BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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In this Issue

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Post-Discharge Termination Upheld on Judicial Review

In a recent decision, successfully argued by Bird Richard, the New Brunswick Court of Queen's Bench upheld a decision by Arbitrator Frumkin, in which he held that Canada Post could terminate an employee who had already been discharged.

Ronald LeBlanc, a letter carrier, was terminated for abusive conduct to a customer. At the disciplinary meeting, after being told that he was discharged and handed the discharge letter, the grievor assaulted his supervisor. In a subsequent letter, the employer advised the grievor that, in essence, in the event he were to be reinstated as a result of the arbitration of the first discharge, he was fired for a second time. He later pled guilty to a criminal assault charge.

In December 2011, the initial discharge was successfully grieved. The arbitrator substituted a three-month suspension and an order for reinstatement. In response to the award ordering reinstatement, the employer confirmed by letter that the grievor would not be reinstated, given that he had been again terminated eighteen months earlier.

At the hearing before the arbitrator, counsel for the Union argued that it was not open to the employer to discharge the grievor a second time, as he had already been discharged and was therefore no longer employed by the employer at the time of the second discharge. The Union relied on decisions where arbitrators had held that a union official could not be discharged after their employer had terminated them. The Union also argued that the employer could only rely on post-discharge conduct in the context of the initial discharge to request that the arbitrator not reinstate the grievor.

As we have reported in a previous issue of EMPlawyer's Update, the arbitrator rejected the Union's analogy, concluding that, "where there is no union dimension attaching to the misconduct, the employee, or discharged employee, may be subject to discharge for postdischarge misconduct, where circumstances warrant." The arbitrator stated that the grievor

was a de facto employee at the time of the second discharge, given that the first award had retroactively reinstated him.

The arbitrator stated that there were two ways in which an employer could have relied upon the assault. While it could not have relied on the conduct to support the first discharge per se, it was open to the employer to:

1. rely upon it with respect to whether or not the arbitrator should exercise his discretion to reduce the penalty on the first matter; or
2. treat the grievor's post-discharge misconduct separately from the misconduct it had relied upon for the purposes of the initial discharge.

All that was required to exercise the second option was to advise the employee, in accordance with the collective agreement, of the employer's intention to discharge him in the event that the grievance against the initial discharge decision succeeded.

The Union sought judicial review of the arbitrator's decision before the New Brunswick Court of Queen's Bench, arguing that the arbitrator's decision was unreasonable because he had failed to follow the previous decisions of other arbitrators on which the Union had relied, and because the arbitrator had relied on a decision with very specific facts that were different than those in the grievor's case.

The Court concluded that the arbitrator's decision was reasonable. The case law raised by the Union did not have a sufficient correlation to the circumstances in the grievor's case and thus was not binding. In addition, despite the fact that the arbitrator had mistaken the facts of one of the cases on which he did rely, the totality of his decision met the standard of reasonableness despite this error.

Ultimately, the Court upheld the arbitrator's decision, finding that he was correct in concluding that, given the seriousness of the grievor's misconduct, the employer had no choice but to advise the grievor that his actions were intolerable and that it intended to terminate him for a second time for this post-discharge misconduct.

This is an important decision for employers in cases where a post-termination event occurs, or where evidence of misconduct only comes to the attention of the employer post-termination. This decision of the Court confirms that an employer may rely on postdischarge misconduct as an independent ground warranting discipline for the misconduct, including termination, should the initial termination be rescinded at arbitration.

Employer Can Waive Notice of Resignation Without Pay in Quebec

Can an employer waive notice of resignation without pay? In Quebec, the answer is yes, at least for now.

In 1994, Daniel Guay was hired by Asphalte Desjardins Inc. In February 2008, he secured employment with a competitor that offered him better wages. On a Friday, he submitted a letter of resignation to his employer, providing three weeks' notice of resignation, which would allow him to finalize his work on certain projects. However, the following Monday, the employer decided to immediately terminate Mr. Guay's employment.

The Quebec Labour Standards Commission, on behalf of Mr. Guay, sought three weeks' pay pursuant to *An Act Respecting Labour Standards* (the "*Act*"). At first instance, the Court found in favour of Mr. Guay. However, on appeal, the Quebec Court of Appeal overturned the decision.

The Court of Appeal's decision is largely founded on provisions of the *Civil Code of Québec* (the "*Code*"), which provides that an employee may not renounce his right to compensation where insufficient notice of termination is given or where the manner of termination of employment is abusive. The Court stated that it therefore flows from the Code that, if the obligation in the legislation has been placed on the employee, and not on the employer, then the employer may choose to renounce its right to notice of resignation. The Court stated that it cannot be inferred that the employment contract continues during the notice period with an impossibility of renouncing notice.

The Court also considered another section of the *Code*, which states that a party for whose exclusive benefit a term has been provided may renounce it without consent of the other party. In this case, the Court noted, Mr. Guay had not provided notice of resignation in order to assist him in a transition from one employer to another. Rather, he provided notice of resignation because he was required to do so and, when his current employer waived the notice period, he started in his new position without delay.

The case law in Quebec prior to the decision in this case generally held that an employer, pursuant to section 82 of the *Act*, had to provide pay during a notice period if it waived an employee's notice of resignation. Thus, the Court had to go further in its analysis to determine whether waiver of notice of resignation constitutes a termination pursuant to section 82 of the *Act*.

In this regard, the Court explained that, even if the contract had survived to the end of the notice period, its termination is irremediably fixed from the moment the employee announces his resignation. The contract ends on the last

day of the notice period because of the unilateral decision made by the employee, a decision that is simply delayed by the notice period. Waiver by the employer of the notice period, according to the Court, does not change the legal consequences of the notice.

On this point, the Court's interpretation is in accordance with prior case law, which has stated that, once an employee announces his resignation to his employer, the legal situation of the parties crystallizes, and a resignation does not become a termination of employment by virtue of the fact that the employer chooses to waive the notice period that the employee must provide. As stated in the case law, for example, where an employer discharges an employee and the employee waives the reasonable notice that the employer must provide to him, the Court would not find that the discharge has transformed into a resignation. Therefore, where the employer waives the notice period, the Court found that this does not trigger the application of section 82 of the *Act*. In the Court's view, the legislator did not intend for section 82 to apply to the circumstances where an employer waives notice of resignation, and the Act must be read together with the *Code* to ensure consistency.

The Court acknowledged that the legislature may need to address the issue because, from an employee's perspective, providing adequate notice to an employer presents a risk that the employer could waive the notice period and leave the employee without employment – and compensation – for the remainder of the notice period, however long that may be. The Court provided a further example involving even more risk: where an employee provides several months' notice of his retirement. However, the Court noted that an employer would be putting itself at risk if it conducted itself in such a manner, and would be abusing its rights, an act for which it could be held accountable.

From an employer's perspective, this decision is a welcome one. There are many situations in which an employer may validly wish to waive an employee's notice of resignation. For example, where an employee may not be dedicated to their work during the notice period, or where an employee is leaving to work for a competitor and work during the notice period could constitute a conflict of interest. Further, as was acknowledged by the Court, notice of resignation is, after all, intended to assist the employer and not the employee, providing the employer with adequate time to hire and train a new employee for the position.

Employers should be aware that the Quebec Court of Appeal's decision does not reflect the state of the law in Ontario, where different legislation applies, and which requires employers to pay out the greater of either the statutory minimum for termination of employment or the notice period, should the employer waive notice of resignation.

Although Quebec law differs from the law in Ontario on this issue, and different legislation applies to Ontario employees, employers with employees working in Ontario and Quebec should be informed of the Quebec Court of Appeal's decision and this recent change in Quebec employment law. Also, this decision is noteworthy as similar reasoning could eventually be applied by Ontario courts.

At this point in time, however, it is unclear whether this change in Quebec law will be a lasting one. An application for leave to appeal to the Supreme Court of Canada has been made with respect to the Court of Appeal's decision. At the time this article went to print, there was no decision regarding the leave to appeal application. Should the Supreme Court decide to hear the appeal, a decision by Canada's highest court will offer employers, both in Quebec and Ontario, more certainty on this change to the law in Quebec, and what implications this might have in other provinces.

We will keep readers apprised of developments in this case.

Employee Dismissed for Cause after Breach of Privacy Policy

In *Steel v. Coast Capital Savings Credit Union*, the Supreme Court of British Columbia upheld the termination of an employee on a with cause basis after the employee breached the bank's confidentiality policy.

Susan Steel had worked for Coast Capital Savings Credit Union for over 20 years. At the time of her dismissal, she was a Helpdesk analyst in the IT Department. In this role, she provided internal technical support to other employees of the credit union. In order to complete her job duties, Ms. Steel was able to access all documents and files within the organization, including employees' personal folders. Access to documents and files was not monitored by the credit union, and Ms. Steel was largely unsupervised.

The employer had established several clear policies and protocols relating to accessing documents and confidentiality, which required permission of the owner of the file or permission from the Vice President of Corporate Security before another employee's file could be accessed and read. As part of the annual performance review process, Ms. Steel had acknowledged that she had read and understood these policies.

Despite this, in July 2008, Ms. Steel accessed another employee's confidential folder and viewed a document – a waiting list for parking spaces, on which she was listed – for her own purposes. She had not been asked by her employer to procure this document, and she did not have the permission of the owner. Ms. Steel was dismissed immediately for cause.

The employee sought summary judgment in her action for damages for wrongful dismissal.

In order to terminate an employee without notice or pay in lieu thereof, it is well established that an employer must have just cause, and that the onus of proving just cause rests with the employer. Just cause may exist where the employee's conduct reveals a character that is dishonest or untrustworthy. In such a case, just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract or breaches the faith in a work relationship, or where the behaviour is inconsistent with the employee's obligations to their employer. In this case, the Court noted specifically that the relationship of trust between employer and employee is crucial in the banking industry, and that employees who work with greater autonomy must be held to a higher standard of trust.

Applying these principles to the facts in this case, the Court found that, while Ms. Steel was not a managerial employee, she did occupy a position of significant trust within the credit union. As it was not practical for Ms. Steel to be monitored all the time, trust was an especially important aspect of her unsupervised position. It was concluded that Ms. Steel violated this trust in two ways. First, she opened another employee's personal files for her own benefit, and not at anyone's request or as part of her duties. Second, Ms. Steel failed to follow the procedures put in place by her employer to govern access to other employee's personal files. The court concluded that these reasons satisfied the just cause requirement, and dismissed Ms. Steel's action.

This case reiterates that breaching the employer's trust by failing to follow a workplace confidentiality policy may constitute grounds for termination for cause, notwithstanding the duration of an employee's employment. However, as in this case, in order to support a termination for cause, employers will need evidence to establish that the employee worked in a position of trust and autonomy within the organization, and that the employee was aware of the relevant policies and protocols.

New Bill to Require Representation Vote Prior to Certification in All Cases

On May 1st, 2013, Bill 62, the *Defending Employees' Rights Act (Certification of Trade Unions), 2013* passed its first reading. The Bill would amend Ontario's *Labour Relations Act*, 1995 to prohibit the Ontario Labour Relations Board from certifying a union as a bargaining agent for employees unless a representation vote has been held among the participating employees. Currently, the Board may certify a union without a vote if:

- it finds that the employer contravened the *Act* during the certification process and no other remedy would be sufficient; and
- in the construction industry, if more than 55 percent of employees are union members.

We will keep readers apprised of the progress of this proposed legislation.

2013 California HR Conference

The Professionals in Human Resources Association is hosting the annual California HR Conference from August 26 to 28, 2013 at the Anaheim Convention Centre in Anaheim, California.

Stephen Bird has been invited to be a presenter at the Conference and will be a member of the Global Employment Strategy discussion panel.

Stephen's program will focus on the following unique aspects of Canadian employment law:

- Jurisdiction over labour and employment law matters: Which laws apply – federal or provincial? What are the differences between the various Canadian jurisdictions?
- Obligations when terminating employment: The different considerations applicable to unionized and non-unionized staff, and the common law concept of "reasonable notice".
- Drug testing and privacy issues: The Canadian approach – what constitutes a reasonable intrusion into an employee's private life? Can an employer conduct covert surveillance or monitor Internet use?
- Employee benefits and insurance: What is provided publicly, and what must an employer cover?

Bird Richard has a limited number of complimentary one-day passes (valuing $5,994) to be conferred to clients of the Firm. One day pass attendees can upgrade their registrations to 2 days for $150 or 3 days for $300. Please be advised that the registration for the Conference closes on August 16, 2013.

Should you require additional information, or are interested in registering for this Conference, please contact our Office Manager, Reyna Goudreau, at rgoudreau@birdrichard.com.

Firm Announcement

The Firm welcomes our new Associate Sheri Enikanolaiye. Sheri has completed her articles with the Firm and has recently been called to the Bar.