Employment Law Update – February 2017

The case of *Ram v. The Michael Lacombe Group Inc.*[i] involved the dismissal of a cook from Burger King due to allegations that the dismissed employee had stolen some French fries and a drink. Despite involving a relatively low level employee and a minor degree of misconduct, the case presented the Court with an opportunity to provide commentary on a broad variety of issues including:

1. Dealing with allegations of theft and the analysis required to determine if just cause exists;
2. Consideration of cumulative misconduct;
3. Factors relevant to determination of length of notice in circumstances involving different employers;
4. Assessment of mitigation in circumstances where the dismissed employee takes no steps to obtain alternate employment;
5. Principles applicable to an award of aggravated damages and quantification of the award; and
6. Principles applicable to an award of punitive damages.

This case serves as an excellent primer on many legal issues that are relevant in employment law cases and for this reason is the subject of this employment law update. The decision provides a succinct summary of the applicable legal principles and the leading cases for each of the considered issues and demonstrates the application of those legal principles to a relatively simple and straightforward set of facts.

Ms. Ram prior to her termination worked as a cook for Burger King for approximately 24 years. During that time, she worked in various locations, all of which were owned and operated by different corporate entities. Ms. Ram was an immigrant with an approximately grade 8 education, was 55 years old at the time of her termination and had little marketable skills. When Ms. Ram was confronted with the allegation of stealing the French fries and drink she immediately apologized and offered to pay for the items. She was confronted with the allegations in front of her supervisor and was asked in the presence of others by a senior member of the employer's team if she had been fired.

1. <u>Determination of Just Cause in circumstances where allegations of theft are made</u>

In assessing whether just cause existed Madam Justice Warren referred to the cases and principles that are familiar to those with a practice representing employers or employees in wrongful dismissal cases. That assessment begins with the Supreme Court of Canada decision in *McKinley*[ii] and the principle that dishonest conduct does not always amount to cause for dismissal, rather the employer is required to assess the seriousness of the misconduct in the context of the particular circumstances of the employee to determine whether dismissal without notice is a proportionate sanction. When criminal conduct or dishonesty is relied on as the basis for termination, particularly cogent evidence is required for the court to conclude that the misconduct actually occurred.[iii] If the court is satisfied that the misconduct occurred, they then must assess whether the misconduct was such that the relationship between the parties was irreparable.[iv]

Madam Justice Warren then considered whether the employer had established the theft. Her analysis of this issue is found at paragraphs 65 and 66 of her reasons and is as follows:

> [65] The first question is whether the defendant has established that it is more likely than not that Ms. Ram committed theft when she took the fries and the drink on December 27, 2013. This requires the defendant to prove, on a balance of probabilities, both that Ms. Ram took the food items and that, in doing so, she had the requisite intent for theft: *Dhatt v. Kal Tire Ltd.,* 2015

> BCSC 1177, at paras. 58 – 59; *Kalsi v. Greater Vancouver Associate Stores Ltd.*, 2009 BCSC 287, at para. 276.
>
> [66] There is no dispute that Ms. Ram took a fish sandwich, fries and a drink without paying for them. The only question is whether the defendant has proved that she intended to steal the fries and the drink…

Madam Justice Warren found that the defendant had not proved that the plaintiff intended to steal, citing a variety of factors, including that she made no attempt to conceal the items from her supervisor and that the apology made in the termination meeting was a result of her being upset and intimidated. Evidence from the supervisor regarding statements made by Ms. Ram regarding the items was not given weight as the statements were not put to Ms. Ram in cross examination at which time she would have had an opportunity to explain, confirm or deny the statements.

Madam Justice Warren further concluded that even if she had found that Ms. Ram's conduct was intentionally dishonest, in the circumstances of this case termination would have been disproportionate to the misconduct. The Court of Appeal decision in *Roe* [v] was distinguished on the basis that Mr. Roe was a senior management employee with great responsibility whose misconduct was premeditated and which he attempted to actively conceal while Ms. Ram was a low-level employee with very limited responsibility and no mentoring or supervisory role, who made no attempt to conceal her actions.

2. <u>Consideration of the doctrine of cumulative misconduct</u>

In considering whether cumulative misconduct could lead to a finding of just cause in the circumstances Madam Justice Warren referenced the explanation provided by the Court of Appeal[vi] of the two ways that cumulative misconduct can influence a determination of whether a defendant has established just cause. Those are:

1. Where an employee has committed more than one act of misconduct, the cumulative effect may justify dismissal even where dismissal would be disproportionate in relation to each individual incident on its own; and
2. Where a single incident of misconduct is alleged to be grounds for summary dismissal when considered in the context of a discipline history that includes previous incidents of similar misconduct.

Neither of these circumstances were found to apply in the case at bar because the decision to terminate was based on the single incident that occurred and because the prior incidents of alleged misconduct were acknowledged to be not serious and did not result in any kind of discipline.

3. <u>Determination of Length of Notice</u>

As noted above, Ms. Ram had worked for Burger King for approximately 24 years but during that time had worked in a variety of locations, with each location being owned and operated by a different corporate entity. Madam Justice Warren determined that the length of service for the purposes of determining appropriate notice depended on whether the employer implicitly agreed to recognize her prior years of service when she moved to the final location. This assessment was said to be based on the question of whether there was an implied term. Finding an implied term would depend on whether, in all the circumstances, it ought to be presumed that the parties intended the employee's prior service to be recognized. Madam Justice Warren quoted the articulation of the test for finding an implied term in an employment contract from *Wrongful Dismissal*[vii] as follows:

> In particular, terms may be, and frequently are, implied in employment contracts where the court concludes that the parties would have agreed to them if when forming the contract, they had turned their minds to the type of situation which later transpired.

This test is referred to as the officious bystander and requires a finding not only that the term sought to be implied is reasonable but also that it is so obvious that it "went without saying".[viii] Madam Justice Warren concluded that when applying the "officious bystander" test she had no difficulty finding an implied term in the employment contract between the defendant and Ms. Ram to include that her prior service would be recognized. The factors relied on in part included Ms. Ram's subjective impressions and in particular that she paid little if any attention to which company was her actual employer at any given time. Also noted was that while with each move Ms. Ram was told that she would have to formally quit and then become employed the impact of her move was simply not discussed. Other referenced factors included that she was not paid severance with the move, that her duties did not change and that the employer through his connections made arrangements for Ms. Ram to become employed at new locations. Madam Justice Warren concluded after reviewing a variety of the factors that:

> [105] In these circumstances, if, at the time Ms. Ram agreed to move to the Granville Street location, an officious bystander had said to the parties, "Should you put in a term that Ms. Ram will be treated as a long-term employee?", they would have "testily" responded with words to the effect that this "went without saying".

For the purposes of determining reasonable notice, Ms. Ram's entire 24 years of service with Burger King was taken into consideration.

4. Assessment of Mitigation

The evidence before the court was that Ms. Ram made no effort to find alternative employment after being terminated. Ms. Ram asserted that as a result of the termination her depression greatly increased and she was disabled from working. Madam Justice Warren found that the evidence did not establish that she was disabled from working, and therefore went on to consider whether she had failed to mitigate her damages. Her failure to attempt to find another job was found to be a failure to mitigate, however that on its own is not sufficient to entitle the defendant to a reduction in the amount of damages. Rather the employer has the further onus to establish that if the plaintiff had taken steps to mitigate she would likely have found equivalent employment.[ix]

Madam Justice Warren concluded that the mitigation defense had not been made out as the employer did not establish that had Ms. Ram taken steps then she likely could have found equivalent employment in less than a year. The period of notice was assessed at 12 months after taking into consideration her years of service, that she was 55 years old and less than fluent in English, and that she had a pre-existing history of depression.

5. Assessment of entitlement to and quantum of Aggravated Damages

Ms. Ram's counsel argued that punitive and aggravated damages should be considered globally, suggesting that the task of the court was to look at total damages organically rather than adding up various heads of damages. The Court rejected that position, noting that aggravated damages are compensatory, while punitive damages are meant to punish. Madam Justice Warren explained that in an employment law case aggravated damages are awarded to compensate a plaintiff for actual damages that is caused by unfair or bad faith conduct of an employer in the manner, as distinct from the fact of, the dismissal. She reviewed the principles taken from the leading cases, specifically the following:

a. Aggravated damages in wrongful dismissal cases are compensatory in nature;
b. It is an implied term of an employment contract that an employer will act in good faith in the manner of dismissal[x];
c. Aggravated damages are considered in the context of breach of the employment contract and are recoverable if such damages were contemplated by the parties at the time they entered into the contract[xi];
d. Damages for mental distress caused merely by the dismissal are not recoverable since dismissal is a clear legal possibility[xii];
e. Damages resulting from the manner of dismissal are only available when the employer engages in conduct during the course of the dismissal that is "unfair or is in bad faith, by being, for example, untruthful, misleading or unduly insensitive"[xiii];
f. If the 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 and award that reflects the actual damages.[xiv]

Madam Justice Warren quoted extensively from the decision in *George*[xv] concluding with paragraph 239 which provides a summary of how entitlement to aggravated damages is determined. Mr. Justice Skolrood concluded as follows:

> [239] As can be seen from the above, aggravated damages may be available to compensate a dismissed employee for mental distress caused by the manner, as distinct from the fact, of dismissal. Put another way, the loss of one's employment will almost always cause some degree of upset but aggravated damages will only be awarded where the conduct of the employer in effecting the termination is inconsistent with the employer's duty of good faith and where the employee suffers mental distress because of that conduct.

Madam Justice Warren applied this two stage analysis is determining whether Ms. Ram was entitled to aggravated damages. The first stage involved consideration of whether Ms. Ram had established that the defendant's conduct in the manner of termination was unfair or in bad faith. The second stage involved an assessment of whether Ms. Ram had established that she suffered mental distress as a result of the manner of the dismissal and not just as a result of the dismissal itself. She concluded that the employer had behaved in an unreasonable, unfair and unduly insensitive manner during the termination.

No medical evidence was led with respect to the mental distress that Ms. Ram suffered as a result of the manner of the termination. The decision in *Lau*[xvi] was cited as authority for the proposition that medical evidence is not required to prove that a false accusation of dishonesty can lead to mental distress. Madam Justice Warren concluded that the evidence established that the manner of the dismissal caused Ms. Ram to suffer shame, embarrassment, anxiety and distress beyond that which she would have suffered any way as a result of the dismissal, but found it impossible to make specific findings regarding the intensity and duration of the symptoms based on the evidence that was before her. She concluded that an award of $25,000 for aggravated damages was appropriate in the circumstances of the case.

6. Assessment of Punitive damages

The purpose of punitive damages in an employment law case was described by Madam Justice Warren as being retribution, deterrence and denunciation. She noted that punitive damages are restricted to cases where an employer's conduct is so malicious and outrageous that it is deserving of punishment.[xvii] She noted as well that an award of punitive damages is "very much the exception rather than the rule" and that such damages are awarded "only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour

and where compensatory damages are insufficient to accomplish the objectives of retribution, deterrence and denunciation".[xviii]

Madam Justice Warren also quoted from the decision in *Vernon*[xix] as follows:

> As noted in *Honda*, in the context of damages for conduct in the course of dismissal, care must be taken when aggravated damages have been awarded to avoid the pitfall of double compensation or double punishment for the same actions. Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.

She concluded that the conduct did not rise to the level of maliciousness required to warrant an award of punitive damages.

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[i] 2017 BCSC 212
[ii] *McKinley v. BC Tel,* 2001 SCC 38
[iii] *Price v. 481530 BC Ltd.,* 2016 BCSC 1940 at para. 180; *Porta v. Weyerhaeuser Canada Ltd.,* 2001 BCSC 1480 at para. 10.
[iv] *Steel v. Coast Capital Savings Credit Union,* 2015 BCCA 127 at para. 27; *Nishima v. Azuma Foods (Canada) Co. Ltd.,* 2010 BCSC 502 at para. 194
[v] *Roe v. British Columbia Ferry Services Ltd.,* 2015 BCCA 1
[vi] *Ogden v. Canadian Imperial Bank of Commerce,* 2015 BCCA 175 at paras. 25 0 33 and 51
[vii] David Harris, *Wrongful Dismissal,* loose-leaf (Toronto: Carswell, 1990)
[viii] *Olympic Industries Inc. v. McNeill* (1993), 86 B.C.L.R. (2d) 273 (C.A., citing *Trollope & Colls Ltd. V. North West Metropolitan Regional Hospital Board,* [1973] 1 W.L.R. 601 (H.L.)
[ix] *Jorgenson v. Jack Cewe Ltd.,* (1978), 93 D.L.R. (3d) 464, [1979] 1 A.C.W.S. 138 and *Munanan v. MacMillan Bloedel Ltd.,* [1977] 2 A.C.W.S. 364 (at para. 10)
[x] *Beggs v. Westport Foods Ltd.,* 2011 BCCA 76, 14 B.C.L.R. (5th) 1 at para 48
[xi] *Honda Canada Inc. v. Keays,* 2008 SCC 39
[xii] Supra, *Honda*
[xiii] *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701, para. 98
[xiv] *Honda Canada Inc. v. Keays,* 2008 SCC 39 at para. 59
[xv] *George v. Cowichan Tribes*, 2015 BCSC 513
[xvi] *Lau v. Royal Bank of Canada,* 2015 BCSC 1639
[xvii] *Vernon v. British Columbia (Liquor Distribution Branch),* 2012 BCSC 133; *Rodrigues v. Shendon Enterprises Ltd.,* 2010 BCSC 941
[xviii] *Whiten v. Pilot Insurance Co.,* 2002 SCC 18, at para. 94
[xix] Supra; para. 385