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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Update: Stay-at-Home Order, Emergency Declaration and School Closures in Ontario

The government of Ontario has declared a third state of emergency as of April 8, 2021 in response to the rapid increase of COVID-19 in our community. Effective 12:01 a.m. on April 9, 2021, the government issued a province-wide Stay-at-Home Order which requires everyone to stay home except for essential purposes. This is in addition to other restrictions that are in place.

All employers are asked to make every effort to allow employees to work from home if possible. Employees are allowed to leave their homes for work if the nature of the individual's work requires attendance at the workplace, as determined by the employer. Thus, despite the Stay-at-Home Order, an employer is entitled to determine whether an employee must attend the workplace, subject to the other restrictions, such as the closure of in-person dining at restaurants for those in restaurant businesses.

As a result, many employers may be required to implement additional layoffs or measures reducing or eliminating hours of work. As a result of Regulation 228/20 relating to Infectious Disease Emergency Leave, if an employee's hours have been temporarily reduced or eliminated by the employer for reasons related to COVID-19 (between March 1, 2020 and July 3, 2021), the employee is deemed to be on Infectious Disease Emergency Leave (IDEL) under the Ontario *Employment Standards Act, 2000*. This regulation provides employers with protection against allegations of constructive dismissal if a leave of absence is necessitated by virtue of this pandemic. Importantly, this protection is currently set to expire on July 3, 2021, although it has been extended on several occasions. It is important for employers to keep an eye on this date to avoid allegations of constructive dismissal resulting from leaves of absences that are imposed beyond July 3, 2021.

An employee is also entitled IDEL if it is necessary for the care for a child that must stay home due to the school closures. It is important to recall that this leave is job-protected statutory leave and therefore, an employer is not permitted to engage in any reprisals associated with such a leave and is entitled to reinstatement at the conclusion of the leave. Please contact us if you have any questions about an employee's leave entitlements under the *Employment Standards Act, 2000.*

What impact does the Pandemic have on Reasonable Notice? Should CERB Payments be Deducted from a Damage Award?

In a February 9, 2021 decision, *Iriotakis v. Peninsula Employment Services Limited,* the Ontario Superior Court of Justice considered the impact of the pandemic on a reasonable notice period.

The employee was terminated without cause on March 25, 2020 from his position as the Business Development Manager. The position was a sales position. He earned a base salary of $60,000 per year, but with commissions he earned more than $145,000. He was 56 years of age at the time and had been employed for 28 months. His employment was governed by the terms of an employment agreement, but the termination clause was not enforceable as it provided for less than required by the *Employment Standards Act, 2000.* He was paid 4-weeks base salary and benefits after being terminated. He secured alternative employment seven months later.

The Court considers age, length of service, character of employment, the availability of similar employment and mitigation efforts in determining an appropriate reasonable notice period. In many cases, the length of service has been the most influential factor often resulting in the range of one month period year of service. In this case, the employer submitted that the reasonable notice period ought to be in the range of 2-3 months.

The employee in this case asserted that he was entitled to receive at least six (6) months of notice on the termination of his employment, in part, due to his inability to find alternative employment as a result of the pandemic. Given the timing of the termination in March 2020, the Court acknowledged that the pandemic has some influence on the employee's job search. At the same time, the Court noted that the impact of

the pandemic on the job market was highly speculative and that the principle of reasonable notice is not a "*guaranteed bridge to alternative employment*." The Court also guarded against applying hindsight to a reasonable notice assessment at the time of termination. While the Court agreed that the job market was a factor to consider, this must be balanced against the brevity of employment. The Court determined that 3 months was a reasonable notice period.

The Court also refused to offset CERB payments that were received by the employee during this period stating that it would not be equitable to do so. We disagree. CERB was specifically designed as income replacement for those impacted by the pandemic. In our view, all amounts received on account of CERB should have been deducted from the award. In respect of both the impact of the pandemic on the reasonable notice periods, and the Court's willingness to deduct CERB payments from a damage award, we expect that there will be more litigation on these subjects. We will keep you informed should more developments in these areas occur.

Court Strikes down Canada Labour Code Termination Clause

We previously wrote a blog article with respect to the decision of the Ontario Superior Court striking down a termination clause under the *Canada Labour Code* R.S.C., 1985, c. L-2. (the "*Code*"). The *Code* applies to federal works and undertakings, such as banks and shipping companies.

In *Sanghvi v. Norvic Shipping North America Inc.*, the Court has struck down yet another termination clause under the *Code*. The case involved a Senior Vice-President, whose employment was terminated as a result of a corporate restructuring. The employee had completed 3 years of employment at the time. The employment contract of the employee stated that his employment could be terminated without reason in accordance with the following conditions:

> *This contract of employment is terminable, without reasons, by either party without giving any notice during probationary period and one month notice on confirmation. The Company reserves the right to pay or recover salary in lieu of notice period. Further, the Company may at its discretion relieve you from such date as it may deem fit even prior to the expiry of the notice period.*

At the time of his termination, Mr. Sanghvi was given one month's salary in lieu of notice. The employer argued that the clause was enforceable as it provided him a greater amount than what was required under the *Code*.

Under section 230 (1) of the *Code,* an employee on termination, is required to be provided two (2) weeks' notice or two (2) weeks' wages at his regular rate of wages for his regular hours of work in lieu of the notice. Section 235 (1) of the Code also requires an employer to pay an employee who is terminated without cause severance pay calculated as the greater of (a) two days' wages for each completed year of employment or (b) five days wages. In this case, under the Code, Mr. Sanghvi was entitled to 2 weeks' wages plus an additional 6 days of severance pay. He received a month's salary, which exceeded the statutory requirement under the *Code*.

Despite this, the Court still determined that the clause was invalid because the contract set a maximum payment of one (1) month as pay in lieu of notice. The Court determined that the clause was invalid, as it did not comply with the *Code when the contract was entered into*. The possibility of a violation of the Code existed given the contract language. In particular, had he been terminated after 7 years of employment, he would have been entitled to more than a month of compensation under the Code (10 days' termination pay and 14 days' severance pay). The Court relied on the decision of *Covenohov Pendylum Ltd.,* for the legal requirement that if a clause has the *potential to conflict* with the minimum employment standards at any time after hiring, the clause is void. In this case, the employee was awarded 8-months' notice as reasonable notice.

For federally regulated employers governed by the *Code*, it is important to recognize that any contract purporting to limit statutory entitlements will be considered void. It is critically important to ensure that termination clauses are drafted in a manner that provides at least the minimum entitlements under the Code, reflective of both the notice of termination and severance pay requirements.

Does Pregnancy impact Reasonable Notice of termination? The answer is YES!

In a recent 2021 decision, *Nahum v. Honeycomb Hospitality Inc.*, the Court considered the impact of a pregnancy upon reasonable notice.

At the time of the termination without cause, the employee had been employed for just 4 months in a mid-level managerial position. She earned $80,000 per year. She was 28 years old and 5-months pregnant at the time of her termination. The employee argued that she should be entitled to 8 months' notice while the employer argued that she should be entitled to 2 months' notice. Notably, there were no allegations of discrimination on the basis of sex under the Ontario *Human Rights Code*. Rather, the argument was that she should be entitled to more notice because of the termination when she was pregnant. In other words, the employee sought to add

"pregnancy" to the list of established factors; namely, character of employment, length of service, age and availability of similar employment.

The Employer argued that an increased notice period based on pregnancy at the time of termination was problematic for several reasons.

First, that concluding pregnant people are less likely to become employed implies that future employers will violate human rights legislation in their hiring decisions. Second, that in order to reach a conclusion that pregnancy is a disadvantage in a job search; actual evidence was required beyond speculation. Third, that considering pregnancy when determining the reasonable notice period is problematic as it opens the door to the inclusion of other factors that may impact an individual's professional success.

The Court disagreed with all three points. On the first point, the Court stated that an employer may legitimately prefer a candidate who is not pregnant for a *bona fide* business reason and that preferring an employee who is not pregnant over a candidate who may require leave is not necessarily a human rights violation. On the second point, the Court indicated that a person's pregnancy is likely to increase the amount of time it will take them to find new employment in most cases, because employers want to fill a need in their organization with someone who will be present to fill that need. It was open to the Court to take judicial notice of the fact that it will take longer to find alternative employment if an employee is pregnant. On the third point, the Court indicated that nothing in the argument recognized the "*inherent barrier that pregnancy poses to most job searches*."

The Court also stated that there was no principled reason as to why, when determining the damages of a wrongfully dismissed employee, their pregnancy at the date of dismissal should not factor into the reasonable notice period when the pregnancy is likely to negatively impact their ability to find alternative employment. The end result was that the employee was awarded five (5) months of notice (more notice than her entire length of employment!). The pregnancy was a significant factor in determining the reasonable notice period resulting in a much higher notice period.

For employers, it is important to remember that while an employer is entitled to terminate an employee who is pregnant for *bona fide* business reasons, or for cause, it is crucial to have very well-documented and objective grounds to justify the termination, failing which there could be an allegation of discrimination on the basis of sex contrary to human rights legislation. A contract of employment, with a valid termination without cause provision, would have also provided some protection to the employer in this case.

Supreme Court refuses leave to Appeal from Swegon Decision

In our summer 2020 Newsletter, we reviewed a case from the Ontario Court of Appeal called *Waksdale v. Swegon North America Inc.* As you may recall, the Court of Appeal determined that notwithstanding the validity of the "without cause" provision in an employment agreement, that because the "with cause" provision was contrary to the *Employment Standards Act, 2000*, the entire contract was void. It did not matter to the Court of Appeal that the termination was without cause and cause was not an issue in the case.

On January 14, 2021, the Supreme Court dismissed the application for leave to appeal the *Swegon* decision. As such, this decision stands in Ontario and employers should carefully review existing employment agreements to ensure that *both* for cause and without cause provisions are enforceable. If you have any questions about the decision, and how it could impact your contracts, please contact one of our lawyers and we will be happy to review your existing employment agreements.