Employment Law Update

There were five cases in the last few months that are of particular note to employment law practitioners:

> *Potter v. New Brunswick Legal Act Services Commission* 2015 SCC 10 – a decision in which the law of constructive dismissal is reviewed, in particular in the context of a suspension with pay and the principles relating to the deductibility of pension benefits from an award of wrongful damages is confirmed;
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> *Steel v. Coast Capital Savings Credit Union* 2015 BCCA 127 – a decision where the principles relating to the termination of an employee for misconduct are reviewed and the rationale from *McKinley v. BC Tel,* 2001 SCC 38 is further explained;
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> *Munoz v. Sierra Systems* 2015 BCSC 269 - A recent British Columbia Supreme Court decision serves as a warning to counsel drafting employment agreements and also resulted in a significant period of notice being awarded to a relatively short term employee.
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> *George v. Cowichan Tribes* 2015 BCSC 513 – this decision considered the assessment of cause applying the *McKinley* principles. The case also considered two damages issues, the treatment of a break in years of employment and claims for aggravated and punitive damages.
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> *Ogden v. Canadian Imperial Bank of Commerce* 2014 BCSC 285, overturned on appeal 2015 BCA 175 – this is a decision concerning just cause and punitive and aggravated damages. The decision was overturned on appeal and a new trial ordered on the basis that the trial judge misapprehended and mischaracterized the position and evidence of the defendant.

Each of these decisions provides clarifications in areas that employment law practitioners deal with on a daily basis. They each provide an explanation of the law and are useful in crafting arguments regarding the existence of case, interpretation of employment contracts and assessment of damages.

Potter v. New Brunswick Legal Act Services Commission

In *Potter* the Supreme Court of Canada provided a review of the law of constructive dismissal. In *Potter* the plaintiff employee was employed under a fixed term which was intended to take him to retirement. Difficulties in his employment relationship arose which led to discussions with the employer about a buy out of his contract. Before those terms could be agreed upon or finalized, the plaintiff employee went on sick leave. When his sick leave was about to end a resolution was passed by the employer to terminate the employment with cause if they were unable to negotiate the terms of the buy-out of the contract. When an agreement with respect to the terms of buy-out were not reached correspondence was sent to the plaintiff employee's lawyer advising him to not return to work until further direction and that he would be continued to be paid until instructed otherwise. Clarification as to whether he had been suspended was sought and the employer

responded by expressing surprise that there was any confusion and indicating that he was not to return to work until further notice.

After two months the plaintiff employee started an action for wrongful dismissal. The trial court held that the plaintiff had not been constructively dismissed and this decision was upheld by the Court of Appeal. The issues for consideration by the Supreme Court of Canada were:

1. Whether and in what circumstances a non-unionized employee who is suspended with pay may claim to have been constructively dismissed;
2. If constructive dismissal had not occurred, did the plaintiff resign by commencing his legal action; and
3. Were the amounts received under the pension deductible from his damages.

The Court confirmed that to establish constructive dismissal requires that the employer's acts and conduct "evince an intention no longer to be bound by the contract" and identified two different categories of when this will occur. The first is when the employer has unilaterally altered a term of condition of the employment and the second is where the employer has generally shown that it does not intend to be bound by the contract by treating the employee in such a way that continued employment is intolerable. This second category was described in the following terms:

> [33] However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying *Farber*, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable…This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and determination of whether those acts evinced an intention no longer to be bound by the contract.

The Court confirmed the two step approach involved in assessing whether constructive dismissal has occurred in the context of a change to the terms of the contract. First the employer's unilateral change must be found to constitute a breach of the employment contract.

> [37] At the first step of the analysis, the court must determine objectively whether a breach has occurred. To do so, it must ascertain whether the employer has unilaterally changed the contract. If an express or implied term gives the employer the authority to make the change, or if the employee consents to or acquiesces in it, the change is not a unilateral act and therefore will not constitute a breach. If so, it does not amount to constructive dismissal. Moreover, to qualify as a breach, the change must be detrimental to the employee.

The second step is to determine whether the change substantially alters an essential term of the contract.

> [39] Once it has been objectively established that a breach has occurred, the court must turn to the second step of the analysis and ask whether "at the time the breach occurred, a

> reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed" (*Farber,* at para 26). A breach that is minor in that it could not be perceived as having substantially changed an essential term of the contract does not amount to constructive dismissal.

In the particular circumstances of a suspension, the Court directed that there is again a two-step analysis. The first step being to determine if there was an express or implied term that authorized the employer to suspend. If there was, then there was no unilateral act and therefore no breach of the contract and a constructive dismissal claim must fail. If the suspension was not authorized by the contract, then a suspension would constitute a unilateral change and the further inquiry of whether the suspension constituted a substantial breach must be made. In making this determination the Court must consider whether a reasonable person in the employee's circumstances would have perceived that the employer was acting in good faith to protect a legitimate business interest, and that the employer's act had a minimal impact on him or her in terms of the duration of the suspension. The employer bears the burden of establishing that the suspension was both reasonable and justified in the circumstances.

The Court adopted their definition of residual power to suspend as developed in *Cabiakman v. Industrial Alliance Life Insurance Co.,* 2004 SCC 55, [2004] 3 S.C.R. 195. That definition was as follows:

> This residual power to suspend for administrative reasons because of acts of which the employee has been accused is an integral part of any contract of employment, but it is limited and must be exercised in accordance with the following requirements: (1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a resiliation or dismissal pure and simply; and (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay.

With respect to the second branch of the test, establishing that a reasonable person in the same situation as the suspended employee would have felt that an essential term of the employment contract was being substantially altered, the court said as follows:

> [106] I would suggest that in most cases in which a breach of an employment contract results from an unauthorized administrative suspension, a finding that the suspension amounted to a substantial change is inevitable. If the employer is unable to show the suspension to be reasonable and justified, there is little chance, to my mind, that the employer could then turn around and say that a reasonable employee would not have felt that its unreasonable and unjustified acts evinced an intention no longer to be bound by the contract. Any exception to this rule would likely arise only if the unauthorized suspension was of particularly short duration.

The Court declined to answer the question of whether there were circumstances where an employee who was unable to establish constructive dismissal would be found to have not resigned when they started legal action. However, the Court opened the door to allowing an employee to start legal action without being found to have resigned by stating as follows:

> [109] Nevertheless, there are instances in which it will not be necessary to conclude that the employee has resigned in bringing the constructive dismissal suit. One such case would be where, following the changes to the contract, the employee has continued to work under protest. This Court has held that employees have a duty to mitigate their damages by remaining in the workplace, provided that doing so would not be objectively unreasonable: see, e.g., *Evans v. Teamsters Local Union No. 31,* 2008 SCC 20, [2008] 1 S.C.R. 661. Where the employment relationship has not become untenable, it is not evident that by commencing legal action the employee should be held to have resigned by operation of law.

With respect to the deductibility of pension benefits from an award of damages, the Court confirmed its decision in *IBM Canada Limited v. Waterman,* 2013 SCC 70, [2013] 3 S.C.R. 985 and specifically the propositions for determining whether such benefits should be deducted in a given case. Those propositions were as follows:

- Benefits have *not* been deducted if (a) they *are not* intended to be an indemnity for the sort of loss caused by the breach *and* (b) the plaintiff has contributed to the entitlement to the benefit
- Benefits have *not* been deducted where the plaintiff has contributed to an indemnity benefit
- Benefits *have* been deducted when they *are* intended to be an indemnity for the sort of loss caused by the breach but the plaintiff has not contributed in order to obtain entitlement to the benefit.

On the basis that the pension was not intended to compensate the plaintiff in the event of his being wrongfully dismissed and that it was a contributory plan the Court found that the pension benefits within the private insurance exception from *Waterman* and were not deductible.

Steel v. Coast Capital Savings Credit Union

Our Court of Appeal once again had the opportunity to consider when an employee's misconduct violates the trust essential to the employment relationship will amount to just cause for dismissal. *Steel v. Coast Capital Savings Credit Union* 2015 BCCA 127 considered the application of *McKinley v. BC Tel,* 2001 SCC 38,, [2001] 2 S.C.R. 161. *McKinley* changed employment law by importing a requirement to determine the justness of cause for dismissal. This required courts to exercise a contextual analysis and apply proportionality. The majority decision of the Court of Appeal in *Steel* held that McKinley requires the trial judge to determine whether in the totality of the circumstances the alleged misconduct was such that the employment relationship could no longer viably subsist.

The facts in *Steel* were that an IT helpdesk professional accessed private documents of a co-worker contrary to company policy. The defendant took privacy issues seriously and had put into place a

protocol to protect the privacy of employee's documents. The dismissed employee, in breach of the policy, accessed a manager's documents without her permission. This was discovered when the manager attempted to access the document when it was already open by the plaintiff. The trial judge found that just cause existed after applying the *McKinley* principles, concluding as follows:

> [26] Ms. Steel occupied a position of great trust in an industry in which trust is of central importance. In her position as Helpdesk analyst Ms. Steel was given the ability to access confidential documents. The employer established clear policies and protocols known to Ms. Steel at the relevant time that were given to govern access to confidential documents. One of the most important of these was that Helpdesk analysts such as Ms. Steel were not to remotely access other employees' files without first receiving specific permission to do so.
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> [27] It was not practicable for Coast to monitor which documents Ms. Steel accessed and for what purpose. The employer had to trust Ms. Steel to obey its policies and to follow the protocols. It had to trust Ms. Steel to only access such documents as part of the performance of her duties and to follow the protocols when she did so. Such trust was fundamental to the employment relationship in relation to Ms. Steel's position. It was, to use the language of Iacobucci J. in *McKinley,* "the faith inherent to the work relationship" that was essential to the employment relationship.
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> [28] Ms. Steel violated the trust in two distinct and important ways. First, she opened a confidential document in another employee's file for her own purposes, not as part of her duties nor at anyone's request.. Second, she violated the protocols that were to govern situations in which remote access of such documents was undertaken. Specifically, she did not have permission to do so from the document's owner, or from anyone entitled to grant such permission.
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> [29] I have concluded that in the circumstances this conduct amounted to just cause for dismissal. It follows that the action is dismissed.

The plaintiff's appeal alleged that the trial judge erred by failing to apply all the factors in *McKinley* and instead focused on her misconduct to the exclusion of her employment history. In particular, the plaintiff alleged that the trial judge failed to take into consideration her 21 years of unblemished service.

The Court of Appeal was divided with Mr. Justice Goepel and Mr. Justice Harris holding that whether the length of service or the quality of service is a relevant factor that mitigate the effect of the misconduct on the employment relationship is a question for the trial judge to determine based on the specific facts and circumstances of a particular case. They further concluded that a trial judge is not required to balance the length and quality of service with the nature and severity of the misconduct, although in appropriate cases and on the facts of a particular case it may be appropriate to engage in such an analysis. Rather than requiring a balancing of the length and quality of service with the nature and severity of the misconduct they said that the question is whether, in the totality of the circumstances, the alleged misconduct was such that the employment relationship could no longer viably subsist. They assumed the definition in *McKinley* of misconduct

that goes to the core of the employment relationship, including behavior that "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer". They dismissed the appeal on the basis that the standard of review given that the question of whether the alleged misconduct provided just cause for dismissal was a question of mixed fact and law was one of palpable and overriding error unless the trial judge made some extricable error in principle.

Mr. Justice Donald wrote the dissenting reasons and found that the trial judge's analysis was incomplete and that if *McKinley* had been correctly applied the termination would have been seen to be unjustly harsh.

<u>*Munoz v. Sierra Systems* 2015 BCSC 269</u>

Munoz v. Sierra System s Group Inc. 2015 BCSC 269 is a decision resulting from a summary trial application. The plaintiff was employed as a consultant in a large IT company. The initial employment offer was for full time employment at a set salary. This was in February 2011. One month after the plaintiff commenced work the defendant introduced a new compensation plan for consultant employees. The new compensation plan included four options for each employee to choose from. According to the terms of the compensation plan after six months, employees were able to switch plans. The compensation plan that the plaintiff was subject to at the termination of his employment was the "Hourly" plan. He had switched to that plan in May 2012. That plan was described in the judgment as follows:

> [20] The "Hourly" plan involved the employee receiving a fixed amount for each hour the defendant billed out to a client and any time not billed was unpaid unless it was a statutory holiday or a payment equal to earned vacation time as a percentage of base salary. The employee assumed 100% of the risk that he will not be working billable hours and in such case the employee received no pay. The reward for the risk was that the employee could earn more than he could with a salary plan alone. The plan referred to the periods of non-placement as "bench" time and encouraged employees to view these periods as time to "recharge".

The plaintiff's work for the defendant was done exclusively for one company. In June 2013 that company requested that all work be stopped immediately. Because this company was the only company that the plaintiff was doing work for he was now on the "bench" and earning no income on the Hourly plan. No work came available for the plaintiff and he was not paid anything between June and October 24, 2013 when he was given notice of termination effective December 5, 2013.

During the time that the plaintiff was "on the bench" he believed that he was still an employee of the defendant and that he had to make himself available for any work that came up. The plaintiff remained in contact with the defendant throughout this period of time in the event that work became available. The defendant looked for work for the plaintiff during this time but was not successful. The plaintiff continued on the defendant's medical and dental plans during this time.

The notice period was described as "worked notice". The plaintiff was told that during this period of "worked notice" the defendant would continue to look for work for him and as a consequence he must be available for work. He was not entitled to any salary during the period of worked notice as no work was made available to him by the defendant.

The issues on the summary trial application were:

1. What were the terms of the employment contract?
2. Did the defendant violate the terms of the employment contract by failing to pay wages to the plaintiff during the period he was off work between June 17,2 013 and the date of the termination notice on October 24, 2013?
3. Did the defendant provide reasonable notice of termination to the plaintiff?
4. What compensation, if any, is owing to the plaintiff?
5. Did the plaintiff fail to mitigate his loss.

Madam Justice Bruce found that the terms of the employment contract were those agreed to by the plaintiff, specifically the "Hourly" plan and further found that none of the terms of the contract were illegal or unenforceable.

With respect to the issue of whether the defendant was in violation of the terms of the employment contract by failing to pay wages between June 17, 2013 and the date of the termination notice, Madam Justice Bruce determined that the answer to this depends on whether the plaintiff could be regarded to be terminated effective June 17, 2013 or not. She concluded that the seminal issue is whether the agreement can be interpreted such that after a certain period of time on the "bench" an employee would be considered terminated and entitled to reasonable notice.

Madam Justice Bruce held that the "bench" period was not defined in terms of its length in the agreement and was in that sense ambiguous. Pursuant to the *contra preferentem* rule, the ambiguity must be construed against the defendant as they were the drafter of the agreement. In determining at what period of time on the "bench" an employee was terminated, Madam Justice Bruce relied upon the terms of the *Employment Standards Act* to interpret an ambiguous term of the employment contract. The definition in the *Employment Standards Act* provides for a "temporary layoff" of up to 13 weeks, anything beyond which is deemed to be a termination. Applying this definition to the facts, Madame Justice Bruce found that the plaintiff was deemed to have been terminated on June 17, 2013, noting that the 13 weeks that could have comprised a "temporary layoff" pursuant to the terms of the *Employment Standards Act* expired on September 13, 2013.

Madam Justice Bruce concluded that while the plaintiff was not entitled to wages after June 17, 2013 under the terms of his employment contract, he was entitled to reasonable notice of termination effective June 17, 2013. In assessing the appropriate period of notice the relatively short period of employment (2 ½ years), the inducements offered during the recruitment process, the restrictions resulting from a non-competition clause and the plaintiff's focus on job security were the primary factors taken into consideration. The plaintiff was awarded ten months' notice. Damages were awarded based on what the plaintiff would have earned if work had been made available to him during the period of notice.

George v. Cowichan Tribes 2015 BCSC 513

In *George* Mr. Justice Skolrood reviewed the application of the *McKinley* principles and drew heavily from the trial court decision in *Ogden,* which was overturned by the court of appeal. The starting point for Mr. Justice Skolrood's analysis was the proposition that employment plays an essential role in an individual's life. He quoted the words of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 at 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Mr. Justice Skolrood referred to the two key principles that emerge from *McKinley v. BC Tel,* 2001 SCC 38 as being:

1. In considering whether cause has been established, the court must engage in a contextual analysis of all of the relevant facts and circumstances; and
2. The objective of the contextual analysis is to determine whether the misconduct is such that it has led to a breakdown of the employment relationship or is otherwise irreconcilable with the continuation of the relationship.

Mr. Justice Skolrood explained that the proportionality principle directs the court to strike an appropriate balance between the alleged misconduct and the proposed sanction, stating that in other words the ultimate sanction of dismissal is only warranted if the misconduct effectively destroys the employment relationship. The central issue to be considered is whether the employee's misconduct, if proven, is so egregious as to effectively render continuation of the employment relationship impossible. The test is an objective one, viewed through the lens of a reasonable employer taking into account all of the relevant circumstances.

In *George* the plaintiff approached another individual at a bar while intoxicated and warned that individual not to interfere with another's visits with his children. Mr. Justice Skolrood found that this isolated incident, away from work, about a family matter, was wholly out of character for the plaintiff. He concluded that in applying the contextual approach and considering the need for proportionality, her conduct was not such as to render continuation of the employment relationship impossible.

There were two issues with respect to the assessment of damages that were of note:

1. Treatment of the break in years of employment; and
2. Consideration of the claims for aggravated and punitive damages.

The plaintiff had been employed by the defendant continuously from 1980 until 1998 when she left to upgrade her education. She returned to work for the defendant in 2000 and continued to be employed until the termination of her employment. In assessing whether the interruption of

service should be disregarded in determining the reasonable notice period, the judge referred to the following factors as being relevant:

- The employer treating the employee as being continuously employed or recognizing her as a long-term employee;
- Whether the employee left voluntarily;
- Whether the employee was induced to return to the employer; and
- The purpose of the interruption in service.

The trial judge concluded that in the circumstances of the plaintiff's case to ignore the entirety of her employment would unfairly disregard and diminish her service to the defendant.

Both a claim for aggravated damages and for punitive damages was made. Mr. Justice Skolrood provides a comprehensive summary of the law relating to the award of each type of damages. In concluding that she was entitled to an award of aggravated damages in the amount of $35,000 Mr. Justice Skolrood referred to the following factors:

1. The plaintiff was never given an opportunity to confront or respond to the allegations made against her, particularly the allegation of dishonesty, which was the reason for the dismissal;
2. The plaintiff was dismissed without any serious consideration being given to her lengthy service, her exemplary discipline record and whether there were measures short of dismissal that could have been imposed, notwithstanding the existence of a process of progressive discipline;
3. The employer failed to engage in the contextual analysis directed by the Supreme Court of Canada before summarily terminating an employee with over 30 years' service;
4. The employer was cavalier, reckless and negligent in the manner of terminating without giving the employee an opportunity to explain or respond which was in breach of the duty of good faith;
5. The plaintiff suffered damages over and above what would flow simply from the loss of her employment.

Justice Skolrood declined to award punitive damages finding that there was no additional conduct on the part of the defendant to justify and award of punitive damages.

Ogden v. Canadian Imperial Bank of Commerce

Ogden was again a case where the issue was determination of just case. *Ogden* involved the termination of a bank employee. At trial the termination was found to be without cause and the plaintiff to be entitled to aggravated damages in addition to damages for the failure to provide reasonable notice. The decision was overturned on appeal. One of the primary arguments on appeal was that the trial judge had copied large parts of plaintiff's counsel's submissions in writing his reasons. The decision was set aside for substantive reasons rather than the court dealing with the procedural fairness issue, concluding that the judge erred in three ways:

1. He misapprehended and mischaracterized CIBC's evidence and arguments on cumulative cause leading him to disregard the contextual effect of the prior discipline history;
2. He made irreconcilable factual findings on aggravated and punitive damages;
3. He misapprehended the evidence that the wire transfer was not a breach of the bank's Code of Conduct, rather than addressing the real issue being whether the bank was justified in terminating Ms. Ogden's employment for cause based on a single incident of misconduct.

Because of these findings the Court did not need to resolve the procedural fairness issue arising from *Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital and Health Centre,* 2013 BCSC 30. However the reasons were concluded with the following statement:

> [85]…I observe, however, that the substantive errors I have identified exemplify the risk attendant in extensively adopting the written submissions of one party as reasons for judgment without addressing the opposing party's arguments and view of the evidence.

A new trial was ordered. Despite the fact that the decision was overturned, the trial decision provides a very useful summary of the law relating to cause and to the assessment of aggravated and punitive damages.