Reaching Out

Reaching Out – First Edition

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Dear Friends,

The Social Service Sector Practice Group is pleased to introduce its first *FTR Now* edition of *Reaching Out.*

Reaching Out is our Social Service Update designed to provide you with legal updates on new and developing cases, trends and topics that are relevant to your sector and which provide you with information and analysis of areas that may impact your operations and agencies.

In this issue, we discuss a variety of issues facing employers including the impact of the character of employment on notice periods, termination for conflict of interest, workplace violence and the impact of the new tort of privacy on the provision of medical information.

It is our hope that this publication provides you with useful and practical information on legal developments that may affect your management of legal obligations. We would be pleased to hear from you with your feedback and with any suggestions for topics you would find of interest in future issues.

Have a great summer!

Lauri Reesor
Editor

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BEYOND THE CAP: WHAT HAPPENED TO 24 MONTHS?

By: Hicks Morley

Recent decisions suggest that courts may be willing to extend the period of reasonable notice for long-serving employees beyond the limits to which employers have become accustomed.

INTRODUCTION

Employers have often argued that lower level employees ought to be provided with a lesser notice period, relying on the reasoning in *Cronk v. Canadian General Insurance Co.* [1] which suggested a 12 month cap on the notice period for these employees. For some time now, the trend has been to give less emphasis on the character of work when determining the appropriate notice period.

THE TREND

Traditionally, the reasonable notice period is assessed by determining the length of time it would reasonably take for the employee to find alternate work, having regard to the following factors:

- The employee's age – the notice period increasing with the age of the employee;
- The employee's character of employment – the notice period increasing for positions of higher responsibility;
- The employee's length of service – the notice period increasing with the length of service; and
- The availability of other work.

In *DiTomaso v. Crown Metal Packaging,* [2] the trial judge awarded 22 months' notice to a long-serving mechanic who was 62 years old. The employer appealed the decision on the basis that the trial judge had failed to give weight to the fact that the employee held an unskilled position and placed too much weight on the employee's age when assessing the period of reasonable notice. The Court of Appeal dismissed the appeal and upheld the trial judge's findings.

In doing so, the Court of Appeal specifically declined to impose an upper limit for the period of reasonable notice and suggested that the character of employment is becoming a factor of less significance:

Crown Metal would emphasize the importance of the character of the appellant's employment to minimize the reasonable notice to which he is entitled. I do not agree with that approach. Indeed, there is recent jurisprudence suggesting that, if anything it is today a factor of declining relative important. This is particularly so if an employer attempts to use character of employment to say that low level unskilled employees deserve less notice because they have an easier time finding alternative employment. The empirical validity of that proposition cannot simply be taken for granted, particularly in today's world. [3]

In *Hussain v. Suzuki Canada Inc.,* [4] the Ontario Superior Court considered the reasoning set out in Di Tomaso when assessing the reasonable notice period for the termination of Mr. Hussain's employment. At the time of Mr. Hussain's termination, he was 62 years old. He had been employed with the employer for 36 years, most recently in the position of Assistant Warehouse Supervisor.

Justice Roberts noted that the Court of Appeal has refused to establish an upper cap for the period of reasonable notice; however, she acknowledged that the typical upper limit awarded for reasonable notice is 24 months. She went on to note that a notice period in excess of 24 months could be awarded in exceptional circumstances.

Justice Roberts proceeded to award Mr. Hussain a notice period of 26 months. In doing so, Justice Roberts stated that while none of the individual factors of Mr. Hussain's employment were exceptional, the totality of the circumstances of Mr. Hussain's employment constituted exceptional circumstances justifying the award in excess of the rough upper limit of 24 months.

This decision seems to suggest that the rough upper limit can be easily disregarded and employers may face increasing notice periods upon the termination of long-serving employees.

The character of employment, unskilled, supervisory or executive, is no longer receiving the same weight as it once did to reduce the notice period for those employees who hold lower level positions with the employer.

Giving this factor less weight leaves the years of service and the age of the employee to receive greater weight, which may prove to be the two defining factors governing the length of the period of reasonable notice. In this respect, older, long serving employees may be granted notice periods which meet or exceed the rough upper cap regardless of the position that the employee held at the time of the termination.

Further, Justice Roberts' decision opens the door to decisions which impose upon employers a period of reasonable notice

which exceeds the formerly expected upper limit of 24 months. She suggests that a combination of routine factors, including lengthy service and advanced age, can amount to exceptional circumstances which justify a period of notice in excess of the rough upper limit.

Employers will need to be mindful of these increasingly growing notice periods when determining the appropriate period of reasonable notice for long-serving and older employees. If a court is satisfied the long service and advanced age constitute exceptional circumstances, it may be that an award which exceeds the 24 month "cap" will become the norm as opposed to the exception. This trend may impose additional burdens on employers as the population begins to age and individuals begin to work longer, potentially creating "exceptional circumstances" should they be terminated by the employer after many years of employment.

BILL 168: CASE DEVELOPMENTS

By: Colin J. Youngman

It has been almost two years since the Bill 168 workplace violence and harassment amendments to the *Occupational Health and Safety Act* ("OHSA") came into force. While case law regarding specific obligations under Bill 168 remains minimal, we have outlined below two important decisions for employers.

In an arbitration decision, *The Corporation of the City of Kingston and CUPE* (August 18, 2011), the termination of a long-service employee who uttered a death threat against her Union President was upheld. The grievor had a significant history of discipline for issues relating to her inability to control her anger, which manifested itself in aggressive behaviour and abusive language.

Arbitrator Newman embarked on an in-depth analysis of an employer's new obligations under the Bill 168 amendments. She stated that the amendments "reflect the view that violence can be prevented if employers, supervisors, and workers, seriously heed signs of danger, communicate clearly, and act with clarity when risk is identified."

Arbitrator Newman also found that the Bill 168 amendments impacted the analysis of a case of this nature in a number of key ways.

Threats of violence in the workplace are, by definition, "workplace violence." The definition of "workplace violence" under Bill 168 includes "a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force… ." Given the definition, Arbitrator Newman held that the workplace violence is the utterance of the words and that there need not be evidence of an immediate ability to do physical harm.

The amendments have changed the manner in which the employer and employee must react to the allegation of a threat. "An employer may not hide its head in the sand…the utterance of a threat in the workplace requires that the workplace parties stop cold. They must report. They must investigate. They must assess the existence of real danger. They must act."

However, Arbitrator Newman also made it clear that termination is not automatic when dealing with an employee who has committed an act of workplace violence, nor will an employer be justified in acting without facts.

The Bill 168 amendments have an impact on the way in which "an arbitrator might assess the reasonableness of termination as an appropriate form of discipline when a threat is found to have been made." While threatening language in the workplace has always been considered "at the grave end of the scale," according to Arbitrator Newman, the amendments "raise the bar on the factor of seriousness of offence."

The amendments create an additional factor to be added to the consideration of the reasonability and proportionality of any discipline imposed: workplace safety. When assessing whether or not the employment relationship can be sustained, Arbitrator Newman found the question to be asked is "to what extent is it likely that this employee, if returned to the

workplace, can be relied upon to conduct himself or herself in a way that is safe for others?"

This comprehensive interpretation of the Bill 168 amendments is helpful to employers. While termination will never be automatic, and any discipline imposed must be proportional, this case indicates that arbitrators are now likely to treat threats of violence seriously and given the circumstances, termination may well be the most appropriate response.

In another recent case (*Conforti v. Investia Financial Services* (September 23, 2011), the Ontario Labour Relations Board ("OLRB") considered the workplace harassment amendments under Bill 168. Unlike the workplace violence provisions, the workplace harassment provisions only require an employer to put in place a harassment policy and program and to provide information and instruction to employees. The provisions do not contain any other duties.

The issue in this case arose in the context of an application made under the OHSA where an employee complained that his discharge was a consequence of making a harassment complaint, and was therefore a violation of the anti-reprisal provisions of the OHSA.

The OLRB Vice-Chair noted that the language of the Bill 168 amendments to OHSA specifically omitted "an obligation to prevent workplace harassment from further duties and obligations where new obligations were created regarding workplace violence." He stated:

…it appears that the OHSA only requires an employer to put a workplace harassment policy and program in place and to provide a worker with information and instruction as appropriate. The OHSA does not provide any further requirements and, in particular, does not provide that the duties under ss. 25, 27 and 28 apply with respect to workplace harassment. Further, the OHSA provides no specific rights to a worker with respect to workplace harassment.

In this respect, the legislature could have imposed an obligation on the employer to provide workplace free of harassment, but it did not do so. The Vice-Chair found that the OLRB "does not have the authority to adjudicate upon the practical application of a policy that otherwise complies with the Act," and its authority is very limited with respect to the new harassment provisions. The OLRB dismissed the complaint.

This is a welcome decision for employers as it confirms that the OLRB does not have jurisdiction to hear complaints from employees who allege they have been harassed and unfairly treated by their employer. The case also confirms that the responsibilities of employers under the Bill 168 amendments with respect to workplace harassment are limited to the creation and posting of a policy and program and to providing information to employee's regarding the policy and program.

JUST CAUSE TERMINATIONS AND CONFLICT OF INTEREST

By: Andrew N. Zabrovsky

Following the Supreme Court of Canada's decision in *McKinley v. BC Tel* [5] in 2001, Canadian courts have adopted a contextual approach to determining whether an employer's decision to terminate an employee for dishonest or inappropriate conduct can be upheld. Courts now routinely consider not only whether the employee engaged in improper conduct, but also the circumstances surrounding that conduct and the proportionality of the employer's response. In keeping with the Supreme Court's reasoning in *McKinley*, courts are now required to consider the following questions in determining whether a termination ought to be upheld: (1) did the employee's actions violate an essential term of the employment agreement, (2) did the employee's actions breach the faith inherent in the work relationship, and (3) were the employee's actions fundamentally inconsistent with the employee's obligations to the employer? [6]

It has long been accepted in the common law that all employees, regardless of position, compensation, or duration of employment, owe a duty of loyalty, fidelity and good faith to their employers. Quite often these duties are enhanced and made explicit through expressed terms of an employment agreement or through explicit employer policies. In the cases of high-echelon managers and directors, the courts have determined that this duty is heightened, as these "fiduciary employees" are

expected to act with a view to advancing the organization's best interests and not entering into personal engagements which conflict with their employer's ongoing or potential activities. [7] Employees other than high-ranking officials have also been found to owe this sort of heightened fiduciary duty where the employee exercises unilateral discretion or power which affects his or her employer's interests, and where the employer is particularly vulnerable to the employee. [8]

When considering the nature of an employee's alleged misconduct in conflict of interest cases, courts have paid particular attention to any contractual or policy terms which may assist it in assessing whether the conduct engaged in was actually misconduct. This focus relates, in part, to the obligation of the employer to make it known what will constitute a conflict of interest in that particular employment context, and how conflicts of interest are to be dealt with.

In *Atkins v. Windsor Star,* [9] a pre-*McKinley* decision, the court considered the case of an employee who had been terminated for allegedly competing with his employer. The employee was engaged to recruit advertisers for a newspaper, and was terminated after his employer found out that he had been publishing his own advertising-funded fishing newsletter. While the court found that the employee's actions could have affected his employer's advertising revenues, and thus amounted to a potential conflict of interest, it concluded that the employer did not have just cause to terminate the employee as it had never expressly set out its expectations with regard to conflicts of interest. As such, absent evidence that an employee has been put on notice that engaging in an enterprise which represents a conflict of interest is forbidden, it is unlikely that an employer's decision to terminate in this sort of circumstance can be deemed "proportionate" under the *McKinley* contextual framework.

Where the prohibition on engaging in conflicts of interest is expressly spelled out by the employer, violations of this expectation have routinely been found to be grounds for dismissal when judged through the McKinley framework. In *Dowling v. Workplace Safety and Insurance Board*,[10] the Court of Appeal found that the employer, the Workplace Safety and Insurance Board ("WSIB"), was justified in dismissing an employee who had purchased laptop computers from an employer registered with the WSIB whose account he supervised and had received money from one of his WSIB clients. When questioned by his employer, he was untruthful and withheld information. The Court of Appeal found that the abuse of this relationship, which was established through the employee's position of trust, was incompatible with the employee's obligations to his employer and constituted a fundamental breach of the employment relationship.

In cases where employees have violated their employer's conflict of interest policies, courts have found such conduct to constitute an irreparable breach of the foundation of the employment relationship[11] and a violation of the employee's "equitable obligation to his employer of loyalty, good faith, honesty and avoidance of conflict of duty and self-interest."[12] In most of these cases, courts have placed an important emphasis on the first step of the *McKinley* analysis – whether the employee had in fact engaged in a conflict of interest or abused his position of trust with his employer. Given the seriousness of this sort of conduct, where proven, courts have left little room for the suggestion that the employment relationship has not suffered irreparable harm.

The importance of this aspect of the *McKinley* test in conflict of interest cases is best evidenced by the decision in *Alishah v. J.D. Collins Fire Protection Company*. [13] In that case, the plaintiff was terminated after his employer found out that he had been considering opening his own company in the same industry as his employer. While the employee had contemplated engaging in this sort of inappropriate competitive behaviour, he had not taken any steps to do so at the time of his termination.

The court found that the employee's "vague long-term discussions" about starting his own business did not constitute a breach of his good faith obligations to his employer, and did not constitute the sort of misconduct which warranted dismissal. This factual determination at the first stage of the *McKinley* test was determinative of the matter, and the employee was awarded damages for wrongful dismissal.

Likewise, in *Dowham v. Lennox and Addington (County)*, [14] the central question for the court was whether the employee in question had engaged in a conflict of interest contrary to County-policy. In that case, the employee held the position of Manager, Non-Profit Housing and was terminated for allegedly giving a friend preferential treatment in his attempts to secure

non-profit housing. Citing the pre-*McKinley* decision in *Canadian Imperial Bank of Commerce v. Boisvert*, [15] the court noted that a conflict of interest is “a situation in which an employee engages in activities which are external and parallel to those he performs as part of his job, **and which conflict or compete with the latter**.” The court found that in this case, the employee’s efforts to help his friend did not constitute a conflict of interest as there was no evidence the employee’s actions actually conflicted with his duties to his employer. By assisting his friend in the application process, the employee had not used his position to exert undue influence or otherwise secure an undeserved benefit for his friend; rather, he was found to be acting consistently with his duties of fidelity and loyalty. As such, the employee’s actions did not constitute a breach of County policy, and could not be used to ground his termination within the *McKinley* framework.

In light of the approach that courts have taken to conflicts of interest within the *McKinley* framework, it is especially important that when employers choose to terminate an employee for such actions, they are able to show that the employees knew the alleged conduct was inappropriate and fundamentally inconsistent with their role within the organization. Likewise, the employer must conduct a thorough investigation to determine whether the alleged actions of an employee truly create the sort of strain in the employment relationship which would constitute a true conflict of interest. In this regard, it is especially important for employers to ensure that they have clear policies concerning what constitutes a conflict of interest in the context of their organization. When employees are hired into high-level managerial portfolios or positions of trust, employment contracts should be crafted which expressly forbid engaging in conflicts or competitive conduct and which require the declaration of potential conflicts of interest as they arise. Taking such precautions can both lessen the possibility of improper conduct by employees, and increase the possibility of success when a termination must be carried out.

WHEN DOES A REQUEST FOR MEDICAL DOCUMENTATION VIOLATE AN EMPLOYEE’S RIGHT TO PRIVACY?

By: Stephanie N. Jeronimo

Accommodating employee disabilities can be a challenging process for many employers, particularly when attempting to accommodate “invisible” disabilities such as mental illness. In these situations, employers face a difficult balancing act between respecting an employee’s privacy with respect to medical issues, while at the same time ensuring the employer has sufficient information to justify a complete absence from the workplace or to assist in the design of an appropriate accommodation plan in the workplace.

Employer fears were raised in January 2012, when the Ontario Court of Appeal released its decision in *Jones v. Tsige*, in which the Court of Appeal unanimously recognized a privacy tort of “intrusion upon seclusion.” The tort provides that an intentional, highly offensive invasion of an individual’s private affairs will give rise to a claim for damages. Understandably, this decision created concern amongst employers that requests for medical documentation to substantiate a request for accommodation could lead to the employer being liable for damages for this newly defined tort.

A recent decision of Arbitrator Surdykowski provides some guidance and deals directly with the impact of the Jones decision. In *Complex Services Inc. and OPSEU, Local 278*¸ Arbitrator Surdykowski considered the grievance of a woman who required accommodation of a mental illness and a physical disability, but refused to provide the employer with sufficient medical documentation.

The grievor had returned from an extended leave of absence on a return to work plan that included accommodations of the grievor’s physical disability, but said nothing of her mental illness. Soon after, the grievor began to complain that the employer was not communicating with her through an “intermediary” (the union), which she claimed was an accommodation she required for her mental illness. The employer had no knowledge of this disability or her need for accommodation and requested medical documentation. The grievor initially refused to provide any documentation, then refused to allow the documentation provided to be assessed by an independent medical examiner. She believed that the employer could conduct its assessment without using her medical information. After repeated requests, the employer refused to allow the grievor to return to the workplace and placed her on an unpaid leave of absence until her fitness to return to work could be assessed.

A grievance was filed claiming that her medical information was private and alleging that the employer's repeated requests for adequate documentation constituted harassment. Interestingly, the employer in this case also filed a grievance, alleging that the union and the grievor had failed to meet their obligations in the accommodation process.

Arbitrator Surdykowski agreed with the employer. While noting that medical information is private, he found that there is no absolute right to privacy. An employer is entitled to access sufficient medical information for legitimate purposes, including to ensure an employee is fit to continue or return to work and to provide appropriate accommodations. In some circumstances, this may require disclosure of the employee's diagnosis and/or treatment.

In addition, Arbitrator Surdykowski found that while an employee can refuse to disclose his or her medical information, there are consequences for taking this position. An employee has no right to sickness benefits or accommodations in the absence of sufficient medical information. If the employee has a disability which requires accommodation, that employee has a duty to cooperate in the accommodation process and provide sufficient information.

As for the newly recognized privacy tort of "intrusion upon seclusion," Arbitrator Surdykowski found that nothing in the Court of Appeal's decision altered an employer's right to manage its workplace or to obtain confidential medical information it requires for a legitimate purpose.

The *Complex Services* decision provides important guidance to employers as they navigate the often murky waters of attendance management and accommodation of disabilities.

Should you have questions or require assistance with any of the issues discussed in our inaugural *Reaching Out*, please contact your regular Hicks Morley lawyer.

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[1] 1995 CanLII 814 (ON CA).

[2] 2011 ONCA 469.

[3] *DiTomaso* at para. 27.

[4] 2011 CarswellOnt 12251.

[5] [2001] 2 S.C.R. 161.

[6] *Ibid.* at para. 48.

[7] See *Felker v. Cunningham,* [2000] O.J. No. 3177 at para. 14 (C.A.).

[8] See *Frame v. Smith*, [1987] 2 S.C.R. 99 at para. 60.

[9] [1994] O.J. No. 623 (Gen. Div.).

[10] [2004] O.J. No. 4812 (C.A.).

[11] See *Corso v. NEBS Business Products Limited*, [2009] O.J. No. 1092 (Sup. Ct. J.) at paras. 70-71.

[12] See *Fraser v. ProScience Inc.*, [2005] O.J. No. 2485 (Sup. Ct. J.) at para. 53.

[13] [2006] O.J. No. 4634 (Sup. Ct. J.),

[14] [2005] O.J. No. 5227 (Sup. Ct. J.).

[15] [1986] 2 F.C. 431 (F.C.A.), leave to appeal to S.C.C. refused, (1986), 72 N.R. 367.

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