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## COURT OF APPEAL OUTLINES KEY PRINCIPLES ON SUSPENDING EMPLOYEES WITH AND WITHOUT PAY

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In *Filice v. Complex Services*, 2018 ONCA 625, the Ontario Court of Appeal provided valuable guidance regarding constructive dismissal, investigative suspensions of employees without pay and proper damages assessments.

The plaintiff/respondent in appeal was employed by Complex Services (the defendant/appellant) as a Security Shift Supervisor at Casino Niagara and Fallsview Casino. All employees in the Casino's Security Department were required to maintain a valid gaming registration issued by the Alcohol and Gaming Commission of Ontario (AGCO), the government body that licenses gaming employees and enforces gaming legislation.

In December 2007, the respondent was placed on an investigative suspension without pay after the OPP advised the Casino's Security Department that he was under criminal investigation for theft in the workplace. The Casino's Associate Handbook Security Edition stipulated that an investigative suspension may be used as part of a process to verify misconduct allegations, and that if a decision is made to separate an employee, the employee may not be reimbursed for the time spent on investigative suspension. A discipline policy with similar terms was also in effect.

On January 21, 2008, the OPP charged the respondent with theft under \$5000 and breach of trust under the *Criminal Code*. Also on that date, the AGCO suspended the respondent's registration under the *Gaming Control Act*. The criminal charges were later withdrawn but his gaming registration remained suspended pending a hearing before the AGCO. The respondent voluntarily surrendered his gaming registration rather than proceed to an AGCO hearing and, because he no longer had the registration, the appellant terminated his employment for frustration.

The respondent brought an action against Complex Services, which in turn was eventually successful on partial summary judgment in having the claims for malicious prosecution, false arrest, breach of the *Charter*, negligence and intentional infliction of mental suffering dismissed. The claims for constructive and wrongful dismissal proceeded to trial, where the lower court awarded the respondent damages of \$75,723.64 for constructive dismissal and punitive damages of \$100,000.00. The compensatory damages were calculated as the pay withheld from him during his approximately 17-month suspension.

Complex Services appealed. The Court of Appeal applied the test in *Potter v. New Brunswick (Legal Aid Services Commission)* and noted that a suspension without pay would normally breach the employment contract *unless* such a suspension was an express or implied term of the employment contract. Here, Complex Services argued that both

the Handbook and discipline policy provided that an employee can be suspended with or without pay, at the employer's discretion.

The Court of Appeal determined that the suspension itself was "clearly justified." Given his role as a Security Supervisor, the information that he was possibly involved in theft and the regulated nature of the casino's operations, "it was entirely reasonable" to suspend the respondent pending an investigation and in fact "it would have been irresponsible of the appellant not to have done so." The Court noted, however, that whether the appellant was justified in suspending the respondent *without pay* was a separate matter.

The Court held that the employment contract did not have express language stipulating that any suspension *would be* without pay (rather, it was discretionary), and therefore the burden rested on the appellant to justify the suspension being with pay by showing that it acted reasonably. The Court concluded that the employer had not met that burden "at least at the very early stage of the investigation." The suspension without pay was therefore found to be a unilateral change to the employment relationship and amounted to a constructive dismissal under the *Potter* test.

The Court then turned to damages and found the trial judge erred in two key respects. First, the trial judge did not undertake a proper damages assessment as the entire period the respondent was suspended was treated as being the appropriate notice period. Citing *Potter*, the Court reiterated that damages for constructive dismissal are the same as for wrongful dismissal. It held that 17 months' notice was an inordinately lengthy notice period for someone in the respondent's position: at the time of dismissal, his length of service was approximately eight years and eight months, he was almost 50 years old, he was earning approximately \$50,000/year and it took him seven months to find other employment. The Court held that reasonable notice in this case was seven months.

Second, the trial judge erred in his punitive damages award. The Court reinforced the principle that punitive damages are only awarded where compensatory damages are not enough to accomplish the objectives of retribution, deterrence and condemnation. Here, the Court found that the trial judge did not analyze why the compensatory award he gave would not meet those objectives. The punitive damages award was therefore set aside.

## Takeaways for Employers

This decision provides valuable guidance for employers seeking to navigate investigative suspensions, particularly suspensions without pay. It reinforces the principle that there may be situations where an employer would be entitled to suspend an employee, and for that suspension to be without pay. The decision also provides good support for suspending an employee without pay in a highly regulated environment.

However, it is important for employment contracts and/or workplace policies to specifically include the right to suspend without pay. Employers should also carefully consider the information available at the time of the suspension and whether they can reasonably justify making the suspension without pay. Good records should be maintained throughout the decision making process.

The decision also reinforces the rule that damages for constructive dismissal are the same as they are for wrongful dismissal.

Finally, it provides a strong statement that trial judges must consider the punitive components of a compensation award and must analyze why that award is not sufficient if punitive damages are granted.

The employer in this case was represented by Hicks Morley's Frank Cesario.

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## THE BC ESA IS CHANGING: WHAT'S NEW AND WHAT'S COMING

— Maggie Campbell of Roper Greyell LLP. © 2018 Roper Greyell LLP—Employment + Labour Lawyers.

BC's NDP government recently moved forward with some significant changes to the province's *Employment Standards Act* ("ESA"). The minimum wage and some statutory leaves of absence have been increased, and these changes are merely the start: further and far reaching amendments to the *ESA* are expected in the near future.