BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

Bird Richard
130 Albert Street, Suite 508
Ottawa, Ontario K1P 5G4
T 613.238.3772
F 613.238.5955
www.LawyersForEmployers.ca

Three Months' Service Employee Entitled to Damages for the Entire Duration of Fixed-Term Contract

In *Ballim v. Bausch & Lomb Canada Inc.*, the Ontario Superior Court of Justice determined that Samina Ballim was wrongfully dismissed by her employer, Bausch and Lomb Canada Inc., on the basis that she was terminated before the expiration of the term of her fixed-term contract of employment.

Ms. Ballim discussed the possibility of employment as a Sales & Trade Marketing Coordinator with Bausch and Lomb Canada Inc. to replace an employee who was going on maternity leave. She was ultimately selected for the job and received an offer by email. In the email containing the offer, the employer stated "It is a one year contract. You will receive benefits."

Just over a month after commencing her employment, the employee requested a month-long compassionate care leave. The employer granted the leave, but terminated her employment without cause upon her return to work. At the time of her termination, the employee had three months' service and the employer paid one weeks' notice under the *Employment Standards Act, 2000* (ESA) in addition to two weeks' pay on a gratuitous basis.

By way of summary judgment, the Court had to determine whether the employee was employed on a fixed-term or indefinite basis. In holding that she was a one-year fixed-term employee, the Court reasoned:

- the email to which the offer was attached constituted part of the employment contract as it was a representation by the person with the authority to make the offer to induce Ms. Ballim to accept the position;
- the email stated that it was a one-year contract;

- the offer indicated that the employment is on a "contract basis", and that the employee's bi-weekly remuneration will be in 26 installments;
- there was no mention in the employment agreement and covering email of maternity leave or that the contract could be terminated earlier with or without notice; and
- there was no "entire agreement" clause in the employment agreement.

The Court held that such a fixed-term contract obligated the employer to pay the employee until the end of the term and that this obligation was not subject to mitigation of damages. The employer was ordered to pay the employee 38.5 weeks' pay and benefits representing the balance of the one year contract. The employee was also awarded her costs.

Fixed-term employment contracts can be a solution to fill short-term positions however; they must be carefully drafted in the event that the Employer wishes to terminate the contract prior to the end of its term. The inclusion of a clear termination clause in the contract would have led to a different conclusion in this case.

Decision to Dismiss Discrimination Complaint of Employee was Unreasonable

In *Dupuis v. Canada (Attorney General)*, the Federal Court granted the Application for Judicial Review of a Canadian Human Right's decision to dismiss the employee's complaint alleging discrimination on the basis of disability.

Mr. Dupuis was employed in the Public Service of Canada since 1988. For the first few years of his employment with Statistics Canada, Mr. Dupuis' was at the SI-02 classification, his performance was satisfactory and he was fulfilling all his duties. In 2000, he was promoted to the position of Information Technology Officer at the SI-03 classification. In 2003, Mr. Dupuis was assigned a new supervisor who became concerned that Mr. Dupuis might be suffering from a disability that was affecting his performance.

In 2004, Mr. Dupuis was referred to Health Canada to assess whether there were any health related conditions or restrictions that were affecting his job performance. Health Canada determined that Mr. Dupuis suffered from Asperger's Syndrome. In its report to the employer, Health Canada did not identify the employee's disability by name, but stated that he suffered from a "chronic condition" that "could impact on his ability to carry out his duties in the areas of comprehension and task completion."

Health Canada also stated that Mr. Dupuis was considered fit to work but stated that certain accommodative measures could improve his work performance such as having him in a position that did not involve social demands or time pressure. Mr. Dupuis did not agree with Health Canada's Asperger's diagnosis or that he suffered from a disability but his employer nevertheless took steps to accommodate his needs in accordance with Health Canada's recommendations. Despite these accommodation measures, Mr. Dupuis continued to receive unsatisfactory performance reviews.

In 2005, in a follow-up report, Health Canada made additional recommendations which included that Mr. Dupuis may benefit from a consultant coming into the workplace to assist with his reintegration.

Between 2005 and 2008, Mr. Dupuis was assigned reduced tasks ranging from the SI-03 to SI-01 levels, as well as additional training and supervisory support, but no consultant was retained to assist him. During this period, his performance reviews continued to record his performance as being unsatisfactory. At this point, Mr. Dupuis was informed that he must improve his job performance within the next three months, or he would be demoted or terminated.

Beginning in August of 2008, Mr. Dupuis was slowly assigned duties at the CR-04 level, for which he was given satisfactory job performance reviews. As a result, he was demoted to the CR-04 level and was given these tasks to perform on a full-time basis. However, Mr. Dupuis did not report for work in his new position and went on medically-approved stress leave instead.

In 2011, he filed a complaint with the Canadian Human Rights Commission (CHRC), claiming that Statistics Canada had discriminated against him on the basis of his disability, and that it failed to properly accommodate him. Upon his return to work in 2012, Mr. Dupuis was assigned an occupational consultant with experience working with persons with Asperger's to assist him in integrating into the workplace in his new position at the CR-04 level.

The CHRC dismissed Mr. Dupuis' complaint as the evidence indicated that Statistics Canada had implemented the accommodation measures recommended by Health Canada, and had attempted to accommodate Mr. Dupuis in his SI-03 position for several years before moving him to a position that met his medical restrictions. The CHRC also noted that Statistics Canada had made a reasonable offer of settlement during the conciliation process.

The CHRC concluded as a result that no further inquiry into Mr. Dupuis' human rights complaint was warranted.

The Federal Court stated that it was clear that Statistics Canada did not follow all of Health Canada's recommendations and concluded that the CHRC's decision lacked the justification, transparency and intelligibility necessary to be reasonable on the following basis:

1. Statistics Canada never hired an expert to assist it in accommodating Mr. Dupuis in his SI-03 position. Retaining the services of an expert would not have caused Statistic Canada undue hardship. The CHRC investigator never addressed Statistics Canada's failure to hire a consultant to assist it in accommodating; he simply concluded that Statistics Canada had done everything that it could to try to accommodate Mr. Dupuis' disability, without success, leaving it with no alternative but to demote him to a clerical position, three levels below his SI-03 position.
2. The CHRC investigator did not consider why Mr. Dupuis was unable to perform at the SI-02 level in a satisfactory manner when he had been able to do so some years before. Consequently, the Court was unable to determine whether the requirements of the job had changed, whether Mr. Dupuis' condition had deteriorated, or whether there was some other impediment to his being able to meet the requirements of his job.

The decision dismissing Mr. Dupuis' complaint was set aside and the matter remitted to the CHRC for further investigation.

Bird Richard will keep readers apprised of developments in this matter.

This decision demonstrates that the Federal Court will intervene in cases where the CHRC has chosen not to proceed any further with a complaint where its decision does not address all the outstanding issues with respect to the accommodation measures sought by the employee and recommended by a physician (in this case, Health Canada).

It is important to note that the Court did not rule on whether the employer had failed to accommodate the employee but rather, remitted the decision back to the CHRC on the basis that its decision lacked transparency and justification. After another review of the evidence, the CHRC may come to the same conclusion, or choose to refer the matter to the Canadian Human Rights Tribunal for a hearing on the merits.

$50,000.00 in Punitive Damages Awarded to Dismissed Employee for Breach of the Duty of Good Faith

In *Morison v. Ergo-Industrial Seating Systems Inc.,* the Ontario Superior Court found not only that the Plaintiff was wrongfully dismissed, but that the employer had made allegations of just cause with no reasonable support in order to improve its negotiation position.

The Plaintiff was a 58-year old regional manager who had been in the employ of the Defendant, a furniture manufacturer, for just over 8 years. In October 2012, he was called into the owner's office and dismissed from employment. He was offered five months' notice of termination, of which one month was working notice. The dismissal letter presented to Mr. Morison contained allegations of just cause for termination. Following the termination, the employer delayed in providing the Plaintiff with his record of employment and paying him amounts owing under the *Employment Standards Act, 2000.* The Defendant paid these amounts in June, 2015; some 2.5 years later. Mr. Morison brought a suit against the employer claiming not only damages for wrongful dismissal, but aggravated and punitive damages for the employer's conduct.

The Court found that given the Plaintiff's age, position, and length of service at the time of dismissal, the Plaintiff was entitled to 12 months' notice of termination. In assessing whether aggravated damages were available, the Court commented that in order to grant aggravated damages, the Plaintiff had to prove actual damages resulting from the manner of dismissal. On this point, the Court found that the Plaintiff's evidence was limited to ordinary pain, distress and financial stress associated with job loss, which are not compensable by way of aggravated damages.

The Court had little difficulty in finding that punitive damages were warranted. In assessing punitive damages, the Court considered the employer's conduct and made the following findings:

- Although the employer initially alleged just cause, its conduct was wholly inconsistent with such allegations, which generally involve conduct egregious enough to cause a breakdown in the employment relationship;
- The inconsistency was incompatible with the Employer's handbook, which stated that dismissal for cause involves a situation where continuing the employment relationship is untenable;
- The employer alleged poor performance, failing to meet sales targets and not addressing concerns about a particular account; however, it was essentially admitted by the Defendant at trial that the Plaintiff was one of the Defendant's top performers;
- Alleging cause was an integral part of the Defendant's negotiation strategy;
- The employer intentionally delayed in paying the Plaintiff amounts owing under the *Employment Standard Act, 2000* in order to put financial strain on the Plaintiff.

The Court found that the employer's allegations of cause, in the absence of supporting evidence, were "a classic example of bad faith" and that its conduct was malicious, oppressive and highhanded. The Court awarded Mr. Morison $50,000 in punitive damages in order to punish the Defendant and serve as retribution, deterrence and denunciation.

An employer will expose itself to punitive damages where it makes just cause allegations without clear and cogent supporting evidence. Further, the intentional delay or failure to pay the minimum entitlements pursuant to the Employment Standards Act, 2000 is also a tactic which can lead to a significant penalty for the Employer. These types of damages may be easily avoided by obtaining legal advice prior to effecting the termination to ensure that there is sufficient evidence to support a termination for cause.

Duty to Accommodate does not include a "duty to allow an employee not to work", Court holds

In *Ontario Public Service Employees Union v. Ontario (Children and Youth Services)*, the Divisional Court upheld the decision of the Ontario Grievance Board. The Board held that the employer had not breached its duty to accommodate the employee's disability when it terminated his employment on the ground of innocent absenteeism.

Mr. Bartolotta, who worked as a youth services officer, suffered from a chronic degenerative back condition that could flare up without warning. When his condition flared up, he was unable to work. When the condition was passive, he was fully capable of performing his duties. Mr. Bartolotta's average rate of absenteeism was 35%, amounting to more than 70 absences per year.

The employer made various accommodation proposals to Mr. Bartolotta who, in turn, rejected the proposals because there were no workplace barriers to his ability to work. Rather, the issue was the largely unpredictable nature of his condition which required him not to work during flare ups. The employer ultimately terminated Mr. Bartolotta's employment on the ground of innocent absenteeism.

In holding that the employer had met its duty to accommodate, the Board held that:

- the employer's duty to accommodate does not include a duty to allow the employee not to work;
- the goal of accommodation is to ensure that an employee who is able to work can do so; and
- the purpose of the duty to accommodate is not to completely alter the essence of the employment contract, that is, the employee's duty to perform work in exchange for remuneration.

The Divisional Court dismissed OPSEU's Application for judicial review on the basis that the Board's decision was reasonable and further added that the duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future. The Court also awarded the employer its costs.

This decision sheds some light on the breadth of an employer's duty to accommodate where an employee cannot perform his job due to innocent absenteeism. Although this case comes from a unionized environment, the principles enumerated therein stem from a judgment of the Supreme Court of Canada and may be applicable to non-unionized employers as well. When confronted with a case of innocent absenteeism due to disability, employers have a duty to accommodate; however, where there is medical confirmation that the employee will not be able to work on a regular and reliable basis in the foreseeable future, the duty will likely not extend to require the employer to tolerate excessive absenteeism.

Legislative Update

Amendments to the *Canadian Human Rights Act* and the *Criminal Code* will create protections based on gender identity or expression

On May 17, 2016, Bill C 16 – *An Act to amend the Canadian Human Rights Act and the Criminal Code* passed first reading in the Senate. The federal Bill proposes amendments to the *Canadian Human Rights Act*, which seeks to extend equal opportunities in employment and provision of services, without hindrance from discriminatory practices based on prohibited grounds. The proposed amendments would see the inclusion of "gender identity or expression" as a further prohibited ground. Gender identity is defined by the Ontario Human Rights Commission as being each person's internal sense of being a woman, a man, both, neither, or anywhere along the gender spectrum.