Employment Law Update

There have been four employment law decisions of note in the past few months, two in British Columbia and two in Ontario. Two of the decisions involved the application of Human Rights legislation, one considered contractual interpretation and defamation claims and one considered the concept of "common employer". All served to confirm and clarify existing law rather than establishing any new principles.

1 Consideration of Human Rights Legislation

In Human Rights cases once a complaint has been filed, the respondent to the complaint can apply to dismiss the complaint on a preliminary basis, in advance of a hearing. The question on the dismissal application is whether discrimination has been established on a *prima facie* basis. There is a three step test to be applied in determining whether a *prima facie* case of discrimination exists, which involves answering the following questions:

1. Is the complainant a member of a class which is a protected group under the Human Rights Code?
2. Has the complainant received adverse treatment with respect to a service or facility customarily available to the public? and
3. Is there a connection between the adverse treatment and the protected ground.

In 2012 the Supreme Court of Canada decided the case of *Moore v. British Columbia (Education).* In this case the Supreme Court articulated the third branch of the test of *prima facie* discrimination test as being one which requires the claimant to show that the personal characteristic was "a factor" in the adverse treatment that they received. Previously the test that had been applied had been one which required the claimant to prove that the personal characteristic caused the adverse treatment, which is a significantly different test.

The BC Supreme Court had the opportunity recently to apply and comment on the test that arose from *Moore* in its decision in *Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal* 2015 BCS 534. The claimant was an advocacy group comprised of current and former drug users which was dedicated to improving the lives of illicit drug users through peer support and education. The respondent was an organization dedicated to helping Vancouver business revitalize the community. They implemented a program that was meant to actively dissuade homeless persons in the downtown core from occupying public spaces. The claimant alleged that the program discriminated against street homeless and drug addicted persons who were disproportionately aboriginal and mentally or physically disabled. A preliminary application to dismiss was brought by the Respondent.

The Human Rights Tribunal dismissed the case on the grounds that it found that the claimant had not provided sufficient evidence to establish a causal nexus between the adverse treatment and the protected grounds or in other words that because the Complainant could not establish that the adverse treatment was caused by the personal characteristic.. The claimant appealed the Tribunal's decision to the BC Supreme Court. The BC Supreme Court found that the Tribunal had been in error in requiring the claimant to establish a causal connection between the adverse treatment and the

protected grounds. The test that the Court said was to be applied, was that established by the Supreme Court of Canada in *Moore.* The Court held that there was no necessity to establish that the adverse treatment was caused by the personal characteristic, rather they had only to establish that the personal characteristic was "a factor" in the adverse treatment. The Court found that the test was satisfied, noting that the discrimination analysis focuses on the impact of the conduct in the dispute and intent is of minimal, if any, relevance. The Court concluded that a *prima facie* case of discrimination existed and returned the case to the Tribunal for a determination of whether the *prima facie* discrimination was justified.

The *Moore* decision obviously makes is significantly more difficult to satisfy the test to have a complaint dismissed on a preliminary basis. If the first two branches of the test are established, being that there is adverse treatment and that the complainant has a characteristic that is a protected ground, it will be extremely difficult to establish that the treatment was not "a factor" in the adverse treatment when the causal connection is not a relevant consideration.

The second decision, *Bellehumeur v. Windsor Factory Supply Ltd.,* 2015 OBCA 473 was an Ontario decision which required considered the application of the requirement that the personal characteristic be a factor in the adverse treatment. This appeal was brought by the dismissed employee. The employee alleged that his termination was contrary to the *Ontario Human Rights Code* as it was related to his mental disability and therefore discriminatory. The trial judge found that the employer was unaware of the employee's mental disability until after they had fired him and therefore did not discriminate against him but rather fired him just as they would any other employee who had made violent threats.

The Ontario Court of Appeal upheld the trial judge's decision and in doing so quoted with approval from the British Columbia Court of Appeal decision in *British Columbia (Public Service Agency) v. British Columbia Government and Services Employees Union,* 2008 BCCA 357. Of note, this decision is pre *Moore.* In that decision an alcoholic employee was terminated due to the theft. In assessing whether the termination was discriminatory the Court of Appeal said as follows:

> I can find no suggestion in the evidence that Mr. Goodings termination was arbitrary and based on preconceived ideas concerning his alcohol dependency. It was based on his conduct that rose to the level of crime. That his conduct might he been influenced by alcohol dependency is irrelevant if that admitted dependency played no part in the employer's decision to terminate his employment and he suffered no impact for his misconduct greater than that another employee who suffered the same misconduct.

The Court of Appeal concluded that as the appellant's mental disability was unknown to them at the time that they terminated him, it played no role in the reason for the termination. The appellant was terminated because he made violent threats to other employees, not because he suffered from a mental disability.

The decision did not refer to *Moore* which would require the mental disability to be a factor in the termination, although not a causal factor. Application of the test from *Moore* would have likely

yielded the same result given the lack of knowledge on the part of the employer of the existence of the mental disability.

2. Contractual Interpretation and Defamation

The unique fact pattern in the decision in *DeGagne v. City of Williams Lake*2015 BCSC 816 resulted in Madam Justice Dardi reviewing several different legal principles that often arise in employment law cases. The case is instructive in each of these areas and provides a primer on the law in each of these.

The facts in *DeGagne* included in part the following:

- On January 31, 2013 a letter agreement between the City and Mr. DeGagne detailed the terms of and conditions of his employment with the City as the CAO, commencing March 1, 2013. The letter agreement provided for a 6 month probationary period of employment during which Mr. DeGagne's employment could be terminated without cause with provision of one months' notice. Thereafter he was entitled to six months' notice plus one month for every completed year of service

- On February 5, 2013 the City provided Mr. DeGagne with a Contract for Services which was essentially identical to the terms contained in the letter agreement with the exception that there was no specified probationary period of employment. Prior to returning the signed Contract for Services to the City, Mr. DeGagne made a significant change to the agreement, allowing him to continue participation in a business that he had independent from the work of the City.

- On February 18, 2013 the Mayor of the City received an anonymous letter which was highly critical of M. DeGagne and of his ability to take on the role of CAO. The Mayor provided a copy to her executive assistant and ultimately to members of City Council and the management team

- On February 27, 2013 the City delivered a termination letter to Mr. DeGagne, indicating that they had reconsidered their offer of employment and would not be proceeding with his employment. They offered him one months' salary. The City did not disclose the existence of the anonymous letter or its role in their decision to not proceed with his employment. A few days prior to this Mr. DeGagne and his partner had moved from Summerland to Williams Lake to enable him to take this opportunity.

Contractual Interpretation

The first issues considered by the court were ones of contractual interpretation, specifically:

1. Did the terms of the letter agreement or the Contract for Services govern Mr. DeGagne's rights on termination?
2. Contractually what was Mr. DeGagne entitled to as a result of his termination?

In undertaking her assessment of these issues Madam Justice Dardi conducted a comprehensive review of the law of contract interpretation and enforceability. The City took the position that the letter agreement governed the parties' relationship. Mr. DeGagne took the position that the Contract of Services governed the relationship. Both parties were seemingly focused on the result that would accrue from a finding of which agreement governed the relationship because of the timing of the termination. Madam Justice Dardi while agreeing with the City that the letter agreement governed the relationship, found that the probationary period clause did not apply and therefore did not limit Mr. DeGagne to the one month's notice provided in that provision.

In assessing which agreement governed the parties' relationship, Madam Justice Dardi referred to basic contractual principles, specifically, that for any legally enforceable contract there must be a meeting of the minds. In her words, "both parties to an alleged contract must have manifestly expressed an intention to be bound by the agreement and the parties must be shown to have reached consensus on the essential terms of the alleged contract." She went on to quote the distillation of when an enforceable contract is created from G.H.L. Friedman's *The Law of Contracts in Canada,* 5th ed (Toronto: Thomson Carswell, 2006). That is as follows:

> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is not concerned with the parties' intentions but with their manifested intentions. It is not whether or not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of the agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

Madam Justice Dardi summarized this test to be that the essential question for determination is whether the parties reached agreement on all matters vital or fundamental to the agreement. She went on to state that it is not necessary for every conceivable matter to be resolved between the parties in order for an enforceable contract to be created.

It was against this backdrop summary of the law that Madam Justice Dardi analysed the facts in Mr. DeGagne's case. She concluded that Mr. DeGagne had signed the letter agreement without comment, signifying his agreement to the terms. She held that although the letter agreement was noted to be a "draft", it is the intention of the parties that determines whether a contract is enforceable or not. Not the designation or otherwise as "draft". She concluded that there was an offer and acceptance of the terms set out in the letter agreement. She further found that the fact that a formal written document to the same effect was to be prepared and executed thereafter did not defer or alter the legally binding validity of the letter agreement.

In dealing with the later Contract of Services, Madam Justice Dardi held that for the terms contained in it to be legally enforceable there must be consensus *ad item* reached on the essential terms of the document. Due to Mr. DeGagne's insertion of the revision relating to his continued participation in the outside business, Madam Justice Dardi concluded that there was no consensus *ad item* and that the agreement was therefore not enforceable.

The second issue considered by the court was damages. Specifically, if the contracts did not apply, what period of notice was Mr. DeGagne entitled to? Was Mr. DeGagne entitled to further damages for breaches of the *Community Charter* if they existed? And at the conclusion of the judgment, was Mr. DeGagne entitled to aggravated, punitive or special damages? Was he entitled to special costs? In analysing these claims Madam Justice Dardi provided a succinct summary of the relevant legal principles. In particular:

a. **Notice –** The term of reasonable notice implied by law may only be displaced by an express contrary agreement. This applies even though actual work had not begun before the contract was cancelled. The well settled factors to be considered in assessing reasonable notice of termination include the character of the employment, the length of the employment, the age of the worker, and the availability of similar employment having regard to the experience, training and qualifications of the worker. Applying those factors to the facts resulted in a finding that Mr. DeGagne should have been provided with six months' notice of the termination of his employment. Madam Justice Dardi noted the following:

> Mr. DeGagne was 57 years old when he was terminated as the CAO, the senior administrative position for the municipality. His starting salary was $130,500 per annum and it was anticipated that his salary would increase to $150,000 per annum. He had more than 25 years of experience as a local government administrator. He and his partner had relocated to Williams Lake in anticipation of his new position.

b. **Community Charter breaches –** Madam Justice Dardi concluded that while the City may be bound by the statutory duties prescribed by the *Community Charter*, the common law does not impose any independent duty of procedural fairness on the City as a public employer when exercising its right to terminate an employment relationship.

c. **Aggravated damages –** Madam Justice Dardi adopted the framework for determination of whether aggravated damages are awardable as outlined in *Honda Canada Inc. v. Keays,* 2008 SCC 39, specifically:

> …Thus, if an employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance.

In the facts of Mr. DeGagne's case, aggravated damages were not awarded because there was insufficient evidence that any mental or emotional distress he sustained was caused by the manner of his termination. His distress over the termination itself is not compensable.

Although the existence of the anonymous letter should have been disclosed and the failure to do so approached but did not reach the threshold for finding bad faith or unfair dealing in the manner of dismissal, this was not sufficient to result in an award of aggravated damages.

d. Punitive damages – the object of punitive damages is to punish an employer in order to deter future unfair conduct. Conduct meriting punitive damages must be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature and such that by any reasonable standard is deserving of full condemnation and punishment. Madam Justice Dardi concluded that although the anonymous letter should have been disclosed the failure to do so did not reach the level of malicious or outrageous conduct that would give rise to an award of punitive damages.

e. Special damages – Costs incurred in attending the interview in Williams Lake were awarded as special damages as were the costs associated with relocating to Williams Lake. As well Mr. DeGagne was awarded damages for the loss of his pension and other benefits for the six month period of notice.

f. Special costs – To be entitled to an award of special costs Mr. DeGagane would have to establish that the conduct of the City was reprehensible in nature. Reprehensible has been broadly defined to encompass conduct that is scandalous or outrageous, as well as milder forms of misconduct deserving or reproof or rebuke. Madam Justice Dardi found that the City had treated Mr. DeGagne shabbily but could not find that the conduct could be properly characterized as reprehensible.

The existence of the anonymous letter led to a claim by Mr. DeGagne of defamation. For those with experience representing terminated employees, defamation is frequently a claim that the terminated employee seeks to pursue. Beyond the issue of proving damages, defamation in an employment context is complicated and particularly subject to the claim of qualified privilege. Madam Justice Dardi provides a great analysis of the law, taking what are very complicated legal principles and making them readily understandable.

As a starting point, to prove defamation a plaintiff has the onus of proving, on a balance of probabilities three elements:

1. That the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
2. That the words in fact referred to the plaintiff; and
3. That the words were published, meaning that they were communicated to at least one person other than the plaintiff.

Madam Justice Dardi concluded that the anonymous letter was defamatory and that it was published, although only published within City Hall and/or between City Staff and Council Members. Madam Justice Dardi then went on to consider whether the publication occurred during an instance of qualified privilege. In doing so, she reviewed the law and the following principles

applicable to the assessment of whether publication has occurred during a circumstance of qualified privilege:

> The defence of qualified privilege recognizes that there are certain prescribed occasions upon which a person may publish untrue defamatory statements about another. If a defendant establishes that the defamatory statement was published on an occasion of qualified privilege, it affords a complete defence to a claim in defamation. In broad terms, the defence of qualified privilege will be defeated if the plaintiff establishes malice or that the defendant's conduct exceeded the limits of the privileged occasion. *Botiuk v. Toronto Free Press Publications Ltd.,* [1995] 3 S.C.R. 3 at pars. 79 – 80
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> A privileged occasion is…an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. *Wang v. British Columbia Medical Association* 2014 BCCA 162
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> The assessment of whether the circumstance is one of qualified privilege is an objective one. Therefore the defendant's belief regarding the right or duty to make the statement does not create a right or duty – it is a question of whether a reasonable person would feel compelled by a duty to make the communication. *Fouad v. Longman,* 2014 BCSC 785
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> Communications regarding employment, are, generally speaking, made on occasions of qualified privilege. *Woods v. Plewes,* 2014 BCSC 318.

Applying these legal principles she concluded that the publication was made in a circumstance of qualified privilege, that the Mayor did not know whether the contents of the letter were true or false and the she provided the letter to her colleagues in good faith in order to determine the appropriate course of action.

3. <u>Common Employer</u>

King v. 1416088 Ontario Ltd. (Danbury Industrial), 2015 ONCA 312 considered the issue of "common" employer. At trial a group of companies was found to be a "common employer". This is an issue which is often of significant importance as it can affect a dismissed employee's ability to collect damages. In *King* the finding of common employer had significant consequences for the dismissed employee because of the resultant joint and several liability and the ability to collect damages under the contract. If there was no finding of common employer the dismissed employee would have been prevented from collecting damages due under the contract.

In upholding the trial judge's decision that a variety of associated companies were a common employer and therefore joint and severally liable, the Court of Appeal held that the trial judge applied the appropriate legal principles in applying *Downtown Eatery (1993) Ltd. v. Ontario (2001),* 54 O.R. (3d) 161 (C.A.). In that decision the Court of Appeal quoted with approval from the decision of the British Columbia decision *Sinclair v. Dover Engineering Services Ltd.* 11 B.C.L.R. (2d) 176 (S.C.) aff'd (1988) 49 D.L.R. (4th) 297. The reasoning that the court relied on was found at page 181 and is as follows:

> The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January 1973. The defendants argue that an employee can only contract for employment with a single employer and that, in this case, that single entity was obviously Dover.
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> > I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.
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> > There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.
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> > As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

The Court went on to summarize the common employer doctrine in Ontario as described in *Gray v. Standard Trustco Ltd. (1994)* 8 C.C.E.L. (2d) 46, 29 C.B.R. (3d) 22:

> …it seems clear that, for purposes of a wrongful dismissal claim, an individual may be held to be an employee of more than one corporation in a related group of corporations. One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group.

The Court of Appeal adopted the Trial Judge's findings on common employer and found that all the appellant companies were jointly and severally liable for the amounts owing under the agreement.

This decision does not establish any new law but is a good reminder of the principles of common employer which are often important in employment law cases. Finding a group of associated companies to be a common employer in many circumstances can mean the difference between a dismissed employee being able to collect damages or not. The case serves as a reminder to counsel to consider this issue in appropriate cases.