
THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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SCC Upholds Substantial Damage Award Against Departing Manager

On October 9 2008 the Supreme Court of Canada released its decision in the case of *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, an appeal from the British Columbia Court of Appeal that sent shock waves through the financial services industry when it was handed down last year.

In this case, a branch manager coordinated the resignation of the investment advisors at a particular RBC branch who all resigned without notice and immediately joined Merrill Lynch.

The SCC refused to impose liability on the group of departing investment advisors for damages for lost profits due to unfair competition to their former employer. It did however uphold the finding of liability for damages resulting from their failure to provide adequate notice of their resignations; in the sum of \$40,000 each, representing a notice period of 2.5 weeks. The Court held the employees to be under no general duty not to compete with their former employer and therefore any further damage award for lost profits was not legally justified.

The branch manager who orchestrated the operation was however held liable for over \$1.4 million in damages for such lost profits; representing five years of losses. The SCC held it to be an implied term of the manager's contract to retain the employees of RBC who were under his supervision. In orchestrating their mass resignation he breached his duty of good faith to RBC.

In addition, though not at issue on the appeal, Merrill Lynch was held liable for \$225,000 in damages for inducing breach of contract and unfair competition, as well as a further sum of \$250,000 in punitive damages. The Merrill Lynch manager was held liable for punitive damages in the sum of \$10,000.

This decision is an important consideration for employees wondering whether they may really be found liable for damages for the failure to provide reasonable notice, the fiduciary obligations of

managerial employees and employers considering the hiring of employees away from their competitors.

RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc., [2008] SCC 54.

Substance Over Form: Commissioned Sales Consultant Operating Through His Own Corporation Entitled to Reasonable Notice of Termination

On June 12, 2008, the Ontario Court of Appeal released its unanimous decision in *Braiden v. La-Z-Boy Canada Ltd.*, finding that a long time furniture sales consultant, who worked solely on a commission basis and provided his services through his own corporation, was still an employee and as such was entitled to reasonable notice of termination and/or payment in lieu of reasonable notice.

Gordon Braiden, a 53 year-old sales consultant, worked for La-Z-Boy for almost 23 years when La-Z-Boy terminated his services. The termination was effected pursuant to a 60 day notice provision in an agreement between La-Z-Boy and Gordon Braiden Sales Inc., a corporation solely owned and operated by Braiden. The Court of Appeal stated that the label "independent contractor" in the agreement was not determinative of the relationship Braiden had with his employer, nor was the fact that Braiden was paid through his corporation.

The Court of Appeal stated that the test of whether an employment relationship exists continues to be a question of fact which focuses on factors such as who has control over the work; who owns any necessary equipment; who bears the financial risk; who has an opportunity for profit; and the degree of responsibility. Having regard to all these factors, the Court of Appeal determined that Braiden was carrying on the business of La-Z-Boy and not Gordon Braiden Sales Inc. The Court of Appeal therefore concluded that the 60 day termination notice provision in the "independent contractor" agreement between Braiden and La-Z-Boy was unenforceable. In particular, the Court of Appeal determined that an offer of continued employment is an insufficient form of consideration when an employee's right to claim common law reasonable notice is at the heart of a bargain.

This decision reinforces the Courts' approach to determining whether an employment relationship exists; preferring substance over form. Employers seeking to limit their exposure to the requirements that come with the hiring of employees by entering into "independent contractor" agreements with them should ensure that the substance of their relationship is not truly that of employee/employer despite the written wording of their agreements.

Braiden v. La-Z-Boy Canada Ltd. [2008] O.J.. No. 2314

Constructive Dismissal Action Dismissed Where Employee Admits Continued Employment By Applying For and Receiving LTD Benefits

On April 17, 2007, an employee applied for short-term disability benefits under her employer-sponsored plan shortly after becoming ill. The application was rejected, but the employee continued to be absent from work. The employer wrote to the employee on May 30, 2007 to inquire as to her intentions. In the absence of a response, the employer advised it would assume she decided to resign her employment. The employee did not respond.

The employee applied for long-term disability benefits under her employer's plan in September 2007, indicating that she was a "current full-time employee". The employer submitted its plan-sponsor statement indicating that the employee was still employed. A few days later, the employee commenced a claim for wrongful dismissal, alleging that she had been constructively dismissed in May, 2007. The long-term disability benefit claim was ultimately accepted, retroactive to the date the employee was first absent from work due to illness. The employee also continued to receive reimbursement for her medical and drug expenses under the employer's health plan over the period of her disability.

The employer brought a motion for summary judgment asserting that there were no grounds to advance a court action for constructive dismissal in the face of the employee's admitted representations that she is a full-time employee of the employer. The Court held that there was no evidence that the employee had been dismissed, and her undisputed representations that she continued to be a full-time employee after May 30, 2007 barred her from now claiming otherwise. There were no facts in dispute which could be referred to trial, and thus the action was dismissed.

Kelland v P.O.I. Business Interiors Inc., [2008] O.J. 2669

Failure to Disclose A Mental Disorder Upon Hiring Is Not A Ground For Dismissal and A Termination On That Basis Will be Found To Be Discriminatory

In a recent case, the Divisional Court judicially reviewed a decision of the Ontario Human Rights Tribunal ("Tribunal") which found that the employer, ADGA, discriminated against a probationary employee, Mr. Lane, and failed to take reasonable steps to accommodate him.

Mr. Lane suffered from bipolar disorder. At the time of hiring, Mr. Lane did not disclose his disability and he misrepresented to the employer the number of sick days he had taken during his previous employment. A few days after he began work, Mr. Lane began exhibiting manic behaviour and was terminated from his position. Mr. Lane filed a human rights complaint, alleging that ADGA had discriminated against him on the basis of a disability by terminating his employment. The Tribunal made findings in Mr. Lane's favour and awarded him general, mental anguish and special damages totalling \$79,278.

ADGA's application for judicial review of the Tribunal's decision was dismissed. In dismissing ADGA's application, the Court concluded that the Tribunal was correct in finding that Mr. Lane was under no obligation to disclose his disability, nor his past record of sick days. The Court upheld the Tribunal's finding that Mr. Lane did not misrepresent his abilities when he applied for his job and that the stigma attached to bipolar disorder supported Mr. Lane's perception that he would not get the job if he revealed his disability or accurately reported his past record of sick days. The Court also found that there was no need for the Tribunal to determine whether Mr. Lane established a *prima facie* case of discrimination with reference to a comparable group.

This case cautions that even if an employee has not disclosed a disability during the hiring process, it does not mean that the employee has misrepresented their ability to do the job. The employer's obligations under the Ontario Human Rights Code continue. In addition, this case assists in putting to rest the need for a complainant to establish a *prima facie* case of discrimination based on a comparator group analysis in the context of a termination.

ADGA Group Consultants Inc. v. Lane [2008] O.J. No. 3076 (Div. Ct.)

Do the Overtime Class Actions Mark the Return of the Class Action in the Employment Context?

The recent decision of the Ontario Superior Court approving a class action settlement in *Corless v KPMG* in respect of unpaid overtime may signal the return of the employment class action.

The settlement was of an action commenced on behalf of all current and former employees of KPMG alleging that KPMG failed to pay overtime in violation of provincial employment standards legislation, such as the *Employment Standards Act* in Ontario. Eventually, a settlement was reached with KPMG and was recently approved by the Court. The settlement provides a process whereby current or former employees can recover outstanding overtime pay from KPMG.

Corless v KPMG, is not the only employment-related class action recently commenced. A number of similar overtime class actions have been commenced, including actions against CIBC, Scotiabank and CN. While these actions are not wrongful dismissal actions based on mass terminations, they are the first high profile “traditional” employment class actions to have been commenced for some time; likely as a result of the experiences from the infamous wrongful dismissal class action, *Webb v K-Mart*.

In that case, K-Mart terminated the employment of approximately 4,000 employees. A wrongful dismissal class action was certified and an assessment process was established whereby the 4,000 or so employees could have their claims assessed by a referee, instead of the court. The assessment procedure was thought to be a streamlined process whereby massive numbers of employees would be able to make similar claims in an efficient manner. However, the assessment process devolved into a quagmire of problems and delays in dealing with the individual issues associated with wrongful dismissal and reasonable notice. In 2005, some six years after the class action was certified, only 24 employee claims were heard by the referees and class counsel repeatedly sought to amend the assessment process through the courts, causing even greater delays.

For years, class action lawyers and potential representative plaintiffs seemed to have shied away from commencing wrongful dismissal class actions, likely as a result of the experiences in *Webb v K-Mart*. With increasing mass terminations as a result of the current economic climate; and with recent developments in class action case-law with respect to the court’s ability to assess damages on an aggregate or class-wide basis, one may see an increase in employment class actions.

One wonders whether the challenges raised by *Webb v K-Mart* have forever scared away class counsel and potential representative plaintiffs from commencing wrongful dismissal class actions, or whether the spectre of further mass terminations will spark a communal and coordinated response by the affected employees in the form of a class action following the example of the *KPMG* settlement.

Corless v KPMG, [2008] O.J. No. 3092

Webb v K-Mart, [1999] O.J. No. 2268, [2005] O.J. No. 3306, [2005] O.J. No. 449

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