments Hardware Ltd. (2012 – Ont. S.C.J.)

Court's Findings

- The notice provisions were inserted into the written contract after the verbal contract was finalized
- There was no mention of notice periods in the verbal contract
- No new consideration was offered for the notice terms in the written contract
- The notice and termination clauses were null and void
- Fasullo was awarded 3.9 months' notice

Practical Implications

- Ensure that all terms of an employment contract are put in writing
- Ensure that all of the terms are presented to an employee prior to his/her start date
- Modifications to pre-existing contracts generally require a further benefit to the parties
- Provide fresh consideration (or reasonable notice) if a term of a contract is changed

Privacy Law Update

- Two significant cases from 2012
- *R. v. Cole* (SCC)
  - Reasonable expectation of privacy on workplace computers
  - Clearly drafted policies can limit
  - http://www.ehlaw.ca/whatsnew/1211/Focus1211.shtml
- *Jones v. Tsige* (ONCA)
  - New tort for invasion of privacy – "intrusion upon seclusion"
  - http://www.ehlaw.ca/whatsnew/1201/Focus1201.shtml

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LEGISLATIVE UPDATE

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Ontario – Mandatory Health and Safety Training

- Proposed new regulation requiring all workers and supervisors to complete health and safety awareness training
- Training content minimums set out in the regulation
- Applies to all workplaces covered by the *OHSA*
- Employers required to keep records of training
- Proposed new regulation would come into force on January 1, 2014
- Training that meets minimum requirements conducted prior to January 1, 2014 deemed compliant

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Mandatory Health and Safety Training

- Worker Awareness includes:
  - Rights and responsibilities or workers and supervisors under the *OHSA*
  - Roles of the Ministry of Labour, WSIB, and Health and Safety Partners
  - Roles of workplace parties, joint health and safety representatives, and health and safety representatives
- Supervisor Awareness includes:
  - Rights and responsibilities of workers and supervisors under the *OHSA*
  - Recognition, assessment, control and evaluation of hazards

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Ontario *Human Rights Code*

- Two new grounds of discrimination added on June 19, 2012:
  - Gender identity; and
  - Gender expression
- The precise meaning of the new grounds is currently being explored

Ministry of Labour Inspection Blitzes

- Inspection Safety Blitzes during February-March, 2013:
  - The Health Care Sector
    - Workplace violence
  - The Industrial and Construction Sector
    - Slips, trips, and falls (ladder safety and fall protection hazards)

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 if 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

Customer Service Standard

- Effective January 1, 2008
- Designated public sector organizations – January 1, 2010
- Private and not-for-profit organizations – January 1, 2012
- Private and not-for-profit organizations (20 or more employees)
  - File accessibility reports – December 31, 2012

Integrated Accessibility Standards
Upcoming Compliance Deadlines

- Compliance deadlines range from January 1, 2013 to January 1, 2021
- Obligations depend on status of employer:
  - Government of Ontario and Legislative Assembly
  - Large designated public sector organizations (50+ employees)
  - Small designated public sector organizations (1-49 employees)
  - Private and not-for-profit organizations (50+ employees)
  - Private and not-for profit organizations (1-49 employees)

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Integrated Accessibility Standards
You Should Already be in Compliance

- January 1, 2012
- Information and Communications
  - Emergency and public safety information
- Employment
  - Workplace emergency information

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Integrated Accessibility Standards
Upcoming Compliance Deadlines in 2013

2013	Private/NFP (50+)	Private/NFP (1-49)	Large Public (50+)	Small Public (1-49)
General Requirements	--	--	Policies Accessibility plans Kiosks Procurement	--
Information & Communication	Education & training resources & material Training educators	--	Education & training resources & material Training educators Public libraries	Public libraries
Transportation	--	--	Numerous i.e. Service disruptions Fare parity Duties of municipalities (bus stops/shelters)	--

Integrated Accessibility Standards
Employment Standard Compliance Deadlines

Employment Standard	Private/NFP (50+)	Private/NFP (1-49)	Large Public (50+)	Small Public (1-49)
Recruitment Employee accommodation Returning to work process Performance management career development and redeployment	January 1/16	January 1/17 (*some exceptions – individual accommodation plans and RTW process)	January 1/14	January 1/15

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QUESTIONS?

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