BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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Conduct Aimed at Forcing a Resignation – Court Awards Damages against the Employer

In *Bovin et al v Over the Rainbow Packaging Services Inc.*, 2017 ONSC 1143, the Superior Court of Justice sent a clear warning to employers who employ bad faith tactics aimed at forcing employees to quit.

Ms. Bovin and Ms. Sidhu began their employment with the Defendant, a packaging company, in 1997. Ms. Bovin was a General Manager/Controller and Ms. Sidhu was a Supervisor. In the spring of 2016, one of the Defendant's principals, Mr. Gill, told Ms. Bovin the company would wind down and be reincorporated into a new business. He asked her for a $100,000 investment. When she declined, Mr. Gill asked if she would accept a pay cut of 33%. Ms. Bovin said she would take only a 5% pay cut.

Concerned about liability, Mr. Gill set in motion a campaign of harassment to make Ms. Bovin and Ms. Sidhu quit. Mr. Gill told Ms. Bovin that she was overpaid and would have to start "at the bottom" when the corporation wound down; began sitting in her office and staring at her while she worked; disclosed her salary to the other employees at the company; and threatened her with legal action if she, herself, failed to take legal action against poorly performing employees.

As for Ms. Sidhu, Mr. Gill blamed her for issues relating to old machinery; made unfounded complaints about her work; told her she would no longer be paid for her lunch break, and, for the first time in twenty years' service, told her she would be required to maintain a time card. Mr. Gill also gave some of Ms. Sidhu's responsibilities to his daughter, who had less than a year's experience at the company. The employer unilaterally decreased Ms. Bovin's and Ms. Sidhu's salaries by 40%. Ms. Bovin and Ms. Sidhu protested and eventually resigned; claiming constructive dismissal.

The Court had no difficulty in finding that the Plaintiffs had been constructively dismissed due to the employer's disrespectful, demeaning and harassing conduct. The Court awarded each Plaintiff 24 months' pay in lieu of notice and Ms. Sidhu $13,325.00 in damages for unpaid overtime. The Court also awarded each Plaintiff $15,000 in moral damages on the basis that the employer's conduct was designed to humiliate the Plaintiffs.

This decision confirms that conduct designed to make the workplace unbearable amounts to a constructive dismissal. In addition, where employers have used bad faith tactics designed to humiliate an employee into quitting, courts will award additional damages to compensate the employees for the unlawful conduct.

Supreme Court of Canada will not hear the Appeal of the 'Curative' Clause

In our summer 2016 edition of EMPLAWYERS' Update, we reported on *Oudin v Centre Francophone de Toronto*, in which the Ontario Court of Appeal upheld a termination clause, despite finding that some of its provisions violated the *Employment Standards Act, 2000* ("*ESA*"). On February 2, 2017, the Supreme Court of Canada dismissed the employee's Application for Leave to Appeal.

As you may recall, the employee, Mr. Oudin, brought an action against his former employer, Centre Francophone de Toronto, for wrongful dismissal and argued that the termination clause in his employment contract was unenforceable as it did not provide for the minimum statutory entitlements set out in the *ESA*.

The Ontario Superior Court of Justice and the Court of Appeal determined that the termination clause was valid in light of other language contained in the employment agreement stating that, in the event that a term of the contract violated the *ESA*, the term would either be modified to render it compliant or excised completely while leaving the remainder of the contract intact:

> If any of the provisions of the present agreement is invalid or unable to be performed by virtue of any law, regulation, order or any other requirement or other principle of law, this modality shall in such case be considered to be modified or nullified, but only to the extent necessary to comply with the statute, regulation, order, legal requirement or principle and the other dispositions of the present agreement shall remain in force.

In light of this "curative language", the Court found that there had been no attempt to contract out of the *ESA*.

The decision of the Court of Appeal can be relied upon in cases where the termination clause is deficient and there is "curative" language similar to the one found in Oudin. As of the date of the publication of this article, no courts have interpreted the impact of Oudin on employment contracts containing severability clauses; however, Bird Richard will keep you updated on whether the Courts will be inclined to uphold termination clauses in the future where this type of "curative language" is present.

Supreme Court to revisit the Meaning of "Employment" in *Human Rights Code*

In 2014, the Supreme Court of Canada considered whether a partnership agreement constituted protected "employment" pursuant to the *British Columbia Human Rights Code* in *McCormick v Fasken Martineau DuMoulin LLP*. The Supreme Court ruled that a partnership was not "employment" and dismissed the case. On March 28, 2017, the Supreme Court will once again have occasion to consider the scope of "employment" in *British Columbia Human Rights Tribunal v Edward Schrenk*.

The Complainant was an engineer who worked for Omega, an engineering firm. At the construction site, Edward Schrenk, the foreman of the project's contractor, Clemas, allegedly made discriminatory comments to the Complainant, a Muslim man, such as "You're not going to blow us up with a suicide bomb are you?"; "f*** muslim piece of shit"; and "go back to your mosque where you came from", among other insults. The Complainant made a complaint to Clemas and Mr. Schrenk was dismissed from employment.

The Complainant then filed a complaint with the British Columbia Human Rights Tribunal alleging discrimination in employment by Mr. Schrenk, and that his conduct was condoned by Clemas and the owner of site. Mr. Schrenk and Clemas contested the Tribunal's jurisdiction to hear the Complaint and asserted that because the Complainant was not an employee of Clemas, but an employee of Omega, Mr. Schrenk's conduct did not amount to "discrimination in employment" within the meaning of the *Code*. The Tribunal sided with the Complainant and found that the *Code* encompasses protection for all discrimination regarding employment. The British Columbia Court of Appeal reversed the Tribunal's decision and found that the Complainant did not stand "in such a relationship to the appellant [Schrenk and Clemas] that the appellant [Schrenk and Clemas] was in a position to discriminate against him with respect to employment".

In Ontario, the Human Rights Tribunal has also had occasion to examine the scope of the employment relationship in *Di Muccio v Newmarket*. In that case, the complainant, a City Counsellor, alleged sexual harassment and reprisal in employment against the Town and other members of

Council. The Tribunal dismissed Ms. Di Muccio's application, finding the applicant's relationship with the Town and her dispute with the other Members of Council was not "with respect to employment." Key to the Tribunal's determination was its finding that, as an elected official, the City did not hire and could not fire her or the individuals on Council she alleged were discriminating against her.

The Supreme Court's eventual ruling on this point could have far-reaching consequences for employers. Should the Supreme Court uphold the Complainant's interpretation of "employment," employers could effectively be required to respond to and defend discrimination complaints from not only their own employees, but individuals with whom some nexus can be drawn to employment. We will advise readers of the outcome of this appeal once the Supreme Court of Canada releases its decision.

Divisional Court sets aside an Award of Aggravated Damages

In *Walker v Hulse, Playfair and McGarry*, 2017 ONSC 358, the Ontario Divisional Court set aside an award of aggravated damages stemming from a wrongful dismissal lawsuit brought in the Small Claims Court.

In December 23, 2013, the Plaintiff was suspended with pay while the employer, a local funeral home, conducted an investigation into inappropriate comments and failure to complete assigned tasks. Upon the Plaintiff's return to work, he was presented with a dismissal letter stating that despite having grounds for termination for cause; the Plaintiff was being terminated without cause. The employer paid the Plaintiff two weeks' pay in lieu of notice in accordance with the *Employment Standards Act* ("*ESA*").

The Plaintiff sued his former employer for wrongful dismissal, mental distress, aggravated damages, punitive damages and intentional infliction of mental suffering in the amount of $25,000 (the limit in the Small Claims Court). Among his claims, the Plaintiff asserted that, despite his contract limiting entitlement to the minimum standards pursuant to the *ESA,* he was entitled to reasonable notice of termination at common law. At trial, the Small Claims Court held that the Plaintiff's termination entitlements were governed by his employment contract which lawfully limited his notice upon termination, to the *ESA*. The Plaintiff's claims save and except an award of $5000 in aggravated damages, were dismissed by the Court. The Court's reasons for the award were the following: "There was no cause for dismissal, but in the termination letter it was threatened; if no release was signed, the plaintiff would be terminated for cause and would receive no severance pay." As the termination was without cause, the Court found that the termination letter gave rise to aggravated damages.

On appeal to the Divisional Court, the Divisional Court reiterated the Supreme Court of Canada's view that aggravated damages are appropriate "where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive." In this case, the Divisional Court found that the employer had not done anything that would allow the trial judge to establish a claim for aggravated damages. Relying on the appellate authority which stated that where cause is alleged, but not ultimately proven, aggravated damages are inappropriate unless the employer had no reasonable basis on which to ground a dismissal for cause, the Divisional Court allowed the employer's appeal and dismissed the Plaintiff's claim.

When terminating an employee, employers must remain vigilant to avoid conduct that can be construed as untruthful, misleading or unduly insensitive. This case exemplifies however that employers are entitled to allege cause and then abandon this assertion, so long as there is some reasonable basis for the allegation. In the absence of a reasonable basis to allege cause, employers may well find themselves defending claims for aggravated damages.

Court of Appeal Clarifies issue of Benefit Provisions in Termination Clauses

In its long awaited decision in *Wood v Fred Deeley Imports Ltd.*, 2017 ONCA 158, the Court of Appeal for Ontario struck down the following termination clause, finding that it constituted an attempt to "contract out" of the *Employment Standards Act, 2000*:

> [The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph…. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000.

The Plaintiff, Julia Wood, started working for the Defendant, a motorcycle distributor, in December 2007. In April 2015, the Defendant was bought out by Harley-Davidson Canada. As a result, the Defendant dismissed all of its employees effective December 4, 2015. At termination, the Plaintiff was earning approximately $100,000 annually and was 48 years of age. The Defendant gave the Plaintiff 13 weeks' working

notice and an additional payment equivalent to eight weeks' pay, for a total notice of 21 weeks' pay.

The Plaintiff sued the Defendant and brought a motion for summary judgment, asking the Court to find the employer's termination provision unenforceable because it did not provide for benefit continuance through the notice period; a violation of the *Employment Standards Act, 2000*. The motions judge pointed out that even though the clause did not refer to the employer's obligation to continue its contributions to the employee's benefit plans during the notice period, it did not expressly contract out of this obligation. The motions judge stated that if he had found the clause unenforceable, he would have awarded the Plaintiff nine months' pay in lieu of notice.

The Plaintiff appealed to the Court of Appeal for Ontario. The Court of Appeal allowed the Plaintiff's appeal and found that the clause constituted an attempt to contract out of the obligation to pay benefits through the notice period. In particular, the Court found the termination clause used language that excluded the obligation to pay benefits because the payments to be made were "inclusive" of her entitlements under the *ESA*. Deferring to the motions judge's finding respecting pay in lieu reasonable notice, the Court of Appeal awarded the Plaintiff nine months' pay, plus her legal costs.

Setting aside termination clauses on a summary judgment motion has been a trend in employment law for the past three years. The Court's reasons in in Wood v Fred Deeley provide a measure of clarity regarding similar termination clauses. A termination clause need not refer to benefits to be enforceable, though the obligation to provide payment of monies in lieu of notice to a departing employee cannot "include" payment of benefits through the notice period. Employers must be vigilant in ensuring the enforceability of their termination clauses, for the consequences of having a Court set them aside can be very costly.

Termination was Discriminatory as "Ultimate Reason" of Employee's Dismissal

In *Ben Saad v 1544982 Ontario Inc.*, the Human Rights Tribunal of Ontario determined the termination of Ben Saad, the employee, was discriminatory on the basis of his disability.

Mr. Saad and three Tunisian friends came to Canada in June of 2014 on a work permit to work as welders for Windsor Management, the employer. On November 4, 2014, Mr. Saad injured himself when a closing rolling steel door struck him in the head. Mr. Saad submitted a medical note on November 10, 2014 stating that he was seen for trauma to the head and a compressed fracture of the lumbar spine and that he would be unfit for work for one week, and then would return to modified duties. Upon his return to work, he was given light work in the assembly department but his supervisor pressured him to return to normal duties up until the time of his termination. On December 23, 2014, the employee submitted two medical notes; one stated that he was unfit for work for two days and the other stated that he was to continue doing modified duties for two months until cleared by his neurosurgeon.

Mr. Saad was terminated on February 6, 2015 because of a reduced cap on the Temporary Foreign Workers Program and because the employee was at the bottom of the seniority list. The employee claimed he was terminated on the basis of disability and ethnic origin.

The Tribunal concluded that the employer discriminated against Mr. Saad on the basis of disability when it terminated his employment, but that he had failed to establish that ethnic origin was a factor in his termination. In its reasons, the Tribunal considered:

- Notes from a January 26, 2015 human resources meeting which stated:

  We now have an access [*sic*] of welders at WinMan. We can reduce foreign workers by 3. Naim, Dali and Neji [*sic*] are on the top of the list due to lack of skill, poor attitudes, and very poor attendance.

  For the Tribunal, this human resources memo made it clear that the employee was dismissed because of his attendance. The internal human resources memo was inconsistent with the employers' explanation that the employee was terminated solely because he was at the bottom of the seniority list.

- The other two employees hired at the same time as the applicant were not terminated, which supported the Tribunal's finding that the ultimate reason the respondent elected to terminate the applicant was his attendance record, which was as a result of his injury and resultant disability.

The Tribunal further noted that, even if there were other reasons for the termination (which it concluded there were not), the fact that there may have been other reasons did not preclude a finding of discrimination.

This decision reiterates that termination decisions will be highly scrutinized by courts and tribunals and the fact that there may have been other legitimate reasons to discharge an employee (in conjunction with a prohibited ground) may not preclude a finding of discrimination.