BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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Arbitrator upholds Decision to fire Employee for Failing to Follow COVID-19 Rules

In the recent decision, *Garda Security Screening Inc. v IAM, District 140 (Shoker Grievance)* [2020] O.L.A.A. No. 162, an employee's employment was terminated due to the failure to follow the employer's COVID-19 rules. The employee signed a statement, annually, confirming she was aware of the employer's Code of Ethics and that she understood that a breach of the Code could result in discipline.

In response to the pandemic, the employer communicated guidelines of the Public Health Agency of Canada to its employees. The guidelines required employees to isolate while waiting for the results of a lab test for COVID-19. The employee was not to report to work if they had gone for a test and were awaiting the results. The grievor denied that she was aware of the requirement, but both the employer and union acknowledged that the employees were made fully aware of this requirement.

On April 12, 2020, the employer was informed by the employee that she had tested positive for COVID-19. The grievor was tested on April 6, 2020, and was informed that she was positive on April 12, 2020. Following an investigation, the employer determined that the individual had gone for a test on April 6, 2020, and returned to work following the test claiming that she did not feel sick, contrary to the requirement to isolate following a test. The grievor argued that she was not aware of the requirement to self-isolate following a COVID-19 test and believed that because she did not feel sick, she could return to work.

The grievor's employment was terminated on April 23, 2020 for failing to follow the COVID-19 guidelines. The employer took the position that the grievor was aware of the requirement to isolate after being tested for COVID-19 and that she recklessly disregarded these important safety guidelines. In

addition, her actions jeopardized the health of co-workers and the travelling public since she worked at an airport. She grieved the termination of her employment.

The Arbitrator determined that the grievor was aware of the public health guidelines and that it was clear that she was required to isolate while awaiting COVID-19 test results. Specifically, the actions of the grievor were a clear violation of the employer's Code of Ethics and public health guidelines. The fact that she did not feel sick was irrelevant. She chose to put others at risk of illness or death and disregarded a clear rule that required her to isolate. The grievance was dismissed.

Breach of health and safety rules have always been taken seriously by Arbitrators when considering appropriate discipline, especially when the consequences are so serious. This case provides an example of a breach of COVID-19 protocols. Interestingly, the media coverage of COVID-19 and its seriousness, in addition to the well-known consequences, were factors for the arbitrator in concluding that the grievor must have known the tremendous risk that she was placing others in by returning to work after a test and after experiencing symptoms that led her to get a test. It is important to communicate clear rules and guidelines to employees – if they are sick or have been tested, employees should be prohibited from coming into the workplace.

Please contact one of our lawyers if you would like us to review your current COVID-19 rules and procedures.

Federally Regulated Employee Bypasses Release – Don't Settle for 90 days!

In *Bank of Montreal v. YanPing Li,* the Federal Court of Appeal recently ruled that an employee who falls under the jurisdiction of the *Canada Labour Code* (the "*Code*") may file an unjust dismissal complaint under section 240 of the *Code,* despite having reached a settlement with her former employer to pay her a lump sum payment in exchange for a signed release.

Ms. Li, worked for Bank of Montreal for almost six years. She was terminated from her employment on March 29, 2017, and was given the option of either remaining on the payroll for a period not exceeding 18 weeks or accepting a lump sum payment. She accepted the lump sum payment. She signed a settlement agreement and Release on May 27, 2017 which released the employer from any and all claims arising out of the termination of her employment. The wording from the release stated the following:

> *[T]he Employee hereby releases and forever discharges BMO, its subsidiaries, affiliates, and successors and each of their respective officers, directors, employees, and agents from any and all actions, causes of action, claims, demands and proceedings for whatever kind of damages, indemnity, costs, compensation, and any other remedy which Employee or Employee's heirs,*

administrators or assigns had, may now have, or may have in the future arising out of Employee's employment or the termination of that employment.

Despite this settlement, and presumed finality of the matter based on the language above, the employee filed the unjust dismissal complaint on September 27, 2017.

Under section 240, an employee is entitled to file a complaint under the *Code* if they have 12 months of employment and they are not a member of a collective agreement. **The complaint must be filed within 90 days.** The matter will then be adjudicated to determine whether or not the complaint is justified or not. If the adjudicator determines that the employee was unjustly dismissed, the adjudicator can then order that the person be reinstated, or alternatively, be paid compensation. This could obviously have a significant impact on an employer who has settled with an employee after terminating them without cause.

The Adjudicator concluded that she had jurisdiction, despite the settlement between the parties, to consider the unjust dismissal complaint. In taking jurisdiction, the adjudicator considered subsection 168(1) of the *Code* which effectively removed the adjudicator's discretion if the complaint was made in a timely manner as required by the *Code:*

"This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part."

On judicial review to the Federal Court, the Federal Court upheld the decision. That decision was appealed further to the Federal Court of Appeal. The Federal Court of Appeal also rejected the Bank's appeal. Specifically, it noted that subsection 168(1) of the *Code* states that Part III applies notwithstanding any contract to the contrary, unless the contract is more favorable to the employee than the rights granted to the employee under the regime.

Of note is that the employer made a compelling policy argument that allowing such a ruling would result in employers not trying to settle before the 90-day period in order to bring a complaint, as it would deprive employees of this settlement leverage. The Court disagreed, and stated that it was up to Parliament to legislate the changes needed. As of writing, leave to the Supreme Court of Canada was dismissed.

For employers who have employees that fall under the Code, this decision should be followed carefully as entering into a settlement in advance of the 90-day period could result in increased damages being awarded in front of an adjudicator if the 90-day period has not yet elapsed.

Supreme Court Clarifies Requirements to Limit Bonus Entitlement upon Termination

In a recent decision from the Supreme Court of Canada, *Matthews v. Ocean Nutrition Canada Ltd.,* the Court clarified the applicable test for limiting an employee's bonus on their termination.

The trial judge concluded that Ocean Nutrition had constructively dismissed Matthews, and that Matthews was entitled to pay in lieu of notice of a 15-month notice period. He was also awarded damages equivalent to what he would have received under Ocean Nutrition's long-term incentive plan (LTIP), which provided for a substantial payment upon the sale of the company. The company was sold 13 months after the Plaintiff's termination, within the notice period. The trial judge concluded that the Plaintiff would have received this payment and that the LTIP did not unambiguously limit or remove his common law right to damages, and awarded damages of $1,086,893, equivalent to what he would have received had he been employed at the time to the termination.

The Nova Scotia Court of Appeal affirmed that he was constructively dismissed and agreed with the 15-month notice award, but held that the Plaintiff was not entitled to damages related to the LTIP. The Court of Appeal relied on the qualification language contained in the LTIP, and in particular, that his entitlements under the LTIP ceased at the moment he left Ocean Nutrition, concluding that the disentitling language in the LTIP was plain and unambiguous.

At the Supreme Court, the Court reviewed the terms of the LTIP. The Supreme Court, noted that because of the wording of the plan, and the fact that he was entitled to reasonable notice of 15 months, there was no question about whether he was entitled to the bonus or not. The question was whether or not the language found in the LTIP was sufficient to unambiguously limit or remove the employee's common law rights. The terms of the plan considered were as follows:

2.03 CONDITIONS PRECEDENT:

ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.

2.05 GENERAL:

The Long-Term Value Creation Bonus Plan does not have any current or future value other than on the date of a Realization Event and shall not be calculated as part of the Employee's compensation for any

purpose, including in connection with the Employee's resignation or in any severance calculation.

The Supreme Court noted that in order to remove an employee's common law right to damages as a result of his constructive dismissal, the language has to be very specific. At paragraph 66, the Court stated:

> *…where a clause purports to remove an employee's common law right to damages upon termination "with or without cause", such as clause 2.03, this language will not suffice. Here, Mr. Matthews suffered an unlawful termination since he was constructively dismissed without notice. As this Court held in Bauer v. Bank of Montreal, [1980] 2 S.C.R. 102, at p. 108, exclusion clauses "must clearly cover the exact circumstances which have arisen". So, in Mr. Matthews' case, the trial judge properly recognized that "[t]ermination without cause does not imply termination without notice" (para. 399; see also Veer v. Dover Corp. (Canada) Ltd. (1999), 120 O.A.C. 394, at para. 14; Lin, at para. 91). Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as "terminated" until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee's common law entitlement.*

For the purpose of calculating damages, the Supreme Court reiterated that the contract is not terminated until the end of the notice period expires. In this case, and despite eligibility language in section 2.03 which required the employee to be a "full-time employee", this language was not specific enough to clearly and unambiguously deny the Plaintiff a common law entitlement to damages for the LTIP arising from an unlawful termination.

In addition, the Supreme Court stated that clause 2.05 did not have the effect of limiting the entitlements of the employee either. The clause refers to "severance calculation" but this language was not specific enough to remove entitlement for the LTIP payment. For example, severance pay and damages arising from the LTIP are distinct legal concepts and significantly greater precision was required to restrict common law damages including specific language restricting LTIP payments during a reasonable notice period.

Therefore, employers should carefully review existing bonus plans or LTIP plans which provide for active employment as a precondition for entitlement or clause that purport to limit entitlements beyond the last day of employment. While the Supreme Court has certainly left the door open for employers to implement contract clauses which limit an employee's entitlements to bonus payments during a reasonable notice period, that language must be very clear, specific and unambiguous.

Ontario Increased Minimum Wage on October 1, 2020

As of October 1, 2020, the general minimum wage increased across Ontario to **$14.25** per hour. Other categories of workers also increased as follows:

Student Minimum Wage	Individuals who are below the age of 18 who work 28 hours a week or less.	$13.40 per hour
Liquor Servers Minimum Wage	Applies to individuals who serve liquor directly to customers, guests, members or patrons in licensed premises and who regularly receive tips or other gratuities as part of their work.	$12.45 per hour
Homeworkers Wage	Employees who do paid work from their **own homes.** This includes students who are employed as homeworkers under the age of 18.	$15.70 per hour

According to the Ministry of Labour website, "homeworkers" are employees who do paid work out of their own homes for an employer (for example, online research, preparing food for resale, sewing, telephone soliciting, manufacturing, word processing).

Due to the pandemic, many employees are now working from home and may fall under the "homeworker" category. If these employees were being paid minimum wage previously, employers should ensure that the increased and applicable minimum wage is being paid to these employees. Please do not hesitate to contact us if you have any questions about the appropriate rate of pay required to comply with these statutory requirements.