Raising the Bar

Raising the Bar – Tenth Edition

Date: September 16, 2015

"*Autumn is a second spring when every leaf is a flower*."

Albert Camus

Dear Readers,

Welcome to Fall 2015! We are excited to bring you this latest edition of RTB as you get ready for the changing of the season.

In this edition, we have a very interesting collection of decisions that you need to know about…including cases about settlement agreements, privilege, evidence on motions, summary judgment and personal lawsuits against corporate officers.

Inside you'll also find our review and thoughts on recent case law about reasonable periods for short service employees. You may be surprised to see where some decisions have gone.

Lastly, we'll share a rule you may not know about, relating to disclosure of insurance policies in litigation.

Thank you to Laila Karimi Hendry, Amanda Lawrence and Maureen Quinlan for their hard work in helping bring this edition of RTB to "print".

Happy reading, and we look forward to hearing from you with comments, questions or feedback.

Frank Cesario and Elisha Jamieson-Davies
Co-Editors

IN THIS ISSUE

PART 1 – CASES YOU NEED TO KNOW ABOUT

Remedy Drug Store Co. Inc. v. Farnham, 2015 ONCA 576 (CanLII)

This case serves as reminder of the importance of drafting clear settlement agreements that actually reflect the parties' agreement.

The issue in this case related to a terminated employee who, shortly before her departure, forwarded a significant number of work emails to her personal computer and printed off a number of documents which she took home with her. The employer commenced legal action, including an interim injunction for protection of its confidential information. Shortly thereafter, the parties put the litigation on hold while discussing settlement via email. The email settlement discussions focused on the terms of the severance, the return of confidential documentation, and the engagement of a third party IT provider to delete all confidential information belonging to the employer from the employee's devices. An agreement was purportedly reached through back and forth email communication.

The employer's lawyers then prepared Minutes of Settlement which, among other things, outlined the steps to be taken to clear the employee's devices of all information relating to the employer, including a forensic sweep. The employee argued that the manner of the sweep proposed in the Minutes was not part of the settlement and that the employer had therefore repudiated the settlement. The employer moved to enforce the settlement and threatened to reinstate injunction proceedings.

The motion judge reviewed the email traffic between the parties and concluded that a settlement had been reached. However, he also concluded that the parties had not agreed to a full forensic sweep and he granted judgment enforcing the settlement on the employee's terms. The employee appealed the finding that the employer's actions were not an anticipatory repudiation or repudiation of the settlement.

The Court of Appeal reviewed the principles of anticipatory repudiation and repudiation, noting that anticipatory repudiation is a "particularly exceptional remedy in the context of settlement agreements." The Court also reiterated the long-held view that it is important to hold parties to their settlement agreements.

While it disagreed with the application of the legal principles by the motion judge, the Court concurred in the result. This case was not one of those rare cases where conduct subsequent to a

settlement agreement constituted repudiation: “the term involving the IT issue [was] not a term of the contract which, if actually breached, would constitute repudiation of the contract…it would not undermine the foundation of the agreement; namely, the financial package” and corresponding release. The Court concluded that the surrounding circumstances indicated that the forensic sweep did not go to the root of the contract and, in light of the release, was “next to meaningless in terms of its impact” on the employee. Additionally, the Court stated that despite its “hard position,” the employer “did not exhibit an intention not to be bound by the contract” and there was no repudiation of the agreement. The appeal was dismissed.

This decision has important lessons. When negotiating a settlement, it is very important to set out the terms in an unambiguous way. Since courts expect parties to abide by their agreements, it is important that the written terms reflect the parties’ true intentions.

Canada (Attorney General) v. Boogaard, 2015 FCA 150 (CanLII)

The Federal Court of Appeal recently found that the words “without prejudice” on a letter from the RCMP Commissioner to the respondent staff sergeant were of no consequence and that the letter was a reviewable decision under the *Federal Courts Act*. The letter denied the respondent’s request for a promotion on the basis of a serious disciplinary incident 15 years prior.

Among other things, the Attorney General had argued that because the letter was “without prejudice”, it was covered by negotiation/settlement privilege and was not a reviewable decision. Rather, it should have been kept confidential as a settlement communication.

The Federal Court had found that there was no hint of potential compromise or negotiation in the letter. It stated that “the Commissioner was exercising a public power and doing it for the reasons he set out in his letter and the Commissioner should not be able to shield it from review merely by writing “without prejudice” on it.” The Federal Court of Appeal agreed that the letter was a reviewable decision, finding that the words “without prejudice” bore no consequence. On the merits, the Federal Court of Appeal upheld the Commissioner’s decision as reasonable.

Courts have made it clear that when they review a document for privilege, confidentiality or other issues, they will not be confined to words such as “without prejudice” that may be written on the document. Instead, the courts will review the substance of the document and make their own determination as to whether the document in question is, in fact, “without prejudice”.

Shah v. LG Chem, Ltd, 2015 ONSC 776 (CanLII)

The plaintiffs in this class action matter sought leave to file a supplemental affidavit on the defendants’ motion challenging the Court’s jurisdiction.

The Ontario Superior Court noted the high threshold for granting leave to file a subsequent affidavit

and found that in this case, the plaintiffs had a very weak case and a “feeble explanation” for why the supplemental evidence could not have been included as part of the plaintiffs’ pre-cross examination evidence or have been discovered earlier. The Court stated:

[38] As noted above, however, the Plaintiffs submit that it is in the interests of justice to grant leave because the Court itself would be prejudiced by the absence of the additional evidence because the Court would be missing important information relevant to the jurisdiction analysis.

[39] However, in the context of an adversarial system of justice, where there are rules of civil procedure and rules of evidence, I do not see how the Court can be said to be prejudiced if it enforces the rules of civil procedure and the law of evidence.

On any motion, parties should always remember to include all relevant evidence in the first instance; otherwise, they risk running afoul of the *Rules of Civil Procedure* and obtaining a judgment based on selected evidence.

Ontario Chrysler Jeep Dodge Inc. v Delisle, 2015 ONSC 5604 (CanLII)

This unusual case is one where the employer sued a former employee! The employee then counterclaimed claiming wrongful dismissal, among other things. In his counterclaim, the employee personally named the employer’s President at the time of his termination (“Gray”) as a defendant.

Instead of bringing a simple motion to remove himself as a defendant, Gray successfully brought a summary judgment motion to have the counterclaim against him dismissed. The Court found that at all times Gray was acting in his corporate capacity when the employee’s employment was terminated.

In his capacity as President, Gray had investigated allegations that the employee had sexually assaulted a co-worker. It emerged through the course of that investigation that the employee had been carrying on a side business for profit out of the Company’s premises. The employee’s employment was then terminated for cause. The Company sued the employee, who counterclaimed for wrongful dismissal.

In granting summary judgment and dismissing the claim against Gray, the Court stated:

- Gray was acting on behalf of the company and, as President, he had the requisite authority to terminate the employment; there was no personal gain to him arising out of the termination and there was no evidence that he “intentionally interfered” with the employee’s employment;
- whether Gray acted out of “ego or arrogance” was not relevant;
- with respect to the assertion Gray was “showboating”, there is no authority “for the proposition that an arrogant or egotistical personality is inconsistent with the duties of a

corporate president";
- to find personal liability on the part of a director or officer, "there must be some activity on their part that takes them out of the role of directing minds of the corporation" (per *Montreal Trust v. Scotia McLeod*);
- "only exceptional cases that result in flagrant injustice warrant going behind the corporate veil" (per *Shoppers Drug Mart*); and
- here, there was simply no cause of action personally against Gray; rather the only issue could be vicarious liability.

When it comes to wrongful dismissal claims, an employee's recourse is generally only against the employer. Successfully seeking damages against a personal defendant who is another employee or officer of the employer is a rare occurrence unless that individual truly acted outside the scope of his or her job.

This case also illustrates the benefits of utilizing the relatively new summary judgment rule.

PART 2 – SHINE A LIGHT ON…REASONABLE NOTICE PERIOD ROULETTE: WHAT TO DO WITH SHORT SERVICE EMPLOYEES

Every employer has, at one time or another, asked itself the seemingly straightforward question: *How much notice is this employee entitled to at common law*? In trying to answer this deceptively difficult question, the employer almost certainly weighs a number of factors, such the employee's age at the time of termination, the employee's position, his or her years of service, and the employee's chances of finding re-employment elsewhere.

Weighing these factors is difficult. Employers are often left feeling as if any assessment, even an educated one, is a gamble. This feeling has likely been exacerbated for those employers who have recently terminated the employment of a short service employee, as the length of notice awarded to short service employees by some Ontario judges has risen steadily over the past few years.

In this article, we will tell you about the recent developments on this thorny issue and give you some tools to chart a course through this area.

THE LAW'S RECENT EVOLUTION

The shift began with the 2011 decision of the Court of Appeal for Ontario in *Love v. Acuity Investment Management Inc. ("Love")*, in which the Court first raised doubts about the weight that an employer can place on an employee's length of service in determining common law notice.

In *Love*, the plaintiff's employment was terminated effective May 3, 2005. At that time, the plaintiff was employed as the Vice President of Acuity Investment Management Inc., had worked for the company for two and half years (a period most would consider relatively "short service"), was 50

years old and was also a part owner in the company. Based on these factors, the trial judge determined that the plaintiff was entitled to five months' notice at common law. The plaintiff appealed this finding, in part, on the grounds that the notice period awarded was too short.

The Court of Appeal agreed, finding that nine months was a more appropriate notice period based on the circumstances. In particular, the Court found that it was appropriate to increase the period of notice on the basis that the trial judge had overemphasized the importance of the length of the plaintiff's employment, but had underemphasized the nature of his employment. The Court stated:

[19]t[…]tWhile short service is undoubtedly a factor tending to reduce the appropriate length of notice, reference to case law in a search for length of service comparables must be done with great care. The risk is that while lengths of service can readily be compared with mathematical precision that is not so easily done with other relevant factors that go into the determination of notice in each case. Dissimilar cases may be treated as requiring similar notice periods just because the lengths of the service are similar. The risk is that length of service will take on a disproportionate weight.

This statement has led some trial judges to award notice periods of unprecedented lengths for short service employees.

For example, in *Wellman v. The Herjavec Group Inc*, the plaintiff was terminated from the position of Data Services Engineer after just 51 weeks of employment. At the time of his termination, the plaintiff was 41 years old, held a mid to senior level position and was provided with two weeks' notice pursuant to his employment contract. At trial, however, the plaintiff's employment contract was found to be void and his notice was increased to four months. In arriving at this conclusion, the trial judge specifically relied on *Love*, noting that length of service is just one factor to be taken into account and that it should not be given disproportionate weight.

The defendant argued that the plaintiff ought to have mitigated his damages as it was able to show that employment in the IT sector is particularly low. Interestingly, the trial judge appeared to place significant weight on the fact that the defendant had not provided enough evidence specific to the Ottawa area, a key determination because the Court found that it was entirely reasonable for the plaintiff to look for employment only in that area, where his family was located.

A similar decision was reached in *Rodgers v. CEVA*. In that case, the plaintiff became the Country Manager for the company on September 6, 2009. His employment was terminated without cause on June 28, 2012, just under three years later, at which time he was provided with two weeks' notice. At the time of his termination from employment, the plaintiff was 55 years old and was found to hold a very senior management level position. Of note, upon hire the plaintiff had been required to purchase shares in CEVA in an amount equivalent to four months of his salary. The trial judge held that this requirement implied that the plaintiff would be engaged in long term employment.

The trial judge also determined that while there had been some level of inducement with respect to

the plaintiff's decision to leave his prior position, the level of inducement did not result in a specific assurance of long-term job security. Nonetheless, the trial judge held that the plaintiff was entitled to 14 months' notice even though he had been employed for less than three years and did not receive credit for the time the had been employed with his prior employer.

Finally, in the recent case *Tetra Consulting v. Continental Bank*, the plaintiff was awarded eight months' notice even though he had not yet signed an employment agreement with Continental Bank and the project for which he was to be hired was abandoned in its entirety. In large part, the trial judge based the decision on the fact the plaintiff was previously a dependent contractor of the Bank and he should therefore receive credit for the two years that he spent as a consultant.

In arriving at this conclusion, the trial judge took particular note of the plaintiff's age (he was 61 at the time the project was abandoned) and stated that "older age employees should be granted longer notice period upon termination, as should those who occupy more sophisticated positions."

CONCLUSION

Based on this recent sample of case law, there is a risk that notice periods for short service employees, older employees and those in sophisticated positions will continue to rise and/or be unpredictable. The finding in *Tetra Consulting* is particularly disconcerting, as it implies both that length of service is of minimal relevance where the nature of the work points in favour of a lengthier notice period and that length of service may not be as important as age where the terminated employee is "older".

Employers should therefore be particularly careful in assessing which factors are weighted, and how they are weighted, to determine a reasonable notice period for an employee in order to minimize litigation risk. These recent cases demonstrate that employers who focus on only length of service for short service employees do so at their own peril.

On a practical level, these decisions also emphasize that, perhaps now more than ever, it is critical for employers to implement and maintain sound and enforceable employment agreements with pre-determined notice periods (which are, of course, compliant with minimum standards obligations). Otherwise, employers may not only expose themselves to an adverse finding at trial, but they may also be unable to accurately predict these risks in advance.

PART 3 – DID YOU KNOW?

Did you know … that Rule 30.02(3) requires disclosure of an insurance policy under which an insurer may be liable to satisfy all or part of a judgment in an action or is required to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment? If requested, a party must produce a copy of the insurance policy for inspection. No evidence related to the policy itself, however, is admissible into evidence unless it is relevant to the issues raised within the action.