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Human Resources Newsletter

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Court strikes prohibitive legislation

A labour dispute between Canada Post and the Canadian Union of Postal Workers (union) had escalated to rotating strikes and a nation-wide lockout. In growing concern over the impact of the labour dispute, the Federal Minister of Labour tabled the *Restoring Mail Delivery for Canadians Act* (S.C. 2011, c. 17) (*Act*"). The *Act* came into force on June 26, 2011. Amongst other things, the *Act* ordered a cessation of the above noted activities, ordered an immediate resumption of postal services, and contained an enforcement mechanism.

The postal workers' union brought an application challenging the constitutionality of the *Act* in *Canadian Union of Postal Workers v Her Majesty in Right of Canada* (2016 ONSC 418). The union argued that the *Act* infringed the freedom of association and freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms* (*Charter*).

In determining whether freedom of association (s. 2(d) of the *Charter*) was infringed, the court asked "whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining" (para 181). The court noted that substantial interference will be found where the measures disrupt the balance between employees and employers which s. 2(d) seeks to achieve. The court noted that the *Act* abrogated the workers' right to strike and that Canada Post hardened its position and sought a more favourable settlement after the legislation was introduced. The court concluded that this interfered with the collective bargaining process and disrupted the balance between employees and employers. The court concluded that s. 2(d) was infringed, and that the infringement was not justified by s. 1 of the *Charter*.

In determining whether freedom of expression (s. 2(b) of the *Charter*) was infringed, the court asked the following:

1) whether the expressive activity in question conveyed meaning;

2) whether it is excluded from protection by virtue of either its location or its method of expression; and

3) whether the protected expressive activity is infringed by either the purpose or the effect of government action.

The court found that the rotating strikes conveyed meaning, as they expressed the union's discontent with what it felt were unfair work practices and requirements. The court found that there was no evidence showing that the expressive activity should be excluded from protection. The court further found that the *Act's* prohibition of striking (the protected expressive activity), clearly had the effect of infringing that expressive right. Again, the court concluded that the infringement was not justified under s. 1 of the *Charter*.

The court declared the *Act* invalid under s. 52(1) of the *Constitution Act, 1982*. It noted that "the Act is narrow and targeted in scope. Reading down or severing those of its provisions which offend the Charter would strip the Act bare and render it completely ineffectual in any event" (para 245). The court found that an award under s. 24(1) of the *Charter* was not appropriate in this case.

This case reminds the government and employers that back-to-work legislation should not substantially interfere with the collective bargaining process and affirms that strikes can be considered expressive activities that convey meaning under s. 2(b) of the *Charter*.

This decision is consistent with decisions in Ontario in education (for example, see "Court finds Ontario in breach of teachers' Charter rights" with respect to the court setting aside Bill 115, the *Putting Students First Act* in the KC LLP Human Resources Newsletter of April 2016). ■

Court of Appeal confirms reinstatement after significant delay

In *Hamilton-Wentworth District School Board v Fair* (2016 ONCA 421) the respondent (Ms. Fair) was employed by the appellant (Hamilton-Wentworth District School Board or board) as Supervisor, Regulated Substances, Asbestos. In 2001, the respondent developed a generalized anxiety disorder and was diagnosed with depression and post-traumatic stress disorder. As a result, she took an approved leave of absence from her employment. From March 2002 until April 2004, the respondent received long-term disability benefits. In April of 2003, the respondent indicated that she wanted to return to work. Her request was refused by the applicant's Disability Management Co-ordinator.

From June 2003 to January 2004, the respondent began to participate in a work-hardening program in the board's human resource department. The respondent made

it clear that her participation in the program did not preclude her from accepting full-time employment as soon as it became available. The respondent's treating psychiatrist indicated to the board that accommodations for the work-hardening program were to exclude work involving any personal liability. In June 2003, the respondent applied for an opening for the position of a Staff Development Supervisor. The position was given to an employee who previously performed the required duties of this role. In July 2003, the board redistributed the duties of a departing Area Supervisor as part of a re-organization process of its plant department. The respondent was told that her medical condition precluded any accommodation within that department.

On December 15, 2003 the respondent filed a complaint under Ontario's *Human Rights Code*, (R.S.O. 1990, c. H-19) (*Code*) (the process which applied at that time) claiming that the board had discriminated against her by failing to accommodate her disability. The school board asked the respondent to meet with a psychiatrist of their choosing. In May 2004, the psychiatrist (Dr. Dermer) provided the school board with his opinion that the respondent "suffers from a psychiatric impairment which renders her permanently disabled from her own occupation as a Supervisor, Regulated Substances." He further stated that:

"[The respondent] would not be able to function in a job which entailed responsibility for health and safety issues, nor any duties which would leave her at risk for personal liability. Outside these limitations and restrictions, [the respondent] is otherwise capable of gainful employment, as she is not currently deemed to suffer from a psychiatric impairment sufficient to render her totally disabled." (para 20)

The board did not identify a suitable position for the respondent and terminated her employment on July 8, 2004. On November 4, 2004, the respondent filed a further complaint alleging that the board had breached the *Code* by terminating her employment.

The Human Rights Tribunal of Ontario (HRTO) concluded that the board had discriminated against the respondent on the basis of disability by failing in its duty to accommodate her beginning in April 2003. (The decision of the HRTO is reviewed in the KC LLP Human Resources Newsletter of April 2013.) The HRTO held that the board could have accommodated the respondent without undue hardship by placing her in the position of Area Supervisor or Staff Development Supervisor. Next, the HRTO held that the budget documents for 2003/2004 reflected that there were surplus full-time Area Supervisor positions in the plant department and that there was a genuine vacancy position for the position of Staff Development Supervisor in the Human Resources Department. Finally, the HRTO found that the board had failed to accommodate the respondent when it neglected to consider any alternative positions for the respondent and instead terminated her.

In terms of remedy, the HRTO ordered the reinstatement of the respondent to her employment with the board as soon as possible. The HRTO ordered that the respondent be reinstated to a position for which she had the basic general qualifications, equivalent to the level that she had been at when last employed. In addition, the HRTO stated that the position was not to involve exposure to personal liability for health and safety similar to the potential liability in the respondent's previous position. The board argued that the passage of time precluded or rendered unfair the respondent's return to employment with the school board. The HRTO noted that the delay in processing the complaint was not the respondent's fault. The board filed an application for judicial review of the HRTO's decision with the Divisional Court.

On September 29, 2014 the Divisional Court dismissed the application for judicial review. (The court's decision is reviewed in "Court confirms damages and reinstatement in termination matter", KC LLP Human

Resources Newsletter, April 2015.) The Divisional Court upheld the HRTO's findings that the board had failed to accommodate the respondent to the point of undue hardship and that reinstatement was an appropriate remedy as reasonable. In addition, the court stated that the passage of time did not render reinstatement inappropriate because the passage of time was largely beyond the control of the respondent. The board further appealed this decision to the Ontario Court of Appeal.

On appeal, the board raised the following issues:

(1) "Is the Divisional Court's apparent error in incorrectly referring to the position of Area Supervisor rather than Staff Development Supervisor a clerical or substantive error and to what extent does that error affect the issues on appeal?

(2) Did the Divisional Court err in holding that there was nothing unreasonable in the HRTO's findings on the issue of accommodation and that [the respondent] should have been appointed to the position of Area Supervisor or Staff Development Supervisor?

(3) Did the Divisional Court err in holding that the Tribunal's finding that the [applicant] failed to accommodate [the respondent] to the point of undue hardship was unreasonable?

(4) Did the Divisional Court err in holding that the Tribunal's decision with respect to remedy was reasonable?" (para 38)

On the first issue, the Ontario Court of Appeal (court) ruled that the Divisional Court's error in misstating the name of the position was clerical and did not affect its decision. On the second issue, the court ruled that the Divisional Court did not err in holding that there was nothing unreasonable in the HRTO's findings on the issue of accommodation and that the respondent should have been appointed to the position of Area Supervisor or Staff Development Supervisor. The board disputed the HRTO's finding that the respondent was capable of returning to full-time employment by April 2003 and that they had failed to accommodate the respondent by not appointing her to the position of Area Supervisor or Staff Development Supervisor. They argued that the respondent was not medically cleared to return to full-time employment and that her medical restrictions precluded her from working in a supervisory position since any supervisory position with the school board carries the potential for personal liability. In addition, the board argued that the HRTO has created a new and unreasonable standard of accommodation because it required an employer to create a surplus position or displace an incumbent employee to accommodate a disabled employee.

The appeal court did not accept these submissions. The court held that it was open for the HRTO to conclude that the respondent could return to work full-time in 2003 and that, "it was open to the Tribunal to construe the medial opinions as confining Ms. Fair's medical restrictions to supervisory positions involving the same level of personal liability as her previous position" (para 58). The court further stated that the HRTO was correct in finding that, "there would have been no need for the [board] to create a surplus position, as the financial resources existed for the Area Supervisor position, or to displace an incumbent employee, as the Staff Development Supervisor position was vacant" (para 61). The court further noted that the HRTO did not create a new standard for accommodation but followed established principles. The court added that "it is true that an employer has no obligation to place a disabled employee into a position for which he or she is not qualified … However to fulfil its duty to accommodate an employee's disability, an employer may be required in an appropriate case to place a disabled employee into a position for which he or she is qualified but not necessarily the most qualified" (paras 73-74).

On the third issue, the court held that the Divisional Court had not erred in holding that the HRTO's finding that the board had failed to

accommodate the respondent to the point of undue hardship was reasonable. The court stated that the board was required to take reasonable steps to accommodate the respondent but failed to do so. As the HRTO explained, reasonable steps would have included altering the respondent's previous position or looking for new positions. With respect to the last issue, the court agreed that the HRTO's decision with respect to remedy was correct. The board argued that the respondent was precluded from receiving the remedy of reinstatement as she did not request it until the new HRTO and transition process were in force. In addition, the board argued that the remedy of reinstatement was unreasonable, unprecedented and disproportionate after a delay of so many years. The court did not accept these arguments. The court stated that the remedy of reinstatement clearly fell within the HRTO's discretion.

This case affirms the positive obligations placed on employers to accommodate employees to the point of undue hardship. It also provides confirmation of the remedial power of the HRTO to reinstate employees who have been terminated, even if a significant amount of time has passed and/or they are unable to fulfill the requirements of their previous position. ■

Court rules grievance procedure in collective agreement proper forum for employee's complaint – Human Rights Commission lacked jurisdiction

In *Northern Regional Health Authority v. Manitoba (Human Rights Commission) and Horrocks* (2016 MBQB 89) the Court of Queen's Bench of Manitoba addressed an application for judicial review of a decision made by the Manitoba Human Rights Commission (Commission). The court ruled that the grievance procedure set out in the collective agreement was the proper avenue to challenge the dismissal of a health care aide represented by a union., rather than a human rights complaint under the *Human Rights Code* (CCSM c. H175) (*Code*).

The complainant employee began working as a health care aide for the applicant employer, Northern Regional Health Authority, in 2009. She was a member of the union and her employment was governed by a collective agreement. In 2012, the complainant filed a complaint of discrimination against her employer alleging that she was discriminated against in connection with her employment on the basis of a disability, namely, alcohol addiction, and that the employer had failed to reasonably accommodate her special needs associated with her disability.

In January 2011, the employer, complainant and union representatives met to discuss the complainant's absenteeism. The complainant was questioned about whether the absences were related to alcohol use. She denied this was a reason for her absences. She did advise that she was on probation as a result of driving a vehicle under the influence and was required to abstain from alcohol as a condition of her probation.

In June 2011, the employer sent the complainant home from work after it was determined that she was under the influence of alcohol while on duty. She was suspended without pay pending an investigation. Later that month, the complainant disclosed that she was struggling with alcohol addiction. The complainant's employer and union representatives met with the complainant and asked her to sign a memorandum of agreement (MOA), which set out terms of her continued employment, including absolute abstinence from alcohol at and outside of work. The complainant refused to sign the MOA and, as a result, her employment was terminated. The union grieved the termination, which went to arbitration and resulted in her signing the MOA and being allowed to return to work. However, prior to the complainant returning to work, her employer terminated

her for cause after two reports alleging the complainant was intoxicated outside of work. The union did not file a grievance and the complainant thus made her complaint to the Manitoba Human Rights Commission (MHRC).

The MHRC adjudicator held that it had jurisdiction and found in favour of the complainant. The employer disputed the MHRC's jurisdiction and applied for judicial review. The MHRC pointed to section 58 of the *Code*, which provided that *Code* was paramount. The employer argued that the MHRC lacked jurisdiction because the grievance process established in the collective agreement provided the appropriate forum for addressing the complaint. The employer argued that pursuant to the *Labour Relations Act*, CCSM c. L10, an arbitrator or board established under that Act had exclusive jurisdiction to hear the dispute.

In the case at hand, the court was required to address which administrative body had jurisdiction to hear the complaint: the Commission or the board of arbitration. In such situations, the question of jurisdiction is determined by examining the essential character of the dispute. The court recognized that the Supreme Court of Canada has agreed with the board of arbitration that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction (see *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42). The court found that the adjudicator had erred by focusing on whether the complainant's human rights had been violated, and should have examined the essential character of the dispute. According to the court, the effect of section 58 of the *Code* was that courts and tribunals were required to enforce the substantive rights and obligations in the *Code*, not that the adjudicative procedures under the *Code* were exclusive to the MHRC. The complainant's collective agreement included a provision for final settlement of all disputes. The court thus found that the labour arbitrator would be in a better position to hear the dispute between the parties.

The court set aside the adjudicator's decision and directed the complainant to file a grievance pursuant to the grievance procedure in her collective agreement, failing which, the matter could proceed to arbitration, pursuant to her collective agreement. ■

Mandatory retirement of school bus drivers at age 65 not supported by evidence, Alberta Tribunal rules, awarding $10,000 damages

In *Mortland and Van Rootselaar v Peace Wapiti School Division No. 76* (2015 AHRC 9) the Alberta Human Rights Tribunal (AHRT) upheld the complaints of two school bus drivers that a policy requiring mandatory retirement at age 65 was age-based discrimination. The AHRT found the policy was rationally connected to the objective of safe transportation of school children and was implemented due to a good faith belief that the policy was necessary to achieve that purpose. However, the blanket restriction was not reasonably necessary as collision rates were not proven to increase at age 65, nor did individual driver assessment result in undue hardship. The AHRT ordered the school division to remove the discriminatory policy, to reinstate the two complainants, and to pay each of them lost wages and $10,000 in damages for injury to dignity.

The complainants were both employed as part-time school bus drivers for the Peace Wapiti School Division No. 76 (school division) for over 30 years. They had also both been required to retire when they turned 65. Neither of the drivers had been disciplined during their employment, nor had any concerns been raised about their driving performance. One had even been evaluated in his final year of driving a school bus, and passed both a written test and a driving evaluation. In addition, both maintained their

qualifications to drive school buses post-retirement.

The school division adopted Policy GGG during the amalgamation of three former school divisions in 1995, which originally provided for the mandatory retirement of all employees at age 65. The policy was amended to require the mandatory retirement of school bus drivers only. The policy allowed for some exemptions to be relied on for employment beyond 65 pending board approval, but the board never made any exceptions.

In 2010, the complainants were advised of their upcoming retirement and in 2012, both told school division that they wanted to continue working past their 65th birthdays. The Board of Trustees did not approve an extension for either employee.

The complainants filed complaints with the Alberta Human Rights Commission claiming that the mandatory retirement policy was age-based discrimination, contrary to s. 7 of the *Alberta Human Rights Act* (RSA 2000, c. A-25.5) (*Act*). The complaints were later combined and proceeded to the AHRT. Section 7(3) of the *Act* provides that "[s]ubsection (1) does not apply with respect to a refusal, limitation, specification, or preference based on a bona fide occupational requirement." Section 11, which was also considered, states that "[a] contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances".

The AHRT allowed the complaints, finding that the school had not demonstrated that age 65 was a *bona fide* occupational requirement, and ordering it to stop applying its mandatory retirement policy, offer reinstatement to both drivers provided they possessed the necessary qualifications, and pay each driver lost wages and general damages for injury to dignity.

The AHRT first addressed and dismissed preliminary issues. The AHRT ruled that it had jurisdiction to hear the complaint as the school division's operations fell under provincial jurisdiction. The AHRT also determined that the abandoned grievances filed by one of the drivers did not qualify as issue estoppel or abuse of process, as the issue had not been litigated before. Finally, the delay was not unreasonable, because the driver's complaint had been held pending the results of similar mandatory retirement complaints from other boards that were further along in the process, and there was no evidence that the delay was prejudicial.

The AHRT next found that a prima facie case of discrimination had been established, based on the test set out in *Moore v British Columbia (Education)* (2012 SCC 61), which requires a complainant to establish "that he had characteristics protected from discrimination under human rights legislation, he had experienced an adverse impact ..., and the protected characteristic was a factor in the adverse impact." In this case, the drivers experienced an adverse impact with respect to their employment and their age was a factor in the adverse impact. The AHRT also found that the school division's policy was mandatory, despite the allowance for exceptions, because the evidence showed that no request had ever been considered.

The AHRT next rejected that the school division could justify the discriminatory policy under section11 of the *Act* as a *bona fide* occupational requirement. Based on the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union* (1999 SCC 48) (*Meiorin*), the AHRT found that "an age 65 or less standard for school bus drivers must be justified on the basis of a *Meiorin* analysis, applied to facts and expert evidence as found."

The AHRT applied the test in *Meiorin*, which requires:

- that the standard was adopted for a purpose rationally connected to the objective requirements of the job;

- that the standard was adopted in an honest and good faith belief that it was necessary to fulfill that legitimate purpose; and

- that the standard was reasonably necessary to accomplish the legitimate work-related purpose.

The AHRT found that the first two steps of the *Meiorin* analysis were met, because the policy was implemented to ensure safe student transportation and was rationally connected to job performance. For the second step, the school division maintained the policy on a good faith belief that it was necessary for the safe transport of its students. However, the school division failed to establish that that the standard was "reasonably necessary" to ensure student safety.

The AHRT found that the policy was not reasonably necessary to accomplish the purpose. After reviewing the evidence, the AHRT held that it had not been proved that school bus drivers over 65 posed an increased safety risk. The expert evidence did not demonstrate that school drivers increased their collision rate or negative driving performance, based on reaching a particular age. As such, the AHRT found that the evidence had "little application" to school bus drivers, who have greater driving skills and ability as compared to the general population (para. 356).

The AHRT questioned why the school division had not provided evidence of school bus collisions increasing during the years leading up to the mandatory retirement of either complainant, nor evidence of collision rates in other Alberta school jurisdictions and that the expert evidence presented was of limited assistance.

The AHRT also found that the school division had not tried to accommodate drivers when it applied the age 65 standard. It had not established that increasing the frequency of road evaluations or medical assessments would result in an undue hardship. As such, the school division had unreasonably denied drivers an opportunity to earn income. Both employees had satisfactory driving records throughout their employment and successfully passed licensing tests that required medical examinations. As such, there was no evidence that the complainants could not perform the job safely and effectively.

After finding that the policy was discriminatory, the AHRT ruled that the policy was invalid, ordered the reinstatement of both complainants, and awarded them compensation for lost wages and benefits in the amount of 18 months' salary. One award accounted for the time until the employee achieved full mitigation of her damages, and the other award was based on the time from the termination to when the driver was able to seek additional income. The AHRT also awarded both complainants $10,000 in damages for injury to dignity, feelings and self-respect. Specifically, the AHRT stated: "[t]he desire expressed in human rights legislation is that those earning a livelihood must not be unreasonably denied the opportunity to continue to do so if able to perform the job effectively and safely" (para 428).

This case highlights that work is fundamental to human dignity, and the blanket application of an age-based policy can negatively impact the individual dignity and self-respect of older workers. Where the policy is not supported by evidence, the policy will likely not be justifiable and may be found to produce a discriminatory result. ■

Non-unionized Federal employees entitled to similar protections against dismissal as unionized workers

The Supreme Court of Canada (SCC) recently delivered a landmark decision regarding the right of employers governed by the *Canada Labour Code*, R.S.C. 1985, c. L-2 (*CLC*) to dismiss an employee without cause. In the six to three majority decision in *Wilson v. Atomic*

Energy of Canada Limited (2016 SCC 29), the SCC ruled that the unjust dismissal sections of the *Code* protect a federal employee continuously employed for twelve consecutive months or longer from dismissal on a without cause basis, even where adequate severance pay is provided. Non-unionized employees of federally regulated business are entitled to similar protections against dismissal as those afforded to unionized workers.

The appellant, Joseph Wilson (Wilson or appellant), worked for the respondent, Atomic Energy of Canada Limited (the employer), for four years before he was dismissed without cause. Despite receiving severance pay, Wilson brought a complaint under section 240 of the *CLC* for unjust dismissal. In defence, the employer alleged that Wilson was terminated with generous severance pay that exceeded the statutory requirements under sections 230 and 235 of the *CLC*. The labour adjudicator accepted Wilson's submission and held that the *CLC* only permitted dismissals for cause. On judicial review, the Federal Court quashed the adjudicator's decision and remitted the matter back for a second hearing. The Federal Court of Appeal dismissed the appeal but leave was granted to the SCC.

The majority of the SCC applied the standard of reasonableness to the adjudicator's ruling and found that it was reasonable. The majority held that an interpretation of the *CLC* that allowed for termination without cause as long as notice and severance were paid was unreasonable because such an interpretation would undermine the "full remedial package parliament created" (para 63). The remedies available under the unjust dismissal provisions, most notably reinstatement, were inconsistent with the right to dismiss without cause and if an employer were allowed to dismiss an employee without cause, then there would be virtually no role for the remedies available to adjudicators under sections 240 to 245.

The SCC provided an overview of the historic context within which the *CLC* evolved into its current form. Most importantly, the 1978 amendments to Part III of the *CLC* introduced the unjust dismissal provisions found from sections 240 to 246 of the *CLC*. These sections grant broad powers to a labour adjudicator, including to order compensation or reinstatement. Notably, these sections will not apply and a complaint cannot be heard by the adjudicator if the employee was laid off because of lack of work or the discontinuance of a function.

The majority held that the purpose of the amendment was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause. When the provisions were introduced, the purpose was to provide federal employees with a similar level of protection as that enjoyed by unionized workers through collective bargaining agreements. The then Minister of Labour was quoted, during parliamentary debates, as saying that the amendments were intended to provide "some of the minimum standards" unionized workers enjoy through their participation in collective bargaining of agreements (para 42). The intention of the amendment was to expand the dismissal rights of non-unionized federal employees in a way that matched those held by unionized workers. The majority held that this was how the provisions have been interpreted by labour law scholars and "almost all adjudicators appointed to apply them"(para 46).

In the collective bargaining context, the term "unjust dismissal" is well understood as meaning that employees who are protected by a collective agreement can only be dismissed for just cause. The requirement to prove 'just cause' places an onus on employers to give reasons showing why the dismissal was justified. The SCC held that much like the scheme under a collective agreement, the unjust dismissal provisions of the *Code* serve to completely replace the common law right to dismiss an employee without reasons.

Ultimately, the SCC held that

"Only by interpreting ss. 240 to 246 [the unjust dismissal provisions] as representing a

displacement of the employer's ability at common law to fire an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense… It is an outcome that is anchored in parliamentary intention, statutory language, arbitral jurisprudence, and labour relations practice. To decide otherwise would fundamentally undermine Parliament's remedial purpose." (paras 68-69)

The dissenting judges argued that the standard of review to be applied should be correctness not reasonableness. The dissent acknowledged that the unjust dismissal provisions under the *CLC* are similar to those found in collective agreements, however they argued that the provisions were no more than a procedural mechanism available to employees and that they did not replace the common law. In their opinion the common law still governed the ability to dismiss an employee without cause, as long as the minimum notice and severance pay provided by section 230 and 235 of the *CLC* were followed. The dissent argued that the ability to dismiss an employee without cause would not render the remedies for unjust dismissal meaningless.

This represents a significant step in the application of the *CLC* to employment agreements, and may impact the reliance on the *CLC* as the applicable labour regime for First Nations education authorities. ■

Court of Appeal confirms School District erred in termination of Teacher

In *Edmonton School District No 7 v Dorval* (2016 ABCA 8) the Alberta Court of Appeal (court) heard an appeal by Edmonton District No 7. The principal at Ross Shepherd Composite High School (RSCHS) advised all teachers to use letter codes, rather than a mark of zero, for students who did not complete assignments. Many teachers, including Mr. Dorval (respondent), refused to do so, as the outcome was an inflated grade inspiring little incentive for completion of missed assignments. Despite the fact that RSCHS's policy stated that teachers may use a code, the principal took the position (with Mr. Dorval only) that it was mandatory to use the codes. The respondent was suspended for refusing to obey lawful directives, repeatedly missing staff meetings, and for behaving unprofessionally and insubordinately. He was ordered to turn in all school property, and was forbidden from entering school or its grounds. During his suspension, the respondent attended the school on three different occasions to return misplaced exams and deliver a letter to the principal. Following these incidents, he was terminated. The principal relied on the same allegations as he had for suspension but added the allegation of neglect of duty as a professional teacher.

The respondent appealed his termination to the Board of Reference (board). The board addressed both the events leading up to the suspension and the termination. The board found that the respondent's actions fell within the lawful and professional exercise of his teaching responsibilities. The board noted that a disagreement does not necessarily constitute insubordination if there is a reasonable explanation for the difference of opinion. The board found that his attendance at staff meetings was above average and there were medical and other reasons for missed meetings. In respect of the termination, the board found that the respondent had provided an adequate explanation for the allegation of retaining school property and unmarked work. It found that personally returning the school property was quicker, cheaper and safer than using a courier. The board concluded that the respondent had been treated unfairly by the appellant in his termination. The board ordered payment of full monetary loss from the date of termination.

The school district appealed the board's decision. The following issues were raised on appeal:

(1) "was the board entitled to consider the events leading up to the suspension?

(2) did the board make a reviewable error in its identification and application of the applicable law of workplace discipline, misconduct, insubordination and off-duty conduct?

(3) did the board make a reviewable error by failing to consider all grounds for termination and ignoring relevant evidence?

(4) did the board make a reviewable error by making irrelevant findings?; and

(5) did the board make a reviewable error in concluding there was no just cause for termination?" (para 34)

On the first issue, the court concluded that there was a clear nexus between the suspension and termination and therefore, the suspension events could be considered when assessing the teacher's termination. On the second issue, the court held that the board made no reviewable errors. On the third issue, the court concluded that the record showed that all reasons for termination were in evidence at the hearing and that the board either accepted the evidence, rejected the evidence, or simply found that some of the evidence did not amount to misconduct worthy of discipline. On the fourth issue, the court found that the comments made by the board (such as there was a personality conflict between the principal and the teacher) were obiter and did not affect the judgment of the board. On the fifth issue, the board concluded that the school district did not act reasonably (either substantively or procedurally) in the termination of the respondent's employment, therefore the board was correct in concluding that there was no just cause for termination. The appeal was dismissed.

The respondent had filed a cross-appeal, in which the issue was whether the board made a reviewable error in its decision to award him damages rather than reinstatement. The standard of reasonableness was applied in determining this issue. The court dismissed the cross-appeal. The court concluded that given the deterioration of the relationship between the parties, and the respondent's evidence regarding whether he would be willing to work for the school district again, the board's decision was within the range of possible, acceptable outcomes and was therefore reasonable. ■

Court of Appeal confirms termination of Teacher for just cause

In *Fernandes v Peel Educational & Tutorial Services Limited (Mississauga Private School)*, (2016 ONCA 468), the Ontario Court of Appeal (court) heard an appeal from the Superior Court of Justice. (The decision of the Superior Court of Justice was reviewed in the KC LLP Human Resources Newsletter of April 2015, "Mental health issues not addressed with respect to teaching deficiencies").

The respondent teacher (Mr. Fernandes or respondent) was terminated by the Mississauga Private School (applicant) after an investigation revealed that the teacher had fabricated marks, entered marks in his records before students did the work or submitted the assignments, and, entered marks for assignments that he had not marked. The trial judge found that the teacher had committed acts of misconduct, but was wrongfully dismissed as the punishment outweighed the seriousness of his infractions.

In coming to this conclusion, the trial judge considered some of the following factors:

- the teachers' 10 years of service with his employer;

- his reputation as a well-regarded teacher (prior to these incidents); and,

- the fact that the employer knowingly allowed the report cards with falsified marks to be sent home with students.

The trial judge awarded the teacher $51,918.00 in damages for lost wages, as well as additional damages for long-term disability benefits he would have been entitled to. The school appealed the trial judge's decision.

The Court of Appeal began its analysis by noting that the trial judge had erred in the application of the relevant legal principles. Thus, the court found it unnecessary to deal with the factual errors raised in the appeal. The court found that the trial judge had also erred in the application of the legal principles for determining whether an employee's misconduct gives rise to just cause for summary dismissal. The court relied on principles confirmed by the Supreme Court of Canada, and stated that the test to determine whether an employer is justified in dismissing an employee on the grounds of misconduct is whether the employee's misconduct gave rise to a breakdown in the employment relationship. The court noted that, " … the test can be expressed in different ways: just cause for dismissal exists where the misconduct 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" (para 103).

In addition, the court relied on *Dowling v Ontario (Workplace Safety and Insurance Board) (2004)* (246 DLR (4th) 65), where the court held that the core question is, "whether the employee's misconduct was sufficiently serious that it struck at the heart of the employment relationship" (paras 49-50). To answer this question, the court must: (1) determine the nature and extent of the misconduct; (2) consider the surrounding circumstances; and, (3) decide whether dismissal was warranted. The court stated that the principle of proportionality underlies this approach; there must be a balance between the severity of an employee's misconduct and the sanction imposed.

The appeal court agreed with the trial judge's findings in respect of the respondent's misconduct. However, the court found that the trial judge committed a legal error because he failed to assess the seriousness of the misconduct. The court stated that, "… the single comment on only one aspect of Mr. Fernandes' misconduct fails to address the seriousness of that misconduct in any meaningful way and constitutes legal error" (para 110). The court then went on to discuss a teacher's special position of trust and noted that, "one of a teacher's most important professional obligations is to fairly and properly evaluate and assess student progress and achievement". Thus, the court found that the respondent's intentional acts constituted serious misconduct. The court then assessed the surrounding circumstances. In relation to the respondent's circumstances, the trial judge noted that the teacher had been employed with the school for more than 10 years and was a well-regarded teacher until the spring of 2009. However, the court stated that the trial judge failed to consider a significant matter: the teacher had offered no explanation for his misconduct. The court noted that, "the absence of any explanation for the misconduct is underscored by two of the trial judge's other findings" (para 117). The trial judge did not consider the employer's circumstances; the court stated this was also a legal error. In discussing the employer's circumstances, the court noted that the respondent's misconduct exposed the school to serious potential harm, and that the respondent breached his employment contract because he did not carry out his duties in a professional manner compatible with the philosophy of the school.

The court then assessed whether dismissal was warranted in this particular case. The court stated that in order to decide if there was just cause for dismissal, it must consider the nature, extent, and seriousness of the misconduct in the context of the surrounding circumstances. The court noted that the misconduct was short compared to the overall period of employment, but struck at the very heart of the employment relationship. Thus, there was just cause for the respondents' dismissal. The court allowed the appeal and

ordered costs of the appeal to the school in the amount of $30,000 and costs for the trial in the amount of $75,000.00. ■

Ontario Court of Appeal increases damages awarded for deaf employee's serious harassment

In *Strudwick v Applied Consumer and Clinical Evaluations* (2016 ONCA 520) the Ontario Court of Appeal ordered additional damages against a company that perpetrated a "campaign of abuse" against a deaf employee.

The appellant, Vicky Strudwick, was treated maliciously and in an "extraordinarily egregious" way by her employer, Applied Consumer and Clinical Evaluations (Applied Consumer or respondent), according to the court. The respondent had refused her accommodation requests and had created additional barriers for her at work, to force Ms. Strudwick to resign.

The appellant lost her ability to hear in October 2011 for unconfirmed reasons. The motions judge found that, as a result, she made several reasonable requests for accommodation to her employer, such as asking to reposition her desk to see when people were approaching, and to use a voice carry over telephone and a visual fire alarm (she offered to personally pay for both). These requests were denied by her immediate supervisor and the general manager of Applied Consumer, who instead began harassing the appellant. For example, her supervisor found excuses to reprimand her, through advising co-workers to call her instead of speaking to her in person. The appellant could not hear the phone ringing, so she would miss the call and be chastised by her supervisor.

The appellant was eventually fired for an unconfirmed "stunt" at a company event. She was called in front of 13 other employees, called a "goddamned fool", and terminated for insubordination and misconduct. She was then given a release to sign along with a cheque for three months' pay. When the appellant refused to sign the release, the cheque was withheld.

Following her termination, the respondent still did not give Ms. Strudwick her outstanding pay until a government agency intervened. The company also delayed her entitlement to unemployment insurance when it provided a document to Employment Services of Canada indicating that the applicant had been fired due to insubordination and wilful misconduct. The applicant was harassed, humiliated, and had no other income source. The entire experience weighed on her emotionally, physically and psychologically.

The motions judge found for the appellant, awarding her damages of $113,782 for wrongful dismissal. The appellant appealed the decision, and the respondent cross-appealed with respect to the costs award. The appellant sought damages totaling $1,019,384.

The Court of Appeal (court) found that the motion judge erred in his considerations, and awarded damages which were too low. The court's reconsideration focused on three main issues in the wrongful dismissal award: breaches of the *Human Rights Code*; the tort of intentional inflection of mental distress; and the damages award itself.

The determination was based on the circumstances of this case, which the court compared to other wrongful dismissal or discrimination cases with similar facts. The court found that the motion judge erred in the determination of damages for breaching the *Human Rights Code* by failing to consider the actual impact on the appellant and by not addressing the efforts to increase barriers in the workplace (the judge had recognized that the employer failed to accommodate Ms. Strudwick).

The court also found that Applied Consumer was vicariously liable for its employees' actions. Section 46.3(1) of the *Human Rights Code* allows for a corporation to be held vicariously liable, as does *Farris v Staubach Ontario Inc.* (2012 ONSC 3876). Farris provides that a corporation can be found vicariously liable when its management fails to deal with harassment in the workplace, and where a "directing mind" of the corporation is responsible for the harassment. In this case, a managing employee participated in the harassment and did not address the immediate supervisor's abuse.

The court considered the range of awards ordered in similar decisions on disability-based discrimination. In comparison, the appellant's circumstances were found to require larger damages than any other case, because of the significant effect of the "malicious and heartless treatment" intended to humiliate Ms. Strudwick.

The court also found that the motion judge erred when awarding damages based on the intentional infliction of mental distress. The tort of intentional infliction of mental distress requires flagrant and outrageous conduct; conduct that intended to harm; and the plaintiff suffered a visible and probable illness.

The court held that the test was met in this case, as the respondent's deliberate and malicious conduct caused the appellant to develop a psychological condition which required a therapist who knew sign language, or a sign language interpreter. The court found that the motion judge erred by not considering the appellant's increased costs of therapy and the non-pecuniary damages from the intentional infliction of mental distress. The court re-calculated the award at a higher amount, to account for the potential cost of an interpreter and added $5,000 in non-pecuniary damages.

The amounts for aggravated and punitive damages were also reconsidered by the court. Aggravated damages address the employer's conduct at the time of termination, and compensate for any unfair of bad faith treatment. The court noted that there could be an issue with overlap between the damages award and the awards for breaching the *Code* or the infliction of mental distress. However, the court found that the conduct during the appellant's termination was so significant that an aggravated damages award was warranted, because of the intended and inflicted humiliation. The court awarded $70,000 for aggravated damages, but deducted a small portion (around $8,500) to prevent overlap between each award amount.

The court next adjusted the punitive damages award. Punitive damages are meant to punish highly reprehensible conduct, in the exceptional cases where other damage awards are insufficient. The objective of punitive damages is to denounce, deter and give retribution for the wrongful behaviour. The employer's behaviour was a longstanding deliberate pattern of malicious misconduct, which the court found deserved a punishment in itself. The court agreed with the lower court's order of punitive damages, but adjusted the amount to meet the objective of punitive damages.

The court's award of $246,049.92 with an additional $20,000 for legal costs represents a strong statement against discrimination and harassment in the workplace. The case speaks to the employer's obligation to accommodate employees, to act in good faith, to treat employees fairly and to respect every person's rights and dignity. ■

Court of Appeal upholds employee's wrongful dismissal and decision to award employee compensation for bonuses that would have been earned during notice period

Lin v Ontario Teachers' Pension Plan (2016 ONCA 619) dealt with an appeal by the Ontario Teachers' Pension Plan Board (board) from a decision allowing the respondent, David Tay Der Lin's (Lin or respondent), action for wrongful dismissal and awarding him a 15 month notice period. The Ontario Court of Appeal (court) upheld the trial judge's decision. Of particular importance for employers is that the court awarded Lin compensation for the bonuses that he would have received during the notice period. The court held that Lin's common law right to damages included compensation for the bonuses which he would have received while employed and during the period of reasonable notice.

Lin had been employed by the board as an investment professional for almost eight years when he was terminated in 2011. The board alleged that it terminated Lin for cause after he emailed a copy of a private placement memorandum (PPM) to a personal friend who was in the investment industry. The board initially alleged that Lin breached his obligations of confidentiality, and then alleged that he breached the board's Code of Business Conduct (Code). The respondent brought an action against the board for wrongful dismissal and was successful at trial.

The trial judge held that the board terminated the respondent's employment without legal cause. The trial judge recognized that the range of reasonable notice was 12-15 months, and chose to award 15 months' notice to reflect the additional challenge of finding replacement employment because of the circumstances of the termination. The trial judge noted the termination was damaging to the respondent's prospects and impeded his efforts to find another job. Furthermore, the trial judge found that the board made it more difficult for the respondent to find alternative employment, delayed his re-employment, and contributed to the conditions that led the respondent to finally take employment outside Canada, in China.

The respondent was awarded $1,002,905, consisting of $1,516,535 owed for the 15 month notice period, less $513,630 in mitigation income – i.e. the amount that Lin made during the 15 month notice period. The award included bonuses the respondent would have received and earned under the short-term incentive plan and long-term incentive plan in which he participated during the period of reasonable notice.

On appeal, the board submitted that the trial judge had erred in his interpretation of the Code and in fixing a period of 15 months' reasonable notice.

The court upheld the trial judge's decision. There was nothing in the trial judge's reasons for judgment that disclosed any error that would justify interference. The trial judge's finding that the respondent was wrongfully dismissed was entitled to deference. The trial judge did not err in finding that the respondent's release of the PPM did not constitute misconduct in violation of Code. The trial judge did not err in awarding the respondent the higher end of the 12-15 month notice period range as a result of the circumstances surrounding the termination. The trial judge considered all relevant factors in doing so. Furthermore, the court upheld the trial judge's decision to award compensation for the lost bonus payments he would have received during his notice period. ■

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