BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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Termination of Older and Long Term Employees – 24 Months Reasonable Notice of Termination

In *Stephanie Ozorio v. Canadian Hearing Society*, the Ontario Superior Court of Justice concluded that Ms. Ozorio was wrongfully dismissed and was entitled to receive 24 months' payment of salary and benefits.

The employer, the Canadian Hearing Society, terminated Ms. Ozorio without notice. Ms. Ozorio had worked for the Society for 30 years, was 60 years old and had held the position of "Regional Director" for approximately 11 years.

Upon termination, the Society originally offered a "voluntary separation offer" of $93,000, less than her annual salary, in exchange for a Release. The employee declined the offer and the employer counter-offered with 12 months' pay and limited contribution to her benefits. The employee refused the second offer and the employer chose to pay Ms. Ozorio her regular salary for the minimal 34 week period for statutory termination and severance pay in accordance with the *Employment Standards Act, 2000* (ESA).

On a motion for summary judgment, it was determined that Ms. Ozorio was wrongfully dismissed. Given Ms. Ozorio's age and likely disadvantage in a competitive labour market, and her comparatively high position within the employer, the Court set the reasonable notice period at 24 months, less the amount already paid by the employer under the *ESA*.

This decision confirms an ongoing trend by courts to award significantly higher levels of reasonable notice of termination (to a maximum of 24 months) to employees who are long tenured and are aged 60 or older. Courts routinely conclude that these employees will have significant difficulties in finding alternative employment. Since the elimination of mandatory retirement at age 65, these situations arise frequently. Employers should consider taking proactive steps when ending the employment of older employees to assist them in finding employment, such as outplacement services and counselling.

Bonuses are Owed during the Notice Period

In two decisions issued on the same day, *Lin v. Ontario Teachers' Pension Plan* and P*aquette v. TeraGo Networks Inc.*, the Ontario Court of Appeal held that terminated employees could claim unpaid bonuses as part of the damages in their wrongful dismissal claims.

The employment agreements included terms which required the employee to be actively employed in order to receive their bonuses. In *Paquette*, the bonus program provided that an employee must be "actively employed by TeraGo on the date of the bonus payment."

In *Lin*, the relevant provisions of the bonus plans provided:

> In the case where a Participant resigns or the Participant's employment is terminated by [Teachers'] prior to the payout of a bonus (normally the first pay period in April), no bonus shall be earned by or payable to the Participant.

In both instances, the employees had been terminated before the bonus payout; however, the court found that the bonus payment dates would have fallen within the reasonable notice period.

In *Paquette,* the motion judge rejected the claim for damages for lost bonus payments on the basis of the contract language. Mr. Paquette appealed, arguing that he was also entitled to receive his bonus for the year.

In *Lin*, the trial judge included Mr. Lin's yearly bonus payment as part of the damages. The employer appealed, on the basis of the contract language which required that the employee be in "active employment".

In both decisions, the Ontario Court of Appeal stressed that the role of damages in wrongful dismissal claims was to place the claimant in the same financial position he would have been in had he been given proper notice of the termination of his employment. The Court found that had the terminated employees been given proper notice they would have been "actively employed" at the time of bonus payouts. Both employees were awarded the bonus they would have earned during the period of reasonable notice.

Employers can set criteria for eligibility for payment of bonuses which excludes employees who have been terminated with or without cause from the bonus plan even if the payout takes place during the notice period. In order to do so, the bonus plan must clearly outline the eligibility criteria to ensure this result. The use of "active employment" or "actively employed" are not

sufficient to achieve this goal. Further, these plans must be carefully drafted to avoid any contravention of an employer's obligations pursuant to the Employment Standards Act, 2000.

Further, where operationally feasible, employers may wish to consider providing periods of working notice to address the higher notice period entitlement.

Fixed-Term Contracts – Getting It Right

In *Joss Covenoho v. Pendylum*, the Ontario Court of Justice determined that the termination provision in the fixed-term contract properly limited the employer's liability upon termination.

The employee was hired by Pendylum Inc. through a one year fixed-term agreement. Pendylum informed its employees that it was introducing mandatory education and criminal background checks and that their employment would be terminated if they refused to provide their consent. Ms. Covenoho refused to provide her consent and was terminated after less than three months of employment with Pendylum.

The employee claimed she was entitled to damages for the remainder of the term of the agreement.

The agreement between the parties stated:

2.1 The term of this Agreement will commence on the date of this Agreement and will continue in full force and effect unless the Agreement is terminated as follows:

(a) immediately by PENDYLUM providing written notice to you if you violate or fail to honor any of these provisions of this Agreement or fail to perform your duties as set out in Appendix A in a satisfactory manner as determined by PENDYLUM (known as Cause); or if the PENDYLUM Client to which you have been contracted terminate[s] its contract with PENDYLUM for your services; OR

(b) by either party providing written notice of at least two (2) weeks to the other.

2.2 In the event of termination, we will have no liability to you, save and except to pay any accrued and earned compensation up to and including the date of termination.

2.3 Upon termination or expiration of the agreement, you agree to return and/or destroy all confidential information and copies and sign an undertaking that all Confidential Information has been returned and/or destroyed.

The Court held that the language in this employment contract expressly provided for early termination and that the employee was not entitled to be paid out for the remainder of the term. Furthermore, as Ms. Covenoho had been employed for less than three months, she was not subject to the notice provisions under the *Employment Standards Act*.

Fixed-term contracts can expose employers to significant awards of damages when the contract is for multiple years of employment and does not provide for an early termination clause. Employers must also be careful to enter into successive fixed-term contracts year after year. Fixed-term employment agreements must be carefully drafted based on the particular circumstances of the employment relationship and to ensure that the employer can end the contract prior to the end of the term with limited liability to the terminated employee.

A Non-Competition Clause Disguised as a Non-Solicitation Clause

In *Donaldson Travel Inc. v. Murphy*, the Ontario Court of Appeal found that a clause that appeared to be a non-solicitation clause was, in practice, a non-competition clause.

The clause at issue provided as follows:

> *The [personal respondent] agrees that in the event of termination or resignation that she will not solicit or accept business from any corporate accounts or customers that are serviced by [the appellant], directly, or indirectly.*

Murphy was employed by Donaldson as a travel agent for a period of approximately 8 years. She resigned from her employment and began to work for a competing firm. Donaldson commenced an action against Murphy and her new employer which claimed that:

1. Murphy had actively solicited customers of Donaldson;
2. the new employer knew or ought to have known that Murphy's solicitation was a breach of her contractual obligation to Donaldson and a misappropriation of its confidential information;

3. the new employer's inducement and participation in Murphy's breaches constituted a wrongful interference with contractual relations; and
4. the new employer had acquired the business of four of Donaldson's clients as a result of these breaches.

The new employer and Murphy brought motions for summary judgment dismissing the action against them. Both actions were dismissed by the motion judge.

On appeal, the Court of Appeal upheld the motion judge's finding that the use of "accept business" in the restrictive covenant transformed the non-solicitation clause into a non-competition clause which was an unreasonable restraint against Murphy. Further, as the clause did not contain either a geographical or a temporal limit on the obligations imposed on Murphy, the Court of Appeal found no basis on which to interfere with the motion judge's conclusion that the clause was unreasonable and therefore unenforceable.

As for the misappropriation of confidential information issue, the Court of Appeal concluded that the employer's evidence failed to demonstrate that the departed employee shared information that had a "quality of confidence" with her new employer. As a result, the Court ruled that there was also no evidentiary basis to conclude that the new employer had induced a breach of contract or the disclosure.

Restrictive covenants are an essential tool for employers who have business interests to protect. As demonstrated over the past two decades, courts will closely scrutinize these restraints of trade to ensure that they balance the rights of the employer to protect its proprietary interests and the employee's ability to make a living. The use of template or boilerplate restrictive covenants will often result in the employer losing all protection against departing employees. Restrictive covenants must be drafted on a case-by-case basis to maximize the chances of successfully protecting an employer's proprietary interests.

Upcoming Seminars

HRPA 2016 Ottawa Law Conference

Thursday, October 27, 2016
9:00 a.m. to 4:00 p.m.

Ottawa Conference and Event Centre,
200 Coventry Road, Ottawa

Caroline Richard will be participating as a panelist at the Conference and discussing what is legally required in relation to return to work protocols for an injured or disabled employee.

To register, please visit HRPA's website at:

https://www.hrpa.ca/professional-development/conferences

The *Accessibility for Ontarians with Disabilities Act (AODA)* – Are you Compliant?

Tuesday, November 22, 2016
9:00 a.m. to 10:00 a.m. – Presentation with Q & A to follow

The Shaw Centre,
55 Colonel By Drive, Ottawa

Registration, networking and complimentary breakfast commence at 8:30 a.m.

To register, please contact Tanya Howlett at: thowlett@birdrichard.com

Navigating the Hiring Minefield

February 2017

The Shaw Centre,
55 Colonel By Drive, Ottawa

Navigating the Termination Minefield

April 2017

The Shaw Centre,
55 Colonel By Drive, Ottawa

Firm Announcement

Bird Richard is pleased to welcome our newest Associate, Nigel McKechnie, who joins the Firm this fall. Nigel has recently provided labour and employment law advice and representation to clients as an associate lawyer and completed his articles at local Ottawa boutiques specializing in labour and employment law. Fluently bilingual, Nigel brings to the Firm a broad range of labour and employment law expertise.