newsletter
newsletter
employment and labour
mcmillan
february 2014

in this issue...

Treat Your Workers As You Would Like A Court To Treat Them": Connor Homes And The "New" Golden Rule Of Employer-Worker Relations

by Martin J. Thompson

Classifying workplace relationships as employer/employee or principal/contractor can be problematic. Courts have wrestled with determining the intent of the parties (step 1) and whether the objective reality supports the parties' expressed intentions of the employer-worker relationship classification (step 2).

The recent unanimous decision of the Federal Court of Appeal in Appeal in *1392644 Ontario Inc. (o/a Connor Homes) v The Minister of National Revenue* 2013 FCA 85 [*Connor Homes*] does not establish a new test for answering the question of whether or not an individual is performing services as their own business on their own account. The decision is significant, however, because it succinctly pulls together the fragments of several previous decisions that, when pieced together, form the two-step approach a Court should use to sort out whether a worker is an employee or an independent contractor.

Although the decision in *Connor Homes* was released only a few months ago, it has already been followed in five subsequent cases and considered in two others. Employers should consider *Connor Homes* to be the "new" leading case on determining the employer-worker relationship.

Everyone knows the golden rule is to "treat others as you would like to be treated". However, in the context of classifying

employer-worker relationships, *Connor Homes* suggests employers should heed a slight twist on this classic maxim: "treat your workers as you would like a Court to treat them".

Choosing whether to have your workers be employees or independent contractors is best done on a case-by-case basis. Employers with questions about which type of relationship is better-suited for their business, or how to clearly establish an employer-employee or independent contractor arrangements, should contact one of our members of McMillan's Employment & Labour Relations Group:

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

Martin J. Thompson, 613.232.7171 ext. 127
martin.thompson@mcmillan.ca

Robert Boyd, 514.987.5019
robert.boyd@mcmillan.ca

N. David McInnes, 604.691.7441
david.mcinnes@mcmillan.ca

Mark Klassen, 403.531.4727
mark.klassen@mcmillan.ca

back to index

Poisoned Workplaces And Constructive Dismissal: Objective Evidence Ousts Personal Perceptions Of Discrimination

by George Waggott and Stefanie Di Francesco, student at law

In *General Motors of Canada Limited v Johnson*, 2013 ONCA 502, the Ontario Court of Appeal overturned an earlier decision which held that a worker was constructively dismissed based on allegations that the workplace was poisoned by racism.

The Facts

The plaintiff, Yohann Johnson, claimed that the reason another employee, Alex Markov, refused to attend a training session led by Johnson was because Markov was racist. Markov claimed that he refused to train with Johnson because of his personal dislike of Johnson, resulting from insensitive comments Johnson allegedly made about the death of Markov's brother.

GM investigated Johnson's complaints on three separate occasions and took remedial action. Dissatisfied with GM's response, Johnson took a two-year approved medical leave of absence to recover from a disability that arose from the alleged discrimination he experienced in the workplace.

Once Johnson was cleared to work, GM offered him two different positions, both within one kilometer of his prior place of employment. GM also offered to adjust Johnson's shifts and supervision. Johnson declined the offers, asserting that he was disabled from working at any GM plant where he may come into contact with his former colleagues. Receiving no medical evidence to support this claim, GM concluded that Johnson had resigned. Johnson claimed he had been constructively dismissed as a result of a workplace poisoned by racism.

Not Constructive Dismissal

Despite finding that Johnson, "genuinely believed that he was a victim of racism in his workplace" and his "perception of events unfortunately led to stress and mental anguish", the Court overturned the trial decision, finding insufficient objective evidence to sustain Johnson's claim.

The Court emphasized the seriousness of an allegation of racism in the workplace and confirmed the far-reaching reputational and employment implications a

finding of a poisonous workplace has for the claimant, alleged perpetrators, and employer. The Court held as follows:

> Judicial consideration of an allegation of constructive dismissal based on alleged racism in the workplace requires careful scrutiny of and balanced attention to all the evidence relating to the allegation in order to determine whether it is more likely than not that the alleged racism occurred.

The Findings

The Court made the following findings with respect to the allegedly poisoned workplaces:

1. Onus: The plaintiff bears the onus of establishing a claim of a poisoned workplace on a balance of probabilities.
2. Discharging Onus: The plaintiff's subjective feelings and genuinely held perceptions of discrimination in the workplace are insufficient to discharge the onus. The onus is discharged only when there is evidence that, to the objective reasonable bystander, would support the conclusion that the workplace was poisoned by discriminatory conduct.
3. Required Misconduct: Except for egregious stand-alone incidents, a poisoned workplace is not created unless serious wrongful behaviour is persistent or repeated.

With respect to the law of constructive dismissal caused by a poisoned workplace, the Court held as follows:

1. Standard of Proof: An employee must prove that the employer's conduct not only constituted a repudiation of the employment contract but that the employer's persistent discriminatory conduct rendered continued employment intolerable.
2. Accommodation Requirements: An employer is not required to ensure that there is no possibility of future contact between the complainant employee and the discriminator employee.

Take Away Points For Employers

The Court was satisfied that GM had taken Johnson's complaints seriously; conducted several thorough investigations; made clear to employees that they did not approve or condone discriminatory conduct; and presented fair and reasonable employment accommodation options to Johnson.

If faced with similar issues, employers should ensure that: (1) all complaints of discrimination in the workplace are taken seriously; (2) complaints are investigated in a timely fashion; (3) investigations of discrimination are thorough and conducted by experienced and objective personnel; and (4) fair and reasonable employment accommodation options are offered to employees who suffer from a disability as a result of a perception of discrimination. These actions project to employees and the public that the employer does not approve or condone discriminatory conduct in the workplace.

For more information on this topic, please contact:

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

back to index

Don't Deduct The "Nest Egg": The Supreme Court Of Canada Upholds No Deduction Of Pension Benefits From Wrongful Dismissal Awards

by Robert Boyd, Claire E. Morton and David Wentzell

It is well established that employees in Canada who are terminated without cause are entitled to reasonable notice or severance in lieu. With respect to the latter, severance is an attempt to put the

employee in the same economic position that would have resulted had the individual received reasonable notice. Under this principle, courts have generally deducted from the severance amount any salary earned during the notice period, including, in certain circumstances, disability benefits.

On December 13, 2013, a long anticipated decision from the Supreme Court of Canada (the "SCC") was published dealing with whether the employer is able to deduct from wrongful dismissal damages amounts paid to the dismissed employee as pension benefits. In *IBM Canada Limited v Richard Waterman*, 2013 SCC 70, the majority of the Court confirmed the principle that employee pension payments are a type of benefit that should not reduce the wrongful dismissal damages otherwise payable.

Background

Richard Waterman was employed by IBM Canada Limited ("IBM") for 42 years. When he was terminated without cause, he was 65 years old and was a long-standing member of IBM's defined benefit plan (the "Plan"). Pursuant to the Plan, he was not entitled to receive both his full pension and employment income until he reached age 71. As a result, when Mr. Waterman was terminated without cause, he started receiving his full pension and the termination of his employment had no impact on receipt of full benefits under the Plan.

IBM provided Mr. Waterman with two months' notice and he sued for wrongful dismissal, asking the court for 24 months of reasonable notice.

At the Supreme Court of British Columbia, IBM argued that all of Mr. Waterman's pension benefits should be deducted from any amount of notice awarded. The basis for IBM's argument was that if pension payments were not deducted, Mr. Waterman would be receiving pension benefits in addition to his employment salary, which conflicts with the compensatory goal of damages for wrongful dismissal. IBM relied on the decision of *Sylvester v British Columbia*, [1997] 2 SCR 315 where it had been decided that disability benefits received during the notice period were deductible from the severance in lieu of notice, at least when the plan was established and funded solely by the employer.

Mr. Justice Goepel of the BC Supreme Court disagreed with IBM and held that Mr. Waterman was entitled to 20 months' notice, without any deduction for pension benefits paid during this period.

IBM's appeal of this decision was dismissed by the British Columbia Court of Appeal. Prowse J.A. writing for the Court relied on *Sylvester*, but concluded that it could be distinguished due to differences in the actual benefits and intentions of the parties, which ultimately led to different results.

The SCC upheld the Court of Appeal decision. Two dissenting judges would have allowed the IBM appeal. The majority decision of the Court set out three matters that needed to be considered in order to decide the appeal:

1. Why is there a "collateral benefit" problem in this case?

The collateral benefit in this case is the advantage to Mr. Waterman in the form of receipt of pension benefits that was directly connected to IBM's breach of the employment contract. The question the Court grappled with is whether those collateral benefits should be deducted from the damages owed to the plaintiff. Cromwell J. for the majority wrote at para. 15 that:

> The problem raised by collateral benefits is the question of whether they should be deducted from the damages otherwise payable by the defendant on account of the breach. This case raises a collateral benefit problem because there is a "but for" causal link between the IBM's breach of contract and Mr. Waterman's receipt of the benefit. He would not have received the pension benefits

and full salary in lieu of working notice "but for" the dismissal.

The Court noted that not all benefits received by a plaintiff will give rise to this issue. Collateral benefit concerns will be relevant if the receipt of benefits is directly connected to the defendant's breach, which either subsequently causes a recovery for the plaintiff in excess of his or her economic loss, or alternatively, the benefit is intended to be an indemnity for the loss from the breach.

2. Is the compensation principle the answer to the problem?

The Court examined whether the compensation principle (i.e. that Mr. Waterman should be in the same economic position had he received working notice) should be strictly applied. The majority held that it should not.

Cromwell J. wrote that there are many exceptions to the compensation principle when benefits to a plaintiff are not deducted and result in the plaintiff being economically better off. The Court continued the analysis of this principle specifically in the areas of charitable gifts and private insurance. With respect to whether the benefit was intended to be an indemnity for wage loss, the Court held at para. 62 that:

"Reliance on the distinction between indemnity and non-indemnity benefits is sound in principle. As McLachlin J. pointed out in her dissenting reasons in *Cunningham*, if the benefit "is not paid to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency", the benefit cannot be seen as having compensated the plaintiff for that pecuniary loss: pp. 371-72. If that is the case, the arguments in favour of deducting the benefit are weaker in the sense that IBM is asking to deduct apples from oranges."

With respect to pension benefits, the Court held that these are in place as a form of retirement savings and not as an indemnity for wage loss. Despite the fact that only IBM had contributed money to the Plan, Mr. Waterman was considered to have contributed to the acquisition of his pension through his years of service.

3. Does the Court's decision in Sylvester support IBM's position that the pension benefits must be deducted?

The SCC held that when the factors such as nature of the benefit (i.e. an indemnity), intentions of the parties based on the employment contract and policy considerations, the Court will arrive at an opposite conclusion as was decided in *Sylvester*. A pension plan is based on years of service and salary and is a method for retirement savings. As a result, Cromwell, J. concluded that parties would not have intended that an employee's vested pension plan should subsidize wrongful dismissal damages.

In addition, in *Sylvester* it was impossible for the employee to receive disability benefits and employment income at the same time. Whereas, in *IBM*, it would have been possible for Mr. Waterman to receive both pension payments and employment income in specific circumstances.

Further, the Court reviewed policy considerations and concluded at paragraph 93 that "non-deduction in this case promotes equal treatment of employees." For example, if an employer was facing economic hardship, they might be more inclined to terminate senior employees who have vested pension rights in order to avoid the payment of lengthy notice periods. The SCC noted at paragraph 93, "this is not an incentive the law should provide."

Takeaway for Employers

Employers should pay close attention to this judgment, in particular, because it was held that pension benefits are not an indemnity for loss of earnings and as such, pension benefits should not be deducted from wrongful dismissal damages. This result will apply uniformly to both defined benefit

pensions (such as Mr. Waterman's) and defined contribution, or money purchase, pensions.

Further and of particular interest to employers and pension plan sponsors, is the Court's suggestion that an employer could reduce wrongful dismissal damages by the amount of pension payments made during the reasonable notice period if the reduction was expressly stated in the employment contract, offer letter or pension plan. Such a provision should only be introduced after consultation with legal counsel.

While this decision imposes a bright-line rule that prohibits the deduction of pension payments of any type from wrongful dismissal damages, it does not affect the law allowing deduction of wage loss indemnity payments such as disability insurance.

For more information on this topic please contact:

Robert Boyd, 514.987.5019
robert.boyd@mcmillan.ca

Claire E. Morton, 604.691.6866
claire.morton@mcmillan.ca

David Wentzell, 416.865.7036
david.wentzell@mcmillan.ca

back to index

Canadian Employment Claims: Global Employers Can Challenge Jurisdiction

by Darryl R. Hiscocks and George Waggott

Many multinational employers blindly assume that they are required to defend a case wherever it is commenced, without considering the prospect of a jurisdictional challenge. A recent Ontario Superior Court decision offers some encouragement for organizations faced with termination and discrimination claims arising from executive employment that has straddled borders. The ruling also offers a caution to dismissed executives about where to initiate legal proceedings.

In *Sullivan v Four Seasons Hotels Limited*, 2013 ONSC 4622 (CanLII), the employer successfully obtained a permanent stay of Ontario wrongful dismissal proceedings. Even though the Court found that there was a valid basis to assert that the Ontario Courts had jurisdiction over the matter, New York was held to be the more convenient forum.

From 2002 until 2007, Kathryn Sullivan was employed by the Four Seasons Hotel, Toronto, as Director of Sales. In 2007, she entered into a new employment agreement in conjunction with her requested transfer to work in New York as Director of Sales for Nevis Resort, which is a Four Seasons-branded property. The transfer to New York was arranged by the Four Seasons head office in Toronto, which also assisted Sullivan with her immigration process.

After Sullivan's employment was terminated in September 2011, she sued in the Ontario Courts, claiming against both the Ontario company that had originally employed her and the New York entity. The Four Seasons challenged the Ontario Superior Court's jurisdiction and claimed in the alternative that New York was the more convenient forum.

Following the Supreme Court of Canada's recent decision in *Club Resorts Ltd. v Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, the Ontario Superior Court found that it could legitimately assume jurisdiction over the matter, but that New York was the more convenient forum. Accordingly, the plaintiff's action was permanently stayed.

The finding that the Ontario Court had jurisdiction to hear the claim was based in large part on the fact that the Four Seasons is resident in and carries on business in Ontario, and that Sullivan's transfer and new employment contract had been facilitated by the Ontario entity. Indeed, a Toronto head office human resources manager drafted the updated contract and assisted with the immigration of the plaintiff to the

U.S. for purposes of her transfer. The Court also noted that the new contract failed to expressly address the jurisdiction or governing law applicable to the New York employment. As a result, the jurisdiction of the Ontario Courts was found to exist due to the "real and substantial connection" between Ontario and Sullivan's employment.

The existence of jurisdiction was not, however, the end of the matter. The Four Seasons prevailed on its alternative argument that New York was the more convenient forum. The success of the Four Seasons in that regard was based on a number of factors, including the location of relevant witnesses (especially the "main witnesses") and evidence. Notably, the Court highlighted that the main allegations by the plaintiff were not merely about her termination, but also of discrimination and other mistreatment during her employment by her direct supervisors, all of whom were located in New York. The head office human resources manager was based in Ontario, but she was not as key a witness as those on site in the New York facility. New York was where most of the evidence at the core of the dispute would be found. The fact that Sullivan was not living in Ontario (she was in Alberta) at the time of the motion may have also worked against her.

Interestingly, in many prior comparable decisions, the Ontario Courts have placed emphasis on the fact that the plaintiff employee would lose a legitimate juridical advantage if forced to litigate his or her termination claim in the U.S. instead of Ontario. In Ontario, an employee dismissed without cause may claim under common law for reasonable notice or pay in lieu of notice, which may run up to twenty-four (24) months in duration (or even more in rare cases); that is not the case in the U.S. Some may call this an "end justifies the means" approach to deciding jurisdictional matters that clearly favours the employee. In any event, the Ontario Court cited a recent Supreme Court of Canada authority for the proposition that juridical advantage should not weigh too heavily in the analysis and noted the Four Seasons argument that the plaintiff's discrimination and tort claims are recognized under U.S. law, before concluding that New York was clearly the more appropriate forum for the matter.

The decision serves as an important reminder for multinational organizations about the potential for jurisdiction disputes in the context of employment litigation. Disputes about jurisdiction are not uncommon, particularly if the governing law and jurisdiction is not clearly agreed in advance and in writing, especially in cases of employee transfers. In any event, litigants will be best served if they consider the prospect of jurisdictional challenges in appropriate cases.

For more information on this topic, please contact:

Darryl R. Hiscocks, 416.865.7038
darryl.hiscocks@mcmillan.ca

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

back to index

To Pay Vacation Pay, Or Not Pay Vacation Pay: That Is The Question

by Paul Boshyk and George Waggott

We are often asked by employers to provide direction about payment of vacation pay to departing employees. What may seem like a simple question, however, can in fact be quite complex.

Legal Framework

When an employee is dismissed – whether with or without just cause – the employer must pay the employee his or her accrued wages to the date of termination, along with his or her accrued but unpaid

vacation pay, in accordance with applicable employment standards legislation.[1]

While the rules above seem relatively straightforward, the issue is complicated in the case of an employee who is dismissed without cause and given pay in lieu of notice. The question then becomes whether or not the employee continues to accrue vacation pay during the applicable period of notice (whether under statute, contract or common law). On this point, the law is somewhat divided.

Case Law Principles

In *Cronk v Canadian General Insurance Co.*,[2] the Ontario Court of Appeal opined that vacation pay continues to accrue during the statutory notice period only. Beyond that, the Court held that vacation pay does not accrue where the employee is "free from any obligations" to the employer. The Court directed as follows:

> *Vacation pay arises as a result of the contract of employment providing for a period of time during the employment year when the employee is not required to "work" but yet is entitled to pay … The [employee] was entitled to receive vacation pay upon the termination of her employment. The statutory benefit must obviously be calculated in accordance with the provisions of the statute and does not apply to the period of notice to which the [employee] is entitled at common law if that period exceeds to period to which the statutory benefit applies.*

The foregoing quote has been cited to support the proposition that employees are only entitled to vacation pay with respect to the statutory notice period. In one case, *Garvin v Rockwell International of Canada Ltd.*,[3] the Court went one step further and held that vacation pay should not accrue beyond the statutory notice period *absent an employment agreement or custom to the contrary*.

On the other hand, however, the Court in *Emery v Royal Oak Mines Inc.*[4] held that an employee is entitled to accrue vacation pay during the entire period of notice if the employee can show that he or she has suffered a loss or deprivation.

Advice for Employers

In light of the decisions in *Garvin and Emery*, employers would be wise to carefully draft employment agreements and/or policies that either (a) limit an employee's entitlement to vacation pay to the applicable statutory minimum, or (b) expressly state that vacation pay entitlements which exceed applicable statutory minimums do not continue to accrue beyond the statutory notice period. Given that the law is arguably in a state of flux, however, employers should be aware that they may be ordered to open their wallets in the event that an employee brings a complaint or action for vacation pay "accrued" beyond the statutory notice period.

[1] For Ontario jurisdiction employees, see *Employment Standards Act*, 2000, SO 2000, c 41, ss. 11(5) and 38. Of course, an employee dismissed without cause must also receive notice of termination or pay in lieu thereof, severance pay and benefit continuation (where applicable).

[2] (1995), 25 OR (3d) 505 (ONCA).

[3] 1993 CarswellOnt 966 (Ct J (GD)).

[4] 1995 CarswellOnt 456 (Ct J (GD)). The ONCA's decision in *Cronk* should prevail because it is a binding precedent which has not been overturned, particularly since it was decided after *Emery*. However, subsequent decisions have held that employees are entitled to accrue vacation pay during the common law period of notice pursuant to *Emery*. For example, see *Minns v. 943372 Ontario Inc.*, 1999 CarswellOnt 2997 (ONSC), where there was seemingly no employment agreement governing reasonable notice of termination and/or vacation pay. It is important to note, however, that *Cronk* does not appear to have been before the court in this decision. Thus the "confusion" in the law in this area may be a function of a failure to adhere to or bring the ONSC's attention to a point which was arguably settled in *Cronk*.

For more information on this topic, please contact:

Paul Boshyk, 416.865.7298
paul.boshyk@mcmillan.ca

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

back to index

Proposed Amendments To The ESA – New Leaves For Ontario Employees?

by Lyndsay A. Wasser

Proposed amendments to the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA") could mean that employees in Ontario will soon be entitled to the following three new unpaid leaves of absence:

(1) Family Caregiver Leave;
(2) Critically Ill Child Care Leave; and
(3) Crime-Related Child Death or Disappearance Leave.

Each of the proposed leaves is described in more detail below.

Family Caregiver Leave

Under the proposed Family Caregiver Leave, an employee would be allowed to take up to eight weeks of unpaid leave to provide care or support to any of the following relations who has a serious medical condition:

- The employee's spouse;
- A parent, step-parent or foster parent of the employee or the employee's spouse;
- A child, step-child or foster child of the employee or the employee's spouse;
- A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
- The spouse of a child of the employee;
- The employee's brother or sister;
- A relative of the employee who is dependent on the employee for care or assistance; and
- Any other individual prescribed as a family member going-forward.

An employee is entitled to the leave of absence if a qualified health practitioner issues a certificate stating that the employee's family member has a "serious medical condition". This term is not defined in the ESA or the proposed amendments, and therefore, the proposed Family Caregiver Leave could potentially apply to a fairly broad range of medical conditions.

There is no minimum service requirement for an employee to be eligible for this leave.

Critically Ill Child Care Leave

The proposed Critically Ill Child Care Leave would require employers to grant an employee an unpaid leave of up to 37 weeks (or for the period set out in the medical certificate described below) to support the employee's "critically ill child". This term is defined as a child under the age of 18 whose baseline health has changed significantly and whose life is at risk due to illness or injury.

An employee is entitled to this leave of absence if: (i) the employee has been employed with the employer for at least six consecutive months; and (ii) a qualified health practitioner issues a medical certificate stating that the employee's child is a critically ill child who requires the care or support of one or more parents and setting out the period during which the child requires such care or support.

The proposed amendments to the ESA also set out certain circumstances where an employee may be entitled to further or additional unpaid leaves of absence, where the employee's child is critically ill.

Crime-Related Child Death or Disappearance Leave

The Crime-Related Child Death or Disappearance Leave would allow an employee to take an unpaid leave of up to 104 weeks if it is probable that the employee's child died as a result of a crime, or up to 52 weeks if it is probable that the employee's child disappeared due to a crime. For the purposes of this leave, "child" includes the employee's child, step-child or foster child under the age of 18. To be eligible for this leave, the employee must have been employed for at least six consecutive months.

The employee is not entitled to the leave of absence if: (i) the employee is charged with the crime causing the death or disappearance of the child; or (ii) it is probable that the child was a party to the crime. Further, the employer can require that the employee provide evidence that is reasonable in the circumstances proving the employee's entitlement to this leave.

Employer Implications

The Bill setting out these proposed leaves of absence (Bill 21) was introduced in March 2013 by Minister of Labour Yasir Naqvi, and is currently in second reading. If passed, these three unpaid leaves of absence would be in addition to the seven existing unpaid leaves under the ESA. The existing leaves are as follows:

- Pregnancy Leave;
- Parental Leave;
- Family Medical Leave;
- Organ Donor Leave;
- Personal Emergency Leave;
- Emergency Leave, Declared Emergencies; and
- Reservist Leave.

Furthermore, the leaves of absence under the ESA are in addition to every employer's duty to accommodate an employee's family status and marital status, up to the point of undue hardship, under the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19. Recent case law indicates that this duty includes allowing employees time-off and/or a flexible work schedule when necessary to care for elderly parents, children (especially special needs children), and/or a pregnant spouse. For more information on this topic, see McMillan's prior bulletin on family status discrimination: an update on family status discrimination.

Since the circumstances where employees are entitled to take unpaid time-off work to address situations involving their family members continue to expand, employers would be well-advised to treat these situations with care, and seek legal counsel whenever they are unsure as to their legal obligations.

For more information on this topic, please contact:

Lyndsay A. Wasser, 416.865.7083
lyndsay.wasser@mcmillan.ca

back to index

"You Can't Have Your Cake and Eat it (Part) 2": An Update on Mitigation and Employment Contracts

by Martin J. Thompson and Kyle Lambert

In June 2012, we wrote about Chief Justice Winkler's decision in *Bowes v Goss Power Products* (2012 ONCA 425) ("*Bowes*"), which had raised a number of eyebrows.

In this decision, the Ontario Court of Appeal held that where an employment contract stipulates a specific

amount of payable notice upon termination, the employee is under no obligation to mitigate his or her damages. Instead, the pay in lieu of notice amount is treated as an amount owed under the contract. As such, the terminated employee has no duty to mitigate and can seek employment elsewhere and remain entitled to the entire notice amount payable under the contract.

A year and a half later, it is clear that this decision is gaining traction across the country. *Bowes* has been cited in four different decisions – two in British Columbia, one from Alberta and one in Ontario. While relying on *Bowes* to varying degrees, each of these decisions have upheld the principle that an employee does not owe a duty to mitigate if his or her contract contains a specified payable notice provision. The four decisions are briefly summarized below:

- In *Freudenberg Household Products Inc. v DiGiammarino* (2012 ONSC 5725), Justice Morawetz was requested to interpret a contractual provision, which entitled an employee to two years' compensation following termination. The Court expressly followed Bowes and forced the employer to pay the full contracted notice amount. Notably, the contract was only for a fixed four-year term. Nevertheless, the Court appears to have treated the duty to mitigate under that contract no differently than how Chief Justice Winkler did in Bowes, where the contract in issue was for an indefinite term.
- In *Allen v Ainsworth Lumber* (2013 BCCA 271), the British Columbia Court of Appeal took Bowes a step further in ruling against an employer that attempted to work around a contracted notice by asking the employee to not report to work during that time. The Court held that the employee had actually been dismissed and, using Bowes to support its decision, required the employer to pay the full contractual notice amount.
- In *Maxwell v British Columbia* (2013 BCSC 1386), the Court cited both *Bowes* and *Ainsworth*, and confirmed that where there exists a contractual severance provision, a dismissed employee is entitled to that specified amount without also being required to mitigate. A duty to mitigate only arises where such a duty is imposed in the contract. Of note, the employee's decision to decline alternative employment subsequent to her termination was deemed to be irrelevant.
- In *Lovely v Prestige Travel* (2013 ABQB 467), the main focus was the enforceability of the employment contract. Once the Court found that a valid contract existed, *Bowes* was cited in ruling that a duty to mitigate does not arise where there is an express contractual term which allows the employer to terminate a fixed-term contract by paying a certain amount of notice. The Court also held that fixed-term contracts should be treated no differently than contracts of indefinite duration. As such, just as an employer is now required to pay the full notice amount specified under an indefinite contract, an employer ought to be required to pay the full amount owed for a fixed term, absent a provision stating otherwise.

What This Means for Employers

Bowes and the decisions mentioned above confirm that employers wishing to prevent an employee from obtaining a windfall following termination must expressly establish a duty to mitigate in the employee's contract. Courts will now view the requirement to pay the entire specified notice period upon termination in an employment contract, whether fixed-term or indefinite, as a contractual obligation. Moreover, it is possible that an employee with a fixed-term contract will be entitled to the full sum owed under that contract without having to mitigate, absent an express provision stating otherwise.

Employers should continue to review their employment agreements to ensure that mitigation is addressed within the termination provisions. If not, employers face the risk of having to pay the kind of windfall envisioned in the decisions discussed above.

For more information on this topic, please contact:

Martin J. Thompson, 613.232.7171 ext. 127
martin.thompson@mcmillan.ca

Kyle Lambert, 613.232.7171 ext.117
kyle.lambert@mcmillan.ca

back to index

Commercial Restrictive Covenants Enforceable

by George Waggott and Robert Boyd

New life has been injected into efforts to enforce restrictive covenants negotiated as part of business deals following a recent decision by the Supreme Court of Canada (SCC). In its reasons in Payette v Guay Inc. 2013 SCC 45, the SCC upheld restrictions negotiated in the context of a sale of business.

Background Facts

Guay Inc. is a leading company in the crane rental business in the province of Quebec. Yannick Payette and his business partners owned a group of businesses in the same area. In 2004, Guay Inc. negotiated to purchase the assets of their crane rental businesses. As is common in transactions of this nature, Payette agreed to be bound by non-competition and non-solicitation restrictions. The specific provisions, granted in the context of a transaction valued in excess of $25 million, applied for a period of five years following closing of the purchase. Also, the non-competition provision restricted Payette's activities in the crane rental industry throughout the province of Quebec.

To ensure a smooth transition in operations following the sale, the parties also agreed to provisions in their purchase agreement in which Payette undertook to work full time for Guay Inc. as a consultant for six months. An employment contract was also eventually agreed at the end of this transitional term.

Several years later, Payette's employment was terminated without cause, which under Quebec employment law is often referred to as "without serious reason". Payette then proceeded to accept a position with a direct competitor of Guay Inc.

Injunction Granted

The initial attempt by Guay Inc. to obtain an injunction to enforce Payette's non-competition provision was unsuccessful. In siding with Payette, the Quebec Superior Court held that the Civil Code of Quebec prevents the enforcement of restrictive covenants in a contract of employment when an employer has terminated an employee without serious reason. Essentially, the employer's termination without cause amounted to a breach of contract which prevented the company from relying on the restrictive covenants.

The Quebec Court of Appeal overturned the Superior Court decision and ordered a permanent injunction. The relevant provision of the Civil Code of Quebec was held to be limited to those instances where the relevant restrictive covenant is linked to a contract of employment. In Payette's case, the restrictions were enforceable because they had been negotiated in the context of a commercial transaction.

SCC: Context For Covenants Is Key

The SCC affirmed the decision of the appeal court and held that the non-competition and non-solicitation provisions were enforceable. The approach to be followed in reviewing the restrictions, must, said the

Court, be guided by the context, which in this case was a negotiated commercial agreement involving a substantial purchase price and parties represented by experienced counsel. Also, the restrictive covenants were clearly a significant consideration granted in return for the purchase price.

In the commercial setting, a restrictive covenant is lawful unless it can be established by the party challenging it that its scope is unreasonable. For Payette, this meant that he had the onus of proving that the relevant terms were unreasonable. In siding with the company, the SCC had regard for the unique and specialized nature of the crane rental industry. More specifically, the SCC emphasized that cranes are mobile, and the activities of the crane rental business depend more on the location of customers' sites than on the company's place of business. Therefore, in this case, the entire province of Quebec was considered by the SCC as a reasonable territory scope for the non-competition provision.

Key Points For Corporations

The Payette decision provides helpful guidance for parties seeking to enforce restrictive covenants both within and outside of Quebec. In support of the enforcement of commercial provisions, the SCC noted that parties negotiating the sale of assets have greater freedom of contract than parties negotiating a contract of employment, both at common law and in the civil law of Quebec, because of the imbalance of power generally characterizing the employer-employee relationship. As a result, the scrutiny applied to determining the reasonableness of the scope of restrictive covenants relating to employment will not be applied with the same rigour or intensity in the commercial context.

A further point of clarification arising from this case relates to the territorial scope of restrictive covenants. In particular, the SCC found that, especially having regard to the modern economy and in the face of new technologies where the clients are not necessarily limited geographically, the lack of territorial limitation does not automatically result in a non-solicitation provision being unreasonable. This contrasts with non-competition covenants, which will not be enforceable without express and reasonable territorial restrictions.

For more information on this topic please contact:

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

Robert Boyd, 514.987.5019
robert.boyd@mcmillan.ca

back to index

"Canadian experience required": prohibited discrimination or being discriminating about standards?

by Lai-King Hum, with research assistance from Ke-Jia Chong, summer law student

It is the classic Catch-22 situation: you need Canadian experience to get a job in Canada, and you need a job in Canada to get Canadian experience. Whether job-hunting or applying for professional accreditation in Ontario, the "Canadian experience" conundrum gives rise to a seeming paradox.

Employers and regulators have argued that discriminating against those without Canadian experience is not prohibited, and that such experience can be gained through supplementary training. Rather, the requirement is a means of being discriminating in selecting candidates with the best qualifications for the Canadian market, with high standards of competence and performance.

The Ontario Human Rights Comission ("OHRC") disagrees. On July 15, 2013, the OHRC released its *Policy on Removing the "Canadian Experience" Barrier* ("Policy"). The Policy outlines the OHRC's position that

requiring Canadian experience is *prima facie* discrimination under Ontario's *Human Rights Code* ("Code"). The Policy has been lauded by some for eliminating in one fell stroke the Gordian-knot of "Canadian experience", said to be the most common barrier to integration into the Canadian job market for newcomers.

Background

High rates of underemployment and unemployment amongst recent immigrants to Canada because of the Canadian experience barrier are cited to justify this Policy. The Policy also points out that to get the requisite Canadian work experience, some newcomers turn to volunteer positions or unpaid internships – situations which are fraught with their own problems.[1]

Discrimination itself is only prohibited if the discrimination is based on a prohibited ground. Sections 5 and 6 of the Code lists the following specific grounds for employment and vocational associations:

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (1); 1999, c. 6, s. 28 (5); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (5); 2012, c. 7, s. 4 (1).

Harassment In Employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (2); 1999, c. 6, s. 28 (6); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (6); 2012, c. 7, s. 4 (2).

Vocational Associations

6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

The OHRC position may be summarized as follows:

- A strict requirement of "Canadian experience" is prima facie discriminatory, and may only be used in rare circumstances; and
- The onus is on employers and regulatory bodies to show that a requirement of prior work experience in Canada is a bona fide requirement

As shown below, the OHRC position steps up developments in caselaw and other decisions by courts, human rights tribunals, labour arbitrators, and regulatory decision makers. In doing so, Ontario has become the first province to explicitly forbid, except in rare circumstances, requiring "Canadian experience" as a condition of hiring or for accreditation into a profession.

[1] The OHRC conducted an online survey with more than 1000 respondents, including jobseekers, applicants for professional registration, and employers. The conclusion was that many newcomers end up volunteering or taking unpaid internships in order to meet the "Canadian experience" requirement. See also article: Lai-King Hum, "will work for free!": employers, beware of offers of free work by unpaid interns, Mondaq/Lexology, July 23, 2013.

The OHRC position is based partly on the Supreme Court of Canada decision in Meiorin,[2] which set out a three-part test to determine when a job requirement which violates human rights legislation may be justified as a bona fide occupational requirement. A bona fide occupational requirement must have all of the following elements:

- The requirement was adopted for a purpose or goal that is rationally connected to the function being performed;
- It was adopted in good faith, in the belief that it is needed to fulfill the purpose or goal; and
- It is reasonably necessary to accomplish its purpose or goal, because it is impossible to accommodate the claimant without undue hardship.

Meiorin involved a complainant who was required to pass a uniform standardized firefighter test, imposed by the government three years after she was hired. She was unable to pass the fitness part of the test, which required her to run 2.5 kilometres in 11 minutes, and lost her job as a result. The court held that the fitness tests were discriminating and inadequate as a measure of ability, and the standards established did not take into account the differences between the physical abilities between men and women.

The Policy makes clear how the Human Rights Tribunal may be expected to deal with applications alleging discrimination based on a requirement for "Canadian experience". The Policy is not binding on our courts. However, OHRC policies are nonetheless given judicial deference.

What does this Policy mean for employers and profession regulators? The law has already been developing in this area. However, the Policy creates more public awareness. As a result, there is an increased risk of applications to the Ontario Human Rights Tribunal for human rights violations based on "Canadian experience", and therefore more vigilance required.

Employers

The issue of "Canadian experience", as opposed to foreign work experience, has already been legally considered in the employment context.

For instance, in *Clarke Institute of Psychiatry v. O.N.A.*,[3] the labour tribunal found that the Clarke Institute of Psychiatry did not recognize nurses' years of experience outside of Canada when the experience was not from particular countries. This was used to calculate the salary grid level of the employee from the collective agreement. The tribunal held that the lack of recognition of experience from particular countries, in this case, Africa, amounted to discrimination based on country of origin or race. Of significance is that the Institute did not produce any rational or substantive explanation for devaluing experience from Africa

Employers should also be cognizant that refusing a candidate with no Canadian experience, but extensive non-Canadian experience, on the basis that they are "over qualified" could also be found to be prohibited discrimination. The Canadian Human Rights Tribunal found in *Sangha v. Mackenzie Valley Land & Water Board*[4] that an employer who applies a policy against hiring overqualified candidates is discriminating on prohibited grounds. The Tribunal found that visible minority immigrants are disproportionately excluded from higher rings of the job market, and therefore they apply to jobs where their qualifications exceed

[2] *British Columbia (Public Service Employee Relations Commission) v. BC EU*, 1999 CarswellBC 1907, aka *Meiorin*.

[3] 2001 CarswellOn 2007, [2001] LVI 3193-10, 95 LAC (4th) 154.

[4] Tribunal: 2006 CarswellNat 2219, 2006 CHRT 9; and Federal: 2007 CarswellNat 2710, 2007 FC 856.

the job requirements. An employer who establishes a rule against hiring overqualified candidates, although neutral on its face, has a greater impact on the visible minority immigrant candidates. The Tribunal also noted that native-born candidates who are rejected because of over-qualification can seek other work suited to their resumes, but immigrants do not have this option.[5]

Profession Regulators

Of more significance is the impact that the Policy may have on the professions and their regulatory bodies. There are over 800,000 members of regulated professions in Ontario, and an increasing number of internationally trained and educated applicants.

Earlier this year, the Office of the Fairness Commissioner (Office), with authority created by legislation to oversee the registration practices of profession regulators, released a report "A Fair Way to Go: Access to Ontario's Regulated Professions and the Need to Embrace Newcomers in the Global Economy".[6] Similar to the Policy, the Fairness Commissioner's report also cites "Canadian experience" as a significant hurdle for all newcomers seeking registration into a regulated profession.

Since the establishment of the Office in 2007, there have been reductions in Canadian experience requirements in the licensing criteria for various professions.[7] In 2011, out of 38 professions, 26 required work experience, of which 15 continued to require Canadian experience, including 6 that specifically required Ontario experience. These include architects, dieticians, engineers, foresters, general accountants, land surveyors, midwives, physicians and pyschologists.

"Canadian experience" in the profession regulation context has also been considered.

In the case of *Bitonti v. College of Physicians & Surgeons of British Columbia*[8], the College of Physicians & Surgeons split applicants for licenses to practise medicine into two categories. The first group, having been educated at medical schools in approved countries, was required to have 12 months of an internship at an approved hospital or two years of a residency program. The complainants belonged to the other group, all of whom were graduates of medical schools outside of selected countries. The latter group was required to have two years of post-graduate study, with one year of an internship in Canada. Those in the second group found it very difficult to obtain one year internships in Canada.

In deciding that the College's practice was discriminatory, the Tribunal analyzed whether the requirement for Canadian experience had a correlation with a protected characteristic, and whether there was an underlying rationale for the rule. The Tribunal found that there was a lack of effort on the part of the College to consider foreign equivalencies,[9] and that there were immediate assumptions based on the country where the medical training took place. The Tribunal also made several suggestions regarding appropriate assessment of foreign credentials.

---

[5] *Sangha* (Tribunal), at para 202.

[6] See http://www.fairnesscommissioner.ca/index_en.php?page=highlights/afairwaytogo. Faced with increasing numbers of applications from internationally trained and educated applicants for registration into the regulated professions, the role of the Office of the Fairness Commissioner was established by the *Fair Access to Regulated Professions Act and Compulsory Trades Act, 2006* (FARPA). FARPA mandates transparency, objectivity, impartiality and fairness in the policies and procedures that regulators use to license applicants in their professions. As part of the Fairness Commissioner's mandate to ensure that the registration practices of Ontario's profession regulators are transparent, objective, impartial and fair, the Commissioner regularly audits profession regulators.

[7] The website for the Office of the Fairness Commissioner contains a list of Ontario's professions and whether Canadian work experience is required.

[8] 1999 CarswellBC 3186.

[9] *Bitoni*, at para 177.

Following the decision in *Bitoni*, the College of Physicians & Surgeons in Alberta was found not to have discriminated against an Israeli trained doctor whose application for specialist medicine certification was denied. He was required to pass a specialist certification process, and he failed the second assessment. His argument that the requirements were impossibly burdensome and virtually unattainable by foreign trained graduates was rejected. The Tribunal, in a decision in line with the reasoning in *Bitoni*, found that there was insufficient evidence that the speciality assessments were discriminatory. The Tribunal also found that the assessments and the six months of training were reasonable and necessary to protect patient safety.[10]

The different outcomes in the two decisions are illustrative of the "best practices" espoused by the Policy. A test that focuses on the individual's actual competencies will not be discriminatory, whereas qualification assessments that are based solely on where an individual obtained their work experience without further individualized considerations will likely be found to violate human rights.

Conclusion

Given the OHRC release of the Policy, what should employers or regulators do?

The obvious answer is to consider eliminating "Canadian experience" as a requirement for a job or for accreditation purposes. However, where an employer or regulator considers that Canadian experience is essential to maintaining proper standards of performance, then it must be able to show that this requirement is bona fide and not related to any prohibited grounds of discrimination.

Alternatively, employers and regulators may modify the requirement of "Canadian experience". One suggestion is rather than requiring Canadian work experience, the requirement could be a demonstrated knowledge of Canadian laws particular to the job or profession, and its industry codes of conduct, as applicable, and norms and standards.

Solutions which go beyond a strict requirement of "Canadian experience" will likely impose administrative burdens upon both employers and regulators, as each individual applicant's work experiences will have to be assessed for foreign equivalencies and accommodation in the form of any additional training. Such individual as opposed to assessments based solely on a preference for education or experience from a particular country will likely be essential to avoiding successful claims of discrimination. The additional administrative burden related to such individual assessments are unlikely to meet the threshold of "undue hardship".

Employers and regulators are also well-advised to maintain records of all applications, and the reasons why a particular applicant is rejected and another chosen. As shown by the case of *Rafiq v. Scotia Capital*,[11] an applicant who was denied a sales position claimed discrimination because his resume contained non-Canadian experience and he was of Pakistani ethnic origin. There was no evidence of discrimination. The determining factor was that the applicant did not have the required prior sales experience. Scotia Capital also provided evidence that two other candidates for the same or similar advertisement had both non-Canadian (Pakistani) experience and sales experience, and were considered better candidates for a sales position.

There are difficulties foreseen with adherence to the Policy. For instance, one of the "best practices" suggestions in the Policy is not to "require applicants to disclose their country of origin or the location of their work experience on their job application form". How are employers, or regulators, expected to assess

[10] *Gersten*, at pages 74-75.

[11] 2010 HRTO 607.

or verify credentials or employment history, given the Policy recommendation against requiring such details?

As stated above, though judicial deference will be given to the Policy directive from the OHRC, the Policy is not binding on the courts. It remains to be seen what effect the Policy will ultimately have on employers and regulatory bodies who continue to maintain that "Canadian experience" is a *bona fide* requirement for employment or licensing.

Employers and regulators who use "Canadian experience" as a criteria for selection are in the meantime put on notice to modify their approaches to hiring and selection of job applicants, and their criteria for accreditation, or be prepared to justify it as a *bona fide* occupational requirement. They are also advised to seek legal advice on this important development.

For more information on this topic please contact:

Lai-King Hum, 416.307.4086
lai-king.hum@mcmillan.ca

back to index

Forfeiture Provisions in Compensation Plans Not Restraints of Trade: Employers Can Refuse Payment to Departed Employees

by George Waggott and Kyle Lambert

Executive compensation plans are often designed to both reward past performance and offer a meaningful retention incentive. In the recent decision in *Levinsky v Toronto Dominion Bank et al.*, (2013) 117 O.R. 3d 106, the Ontario Superior Court reinforced the accepted rule that forfeiture provisions in compensation plans are not likely to be an unenforceable restraint of trade.

Levinsky: Background

In *Levinsky*, a dispute arose after a senior executive left TD Bank to start up a hedge fund. Under the provisions of the bank's Restricted Share Unit ("RSU") Plan, participants were awarded RSUs which did not vest until three years following the initial allocation. The RSU Plan rules provided that should a participant resign from the Bank before the RSUs vested, all unvested RSUs would be forfeited. The TD Plan rule relied-upon provided as follows:

A Participant's entitlement to a Particular Award will be Forfeited without notice by the Bank, if the Participant resigns from Service prior to the Maturity Date of such Particular Award.

Legal Framework: What Triggers Forfeiture?

TD Bank successfully claimed that the forfeiture rule was enforceable. The Court held that when reviewing these types of clauses, the key feature will be what event or conduct triggers the forfeiture provision.

Clauses that tie eligibility for compensation to continuation of service are acceptable, whereas clauses which tie forfeiture to post-termination activity are subject to challenge as restraints on trade. The key for employers is to ensure that the contract clause does not fetter the employee's ability to choose where the employee wants to work next.

In *Levinsky*, the Court held that the specific Plan rule triggered forfeiture based solely on the end to employment. The Court therefore dismissed the employee's argument that the rule constituted a restraint on trade. Instead, the Court found that the forfeiture of RSUs upon resignation was an appropriate form of loyalty incentive.

In holding that the Plan rule was "agnostic as to the participant-employee's post-resignation conduct", the Court also stressed that the employee was fully advised of the RSU Plan when he accepted his latest position, noting that Levinsky was a sophisticated

individual who understood the terms of his employment. Finally, the Court added that the evidence that Levinsky set up his own business after leaving the bank could hardly indicate that the contractual provision restricted his post-resignation commercial activities.

Key Points for Employers

Levinsky reinforces the fact that employers can, with appropriately drafted documents, make incentives contingent upon conditions such as continued employment. This will be the case so long as the compensation plan does not improperly restrict the employee's subsequent activity. This case is helpful for employers since it confirms that a resignation does not necessarily trigger an immediate, or perhaps any, entitlement to unvested compensation.

For more information on this topic, please contact:

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

Kyle Lambert, 613.232.7171 ext.117
kyle.lambert@mcmillan.ca

back to index

Workplace policies on bullying and harassment are now mandatory in BC. Is your business compliant?

by Claire E. Morton

WorkSafeBC has responded to these concerns by implementing new occupational health and safety requirements in British Columbia workplaces.

Effective November 1, 2013, employers must take reasonable steps to prevent, or otherwise minimize, workplace bullying and harassment. Employers must:

- develop a Policy Statement with respect to bullying and harassment not being acceptable or tolerated;
- inform workers of the Policy Statement;
- enforce compliance with the Policy Statement;
- develop and implement procedures for workers to report incidents of bullying and harassment; and
- develop and implement procedures for investigating complaints of bullying and harassment.

We strongly encourage and recommend all employers to review their workplace policies and practices to ensure they are compliant with these new requirements.

For more information on this topic, please contact:

Claire E. Morton, 604.691.6866
claire.morton@mcmillan.ca

back to index