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LAWYERS FOR EMPLOYERS

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Divisional Court Overturns Decision by HRTO Allowing Discrimination Claim on the Basis of Permanent Residence

The recently released decision of *Imperial Oil Ltd. v. Haseeb,* [2021] O.J. No. 2998 from the Divisional Court of Ontario, judicially reviewed the decision of the Human Rights Tribunal of Ontario (HRTO), which determined that an individual could claim direct discrimination based on permanent residency.

As part of its recruitment program, Imperial Oil decided only to make job offers for entry-level project engineer positions to candidates who were eligible to work in Canada on a permanent basis.

The employee was a student at McGill University and wished to work in the energy sector. He was not a permanent resident, or a Canadian Citizen. He held a visa as an international student which permitted him to work on a full-time basis in between semesters.

The employee was told in advance of the policy that Imperial only hired employees who were able to work in Canada on a permanent basis. On the recruitment forms, the employee answered yes to all questions related to whether he was able to work in Canada on a permanent basis.

It was later determined that he was not able to work in Canada on a permanent basis, as he was not a permanent resident or a citizen.

At the HRTO, the employee argued that section 5(1) of the Ontario *Human Rights Code* applied, and that the requirement that he be at least a permanent resident was discriminatory, as it fell under the enumerated ground of "citizenship" found in that section. The HRTO agreed, and found that Imperial Oil had discriminated against the employee on the basis of citizenship.

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On judicial review, the Divisional Court disagreed. It indicated that there was no direct discrimination in respect of the enumerated ground of citizenship under section 5(1) as permanent residence is not the same as citizenship. It noted that that there is a difference between the meaning of "citizenship" and "permanent resident" under the *Immigration and Refugee Protection Act* that could not be ignored. The word "citizenship" means Canadian citizenship, and the word "permanent resident" means a person who has acquired permanent resident status and has not subsequently lost that status.

A key example used by the Divisional Court in section 43 highlights its reasoning:

> *To my mind the distinction between "permanent residence" as a separate ground for discrimination, incorporated into citizenship, as opposed to being a benefit that comes with citizenship, but is otherwise available, is demonstrated by the following hypothetical. If a Canadian citizen resident in Detroit (just over the Canadian border) was refused employment by Imperial Oil in Windsor, because he or she was not permanently resident in Canada would he or she be able to claim discrimination based on "citizenship". Presumably not. This points out that "permanent residence" is not a ground for discrimination fully encompassed within "citizenship". It has an independent and separate standing. Again, it could be circumscribed such that it is the source of "indirect" or "constructive discrimination" but cannot stand on its own as "direct discrimination". In short, permanent residence is not a ground of discrimination and there is nothing in the plain and ordinary meaning of the applicable words that would make it so.*

The Divisional Court has highlighted that direct discrimination based on the status of permanent residence is not protected by the *Ontario Human Rights Code,* and is not subsumed by the words "citizenship" found in section 5(1) of the *Code*.

Does the COVID-19 Pandemic Impact Reasonable Notice for Employees?

In the recent decision of *Kraft v. Firepower Financial Corp.*, 2021, ONSC 4926, an employee was terminated by the employer without cause. He sued for pay in lieu of notice, commissions, bonuses, holiday and vacation pay.

The employee was a specialized commissioned salesperson working in the investment field and focused on mergers and acquisitions. He sought salary in lieu of notice equal to 10 months of salary.

The employee's employment was terminated at the onset of COVID-19 in March 2020, within days before the declared emergency. The employee argued that the pandemic seriously impacted his ability to find new employment. The employee in this case had a job search that lasted 13 months, where he applied to over 70 jobs.

The employer argued that there was no reason to take account of the economic shutdown because of the pandemic, as the employee was dismissed before the Ontario government issued its emergency orders, and so any argument about the COVID-19 pandemic should not be given any weight.

The Court disagreed, and indicated that because the Plaintiff was terminated during the second week of March 2020, and that the economy was shutting down and remained closed during the employee's prolonged job search it impacted him finding a job. It further noted that there was uncertainty in the economy and the job market and fewer employers were looking to fill positions.

The Court determined that a reasonable notice period based on his age, tenure, character of employment and availability of similar employment was in the range of 9 months, but the Court specifically added a month due to the pandemic, awarding the employee 10 months of reasonable notice. At paragraph 22 the Court specifically states that with respect to the pandemic and reasonable notice period:

> *As indicated, there is evidence that the pandemic impacted on the Plaintiff's ability to secure new employment. In light of that evidence, he deserves to receive at least somewhat above the average notice period.*

While other decisions in the past year have danced around the subject of whether or not they would consider the pandemic to increase the reasonable notice period, this appears to be the first decision that definitively provides a pandemic bump up to the reasonable notice calculation. At the same time, in this case, there was evidence supporting the challenges faced by the employee due to the pandemic. This was also a unique case due to the timing of the termination at the very outset of the pandemic which is a distinguishable factor.

If you have any questions about this decision, and how it may impact your business, please give us a call.

Infectious Disease Emergency Leave and Worker Income Protection Benefits Extended

On September 16, 2021, the Ontario government announced that it would extend the temporary measures found in O. Reg 228/20 Infectious Disease Emergency Leave (IDEL). The extension is to end on **January 1, 2022.** The government has also extended Ontario's Worker Income Protection Benefit ("WIPB") which provides employees with up to 3 days of paid leave because of certain reasons related to COVID-19 until **December 31, 2021.**

The result of the extension is that non-unionized employees who are subjected to IDEL because the employer reduced or eliminated their hours will continue to be deemed to be on IDEL. As indicated in our previous newsletters, employees who are subject to IDEL due to a reduction of hours or elimination of hours due to COVID-19, are deemed to be on IDEL leave (not temporary layoff) and shall not considered to be constructively dismissed under the *Employment Standards Act* (the "*ESA*").

It is also important to note that in recent decision from the Ontario Superior Court (*Taylor v. Hanley Hospitality Inc., 2021 ONSC 3135*), the Court confirmed that an employee properly placed on IDEL leave pursuant to the terms of the *ESA* is not constructively dismissed under the common law. This case is being challenged to the Ontario Court of Appeal, and therefore, the issues surrounding constructive dismissal under the common law arising from reductions of hours, pay and necessary layoffs due to COVID-19, remains to be fully determined.

Ontario Superior Court distinguishes *Swegon*

As many of our readers are aware, since the decision in *Waksdale v. Swegon North America*, where the Ontario Court of Appeal determined that because a just cause termination provision provided a lower threshold than the Ontario *Employment Standards Act, 2000*, that the entire termination clauses were void including without cause provisions, employers have been scrambling to amend employment contracts.

Thankfully, in the recent decision of *Rahman v. Cannon Design Architecture Inc.,* 2021 ONSC 5961, the Court determined whether the following termination clause was valid. The contract confirmed that upon termination without cause, the employee would receive not less than:

> *"advance notice and/or applicable payments, benefits continuation, and severance pay if applicable, equivalent to the minimum applicable entitlements contained within the Ontario Employment Standards Act, 2000, as amended, or any applicable successor legislation" and*
>
> *"for greater certainty, Cannon Design's maximum liability to you for common law notice, termination pay, benefits continuation, severance pay, or payment in lieu of notice shall be limited to the greater of the notice required in your Officer's Agreement or the minimum amounts specified in the ESA."*

The employee sought legal advice, and was specifically given advice on the termination clause. The counter proposal made by the employee and her lawyer was that notice of one month per year of service should be provided in exchange for a full release in the event of a termination by the company.

The employer created an enhanced benefit and provided for two months' notice in the event of termination within the first five years, conditional on receipt of a release. The Court determined that these represented a material improvement in excess of the *ESA*.

The employee, relying on the Court of Appeal decision in *Swegon*, argued that the termination provisions of her employment agreement were void because the just cause provision violated the minimum standards set out in the Ontario *Employment Standards Act, 2000*. The clause provided that "*CannonDesign maintains the right to terminate your employment at any time and without notice or payment in lieu thereof, if you engage in conduct that constitutes **just cause** for summary dismissal*." At first glance, the clause is the same that led the Court in Swegon to set aside the entire contract because it failed to provide for the higher standard of "***willful misconduct, disobedience or willful neglect of duty***" as required by the *ESA*.

The Court disagreed with the employee that the strict construction approach taken by the Court of Appeal in *Swegon* had to be taken in every case. The Court distinguished *Swegon*, indicating that in this case:

1. The termination provisions were freely negotiated with independent legal advice between reasonably sophisticated parties without any marked disparity in bargaining power;
2. The negotiations resulted in material improvements for the benefit of the prospective employee in excess of ESA minimums; and

3. The offer letter contains an explicit "for greater certainty clause" recognizing that the employer's maximum liability for common law notice was limited to the greater of notice required in the agreement and the minimum amounts specified in the ESA.

The Court correctly points out that if employers are uncertain as to the application or enforceability of freely negotiated agreements, employers will forego any severance benefits beyond the *ESA* minimums for fear that any attempt to provide something greater at the time of termination will be found invalid resulting in common law liability. Despite the apparent logic of this decision and enforceability of the termination without cause provision, the reasoning here is difficult to reconcile with the Court of Appeal decision in *Swegon*. We will keep you notified if there is a decision from the Court of Appeal on this case. If you have any questions about the decision, or whether your termination clauses are currently valid, please contact us.

Employer Beware: Repudiation of Contract Findings on the Rise

In the case of *Perretta v. Rand A Technology Corp.* [2021] O.J. No. 1486, the employee filed a summary judgment motion seeking $26,907 in damages for wrongful dismissal. She was a sales representative of the company, and her base salary was $46,500.

The employer terminated the employee's employment without cause on March 31, 2020. The employment contract signed by the employee required that in the event of a termination without cause, the employee would be entitled to two weeks' notice, or pay in lieu of notice **plus** the minimum notice or pay in lieu of notice, benefits and severance pay required by the *Employment Standards Act, 2000.*

Instead of simply providing her with the additional two (2) weeks and her entitlements under the *ESA,* the Employer demanded that she sign a full and final release as a condition of her receipt of her contractual entitlements. On April 1, and April 2, 2020, the employer sent two letters demanding that the employee sign a release in order to get the two (2) weeks of pay. The employee retained a lawyer who advised the employer that its treatment of the employee was in breach of its contract. The employer's lawyer apologized and then the employer transferred the 2 weeks' pay to the employee without the requirement for the signed release.

The employee argued, that the contract was repudiated, and the employer could not rely on their termination clause, and alternatively the termination clause was not valid.

The Court reviewed the test for anticipatory repudiation as follows:

> *The test is whether considering surrounding circumstances, including the nature of the contract, the motives which prompted the purported breach, the impact of the party's conduct on the other party, a reasonable person would conclude that the breach party no longer intends to be bound by the contract with the result that the innocent part would be deprived of substantially the whole benefit of the contract.*

In this case, the Court noted that instead of paying the employee the amount she was contractually entitled to, the employer presented her with an enhanced severance offer. It further noted that the release itself was broad in scope, indicating that the demand was not a casual or accidental slip. The fact that the employer made the demands on two different occasions was also indicative that it was not a mistake.

The Court determined that the employer repudiated the contract on the basis of failing to pay the amounts, and making multiple requests for a release was a repudiation. The termination clause was also determined to be invalid.

In considering this case, it is notable, that the Court determined that a repudiation occurred as the failure to pay the two (2) weeks substantially deprived the employee of the whole benefit of the contract. The employer also did pay the employee the entitlement, after it determined its error. While the employer was clearly wrong in this case to demand the release for a contractual entitlement, a finding that the entire contract was repudiated seems to be a harsh conclusion.

This is the second case which has dealt with repudiations of employment contracts in the last year, as a strategy by employee-side lawyers to increase access to reasonable notice by voiding the employment contract - the first being *Humphrey v. Mene Inc.* [2021] O.J. No. 2476. It would appear that Courts are becoming more comfortable setting aside freely negotiated employment agreements due to any employer misstep. In our view, the appropriate result is enforcement of the contractual terms that were agreed upon, but to set aside the entire agreement is severe and results in an unfair windfall for employees. We will keep you advised if either of these decisions are appealed.