BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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Loose Lips Sink Ships – Repayment Obligation

The benefit of restrictive covenants, such as a non-disclosure provision in a settlement agreement, was recently underscored in the Ontario Superior Court decision of *Wong v. Globe and Mail*.

To briefly recount the facts, Jan Wong had been employed by the Globe and Mail for 21 years prior to her termination. She was on and off work for months at a time due to depression. The employer ordered her return to work, despite Wong contending that she was unable to work. When the applicant did not return to work as directed, her employment was terminated.

As a consequence of the termination, grievances were filed. The parties settled the grievances pursuant a Memorandum of Agreement (the "MOA") whereby the Globe and Mail agreed to pay the applicant a lump sum representing sick leave entitlements and two years' salary in the amount of $209,912.00.

The MOA also contained provisions regarding confidentiality and non-disparagement, and the related consequences of any breach of those provisions by Ms. Wong:

> Should the Grievor breach the obligations set out in paragraphs 5 and 6 above, Arbitrator Davie shall remain seized to determine if there is a breach and, if she so finds, the Grievor will have an obligation to pay back to the Employer all payments paid to the Grievor...

Subsequent to the MOA, Ms. Wong wrote and published a book entitled "Out of the Blue" about her experience with depression in the workplace. In response, the employer sought a determination that twenty-three phrases of the book breached the MOA's confidentiality provision and an order that the applicant forfeit and repay the settlement funds. The employer's application was successful as Ms. Wong was found to have breached the confidentiality provision of the

MOA. As a consequence of that breach, an arbitrator had ordered Ms. Wong to repay the settlement funds.

Ms. Wong applied for judicial review. The Court provided an analysis of the merits of the case even though it concluded that Ms. Wong did not have standing to bring the application for judicial review as she was a unionized employee. The Court applied the standard of reasonableness to the arbitrator's decision on whether there was a breach of the MOA. It disagreed with Ms. Wong's submission that she did not breach the MOA because she understood that she could speak about the terms of the settlement as long as she did not reveal the actual amounts paid on the following grounds:

- Generally speaking, evidence of the subjective understanding of the parties as to the meaning of a contract is not admissible for purposes of interpreting the document.
- The confidentiality provision was clear and unambiguous that the "terms of the settlement" could not be disclosed.

The judge dismissed the employee's application for judicial review, and ordered her to pay costs of $15,000 to each of the union and the *employer.*

For employers, the disclosure of the terms of settlement has ample consequences in the case of future employee termination but also, exposure to the scrutiny of the public. This decision serves as a reminder that non-disclosure provisions in settlement agreements are important. Essentially, when the agreement is unambiguous and is executed with informed consent, without any apprehensions as to the capacity of the parties, a non-disclosure provision can serve to protect important business interests.

Expert Advisory Panel on Occupational Health and Safety Releases 2013-2014 Report

The Expert Advisory Panel on Occupational Health and Safety was created in 2010, in order to conduct an extensive and comprehensive review of Ontario's occupational health and safety (OHS) system and to recommend structural, operational and policy improvements to that system.

Since its inception, the Expert Advisory Panel has released annual reports to the Ontario Minister of Labour. Following a year-long review, this year's Panel, which was led by George Gritziotis, Chief Prevention Officer, has now released its report for 2013-2014.

The report highlights accomplishments made by parties across the system, including the Ministry of Labour, health and safety associations, and the Workplace Safety and Insurance Board (WSIB).

As of March 31st, 2014, 18 of the 46 recommendations originally proposed by the Expert Advisory Panel in 2010 had been completed or were ongoing. Of the highest priority recommendations, the following have been completed:

- the creation of the Prevention Office (being a Chief Prevention Officer and a multi-stakeholder Prevention Council);
- the mandatory posting of a health and safety awareness posters in all Ontario workplaces;
- the expedition of the resolution of reprisal complaints under the *Occupational Health and Safety Act*, as well as increased access to information and support for complainants;
- the provision of mandatory, online health and safety training for all supervisors; and
- the establishment of a vulnerable worker task group and a small business task group.

In addition, the Panel reports the entire OHS system is now focusing on addressing the hazards that result in the most occupational injuries, illnesses and fatalities.

The Panel's report states that, from 2003 to 2013, 15 percent of all allowed traumatic workplace fatality claims arose due to falls to a lower level. In response, the Ministry of Labour has developed an integrated action plan to prevent falls from heights. Part of this plan includes the release of a proposed Working at Heights Training Program Standard, which contains rigorous standards for workers who work in this high-risk field. The Ministry is currently conducting consultations regarding the Program, as well as a proposed regulation that would make the Program mandatory in the construction sector.

The Panel's annual report also states that, from 2011 to 2013, the WSIB reported 48 allowed traumatic and occupational disease fatality claims from Schedule 1 mining employers while, during the same period, the Ministry of Labour recorded 80 critical injuries in underground mines. The Ministry, along with mining stakeholders and an industry advisory group, has therefore undertaken a comprehensive review of emerging occupational health and safety issues that relate to mining. Following 12 public consultations, the receipt of over 60 written submissions, and the creation of a number of working groups, a final report is expected in early 2015.

Employers need to stay apprised of all occupational health and safety requirements, including those currently in place,

as well as those likely to become law in the near future. Given the emphasis placed on occupational health and safety across the entire OHS system, employers must expect to be subject to harsh penalties for any instances of non-compliance.

Legislative Update: Leaves to Help Families Now in Force

In the Summer 2014 issue of EMPlawyers Update, we informed readers about Bill 21, the *Employment Standards Amendment Act* (Leaves to Help Families), 2013, which amends the *Employment Standards Act*, 2000 (*ESA*) to create family caregiver leave, critically ill child care leave and crime-related child death or disappearance leave.

Bill 21 came into force on October 29th, 2014. Accordingly, Ontario employers should promptly review their leave policies and procedures to ensure that they reflect these new, statutorily-protected leaves of absence.

Non-Continuous Service and Reasonable Notice: Cautionary Tale for Employers

In *Vist v. Best Theratronics Ltd.,* the Ontario Superior Court considered the impact of non-continuous service on the calculation of reasonable notice of termination in a non-unionized workplace. The Court held that when determining the appropriate amount of reasonable notice of termination, years of service earned prior to periods of service interruptions will be taken into account.

Margus Vist, a 54-year-old bio-physician brought an action for wrongful dismissal against his former employer, Best Theratronics Ltd. seeking damages for reasonable notice of termination.

The issue before the court was the amount of reasonable notice of termination to which Mr. Vist was entitled. The employment relationship was governed by the *Canada Labour Code*, Part III, R.S.C., 1985, c. L-.2.

The case revolves around Mr. Vist's complex employment history:

- beginning in 1988, Mr. Vist was employed by MDS Nordion and its predecessors on an on-and-off basis;
- he started at AECL's Isotope Division, later named Theratronics International Ltd., in 1988. Theratronics International was then succeeded by MDS Nordion;
- from 1993-1994 he worked for an unrelated company;
- in 1994, returned to MDS Nordion and worked there until the period of 2003-2007, during which he was a self-employed consultant to MDS Nordion;
- in 2007, he was once again an employee of MDS Nordion;
- in 2008, MDS Nordion was succeeded by Best Theratronics, where he worked until his termination.

In total, he had worked for these related companies for sixteen of the past twenty-one years.

In May 2008, Mr. Vist's employment came to be governed by a written employment contract. The contract ensured his service with the former employer would be recognized and terms and conditions of his former employment would continue. The contract did not include a termination clause.

On May 19, 2009, Mr. Vist notified Best that he wished to leave his position as General Manager and return to his prior engineering role. He received no response to his request until June 17, 2009 when Mr. Vist was handed a notice of termination. Cause for termination was not alleged; accordingly, he was provided with two weeks' pay in lieu of notice and three weeks of severance pay, which is the minimum pursuant to the *Code*.

In his wrongful dismissal suit, Mr. Vist claimed nine months of reasonable notice of termination. Best asserted that Mr. Vist's accrued continuous service with MDS Nordion and Theratronics International was only 2.5 years, thus a lengthier notice period was unmerited. Furthermore, Best argued that Mr. Vist did not attempt to mitigate his damages in a role comparable to the General Manager.

The Court held that as the contract did not include a termination clause, there was an implied term in the contract which provided that in the absence of just cause for termination, he would be provided with reasonable notice of termination or compensation in lieu of notice.

The Court addressed the issue of Mr. Vist's length of service. The Court found Mr. Vist's service at Best was interrupted for a "brief" three and a half years. The Court also found that his employment contract with MDS Nordion, which expressly recognized his service date to be January 1, 1993, and his subsequent employment contract with Best, which expressly stated: "Best Theratronics Ltd. will recognize any accrued continuous service with MDS Nordion and its predecessors" were "ambiguous".

The Court concluded that because his years of service were interrupted and the employment contract was ambiguous on the issue, the total years of service at these related employers could not be "cumulative". Rather, "some weight" would be afforded to the previous employment period and Mr. Vist would be given "some credit for his past services", and "treated as a long term employee having given sixteen years of service to the defendant and its predecessors."

In light of the foregoing, the Court determined that six months is the appropriate reasonable notice for his dismissal.

This decision informs employers governed by the *Canada Labour Code* that an employee's prior service can factor into the calculation of *reasonable notice*, potentially turning a short-term employee into a long-term employee. For the calculation of severance pay, however, twelve months of *continuous* service is required and multiple periods of employment with the same employer does not have to be considered.

Under the Ontario *Employment Standards Act, 2000*, when calculating severance pay, multiple periods of employment with the same employer must be considered regardless of the duration of interruption in service and the reasons for the interruption. For the calculation of notice of termination, however, the Courts have considered the length of service relative to the length of the interruption, representations made by the employer and any agreements on the issue.

Words on Pregnancy and Parental Benefits from the Supreme Court

The case began in February 2011 when the British Columbia Teachers' Federation filed a grievance against the Surrey School Board, which is represented at the bargaining table by British Columbia Public School Employers' Association.

In the collective agreement, the Surrey School Board benefits plan provides birth mothers, birth fathers and adoptive parents with 95% of their salary for the two-week unpaid waiting period for Employment Insurance benefits, and 70% of the difference between EI benefits and their salary for an additional 15 weeks of Supplemental Employment Benefits (SEB).

The SEB plan had been interpreted and applied to disallow birth mothers to SEB during their parental leave if they had already been paid out the two-week unpaid waiting period and 15 weeks of SEB during the period of maternity leave.

The Federation argued that the SEB plan was discriminatory against mothers because it failed to provide supplemental employment benefits during their parental leave which was paid out to the birth fathers and adoptive parents.

In April 2011, Arbitrator Hall concluded that the SEB plan, as it applied to parents claiming benefits from the point of pregnancy, breached the substantive equality rights of birth mothers under s. 15(1) of the *Charter of Rights and Freedoms* and s. 13(1) of the British Columbia *Human Rights Code,* and could not be justified under s. 1 of the *Charter* or s.13(4) of the *Code.*

The Federation's grievance was upheld and the parties were ordered to engage in a new round of bargaining to work towards remedying the unequal treatment of birth mothers.

The Employer appealed the decision to the B.C. Court of Appeal. In September 2013, the Court of Appeal ruled that the arbitrator had erred and dismissed the Federation's grievance on the basis that there was no unequal treatment of birth mothers concerning SEBs because:

- Both birth mothers on maternity leave and persons on parental leave were entitled to the same 15 weeks of SEB as well as payment for a two-week period before statutory benefits became available.
- Both forms of leave relate to the occasion of an addition of a new member to a family unit.
- Both types of leave are conducive to the societal purpose of the enhancement of family health and stability.

Accordingly, the Court of Appeal concluded that these leaves had the same common underlying purpose and were treated equally.

The Union appealed this decision to the Supreme Court of Canada. The main issue being whether failing to provide birth mothers with supplemental parental benefits above and beyond maternal leave was discriminatory.

On November 14, 2014 the Supreme Court issued a brief oral decision from the bench simply stating, in full:

> "The Court of Appeal erred in failing to give deference to the Arbitrator's interpretation of the collective agreement and in failing to recognize the different purposes of pregnancy benefits and parental benefits. The Arbitrator was entitled to reach the conclusions that he did and we see no reason to interfere with the remedy. The appeal is allowed with costs and the Arbitrator's award is restored".

This decision is worthy of note for employers in Ontario who have similar language in their collective agreements and benefits plans providing SEB. Employers should ensure that the right to SEB during parental leave is equally afforded to birth mothers, birth fathers and adoptive parents to avoid allegations of discrimination.

Firm Announcements

The Firm welcomes our new Associate, Marie-Michèle Pellerin-Auprix. Marie-Michèle recently completed her articles and has been called to the Bar.

We are proud to announce that our Partner, Annie G. Berthiaume, has been appointed as Vice-Chair to the Canadian Industrial Relations Board effective January 2015.