Employment Law Update – August 2016

Decisions of note to employment law practitioners in the last few months include a decision by the Supreme Court of Canada which limits the ability of federally regulated employers to dismiss on a without cause basis, two decisions considering non-competition clauses, a decision that considered the concept of "wrongful quitting" and a decision that explained how vulnerability of an employee affects determination of reasonable notice.

Does the Canada Labour Code prohibit without cause terminations?

Reasons for judgment were released on July 14, 2016 by the Supreme Court of Canada in the case of *Wilson v. Atomic Energy of Canada Ltd.*[1] and the reasons are a must read for any lawyer practicing employment law. The issue for the court was whether it is ever lawful for a federally regulated employer to dismiss a non-unionized employee without cause. The adjudicator in this case had found that only dismissals for cause are permitted under the *Canada Labour Code.* On judicial review the Federal Court and the Federal Court of Appeal disagreed.[2] Both Courts held that dismissals without cause are permitted under the *Code.* The majority of the Supreme Court of Canada bench, including Abella J., McLachlin C.J., Karakatsanis Wagner and Gascon JJ. agreed with the adjudicator that only just cause dismissals are allowed under the *Code*. Dissenting reasons were written by Cote and Brown JJ., with Moldaver J. concurring.

The potential restriction on the ability of federally regulated employers to dismiss in a situation other than one involving just cause arises due to the operation of s. 240 – 246 of the *Code*. These provisions were added when the *Code* was amended in 1978. The provisions are under the heading "Unjust Dismissal". The provisions apply to non-unionized employees who have completed 12 consecutive months of continuous employment. Any such dismissed employee has 90 days to make a complaint if they consider the dismissal to be "unjust". One of the remedies available to the adjudicator if they find that the dismissal is unjust, is to order reinstatement. The adjudicator in the underlying case held that a dismissal without cause is automatically an unjust dismissal, regardless of whether appropriate severance has been paid or not. The majority agreed with this interpretation while the dissent ruled that dismissal without cause is not *per se* unjust, so long as adequate notice is provided. The dissent went on to say that payment of adequate severance does not allow the employer to escape the scrutiny of the adjudicator or the courts if the employer chooses to challenge the lawfulness of the dismissal.

The background to the underlying complaint was that the Appellant had worked as an Administrator for his employer for four and a half years prior to his dismissal in November 2009. He had no history of disciplinary steps being taken. He launched a complaint under the *Code* pursuant to the Unjust Dismissal provisions. In response to a request from an inspector for the reasons for the dismissal, the employer said that "he was terminated on a non-cause basis and was provided a generous dismissal package". A labour adjudicator was assigned to hear the complaint and the employer sought a preliminary ruling on whether a dismissal without cause together with a sizeable severance package meant that the dismissal was a just one. The Adjudicator concluded that an employer could not resort to severance payments to avoid a determination under the *Code* about whether the dismissal was unjust. Because the employer was not

[1] 2016 SCC 29

[2] 2013 FC 733, 435 F.T.R. 300; 2015 FCA 17, [2015] 4 F.C.R. 467

relying on cause to terminate the Appellant, the complaint was allowed. The Appeal courts disagreed with this decision, finding that there was nothing in Part III of the *Code* that precluded employers from dismissing non-unionized employees on a without cause basis.

The majority of the Supreme Court of Canada disagreed with the appeal courts finding that Part III of the *Code* did not preclude employers from dismissing non-unionized employees on a without cause basis. Support for this position was obtained from determining the underlying purpose of the addition of the Unjust Dismissal provisions of the *Code.* The majority concluded that only by interpreting these sections as representing a displacement of the employer's ability at common law to fire an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense. Abella J. at paragraph 39 concluded as follows:

> [39] …The text, the context, the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code.* The alternative approach of severance pay in lieu falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" because it completely undermines the purpose by permitting employers, at their option, to deprive employees of the full remedial package Parliament created for them. The rights of employees should be based on what Parliament intended, not on the idiosyncratic view of the individual employer or adjudicator.

The dissenting judgment focused on the requirement for the dismissal to be "unjust" and the preservation of the right of an employer to dismiss an employee without cause through the sections of the *Code* that confirm that the common law is not displaced by the *Code.* The question framed by the dissent was summarized at paragraph 101 as follows:

> [101]…The adjudicator was asked to determine whether a dismissal without cause but with pay in lieu of notice was nevertheless an unjust dismissal. The narrow question we are addressing is this: Is a dismissal without cause <u>automatically</u> an unjust dismissal that <u>always</u> entitles an employee to a remedy under s. 242(4)? Or, as the Federal Court and Federal Court of Appeal both found in this case, is a dismissal without cause <u>potentially</u> an unjust dismissal (depending on the circumstances) that <u>could</u> entitle an employee to a remedy under s. 242(4)?

The dissent concluded that the Unjust Dismissal sections of the *Code* create an additional potential mechanism for complaining about a dismissal, and provide an additional remedy for such complaints. But they do not define what dismissals qualify as unjust. The dissent went on to state that in a "without cause" regime, dismissals without just cause are unlawful dismissals unless they are accompanied by appropriate notice and severance pay. The conclusions of the dissenting judgment are summarized in paragraphs 129 and 148. Those conclusions were as follows:

> [129] Section 168 of the *Code* expressly preserves the continued application of the common law to the federally regulated employment relationship. There is therefore an overlap between the legislation and the common law here. Absent clearly and unambiguously expressed legislative intent to change the common law by adding the unjust dismissal provisions in ss. 240 to 245, we must interpret the *Code* consistently with the common law, particularly since

> Parliament expressly preserved the common law by enacting s. 168. The majority has pointed to no such clear an unambiguous statutory language. We must therefore interpret the *Code* consistently with the common law, meaning that the contractual basis of individual employment continues to apply, and that federal employers are not categorically prohibited from dismissing non-unionized federal employees without cause. More particularly, we must understand Parliament, in adding ss. 240 to 245 as well as s. 246, as having preserved the concurrent jurisdiction of the courts over the question of the lawfulness of the dismissal, and not as having fundamentally altered the nature of the employment relationship. Parliament simply created another procedural mechanism through which employees could challenge the lawfulness of their dismissal, in which the additional remedy of reinstatement is available.
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> [148] But a procedural mechanism that increases access to justice does not, in and of itself, fundamentally alter the nature of the employment relationship. This procedural mechanism – access to which s dependent on the discretion of the Minister – is not, therefore, the exclusive means by which a federal employee must challenge the lawfulness of the dismissal. The employee may choose to challenge the dismissal through the courts as well. The unjust dismissal provisions are simply a procedural option for federal employees. The common law continues to apply, and federally regulated employers are entitled to dismiss employees without cause, but with payment of the appropriate notice and severance pay as prescribed by ss. 230 and 235 of the *Code*, the contract of employment, or the common law (whichever is greater). Adjudicators and courts possess concurrent jurisdiction to determine the adequacy of the notice and severance pay and to order any other remedies that may be warranted in the circumstances. The mere provision of a notice and a severance payment does not allow an employer to escape the scrutiny of an adjudicator any more than it would allow the employer to escape the scrutiny of a court.

The dissenting judgment agreed with the reasons of the Federal Court and the Federal Court of Appeal that the *Canada Labour Code* does not prohibit all federally regulated employers from dismissing employees without cause.

This case is a very important one for any legal counsel advising either employers or employees of federally regulated employment. The decision displaces the common law right of employers to dismiss without cause in circumstances where either adequate notice or pay in lieu of notice are provided.

Competing Past Employees

Mr. Justice Weatherill considered a summary trial application to prevent two past employees from competing with their former employer[3]. The employer's business was selling customized promotional materials primarily to individuals in the automotive industry. The employees at the time that they left the employment of the employer were the sales coordinator and the operations manager. Both had signed restrictive covenants and confidentiality agreements with the employer. Both resigned their position to begin business in competition with the employer in the sale of customized promotional products.

In considering the employer's application Mr. Justice Weatherill considered the duties of employees generally. The duties considered and the consequences of those duties included:

[3] *2909731 Canada Inc. (Pewter Graphics) v. Toews* 2016 BCSC 852

1. Duty of Fidelity – implied in every contract of employment is a general duty of good faith and fidelity. An employee must protect against the unauthorized disclosure or appropriation of the employer's trade secrets and confidential information;

2. Fiduciary duty – employees who are able to unilaterally exercise power or discretion so as to affect the employer's legal or commercial interests in a way that exposes the employer to particular vulnerability at the hands of the employee, will owe the employer a fiduciary duty over and above their implied duty of fidelity;

3. Duty of confidence – an equitable duty of confidence arises where information that has a necessary quality of confidence about it is communicated in circumstances importing an obligation of confidence and the recipient uses the information in an unauthorized way to the detriment of the communicating party.

Mr. Justice Weatherill concluded that the employer had failed to demonstrate, on a balance of probabilities that the defendants had breached their common law duty of fidelity owed to the plaintiff. He found that neither defendant owed a fiduciary duty to the plaintiff and that there was no evidence that either defendant had used information from the employer's Master Contac List as a "springboard" or head start for their business.

He then went on to consider the impact of the confidentiality clause and the restrictive covenant. In considering the claim of the plaintiff that the defendants were in breach of the confidentiality clause, Mr. Justice Weatherill described the plaintiff's position as akin to submitting that merely competing in business is sufficient. The law is clear that it this is not sufficient. An employer is not entitled to be protected from competition at the hands of a former employer merely on the basis of the former employment alone.[4]

In considering whether the restrictive covenant provided the basis for preventing the defendant's from competing with the plaintiff, Mr. Justice Weatherill reviewed the law relating to restrictive covenants, starting with the general statement contained in *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*[5]. In that case the court stated, at 923:

> …A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in discouraging restraints in trade, and maintaining free and open competition, unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power.

[4] *Alberts et. al. v. Mountjoy et al.* (1977), 16 O.R. (2d) 682 at 6 (H.C.J.)
[5] [1978] 2 S.C.R. 916

Determining "reasonableness" requires "an overall assessment of the clause, the agreement within which it is found, and all of the surrounding circumstances".[6] The factors considered in making the assessment include:

1. Does the employer have a "proprietary interest" entitled to protection? A proprietary interest may include the employer's trade secrets, confidential information, such as customer lists, and its general goodwill arising from its presence and trade connections in the market.[7]

2. Are the temporal and spatial features of the clause too broad, or in other words is the covenant reasonable in terms of duration and geographical location? Non-competition clauses generally must contain geographic and time limitations to be reasonable, however, non-solicitation clauses are client specific and hence geographic limitations are not necessary.[8] Restrictive covenants that protect the employer's trade secrets and confidential information do not require temporal limits to be enforceable so long as they are unambiguous and reasonable.[9]

3. Is the covenant unenforceable as being against competition generally, and not limited to proscribing solicitations of clients of the former employer?

Mr. Justice Weatherill found the non-competition clause in this case to be unenforceable noting that they are enforceable only in exceptional circumstances[10] and that there were no exceptional circumstances in the case at bar. In order for a determination to be made as to whether a restrictive covenant is reasonable, the covenant must be unambiguous. Various ambiguities in the clause were identified. The onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. An ambiguous restrictive covenant will be prima facie unenforceable because the party seeking to enforce it will be unable to demonstrate reasonableness in the face of an ambiguity.[11]

Enforceability of a non-competition clause was also considered in *Powell River Industrial Sheet Metal Contracting Inc. (P.R.I.S.M.) v. Kramchynski.*[12]. In this case the plaintiff had purchased a business and a part of the term of the purchase involved the defendant continuing to work in the business. The work available declined over time and the defendant left the employment and began working for another employer who was in direct competition with the plaintiff. There was a further issue in the case involving another employee who left the business and the plaintiff alleging that the defendant induced that employee to leave his employment, in breach of the duty of good faith owed to the plaintiff.

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[6] *H.L. Staebler Co. v. Allan*, 2008 ONCA 576 at para. 36, leave to appeal ref'd [2008] S.C.C.A. No 399 and *J.G. Collins Insurance Agencies Ltd.*

[7] *Globex Foreign Exchange Corp. v. Kelcher,* 2005 ABQB 676 at para. 26, varied on other grounds 2005 ABCA 419; *Lyons v. Mltari* (2000), 50 O.R. (3d) 526 at paras. 12 and 45 (C.A.); *Dr. P. Andreou Inc. v. McCaig,* 2006 BCSC 829, varied on other grounds 2007 BCCA 159.

[8] *H.L. Staebler* at paras. 38 – 39, 48, 50; *Promotional Wearhouse Inc. v. Campbell,* 2002 ABQB 502 at paras. 11 – 13; *Shafron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6 at paras 26 – 28; *KOS Oilfield Transportation Ltd. v. Mitchell,* 2010 ABCA 270 at para. 31; *Pauette v. Gay Inc.,* 2013 SCC 45 at paras. 61, 63, 65, 69-70, 72 – 74.

[9] *Evans v. Sports Corp.,* 2011 ABQB 244 at para. 240, aff'd 2013 ABCA 14

[10] *H.L. Staebler*, at para. 42

[11] *Shafron*, at para. 27

[12] 2016 BCSC 883

The analysis of the enforceability of the non-competition agreement was similar to that undertaken by Mr. Justice Weatherill, with similar reference to *Elsley*. The general principles applicable to enforceability of non-competition clauses were described by Madam Justice Harris as follows:

> [81] Courts are generally reluctant to uphold non-competition clauses in employment agreements which preclude an employee from engaging in any form of work that competes with the former employer's business. Such clauses are considered not to be in the public interest and in restraint of trade. However, where a non-competition clause is contained in an agreement for the sale of a business, it may be found to be reasonable as protecting an employer's legitimate business interests, *Elsley*, at p. 924, *Payette v. Guay Inc.*, 2013 SCC 45, para. 9

Madam Justice Harris found that the non-competition clause when originally entered into in this case was not unreasonable but became unreasonable when the plaintiff failed to provide the defendant with sufficient work. Madam Justice Harris held that the failure to provide sufficient work was a breach of the plaintiff's obligations under the employment agreement and rendered the non-competition agreement unenforceable. She concluded as follows:

> [90] Accordingly, although the non-competition agreement was not unreasonable when it initially was conceived, it became unreasonable and contrary to the public interest once the plaintiff was unable to provide the defendant with sufficient work. Providing the defendant with the work sufficient to obtain the benefits of the collective agreement was effectively the condition precedent to the enforcement of the non-competition agreement.

In dealing with the allegation that the defendant breached his duty of good faith owed to the plaintiff in inducing another employee to leave his employment, Madam Justice Harris reviewed the law with respect to employee's duties. She quoted from the decision of Madam Justice Russel in *Zoic Studios B.C. Inc. v. Gannon*[13] where she quoted the following from the decision of Fisher, J. in *McMahon v. TCG International Inc.*[14] where at paragraph 51 the duty owed by the employee was described as follows:

> [51] The implied duty has been held to include the following:
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> 1. To serve his employer faithfully;
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> 2. Not to compete with his employer;
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> 3. Not to reveal confidential information;
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> 4. Not to conceal from his employer facts which ought to be revealed;
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> 5. To provide full-time service to his employer.

Madam Justice Harris also confirmed the general common law duty of honesty in contractual performance that was discussed in *Bhasin*[15]. That duty was described by the Court as follows at para. 73:

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[13] 2012BCSC 1322, rev'd on other rounds, 2015 BCCA 334
[14] 2007 BCSC 1003
[15] *Bhasin v. Hrynew,* 2014 SCC 71

> …This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance…

Madam Justice Harris on the evidence found that the plaintiff already knew about the departing employee's intention to leave the company and she did not accept that the defendant conspired with the departing employee to leave and take clients of the plaintiff with him. She therefore concluded that there was no breach of the duty of loyalty or honesty.

Wrongful Quitting

The British Columbia Court of Appeal had the opportunity to consider a claim which involved in part a claim by the employer for damages resulting from an employee quitting without providing reasonable notice. In *Consbec Inc. v. Walker*[16] the employee who was found to best be described as an estimator, had quit without providing any notice. The Trial Judge found that this failure to provide notice resulted in damages for the employer and awarded damages of over $50,000. The damages award included costs relating to an employee who was transferred and employee who temporarily went to the location during a transition period. The defendant appealed the manner in which the damages were assessed. The Court of Appeal agreed with the defendant and set aside the damages award.

In doing so, the Court reviewed the principles relating to wrongful quitting and the assessment of damages that follows. The Court stated that the first step for the trial judge was to make a determination of the amount of notice that the employee should have given of his intent to quit, and then determine what damages, if any, were suffered by the employer due to the failure to provide that notice. The Court reviewed the purpose of providing notice[17], that being to give the employer a reasonable time to adjust to the employee's departure. The Court of Appeal said that in determining the appropriate notice period regard should be had to the employee's duties and responsibilities, salary, length of service, and the time it would reasonably take the employer to have others handle the employee's work or to hire a replacement. The Court of Appeal found that in the circumstances of this particular employee one month would have been reasonable.

The next step is to determine what damages, if any, flowed from the employee's failure to give one months' notice. The Court described the measure of damages as being not the cost to the employer as a result of the employee leaving the company, but the cost to the employer as a result of the employee's failure to give notice.[18]

The Court, in applying these legal principles, found that the trial judge had erred in her assessment of the damages that resulted from the failure to provide adequate notice. The costs relating to transferring another employee to the departing employees position were not recoverable as they were due to the departure itself and not due to the failure to provide adequate notice. The costs relating to transferring another employee to immediately handle the transition were recoverable but they had to be set off against

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[16] 2016 BCCA 114

[17] *Physique Health Club Ltd. v. Carlsen* (196), 141 D.L.R. (4th) 64; *Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain Inc.* (1993), 45 C.C.E.L. 276

[18] *Bradley v. Carleton Electric Ltd.* (1998), 37 C.C.E.L. (2d) 144 at para. 2 (Ont. C.A.)

the costs saved in not paying the departing employee for the one month which it was found he should have provided as reasonable notice. The net result was that the employer saved money and no damages award should have been made against the departing employee.

Vulnerability a factor relevant to assessment of the period of notice

In *Pakozdi v. B & B Heavy Civil Construction Ltd.*[19] Madam Justice Sharma considered whether the dismissed employee's vulnerability at the time of termination was a factor which could be taken into consideration in the assessment of the appropriate period of notice. The plaintiff was 55 years old at the time of trial. The plaintiff began working for the defendant in December 2013 and was terminated in January 2014. He was employed in the position of structural estimator. While the plaintiff was working for the defendant he also continued to work on a contract basis with others and the defendant was aware of this.

In May 2014 the plaintiff suffered an injury which resulted in him being bedridden but he continued to do his work. The plaintiff communicated with the employer about his medical condition throughout the time of the original injury until his termination. In January 2015 after his termination he suffered a further set back in his physical condition which resulted in him being unable to pursue full time employment subsequent to his termination. Medical evidence was presented at trial on behalf of the plaintiff including an opinion that the plaintiff had a number of significant barriers that impacted his ability to find alternate work after his lay off. Madam Justice Sharma found that the evidence was clear that very early in his employment the defendant was aware of the plaintiff's physical and medical condition and they accommodated his condition. The plaintiff alleged that the notice period should be extended due to this vulnerability.

Madam Justice Sharma's assessment of the period of notice began with a consideration of what the appropriate period of notice would be taking the usual *Bardal* factors into consideration. She noted that "short term employees are entitled to a proportionately longer period of notice".[20] She also noted that the plaintiff's age was a factor supporting a longer notice period.[21] She concluded that in light of his experience, age and length of employment, the applicable notice period is five months. She then went on to consider the impact of the plaintiff's vulnerability at the time of firing and how that impacted the notice period. She quoted the following passage from para. 72 of *Ostrow:*

> As can be seen from the discussion of *Singh* above, the vulnerability of a particular employee can also be a factor taken into account when assessing the length of the notice period. As stated in *Ansari*, the primary consideration in awarding damages for wrongful dismissal is the ability of the employee to find alternative and comparable employment. It has subsequently been recognized that the health issues of an employee may reasonable affect that ability by making them less desirable to prospective employers: see *Lewis v. Lehigh Northwest Cement Ltd.*, 2008 BCSC 542 at para. 24…

[19] 2016 BCSC 992
[20] *Ostrow v Abacus Management Corporation Mergers and Acquisitions,* 2014 BCSC 938 at para. 41
[21] *Henderson v. Bristol-Myers Squibb Canada Inc.,* [1996] 8 W.W.R. 415, 146 Sask. R. 127 (Q.B.) where the court noted that after the ae of 50 re-employment opportunities for people are reduced.

Madam Justice Sharma concluded that the vulnerability and the impact that this would have on the plaintiff's ability to search for and secure alternative employment justified an increase to the notice period to eight months.

Another interesting aspect to this case concerned mitigation. As noted the plaintiff during the time of his employment also conducted work on behalf of others and earned income from this during his employment with the defendant. The defendant at trial argued that these earnings that the plaintiff continued to have post termination should be considered mitigation and should work to reduce the monies owing by the defendant. In rejecting that argument Madam Justice Sharma found that the defendant had accepted that the plaintiff would continue to work for another entity during the course of his employment and that therefore his earnings from that entity were not to be deducted from his damages claim.