Employment Law Update May 2017

The theme of this edition of the Verdict is Disabilities. There are frequently employment law cases considering the issue of disability, either in the context of terminations of disabled employees or the effect of extended disability on employment law agreements. There are a myriad of human rights decisions considering the role of disability in adverse treatment in employment relationships and the duty to accommodate disability. The last few months however have not yielded decisions on this topic, rather the significant decisions of the last few months have considered:

1. The enforceability of a termination clause in an employment contract;
2. Notice in the context of a short term, senior employee;
3. Determination of just cause;
4. The rights to reasonable notice in circumstances "akin" to an employment relationship; and
5. Duties and obligations on an employer terminating a probationary employee.

These significant decisions of the last few months will be summarized in this paper. There are no new legal principles, rather these decisions provide a good summary of existing law. The Court of Appeal decision dealing with notice in circumstances akin to an employment relationship considered interesting arguments by counsel and settled the obligations of employer's in similar circumstances. If you are dealing with a situation involving disability in the employment context be alive to the obligations on the part of the employer to comply with *Human Rights* legislation and to avoid adverse differential treatment of an employee due to the disability. Also be aware of the common law implications of an extended period of disability. There are a number of cases to provide you with a road map to determine the employer's obligations in the face of disability.

Enforceability of Termination Clauses

The decision of Madam Justice Fisher in the case of *Davies v. Canada Shineray Suppliers Group Inc.*[i] considered the enforceability of a termination clause in what was purported to be an independent contractor situation. The plaintiff was hired as a day care general manager on July 1, 2015. The contract stated that the plaintiff was hired as an independent contractor and the term of the contract was for five years. The contract included the following clause regarding termination:

> 8. Additionally, the Company may terminate this Agreement with or without cause by providing you with three (3) months' notice of cancellation. In such an event, the Company shall have no further liability or obligation to you and you will have no action, claim or demand against the Company at common law or under statute.

On March 30, 2016 the plaintiff was given notice of termination effective April 1, 2016. At trial the plaintiff sought damages for the remainder of the term of the contract on the basis that:

(1) The termination provision in clause 8 of the contract is unenforceable, and
(2) The defendant had not established just cause for the dismissal.

The plaintiff submitted that the termination clause was unenforceable because it offended the *Employment Standards Act* and the *Human Rights Code.* The plaintiff submitted that the termination clause purported to remove the right of the plaintiff to make any claim against the employer, whether at common law or under any statute. The plaintiff submitted that this was an abrogation of their rights under the *Employment Standards Act* and the *Human Rights Code* and was therefore not enforceable.

The first issue considered by the trial judge was whether the plaintiff was hired as an independent contractor or an employee. In finding that the plaintiff was an employee and that the contract was a contract of employment, Madam Justice Fisher applied the factors set out in the Supreme Court of Canada decision *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[ii] In that decision, the court set out a number of factors to consider in determining whether a person is an employee or an independent contractor, recognizing that the central factor is whether the person is performing the services as a person in business on his or her own account. The factors that court instructed to be taken into consideration included the level of control the employer has over the worker's activities, whether the worker provides her own equipment or hires her own helpers, the degree of financial risk taken by the worker, the worker's degree of responsibility for investment and management, and the worker's opportunity for profit in the performance of her tasks.

The second issue considered by Madam Justice Fisher was whether the employer was entitled to rely on the termination clause when they were in breach of the terms of the clause by failing to provide the plaintiff with the required three months' notice upon termination. Madam Justice Fisher confirmed the long standing authority that permits an employer to rely on a termination clause even where that employer does not comply with its terms.[iii] On this basis, she concluded that the termination clause was enforceable and the employer was required to provide notice pursuant to the terms of the clause.

Finally, Madam Justice Fisher considered whether the employer had just cause to terminate the contract. She stated that the employer had the onus of establishing just cause for dismissal on a balance of probabilities. To establish just cause, the employer must prove that the conduct of the plaintiff goes to the root of the contract and fundamentally strikes at the employment relationship, or in other words, is seriously incompatible with her duties. [iv] Madam Justice Fisher noted that this would include habitual neglect of duty, incompetence, willful disobedience or serious misconduct.[v] After applying this test she found that the employer had failed to establish just cause.

In this decision, a practice point is raised that is often forgotten by counsel in the heat of a trial. If you intend to impeach a witness, you must put the evidence to them in cross examination so that the witness is provided with an opportunity to provide an explanation. The failure to do so will result in little weight being given to the evidence. Madam Justice Fisher described the rule and its application in the circumstances of this case, at paragraph 63. She stated as follows:

> [63] None of Mr. Du's evidence about these matters was put to Ms. Davies in cross-examination, contrary to the rule in *Browne v. Dunne* (1893), 6 R. 67 (HL). This is a rule of trial fairness, which requires a party who intends to "impeach a witness" to confront the witness with the evidence during cross-examination so that the witness has an opportunity to provide an explanation. The rule is not fixed and the extent of its application is within the discretion of the trial judge after taking into account all the circumstances in the case: see *R. v. Lyttle*, 2004 SCC 5 at para. 65; *R. v. Gill*, 2017 BCCA 67 at paras. 22 – 24. Evidence contradicting a witness's testimony may be admitted despite a failure to put it to the witness, and the failure goes to the weight to be given to the evidence: *Vasiliopoulos v. Dosanjh*, 2008 BCCA 399 at para. 37. I allowed the evidence to be admitted subject to consideration of weight.

Ultimately Madam Justice Fisher gave the evidence no weight.

A second practice point considered in this decision was the ability to call a witness who was not listed in a witness list. Rule 12-5(28) provides that unless the court otherwise orders, a party must not lead evidence at trial from a witness unless that witness is listed in a witness list. Madam Justice Fisher held that for a court to otherwise order, there must be a reasonable explanation for the late notice, some ability

for the court to rectify any prejudice caused by such a late addition and some utility in the expected evidence.

Notice for a short term, senior employee

Sollows v. Albion Fisheries Ltd. [vi] provided the court with an opportunity to summarize the principles applicable to termination of short term senior employees. The case proceeded by way of summary trial. The plaintiff was 60 years old at the time of termination. He worked for the defendant for a period just shy of three years. He had worked for the defendant approximately 9 years earlier and was employed at the time that he was approached by the defendant to return to its employ. The summary trial application was hear within 5 months of dismissal and the decision was rendered within 8 months of dismissal. This resulted in consideration by the court of the following:

1. Inducement
2. Break in service
3. Reasonable notice
4. Mitigation
5. Contingency

In considering the impact of inducement, if any, Madam Justice Gropper referred to the decision in *Wallace v. United Grain Growers Ltd.*[vii], where the court stated the following:

(a) That inducements are another factor added to the four well-known *Bardal* factors in assessing the reasonable notice period;
(b) That not all inducements will carry the same weight;
(c) The reason for the relevance of inducements is the expectation interest of the parties involved; and
(d) Representations of potential career advancement are important.

Since this decision, if additional damages are to be granted, the source of these additional damages must be found within the contractual matrix by asking what was in the reasonable contemplation of the parties when the contract was formed.[viii] The cases establish that there must be some evidence of a representation by the employer creating an expectation or reliance interest at the time the contract is made for the loss to be compensable. In finding inducement to not be a factor that increases length of notice in the case at bar, Madam Justice Gropper noted that the subjective reliance and expectation interests of the employee are not the controlling factors in determining whether the employer induced the employee to accept the position. Madam Justice Gropper pointed to the absence of assurances about the circumstances of employment or potential termination and the absence of a guarantee of job security as factors that were determinative.

With respect to the break in service, as noted the plaintiff had previously been employed by this employer. His last period of employment with the defendant was lengthy and had occurred approximately nine years previously. An argument was made by the plaintiff that the entire length of time of service with the employer should be taken into consideration in assessing reasonable notice. This argument was rejected by Madam Justice Gropper. In analysing this issue, she considered a variety of factors including that the parties did not discuss credit for prior service in their discussions, it was not referred to in the employment agreement and the plaintiff did not ask to be credited for his prior years of service. The factors that appear to be determinative in the analysis were the extended break in service and the lack of inducement.

With respect to reasonable notice, Madam Justice Gropper referred to the decision of *Gillies v. Goldman Sachs Canada Inc.*[ix] where the Court stated at para. 32 that:

> …for persons of specialized employment skills who are nearing the older end of the workforce spectrum for the occupation, at a high level of responsibility, in circumstances where replacement employment may not be readily available, 12 months will not be unusual notice and longer notice will be the norm.

Madam Justice Gropper commented that the fact that an older employee may have a more difficult time finding new employment does not automatically justify a 12 month notice period, but his age is a factor that supports a longer period of notice. She concludes at paragraph 81 as follows:

> In light of the above, I find that the notice period should be on the lengthier side, and the often applied range of one month for each year of service is not reasonable under the circumstances.

Madam Justice Gropper concludes in the circumstances that 10 months' notice is appropriate. As noted above, the summary trial application was heard five months after termination and the decision was rendered eight months after termination. This led to consideration of two further factors, mitigation and contingency. With respect to mitigation, Madam Justice Gropper quoted the test to be applied in respect to mitigation as enunciated by Madam Justice Gray in *Luchuk v. Starbucks Coffee Canada Inc.*[x] at para. 39. That test was described as follows:

> In summary, the burden on a defendant to prove that a plaintiff failed to mitigate is a high one. The defence has to prove not only that the employee did not take such steps as a reasonable person in the dismissed employee's position would have taken in their own interests, but also show that if the plaintiff had taken those steps, the employee likely would have found equivalent employment.

Madam Justice Gropper noted the difficulty in satisfying this two part test and concluded that the defendant had not established on a balance of probabilities that the plaintiff did not take reasonable steps to find alternative employment and notes that she cannot assume that if steps had been taken the plaintiff would have found a new job. She noted the requirement of evidentiary support to come to such a conclusion.

The final issue to be considered was whether, given the timing of the decision, contingency factors should be taken into consideration. The authority for reducing the notice period on this basis is found in *Foster v. Kockuyms Cancar Division Hawker Siddeley Canada Inc.*, [xi]. The Court of Appeal reduced a notice period from 20 to 15 months noting the following with respect to a contingency factor:

> 14 With this summary trial being heard just short of five months after the dismissal IU think there must be built into the notice period a contingency factor that recognizes the possibility that the employee will obtain employment within the notice period.
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> 15 In my opinion a notice period of 20 months in this case "is outside the range of reasonableness to a degree warranting this Court's intervention".
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> 16 I think a reasonable notice period in this case would be 15 months and I would allow the appeal on this issue and substitute 15 months for 20 months.

Madam Justice Gropper also quotes from the decision in *Luchuk* where Madam Justice Gray describes the basis for a contingency reduction in the following terms:

> Wrongful dismissal cases are awkward, because the claim arises when the individual has been dismissed without reasonable notice, and then there is a bit of a race. Naturally the person who was dismissed would prefer to have an award from the Court and then afterwards get a job, because they would have a windfall, in the sense of receiving income from two sources representing the same time period. Naturally the defense would prefer that the plaintiff had found a job before the court hearing, because fi the plaintiff has replaced the employment with another job, then he or she will not have suffered the loss of their entire employment income for the notice period. This tension is always present in wrongful dismissal cases, and it is something that the Court has to be mindful of.

Madam Justice Gropper declines to make a reduction for the contingency possibility of the plaintiff finding employment during the notice period. However she goes on to state "If he has found alternative employment in the period between the hearing and the publication of these reasons, that fact should be made known to defendant's counsel and the notice period should be reduced accordingly." This statement appears to place a positive onus on the dismissed employee to report re employment during the period between the time of hearing and the publication of the reasons for judgment and counsel representing both employers and employees should be mindful of this obligation.

Just cause

Another decision determined by way of summary trial was *Stock v. Oak Bay Marina Ltd.*[xii] This is a decision of Madam Justice Adair in which just cause is alleged. The employer applied by way of summary trial for dismissal of the action. Madam Justice Adair found that the case was appropriate for determination by way of summary trial but also found that the employer had failed to demonstrate that it had just cause to terminate.

The plaintiff was born in 1960 and had worked for the defendant since January 1995. She was originally hired as a clerk and at the time of the termination had worked her way up to become a sales agent. Her termination was a result of a discovery by the employer of her improperly marking guest records. By doing so she improperly got the benefit of the reservation as part of her sales activity regardless of whether she contacted the individual guest. Her explanation for doing so was because she intended to contact the guest to sell an activity, although she did not ever actually contact the guest. Her employment was terminated for cause in August 2015. In April 2016 the employer provided the plaintiff with a very brief reference letter and the plaintiff ultimately found part time work in September 2016 and full time work in October 2016.

This case provided Madam Justice Adair to review the principles for determining whether an employer is justified in dismissing an employee on the grounds of dishonesty. A two part test was established by the Supreme Court of Canada in *McKinley v. BC Tel*[xiii]. To determine whether just cause exists, the court must determine:

1. Whether the evidence establishes the employee's dishonest conduct on a balance of probabilities; and
2. If so, whether the nature and degree of the dishonesty warrant the employee's dismissal.

In particular, the test requires an assessment of whether the employee's misconduct gave rise to a breakdown in the employment relationship justifying dismissal, or whether the misconduct can be reconciled with sustaining the employment relationship by imposing a more "proportionate" disciplinary response[xiv]. A contextual approach governs the assessment of the alleged misconduct[xv]. That assessment includes a consideration of the nature and seriousness of the dishonesty, the surrounding circumstances in

which the dishonest conduct occurred, the nature of the particular employment contract and the position of the employee[xvi]. The ultimate question to be decided is "whether the employee's misconduct was such that the employment relationship could no longer viably subsist".[xvii]

Madam Justice Adair summarized the required analysis in the following terms:

> [63] The trial judge is not obligated to formally balance the length and quality of service with the nature and severity of the misconduct in determining whether there was just cause to dismiss, although it may be appropriate on the facts of a particular case to engage in just such an analysis. The framework adopted by the Court in *McKinley* focuses on the nature and severity of the misconduct in relation to its impact on the employment relationship; it is not a balancing exercise between the value of the employment to the individual and the severity of the misconduct. See *Lau* at para. 145 (citing *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, at paras. 28 – 29).
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> [64] The standard of proof is on a balance of probabilities. The court must scrutinize all of the evidence with care, and the evidence must be sufficiently clear, convincing and cogent to satisfy the burden of proof. See *Lau* at para. 146 (citing *F.H. v. McDougall*, 2008 SCC 53 at paras. 46 and 49).

Applying the first part of the *McKinley* test Madam Justice Adair found that the plaintiff's conduct was wrongful. She also found that the misconduct was serious from the employer's point of view, undermining the trust that an employer is entitled to have in an employee. However she did not agree that immediate termination was justified. She found that a more proportionate disciplinary response would have been appropriate, taking into account her age, her long employment history, her unblemished record, the fact that she received no benefit from her actions and the lack of any clear warning about the consequences of such actions. She found therefore that the employer failed to demonstrate that it had just cause and that the plaintiff was therefore entitled to damages for wrongful dismissal.

Another interesting aspect of this decision is the manner in which Madam Justice Adair dealt with the re-employment. The plaintiff had failed to disclose her earnings from re employment. The defendant urged the court to cut off damages at the point of re-employment, in effect drawing an adverse inference from her failure to disclose details about her new position and the income being earned. Madam Justice Adair agreed with this position, and awarded damages only up to and including the point where the plaintiff found new employment.

<u>Reasonable notice in relationship "akin" to employment relationship</u>

Our Court of Appeal had an opportunity to comment on the nature of relationships on the spectrum between traditional employer/employee and independent contractor and the obligation to provide reasonable notice in the circumstances of that relationship in the case of *TCF Ventures Corp. v. The Cambie Malone's Corporation*[xviii]. This was an appeal of an order based on a finding that the plaintiff was entitled to reasonable notice arising from the termination of a relationship that was found to be akin to an employment relationship. Also appealed were the award of notice period and the damages awarded. The appellant employer accepted the trial judge's finding that the substance of the employment relationship placed it on a continuum closer to the employee than a pure independent contractor, however, they argued that the judge erred in implying an entitlement to reasonable notice by operation of law. They argued that the entitlement to notice arises only in respect of classic employment relationships. They argued that it is required to establish on the facts that an entitlement to notice is to be implied and then to analyze the facts to determine what that notice period should be.

The Court of Appeal disagreed, finding that reasonable notice is implied as a consequence of the classification of the employment relationship. The Court of Appeal agreed with the employee's submission that if the relationship falls within a certain class of relationships the obligation to provide reasonable notice, absent agreement to the contrary, is implied as a matter of law and does not need to be established as a matter of intention.[xix] The Court of Appeal agreed that the law recognizes that employment relationships may exist on a continuum, but where a relationship is found to be more akin to employee/employer than independent contractor or strict agency, it will be treated as an employer/employee relationship and the obligation to provide reasonable notice will be implied as a matter of law. The Court concluded:

> [24] As I read the judgment, the Court is clear that where the relationship bears more resemblance to, or is akin to, an employer/employee status the relationship will be treated as an employee/employer relationship for the purpose of implying an obligation to provide reasonable notice.

The second argument made by the appellant that damages should have been calculated on net earnings or the income declared by the plaintiff, not gross revenue, since only net earnings or income reflect a loss. The Court disagreed with this submission stating that the loss suffered by the plaintiff in what in substance is akin to an employment relationship, is the revenue lost. For that reason it is the gross revenue, not the net earnings or income that is the measure of the loss.

Probation

The Court once again had the opportunity to explain probationary periods of employment and the rights and obligations that flow from such periods of employment in the case of *Ly v. British Columbia (Interior Health Authority)*[xx]. The plaintiff employee began work as a manager on November 6, 2014 and was terminated on January 8, 2015. His employment contract included a probationary term of employment. The issue for the court was whether the employer made met its legal obligation to carry out a good faith assessment of the plaintiff's suitability for continued employment.

Madam Justice Morella explained the test for dismissal of a probationary employee and the application of that test as follows:

> [57] As addressed above, the test for dismissal in the context of probationary employment is suitability. Just cause need not be established. An employer needs only to establish that it acted in good faith in its assessment of the probationary employee's suitability. *Jadot*[xxi]
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> [58] In determining whether an employer acted in good faith, courts have examined the process through which the employer determines whether the employee is suitable for permanent employment. While an employer is not required to give reasons for the dismissal of the probationary employee, that employer's conduct in assessing the employee is reviewed by the court in light of various factors such as 1) whether the probationary employee was made aware of the basis for the employer's assessment of suitability before, or at the commencement of, employment; 2) whether the employer acted fairly and with reasonable diligence in assessing suitability; 3) whether the employee was given a reasonable opportunity to demonstrate his suitability for the position; and 4) whether the employer's decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only his job skills and performance but also character, judgment, compatibility and reliability.[xxii]

Madam Justice Morellato concluded that absent a fair opportunity to demonstrate his suitability, the dismissed probationary employee is entitled to damages. After assessing the circumstances surrounding the plaintiff's termination she concluded that the employer did not meet the requisite standard of good faith in assessing the plaintiff's suitability for the position. She found that the plaintiff was simply not given a reasonable opportunity to demonstrate his suitability for the position of manager and awarded him damages for wrongful dismissal. The plaintiff had found re-employment within three months of his termination and the damages awarded were equivalent to three months.

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[i] 2017 BCSC 304
[ii] 2001 SCC 50 at para. 47
[iii] *Nygard International Ltd. V. Robinson* 46 BCLR (2d) 103 (CA)
[iv] *Panton v. Everywoman's Health Centre Society* (1988), 2000 BCCA 621 at para. 28
[v] *Port Arthur Shipbuilding Co. v. Arthurs* [1967] 2 OR 49 (CA), rev'd on other grounds [1969] SCR 85, at 55
[vi] 2017 BCSC 376
[vii] [1997], 3 S.C.R. 701 at paras. 83 - 85
[viii] *Fidler v. Sun Life Assurance Co. of Canada,* 2006 SCC 30; *Honda Canada Inc. v. Keays,* 2008 SCC 39
[ix] 2001 BCCA 683
[x] 2016 BCSC 830
[xi] (1993) 83 B.C.L.R. (2d) 207 (CA)
[xii] 2017 BCSC 359
[xiii] 2001 SCC 38
[xiv] *McKinley,* at paras. 48, 53 and 57
[xv] *McKinley*, at para. 51
[xvi] *McKinley,* at paras. 48 - 57
[xvii] *McKinley,* at para. 29
[xviii] 2017 BCCA 129
[xix] *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986
[xx] 2017 BCSC 42
[xxi] [1997] B.C.J. No. 2403 (C.A.)
[xxii] *Geller v. Sable Resources Ltd.,* 2012 BCSC 1861 at para. 33; *Ritchie; Jadot; Longshaw v. Monarch Beauty Supply Co.,* [1995] B.C.W.L.D. 2945 (S.C.); *Rocky Credit Union Ltd. V Higginson* (1995), 27 Alta. L.R. (3d) 348 (C.A.); *Jacmain v. Attorney General (Can.) et al.* [1978] 2 S.C.R. 15 (S.C.C.); *Gebhard v. Board of Education of the Wilkie School Division No. 59* (1986), 52 Sask. R. 272 (Q.B.)