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Featured Articles

Protection in the Face of Employee Fraud – The *Mareva* Injunction

By: Hicks Morley

What steps can an employer take to protect its interests when encountering employee fraud? In this article, we discuss the *Mareva* Injunction – an extraordinary litigation remedy that freezes assets of a party pending trial.

Hypothetical Situation

Ms. Albert is a long-service employee who is preparing to retire. She is a trusted manager who has considerable latitude to manage the company. Her responsibilities include approving expenditures, issuing work orders and engaging sub-contractors. Ms. Albert manages an entire division of the company with little oversight from the company's owners.

The company hires Ms. Singh to take over Ms. Albert's role. She shadows Ms. Albert for a few weeks before Ms. Albert's retirement. Ms. Singh quickly learns that Ms. Albert's division has not been following company procedures for approving expenses and engaging sub-contractors. Ms. Singh reviews the company's books more closely and begins to suspect that Ms. Albert has been transferring company funds to shell companies for personal gain. Ms. Singh reports her initial findings to the company's owners.

Ms. Albert is set to retire in two weeks and is planning to sell her house and move south of the border. How can the company protect itself?

Mareva Injunctions

A *Mareva* injunction is an extraordinary court remedy that freezes the assets of a party pending trial. It can help ensure that if a plaintiff is ultimately successful in the litigation there will be assets available to satisfy the judgment. The rationale for granting *Mareva* injunctions is that a defendant should not be permitted to thwart the court's process by dissipating assets prior to the determination of the plaintiff's entitlement.

To obtain a *Mareva* injunction, a plaintiff must:

1. make **full and frank disclosure** of all material matters within its knowledge

2. give particulars of the claim against the defendant, stating the grounds of the claim and the **points that could fairly be made against** it by the defendant
3. give grounds for believing that the defendant **has assets in the jurisdiction**
4. give grounds for believing that there is a **real risk of the assets being removed out of the jurisdiction or disposed of** within the jurisdiction or otherwise dealt with so that the plaintiff would be unable to satisfy a judgment awarded to it, and
5. give an **undertaking as to damages**.

Mareva injunctions may be brought without notice. For this reason, there is a heavy onus on the moving party to make full and frank disclosure of all material matters within its knowledge and advise the court of the opposing party's expected position. A failure to make such disclosure can be fatal to the motion.

The "Fraud Exception"

In the case of Ms. Albert, the fact that she is making arrangements to permanently move south of the border may provide a basis for establishing a real risk of her assets being dissipated. However, this type of evidence is not always required.

If the company can establish a strong *prima facie* case of fraud, that evidence may support the inference that the defendant is likely to leave the jurisdiction or is inclined to dissipate or conceal assets. As Strathy J. stated in *Sibley & Associates LP v. Ross*:

It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff. [at para. 63]

While an allegation of fraud does not automatically entitle a plaintiff to a *Mareva* injunction, strong evidence of fraud may obviate the need for direct evidence establishing the risk of dissipation of assets.

Steps for Employers to Take to Address Suspected Employee Fraud

Fraud is a serious allegation that should not be raised lightly. Suspected fraud also requires employers to act quickly and decisively. In order to properly balance these competing concerns, employers should have a clear plan in place for responding to suspected employee fraud.

Employers responding to suspected fraud should consider the following steps:

- **Preserve evidence**. Secure all potentially relevant records. With electronic documents such as email, ensure that any automatic deletion processes are suspended.
- **Initiate formal investigation**. Assign staff to conduct the investigation. Ensure that the investigation process is documented. Consider engaging third parties to conduct the investigation or parts of it (such as reviewing accounting records).
- **Interview the employee suspected of fraud**. Employers *may* want to interview the employee and give them the opportunity to respond to the allegations. This may not be appropriate in all cases. There is a risk that alerting the employee to the fact of the investigation may cause them to dissipate assets.
- **Advise insurers**. Review your insurance policy. You may have reporting and other obligations to your insurers. Failing to advise a company's insurer may result in denial of coverage.
- **Contact counsel**. Contact litigation/employment counsel early in the process. The earlier you engage counsel, the better prepared they will be to proceed with an injunction, should you choose to pursue that option.
- **Contact the police**. Once the investigation is completed, you *may* want to alert the police to the fraud.

A *Mareva* injunction is an extraordinary remedy that is not appropriate in all cases. However, employers should be prepared to respond to employee fraud quickly and in a manner that best protects their interests.

Key Human Resources Decisions in 2019 and Cases to Monitor in 2020

By: Julia M. Nanos

This past year, there were a number of noteworthy judicial and tribunal decisions that impact workplaces in Canada. We've highlighted some of them below, as well as identified a few decisions to watch for in 2020**.**

Human Rights

Damages

- The Ontario Divisional Court upheld a decision of the Human Rights Tribunal of Ontario (HRTO) which awarded the respondent $200,000 for injury to dignity, feelings and self-respect arising out of discriminatory conduct by her employer / landlord. (***Joe Singer Shoes Limited v. A.B.***)
- The HRTO awarded an applicant approximately $120,000 for lost income / compensation for the respondent's discriminatory conduct in a job application process when it required that he provide proof of eligibility to work permanently in Canada. (***Haseeb v. Imperial Oil Limited***)

Accommodation

- The Ontario Divisional Court held that an employer's duty to accommodate is only triggered when the employee can communicate an ability, not just the desire, to return to work. The duty to accommodate ends when the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future. (***Katz v. Clarke*****,** 2019 CarswellOnt 6703)
- The Supreme Court of Newfoundland and Labrador held that an employer did not have a duty to accommodate an employee, who used medical cannabis, by placing him in a safety-sensitive position. The employer was "unable to readily measure impairment from cannabis, based on currently available technology and resources" and the risk of harm constituted an undue hardship. (***International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.***)

Termination of Employment

Reasonable Notice

The Ontario Court of Appeal held that the presumptive standard for reasonable notice damages is 24 months, barring exceptional circumstances. It reduced a lower court award of 30 months to 24 months' reasonable notice. (***Dawe v. The Equitable Life Insurance Company of Canada***)

Damages

The Ontario Court of Appeal upheld a significant damages and costs award against an employer made by a trial judge in a wrongful dismissal action. The judge held that the employer's actions constituted an intimidation tactic and that it breached its obligation of good faith and fair dealing in the manner of dismissal. (***Ruston v. Keddco MFG. (2011) Ltd.***)

Executive Compensation

The Ontario Court of Appeal:

- held that an employee's entitlements stemming from a standard form Shareholders' Agreement between the employee and the employer were separate and apart from the employee's entitlements stemming from his employment contract. (***Mikelsteins v. Morrison Hershfield Limited***)
- affirmed the need to examine the strict wording of an incentive compensation plan when assessing entitlement throughout the common law notice period, holding that the trial judge erred when he found the former executive was presumptively entitled to the incentive compensation. (***Manastersky v. Royal Bank of Canada***)
- held that a respondent executive was entitled to a bonus throughout the notice period as there was nothing in the wording of the employment agreement to suggest that the parties had contracted out of the right to damages for lost bonus potential. (***Andros v. Colliers Macaulay Nicolls Inc.***)

Workplace Safety and Insurance

Right to Sue

The Workplace Safety and Insurance Appeals Tribunal held that a civil action for constructive dismissal based on alleged workplace harassment and bullying was statute-barred under the *Workplace Safety and Insurance Act, 1997* and could not proceed. (***Decision No. 1227/19***)

Litigation

Tort of Harassment

In September 2019, the Supreme Court of Canada (SCC) denied leave from the Ontario Court of Appeal decision in ***Merrifield v. Canada (Attorney General)***, confirming that the "tort of harassment" does not exist in Ontario.

Decisions to Watch for in 2020:

- ***Heller v. Uber Technologies Inc***. On November 6, 2019, the SCC heard an appeal from this decision of the Ontario Court of Appeal which held that an arbitration clause in a Services Agreement between Uber drivers and Uber, which stipulates disputes are to be determined in Amsterdam, amounted to an illegal contracting out of the *Employment Standards Act, 2000* and was also unconscionable.
- ***Ocean Nutrition Canada Ltd. v. Matthews***. On October 8, 2019, the SCC heard an appeal from this decision of the Nova Scotia Court of Appeal, which considered long-term incentive plan entitlements as part of a constructive dismissal claim, and, in the dissent, the duty of good faith and honesty in the performance of employment contacts.

With thanks to Danika Winkel, 2019-2020 Hicks Morley articling student, who assisted in the preparation of this article.

Legislative Round-Up: Notable Changes in Force in 2019 and Reforms on the Horizon

By: Julia M. Nanos

Changes to federal and Ontario labour and employment laws abounded in 2019. We review some of these changes in this article, as well as highlight a few federal amendments that are expected to come into force in the new year.

Ontario

***Employment Standards Act, 2000* (ESA)**

- Effective January 1, 2019, many of the amendments made to the ESA by Bill 148, *Fair Workplaces, Better Jobs Act, 2017* were repealed or replaced by Bill 47, *Making Ontario Open for Business Act, 2018*, including:
    - the repeal of personal emergency leave (and its two paid sick days) and enactment of three new leaves (sick leave, family responsibility leave, bereavement leave)
    - repeal of equal pay for equal work based on employment status
    - a modified three-hour rule for scheduling; repeal of other scheduling changes including minimum on-call pay, minimum cancellation pay and the right to refuse work.
- Effective April 3, 2019, the requirement for director approval for excess weekly hours and overtime averaging agreements was removed, as was an employer's obligation to post ESA posters in the workplace.

***Labour Relations Act, 1995* (LRA)**

Effective July 4, 2019, certain public sector entities are now deemed "non-construction" employers to whom the construction provisions of the LRA will not apply (such as municipalities, local housing corporations, social services administration boards, school boards, hospitals, colleges and universities).

Pension Benefits Act

Effective December 10, 2019, changes to the *Pension Benefits Act* made by Bill 132, *Better for People, Smarter for Business Act, 2019* enact new rules regarding electronic communications deeming members and former members to consent to the receipt of certain documents sent in electronic form. Such members may opt out of receiving electronic communications at any time.

Bill 124, *Protecting a Sustainable Public Sector for Future Generations Act, 2019*

Effective November 8, 2019, Bill 124 provides for a three-year window of salary moderation and compensation restraint measures for non-union and unionized employees employed by the Ontario government, Crown agencies, the broader public sector and a range of organizations that receive funding from the Ontario government.

Workplace Safety and Insurance Act, 1997

Effective January 1, 2020, a new Rate Framework will be in place which fundamentally changes the way the Workplace Safety and Insurance Board classifies Schedule 1 employers and sets their premium rates.

Federal

Canada Labour Code

Significant changes to the *Canada Labour Code* came into effect in 2019, including among other things:

- new internal audit provisions and a new "Complaints Relating to Reprisals" Division
- changes to working conditions, vacation and holiday pay, hours of work and overtime and the review and appeal

process
- new and expanded leaves and removal of certain service requirements
- new unpaid breaks.

Parental Sharing Benefits

Effective March 17, 2019, changes to the ***Employment Insurance Act*** created a parental sharing benefit for two-parent families. Corresponding changes were made to the ***Canada Labour Code***.

Federal Legislation to Watch for in 2020:

It is anticipated that the following will come into force in 2020:

- the federal *Pay Equity Act*
- changes to the *Employment Equity Act* with respect to pay transparency requirements, and
- further changes to the *Canada Labour Code*, including the new violence and harassment provisions, changes to individual and group termination, a new Part IV Administrative Monetary Penalties, and more.

We are also watching for development of regulations under the *Accessible Canada Act.*

With thanks to Danika Winkel, 2019-2020 Hicks Morley articling student, who assisted in the preparation of this article.

Featured Lawyer

Elisha C. Jamieson-Davies

Elisha Jamieson-Davies is an experienced litigator in Hicks Morley's Toronto office. She represents both public and private sector clients in a variety of industries, including financial services, school boards, retail, social services, mining, manufacturing, colleges, hospitality, municipal, not-for-profits, healthcare and consulting. Elisha has expertise in many types of litigation including employment disputes, long-term disability claims, commercial disputes, restrictive covenant enforcement, class actions, and judicial reviews/appeals.

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Featured Topic

Litigation

Hicks Morley's litigators are well-known for skilled and effective advocacy, built through our frequent appearances before the Ontario courts and a wide variety of arbitration boards and administrative tribunals. We have achieved successful outcomes for our clients, with many cases resulting in precedent-setting decisions. Our litigators also have significant experience with class proceedings relating broadly to workplace and pension matters. We act for private and public sector clients in class action litigation relating to wrongful and constructive dismissal, statutory severance, overtime, pension benefits and pension administration, employee and retiree benefits, employee retention bonus claims and employee health claims.

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