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LAWYERS FOR EMPLOYERS

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Offer Letter Now, Employment Contract Later? Court of Appeal Shows that this Approach can Cost Employers

In *Holland v. Hostopia.com Inc.*, 2015 ONCA 762, the employer did what many well-meaning but busy employers do when hiring a new employee: provide a bare-bones offer letter, and follow up with a more detailed employment agreement once the employee has settled in. However, as the Court of Appeal ruled in Mr. Holland's case, when key terms and conditions are introduced only after an employee has started work, the employer may be unable to rely on them, and costly common law notice of termination requirements may apply.

Mr. Holland was hired by Hostopia as a National Accounts Manager. At the time of hiring, he signed a written offer of employment ("the offer letter"), which contained a statement that he would later be required to sign an employment contract ("the employment agreement"). He was also presented with a Code of Business Conduct and a Proprietary Rights Agreement, the latter of which containing non-competition and non-solicitation provisions. Neither document, however, dealt with termination or notice periods.

Nine months after starting work, Mr. Holland was presented with the anticipated employment agreement, which he signed. The employment agreement provided:

- termination would be by notice in accordance with the *Employment Standards Act, 2000* (*ESA*),
- a recital that the agreement was made "in consideration of the Employee's employment by Hostopia and the compensation paid to the Employee from time to time while so employed", and
- two terms that varied the period of the non-competition and non-solicitation clauses contained in the Proprietary Rights Agreement.

After seven years, Hostopia found that Mr. Holland's sales performance was poor. Notwithstanding its allegations of poor performance, the employer terminated him on a without cause basis, and paid him an amount equal to his entitlements under the *ESA*. Unsatisfied with this sum, Mr. Holland sued Hostopia for wrongful dismissal.

In addition to claiming damages based on common law reasonable notice, the employee also claimed damages for lost commissions. During employment, Mr. Holland's commission entitlement had been governed by a Non-Salary Compensation Memorandum, which stated that he was entitled to commissions if he attained certain sales figures, as well commissions on revenue that was "booked" by the employer on his client accounts. At the time of termination, Mr. Holland had been finalizing an agreement with a potential new customer. Although the account was not formalized until eight months after his termination, Mr. Holland sought damages for the commissions associated with that account as well.

When the trial judge dismissed Mr. Holland's action for wrongful dismissal and upheld the employment agreement that limited his damages to the minimum amounts set out in the *ESA*, Mr. Holland appealed the decision to the Court of Appeal.

Enforceability of the Employment Agreement:

Regarding whether the employment agreement limited Hostopia's liability on termination to the *ESA* minimums, the Court of Appeal found that the employer was out of luck.

Mr. Holland was employed pursuant to the offer letter for some nine months before he signed the employment agreement. Since there were no terms in the offer letter explicitly limiting his entitlements on termination to the *ESA*-provided statutory minimums, it was an implied term of the offer letter that Mr. Holland was entitled to common law reasonable notice.

The employment agreement then introduced a new, inconsistent term: notice on termination would be limited to the minimums contained in the *ESA*. As the employee had not previously consented to this term, and had received no new consideration in exchange for his agreement to it, the Court of Appeal found that the term could not be upheld. The Court disagreed with the trial judge, and found that the offer letter and employment agreement were **not** two interrelated elements of the same agreement; rather, the latter was a new agreement that required fresh consideration. As the Court stated, "Without fresh consideration, the Employment Agreement could not displace the implied term of reasonable notice contained in the Offer Letter."

Finding that the appropriate range of damages for an employee in Mr. Holland's position was eight to twelve months, the Court of Appeal decided not to interfere with the trial judge's decision that, in the event the employment agreement was unenforceable, damages in the amount of eight months' notice would be appropriate.

Entitlement to Commissions:

While the Court of Appeal held that Mr. Holland was entitled to be compensated for the commissions he would have been paid in the ordinary course of employment during the reasonable notice period, it upheld the trial judge's finding that Mr. Holland was not entitled to commission with respect to the new client account he had been working on at the time of termination, for the following reasons:

1. although he was the lead person on the new account, he did not find the new client; rather, he had worked with a large team of employees,
2. Mr. Holland's argument that he had obtained a "deal in principle" prior to his termination was not borne out by the evidence,
3. Mr. Holland's contribution to the new deal was assessed as a maximum of 15 percent, while the work done by other employees after his termination was much more significant, and
4. Hostopia had not terminated Mr. Holland for the purpose of avoiding paying commissions on the new deal.

In the end, the appellate court allowed Mr. Holland's appeal and awarded him eight months' reasonable notice, including all salary, commission and bonuses he would have received during that time (less amounts already paid by Hostopia and mitigation earnings accrued during that period).

This decision demonstrates that, although important, a carefully drafted employment contract alone may not be enough to protect the employer on termination: both the timing of the introduction of the contract and the provision of appropriate, fresh consideration as required are vital in order to ensure that the employment contract will be enforceable. Specifically, new employees should sign their employment contract ***before*** *their first day at work, and be provided with ample time to read the agreement and seek legal advice. Bird Richard can assist employers in drafting and implementing employment contracts, both for new hires and existing employees.*

Ontario Human Rights Tribunal Finds Employer Properly Required Employee to Undergo IME

In *Bottiglia v. Ottawa Catholic School Board*, 2015 HRTO 1178, the Human Rights Tribunal of Ontario ("the Tribunal") considered whether the employer failed to fulfil its duty of accommodation by requiring an employee to participate in an independent medical examination (IME).

Marcello Bottiglia was a Superintendent of Schools for the Ottawa Catholic School Board ("the Board") with over 30 years' seniority. Having accumulated 465 days of paid sick leave, and having been diagnosed with unipolar disorder, Mr. Bottiglia had been off work on paid sick leave for almost two years. In February 2012, he confirmed to his employer that he was unable to return to work, and his recovery would take a prolonged period of time. In June 2012, Mr. Bottiglia's doctor wrote to the Board, reiterating that he was unable to return to work and that a return at that time might place him at a serious risk of relapse. In August 2012, however, the Board was advised that Mr. Bottiglia would be able to return to work on a limited basis sometime in the next two months. The evidence demonstrated that this anticipated return to work corresponded with the time by which Mr. Bottiglia's sick leave and vacation credits would be entirely depleted.

Mr. Bottiglia's proposed return to work plan involved him initially working for only eight hours per week with no evening meetings, as well as a work hardening process that would take six to 12 months to complete, with no guarantee he would return to full time duties during that period. Given its concerns with this proposal and the timing of his return to work, the Board requested that Mr. Bottiglia undergo an IME. The employee opposed the request for an IME, arguing that, if the employer wanted more information, it should have taken a less intrusive step, such as conferring with his family physician. IMEs, Mr. Bottiglia argued, are intrusive, subject to abuse, and should be used only as a last resort.

When the Board refused to return him to work without an IME, Mr. Bottiglia brought an application before the Tribunal, alleging discrimination on the basis of disability. Specifically, he alleged that the Board had failed to accommodate his return to work by not participating in the process in good faith, not accepting his initial return to work proposal, refusing to confer with his doctor, failing to hold a return to work meeting, requiring him to participate in the IME, and then compromising the examiner's impartiality.

The Tribunal dismissed the application and found it was reasonable for the Board to require the employee to undergo an IME in order for it to meet its obligations to appropriately accommodate him. The Tribunal found that the Board had *bona fide* reasons to question the adequacy and reliability of the information provided to it; in particular:

- the employee's medical condition and ability to return to work, given the significant and unexpected changes in the employee's stated ability to return, and the tentative and uncertain prognosis given by his physician,
- the adequacy and appropriateness of the employee's proposed return to work plan, given the nature of the proposed accommodation, the employer's experience with work hardening, and the essential duties of a superintendent, and
- the fact that the Employee's proposed return to work after an absence of over two years coincided with the end of his paid leave.

The Tribunal went on to find that the Board acted in good faith throughout the accommodation process overall, and that its efforts to meet its procedural duties to accommodate the employee were reasonable.

The Tribunal added the caveat that an employer may request that an employee undergo an IME only in the rarest of circumstances, but that this case fell well within those parameters.

This decision confirms that, although rare, circumstances do exist where employers may legitimately require employees to undergo an IME. When an employee submits inconsistent information, multiple return to work dates, or requests for accommodation that do not suit their particular functions in the workplace, the Tribunal may find that an IME is not inconsistent with the duty to accommodate.

Ontario Human Rights Tribunal Upholds Termination of Employee who Failed to Provide Medical Support for Absence

In *Hitchcock v. Lafarge Canada Inc.*, 2015 HRTO 1296 (CanLII), the Human Rights Tribunal of Ontario reiterated the limits on the employer's duty to inquire regarding an employee's disability and need for accommodation, and the corresponding obligation on employees to keep their employers informed.

Stanley Hitchcock was a "Ready Mix" truck driver with three years' service with Lafarge Canada Inc. He had a history of absenteeism and discipline. After he left work midway through his shift, his plant manager telephoned him to remind him that he would need a medical note to support his absence. Mr. Hitchcock replied that his doctor was on vacation for three weeks. The plant manager then requested a meeting with the employee, during which he was given a

three-day suspension for being absent without authorization, as well as a letter stating that he was required to provide a physician's certificate substantiating his absence. In the letter, he was also advised that, if the requested information was not received by the deadline (being approximately one week after the absence), he would be considered to have abandoned his position, and his employment would effectively be terminated.

Unbeknownst to Lafarge, and completely unrelated to Mr. Hitchcock's employment, on the day by which he was supposed to have provided his physician's certificate, Mr. Hitchcock was arrested by police and taken into custody.

Since the employee thus had not provided medical evidence to support his absence from work by the stated deadline, he was terminated by letter the following day.

Mr. Hitchcock filed an Application with the Tribunal, in which he alleged discrimination in employment on the basis of disability. Particularly, he alleged that Lafarge had failed to accommodate his disability, an alleged kidney stone condition, by failing to accommodate his disability-related absence, placing unreasonable requirements on him regarding the provision of medical documentation in relation to that absence, and ultimately terminating his employment.

The Tribunal found that, while kidney stones constitute a disability within the meaning of the *Human Rights Code*, it was unclear whether this disability gave rise to an actual need to be absent from work on the day in question. Even assuming Mr. Hitchcock did have a disability-related need to be absent, the Tribunal found that the duty to accommodate did not arise in this case, as the employer **was not reasonably aware** that there was a need for accommodation: Mr. Hitchcock did not tell the plant manager he had kidney stones, nor did he request any form of accommodation or make any disability-related needs known.

With respect to the termination of employment, the Tribunal concluded that disability was not a factor. The Tribunal found that Mr. Hitchcock's employment was terminated, not because he had a (potentially) disability-related absence, but rather because the employer had not been able to reach him to see whether he had obtained a medical note, given that the employee was in police custody. Accordingly, Mr. Hitchcock was found to have abandoned his position, and his application to the Tribunal was dismissed.

Mr. Hitchcock then filed a request to the Tribunal to exercise its discretion to reconsider its own decision, arguing that the Tribunal had been influenced by irrelevant and prejudicial information about his arrest, and that Lafarge had not met its duty to inquire. In this case, however, the Tribunal found that the employee did not meet the threshold criteria justifying reconsideration.

After dismissing the allegations that the evidence surrounding his arrest was prejudicial, the Tribunal considered the extent of an employer's duty to inquire into an employee's medical condition and need for accommodation. The Tribunal confirmed its earlier ruling, stating:

> In my view, the present case is quite different from cases where an employer is aware, or reasonably ought to be aware, that there may be a relationship between an employee's disability and performance, and makes an adverse decision based on performance without inquiring into the possible relationship between the employee's disability and performance. […]
>
> In the present case, the Tribunal found that it was not clear that the applicant had a disability-related need to be absent from work […], but that, if he did, the respondents would not have reasonably been aware that he had any disability-related needs requiring accommodation.[…] and he was not able to communicate with them about the requirement to provide a medical note for his absences, because he was in police custody, and not for any reasons related to disability. The applicant was deemed to have abandoned his position, after he was absent and did not reasonably communicate with the respondents.

This decision provides guidance with respect to the limits of the duty to inquire about an employee's illness or injury, and the importance of the employee's role in providing adequate information regarding her or his disability when requesting accommodation.