BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Summer 2021

A Quarterly Newsletter on Labour and Employment Law Issues

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

Employee Placed on COVID Leave not Constructive Dismissal, Court Reverses Earlier Ruling

Previously, we provided an e-blast on the decision *Coutinho v. Ocular Health Centre Ltd.* 2021, ONSC 3076. In that case, the Superior Court determined that an employer placing an employee on the *Infectious Disease Emergency Leave* ("IDEL"), found in O. Reg. 228/20 made under the *Ontario Employment Standards Act, 2000* (the "ESA") amounted to a constructive dismissal under the common law.

By way of background, an employee is deemed to be on IDEL leave if:

1. An employee is not represented by a trade union;
2. The employer temporarily reduces or eliminates the employee's hours of work and/or wages for reasons related to COVID-19; and
3. The temporary reduction or elimination occurs during the COVID period, which is scheduled to end on September 25, 2021.

The Regulation specifically states that a reduction or elimination in a non-unionized employee's hours and wages for reasons related to COVID-19, (1) does not constitute a layoff within the meaning of the *ESA*, and (2) does not constitute constructive dismissal. Despite these statutory provisions, the Court reasoned that the *ESA* did not displace the employee's right to pursue a *common law* claim for constructive dismissal. The Court relied on section 8(1) of the *ESA* which states that nothing in the *Act* effects an employee's right to pursue a civil remedy.

In *Taylor v. Hanley Hospitality Inc.* 2021 ONSC 3135, the Ontario Superior Court has determined that an employee placed upon IDEL is not constructively dismissed under the common law. In doing so, the Court ruled that the reasoning applied by the Court in *Coutinho v. Ocular Health Centre* was wrong and that it ignored the exceptional circumstances

created by the pandemic and the inherent unfairness for employers to face wrongful dismissal claims in the face of government declared states of emergency and forced closures.

In this case, Ms. Taylor was an employee of a Tim Hortons (Hanley Hospitality Inc.). Due to the COVID-19 emergency, Tim Hortons was required to close all of their storefronts and was limited to takeout and delivery. On March 27, 2020, Ms. Taylor was temporarily laid off from her employment and on August 18, 2020, she was advised that she was being recalled to her employment effective September 3, 2020. She claimed that the layoff was a constructive dismissal and that her employment had been terminated. She claimed that the *ESA* and IDEL provisions did not displace her common law right to pursue a constructive dismissal claim. The Court rejected her argument and in doing so, rendered the opposite decision to *Coutinho v. Ocular Health*.

In reviewing the arguments, the Court agreed with the Employer that:

- Section 8 of the *ESA* has never been interpreted to go as far as the Court did in *Coutinho* and the Court has never before held that section 8(1) prevents the *ESA* from displacing the common law;
- IDEL provides the employer with a specific statutory right to place an employee on leave for reasons related to COVID and placing an employee on this leave amounting to constructive dismissal would render the legislation meaningless;
- It is essential that the court remembers the context of IDEL and in particular, that it was enacted in response to government-imposed shutdowns necessitated by a pandemic forcing business to close or restrict its business with the specific intent to protect employers from such lawsuits; and
- The Court in *Coutinho* failed to consider and appreciate these factors, and the analysis in that decision was wrong in law.

This is a welcomed decision for employers and in our view, the correct one. It is consistent with the legislative intent of the IDEL provisions that were enacted in response to a pandemic. As the Court noted in the *Taylor* decision, the Ontario government recognized the inherent unfairness in subjecting employers to wrongful dismissal claims in the face of government-imposed closures and restrictions. While this decision is welcome news, employers should be aware that the law remains unsettled and could still face claims of constructive dismissal in response to layoffs required by the pandemic. Both decisions are being appealed, and therefore, it will be up to the Ontario Court of Appeal to resolve the matter. Employers should also be aware that the protections offered under the IDEL provisions are only in place until September 25, 2021

If you have any questions of how this decision might impact you directly, please contact us.

Alberta Court of Appeal provides Guidance on Test for Family Status Discrimination

In the decision *United Nurses of Alberta v. Alberta Health Services, 2021 ABCA 194*, the Alberta Court of Appeal reviewed the decision of *Canada (Attorney General) v. Johnstone 2014 FCA 110,* a Federal Court of Appeal decision which is the leading authority setting out the test for family status discrimination.

The central issue in the appeal was what the applicable test for *prima facie* discrimination in family status human rights cases should entail. In other words, what is the threshold required for an employee to raise family status discrimination?

In the decision on appeal, the Arbitration Board majority followed the *Johnstone* test that requires that an employee has sought out reasonable alternative childcare arrangements unsuccessfully and that the employee is unable to fulfill his or her parental obligations. Only after being unable find alternative childcare arrangements, is a *prima facie* case of discrimination made out. This decision places some onus on the employee to make reasonable efforts to find child care before claiming discrimination based on family status. This seems like a reasonable approach.

However, in this case, the Alberta Court of Appeal determined that the *Johnstone* test should not be followed. Rather, the Court followed an earlier decision from the Supreme Court of Canada, *Moore v. British Columbia,* which laid down the following 3-part test for determining a *prima facie* case of discrimination:

(1) the complainant has a protected characteristic;

(2) they experienced an adverse impact on account of the challenged norm; and

(3) the protected characteristic was a factor in the adverse impact.

The Court of Appeal indicated that the additional requirement to establish that reasonable efforts were made to find alternative childcare options puts a further burden on a family status claimant to prove an element of self-accommodation which is not present in other discrimination matters, which is inconsistent with the Supreme Court of Canada precedent.

Though this decision arises out of Alberta, it should also be noted that the *Johnstone* test has been modified by the Ontario Human Rights Tribunal in *Misetich v. Value Village Stores Inc.,* 2016 HRTO 1229, following the same logic as the Alberta Court of Appeal. As it stands in Ontario, there has not been a unifying decision from the Court of Appeal similar to Alberta. However, given this new case and the comments found in *Misetich*, it is more likely than not that the Ontario Courts will adopt the new approach.

For employers, this does not mean that efforts by an employee to find alternative childcare are not relevant; but at the stage of determining whether a *prima facie* case is established, that evidence is not required for an applicant to meet its onus. Rather, the evidence will be considered to determine whether the employee cooperated with the accommodation process. It also remains appropriate for employers to make reasonable inquiries of employees as to the steps that have been taken to secure childcare if accommodation is being requested on this basis. Employees continue to have a duty to cooperate in the accommodation process.

Requirement to Pay Severance Pay not Limited to Payroll in Ontario

Under the Ontario *Employment Standards Act,* S.O. 2000, c.41. ("*ESA*"), an employee with more than five (5) years of service and where the employer has a payroll in excess of 2.5 million dollars, that employee is entitled to severance pay upon termination from employment without cause. An issue that often arises is how to calculate the 2.5 million payroll and in particular, whether payroll for employees outside of Ontario should be included in the calculations.

In a recent decision *Hawkes v. Max Aicher (North American) Ltd.,* the Divisional Court heard an application for judicial review of an Ontario Labour Relations Board ("OLRB") decision related to this issue. The OLRB had determined the employee was not entitled to severance pay from his former employer under the *ESA,* ruling that only payroll for Ontario employees should be included in the calculation, given the scope and jurisdiction of the *ESA* which only applies to employees working in Ontario. Notably, had the Employer's global payroll been applied, it was well over 2.5 million. The employee had been employed by the employer, and its predecessors for a period for over 30 years.

On judicial review, the Ontario Divisional Court set aside the decision from the OLRB. In a scathing rebuke of the Board's decision, the Court held that the Board "*…reached a conclusion that is inconsistent with the text, context, and purpose of the provision*" and described the Board's findings as devoid of any coherent or rational analysis. The Court noted that the specific wording of section 64(2) of the *ESA* does not restrict the calculation of an employer's payroll to its payroll in Ontario. Had the legislature intended that result, the legislature could have explicitly excluded payroll outside of Ontario. The Court stated that there is no jurisdiction impediment to Ontario legislating that an assessment of payroll for the purposes of severance pay should include national or international payroll.

The Court cited the *Paquette* decision from the Ontario Superior Court of Justice. In that case, the Court determined that total payroll, including payroll outside of Ontario, should be included in the calculation. The judge in that decision reviewed other legislation in Ontario that imposed obligations related to payroll and that if the Ontario legislature intended to exclude payroll, it has done so explicitly and clearly. The Court said that while the OLRB was not bound by the Superior Court decision, it should have given it careful consideration, "*particularly in light of its careful analysis*."

The Supreme Court of Canada has stated that when interpreting the *ESA*, the protections afforded to employees should be given a broad and generous interpretation in order to extend its protections to as many employees as possible. The Divisional Court ruled that the OLRB's interpretation of the severance pay provisions, excluding payroll outside of Ontario, directly undermined that direction from the Supreme Court of Canada and that the interpretation it applied was wrong. The Divisional Court stated that the payroll exemption is to be interpreted narrowly, exempting only truly small enterprises, and that it should not to be used by larger national or multinational corporations to avoid paying severance pay to long-service employees.

For employers, the combination of the *Paquette* decision and this Ontario Divisional Court decision means that when making determinations regarding severance pay entitlements, employers should factor in all payroll for the company, including payroll outside of Ontario.

Superior Court Rules that Arbitration Clauses in Employment Contracts are Enforceable

In a recent decision, *Leon v. Dealnet Capital Corp.,* 2021 ONSC 3636, the Ontario Superior Court determined whether or not an arbitration clause contained in an employment agreement was enforceable. For employers, inserting an arbitration clause into an employment agreement is a good tool to provide some certainty and, in most cases, an arbitration can be completed much quicker and for less cost than the Court process.

However, employees often challenge these provisions after a termination and there are recent decisions confirming that any attempt to displace a statutory right under the *Employment Standards Act, 2000* ("*ESA*") including the right to make a complaint to the Ministry of Labour, will result in such a clause being unenforceable. This was the argument that was successfully made in *Heller v. Uber Technologies*, which resulted in an arbitration clause being set aside.

The Arbitrator clause was written as follows:

> *8.1 All disputes arising out of or in connection with this contract, or in respect of any legal relationship associated therewith or derived therefrom, will be referred to mediation and, if unsuccessful, finally resolved by arbitration under the statutes of the Province of Ontario (the Arbitration Clause).*

The contract also contained the following wording:

> *1.5 This Agreement will be governed by and construed in accordance with the laws of the Province of Ontario. This Agreement shall be subject to the Employment Standards Act, 2000 (Ontario), as amended or replaced. If the Employee is entitled to any rights or payments under that legislation which are not reference [sic] in this Agreement or which exceed amounts payable under this Agreement, the provisions of that legislation shall supersede the provisions of this Agreement. The failure of any provision of this Agreement to reference or acknowledge the provisions of that legislation shall not invalidate that provision (the Governing Law Clause).*

Here, the employee made the same argument in an effort to set aside the arbitration clause. However, in this case, the Master disagreed, noting that in *Uber,* the clause contained a choice of foreign law provision which completely ousted the jurisdiction of the *ESA* in its entirety. In this case, the clause was distinguishable from the *Uber* clause because the arbitration clause had to be read in conjunction with clause 1.5 as set out above, which specifically preserved all statutory entitlements under the *ESA*. The Master noted that the employment agreement expressly preserved the rights provided under the *ESA* and did not foreclose the employee from making a complaint to the Ministry of Labour. Thus, the arbitration clause was valid.

Following *Uber* decision, there was some concern about the enforceability of any arbitration clause in an employment agreement, but the Superior Court has determined that arbitration clauses are still valid provided they do not oust the *ESA*. We have previously written newsletter articles on the decision of *Heller v. Uber Technologies* which was brought all the way to the Supreme Court, you can read the commentary on that case by using the following URL: http://lawyersforemployers.ca/wp-content/uploads/2020/07/Bird-Richard-Newsletter-Summer-2020.pdf If you have any questions about arbitration clauses in your contracts or want to include an arbitration clause in your employment agreement, please give us a call and we can provide you with more details about the pros and cons of an arbitration clause.