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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Employment Notes

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Labour and Employment Group

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RECENT ISSUES REGARDING DISABLED EMPLOYEES

Kevin Robinson

It is a difficult situation for any employer when a disabled employee is unable to return to work. Many questions arise for the employer regarding whether the employee can be replaced, whether the employee's job has to be kept open for him/her, if so, for how long, what steps the employer must take to accommodate the employee and can or should the employee be terminated. All of these questions are important but also delicate and should be considered carefully before any action is taken.

In general, an employer can terminate any employee without cause by providing that employee with reasonable notice. However, the decision to terminate an employee is always subject to the provisions of the Ontario Human Rights Code. If the employer is terminating the employee, even with reasonable notice, for reasons that contravene protections provided by the Human Rights Code, then that employer may be held accountable for damages suffered by the employee. The termination of an employee because of his/her absence due to disability is, by definition, a contravention of the Human Rights Code. The employer has a duty to accommodate the disability of the employee to the point of undue hardship. It will be the employer's onus to show that it has taken every reasonable step to accommodate the employee's disability.

The Ontario Human Rights Commission has recently published its new policy and guidelines on disability and the duty to accommodate which carefully outlines the employer's obligations in that regard. The policy is available on the Commission's website at **www.ohrc.on.ca.**

A largely unanswered question in the human rights jurisprudence is the question as to the length of time that the employer must wait before making a decision to terminate a disabled employee if that employee is unable to return to the workplace. It is strongly urged that legal advice be sought before taking any steps with respect to a disabled employee. However, in general, greater obligations and a longer notice period should be provided to an employee with a longer tenure with the employer.

A doctrine related to this issue that has recently come into question is with respect to the doctrine of frustration of the employment contract due to the disability. The theory surrounding frustration of contract is that because the employee is disabled and wholly unable to perform his/her job, the very basis of the agreement between the parties cannot continue. However, the threshold to establish frustration of an employment contract was extremely high and several cases had suggested that if an employer provides access to a short-term and long-term disability benefit, then, logically, the contract cannot be frustrated because the original contract contemplated the potential disability of the employee.

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The doctrine of frustration of an employment contract has been considered by the Ontario Court of Appeal in *Antonacci v. Great Atlantic & Pacific Co. of Canada.* The defendant employer argued that the employment contract had been frustrated due to the employee's inability to attend at work due to his disability. The trial judge cited the case law noted above but then went further. She noted that the size of this particular employer and its economic ability to provide alternative work arrangements to its employees suggested that the employer should have accommodated the employee. This duty to accommodate has traditionally been required by the Ontario Human Rights Commission, but not judges. The Ontario Court of Appeal cited that finding and did not question it. Though not explicit on the point, it seemed clear that the notion of a duty to accommodate the employee's disability has been taken into account in this common law claim for wrongful dismissal and with respect to the argument that the employment contract had been frustrated.

Therefore, it appears that the formerly distinct concepts of obligations arising out of human rights legislation and obligations arising due to common law duties have converged and the duty to accommodate remains the paramount obligation of employers in these circumstances. ■

HOW DO YOU VALUE THE LOSS OF FUTURE EMPLOYMENT IN A BARGAINING UNIT?

William D. Anderson

It has long been recognized that there are situations where an employee should not be reinstated into the bargaining unit following the termination of his or her employment even though the employer did not have just cause to terminate the employee. Cases tend to arise in circumstances where the employment relationship, including the relationship between co-workers, has become untenable.

The difficulty for arbitrators is to decide what damages the employee has suffered.

The preponderance of case law indicates that the damages suffered by such an employee correspond to those suffered by a non-bargaining unit employee. That is, the employee is entitled to a payment in lieu of reasonable notice.

Familiar factors such as length of employment, age and the nature of the position are considered by the arbitrator. In past arbitration awards, it has been recognized that membership in a bargaining unit is one of the factors which may be considered in determining a reasonable damage award.

Other arbitrators have simply quantified what they believe would be reasonable compensation for the loss of bargaining unit rights without consideration of the concept which drives the notion of reasonable notice which is: how long would it reasonably take the employee to replace his/her employment? Hence, what actual damages has the employee suffered?

In a recent decision in *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79*, an arbitrator has gone one step further. In this decision, the arbitrator considers the factors normally considered in making such an award and then augments that award by consideration of the loss of the rights of being an employee under a collective agreement. The order is coincidentally equivalent to one month's salary and benefits per year of service which was the old benchmark at common law for reasonable notice.

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"Secondary picketing will now be considered generally lawful so long as the picketing is aimed at the primary employer. However, there remains a limit to the nature of secondary picketing that will be permitted."

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The decision then departs from precedent and states that there will be no reduction in the award of damages for the actual wages earned by the employee during the period for which he/she is to be compensated.

Conceptually, the premise is that the award of damages to compensate the employee for the loss of his/her employment in the bargaining unit is not an award of lost wages. The difficulty, however, is that the award bears no relationship to the actual damages suffered by an employee. That is, an employee may secure better employment the day after termination and still be awarded the loss of his salary and benefits for two years. This scenario creates an enormous windfall when the employee has actually suffered no damages.

This decision starts with one theory of damages (compensating the employee for the period of time it should reasonably take the employee to find comparable employment) and imposes that determination on a different theory of damages (awarding compensation for the loss of the right to remain an employee in the bargaining unit) While this fusion may avoid criticism that the quantum of the damage award is totally arbitrary, it is inconsistent legally, and it does not address the underlying issue: How do you assign value to the loss of future employment in a bargaining unit?

It will be interesting to see whether this line of authority is endorsed in the future. ■

SUPREME COURT RULES SECONDARY PICKETING IS ILLEGAL

Kevin Robinson

In a recent decision, the Supreme Court of Canada has pronounced that secondary picketing by a union engaged in a lawful strike is generallylegal unless it involves tortious or criminal conduct.

In the past, there has been no dispute that a union involved in a lawful strike or lock-out was entitled to picket the primary employer. However, there was some confusion as to what, if any, picketing would be allowed at secondary locations. For example, could a union picket one of the primary employer's customers?

Prior to the Supreme Court's decision in*RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, the case law in Ontario provided for several exceptions from a general rule that secondary picketing was not allowed.

That case law has now been clarified with the Supreme Court's recent decision. Secondary picketing will now be considered generally lawful so long as the picketing is aimed at the primary employer. However, there remains a limit to the nature of secondary picketing that will be permitted. In particular, if secondary picketing involves tortious or criminal conduct, it will not be permitted. For example, in this particular case, the Supreme Court found that the union's picketing of the homes of management employees was tortious in that it constituted intimidation of the individual employees and was therefore unlawful. To the extent that any picketing constitutes an independent tort (for example: trespass, intimidation or inducement of a breach of contract), the secondary picketing will not be permitted. The specific facts of each case will determine whether there has been illegal activity in the secondary picketing which will render it unlawful. ■

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"...negotiations have broken down and the Ontario government has announced that as of March 9, 2002, Québec contractors will now be subject to the (Fairness is a Two-Way Street Act) and are required to comply."

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LATEST WORD FROM MINISTRY OF LABOUR ON DECERTIFICATION APPLICATIONS

Elizabeth J. Forster

The Labour Relations Act was recently amended to require the Ministry of Labour to publish a document which would explain the decertification process to unionized employees.

Section 63.1 of the Act requires an employer to use reasonable efforts:

(a) to post and keep posted a copy of a document published under this section in a conspicuous place in every workplace of the employer at which employees represented by the trade union perform work;

(b) to post and keep posted with that copy a notice that any employee represented by the trade union may request a copy of the document from the employer;

(c) once in each calendar year, to provide a copy of the document to all employees of the employer who are represented by the trade union; and

(d) upon the request of an employee of the employer who is represented by the trade union, to provide a copy of the document to him or her, even though the employer has previously provided or will subsequently provide the employee with a copy of the document under clause (c).

The Ministry has now prepared this document. It can be found on the Ministry's web site at **www.gov.on.ca/LAB/ann/ann_e/decert_e.htm.**

FAIRNESS IS A TWO-WAY STREET ACT (UPDATE)

Kevin Robinson

In our newsletters of October 1999 and April 2000 we discussed the *Fairness is a Two-Way Street Act*. This was legislation passed by the Ontario government imposing strict requirements for Québec contractors wishing to perform construction work in the province of Ontario. It also states that no Québec contractor may do construction work in respect of Ontario governmental projects. This Act was implemented in response to restrictions imposed on Ontario contractors wishing to work in Québec.

In 1999 the provinces had agreed to discuss the matters concerning construction labour mobility and the Act was not enforced while negotiations proceeded.

Apparently those negotiations have broken down and the Ontario government has announced that as of March 9, 2002, Québec contractors will now be subject to the Act and are required to comply. They also will not be eligible to successfully bid on Ontario government work. The Minister of Labour has stated that the Act will be "vigorously enforced."

This will significantly affect any contractors with Québec roots until the provinces are able to resolve this ongoing dispute. If you require further information about the requirements of the Act, please contact us. ■

Employment Notes is a publication of the Labour and Employment Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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