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

SUMMER 2007

EDITORS:

Nancy Shapiro, nshapiro@kmlaw.ca
Phone: (416) 595-2108

Arleen Huggins, ahuggins@kmlaw.ca
Phone: (416) 595-2115

RECENT DEVELOPMENTS

Contract Frustration based on "Disability" Demands Contextual Approach

The termination and rights of employees absent from the workplace as a result of illness and disability has always been a difficult matter to deal with. Some guidance has now been offered as to when such absence will be considered to be "permanent" such as to cause a "frustration of the employment contract."

The Nova Scotia Court of Appeal considered whether a 12 year administrative employee of a non-profit employer could be terminated after a one-year absence from the workplace. Her illness was considered serious but not permanently disabling at the date of her termination. The application for disability benefits had indicated that a one year leave of absence would be required. After the year passed, the employee was not ready to return and was terminated. The issue for consideration was whether her employment contract had become frustrated as alleged by the employer.

The Court of Appeal applied the test established in *Marshall v. Harland & Wolff Ltd.* [1972] 2 All E.R. 715 (N.I.R.C.) of whether "further performance of [the employee's] obligations in the future would either be impossible or would be a thing radically different from that undertaken by [the employee] and agreed to be accepted by the employer under the agreed terms of [the employee's] employment. Any other factors bearing on this issue must also be considered."

The Court held that in order for a "frustration" of contract to occur, consideration must be given to the following factors as they existed as at the time of the termination: expected length of future absence; whether the employer is prepared to and can accommodate that absence; and, the employment record of the employee (essentially whether the employee was a valued employee with an otherwise good service record and the length of employment of the employee, including a consideration as to whether the employee was a "key" employee such as to necessitate their replacement).

In this case, the Court upheld the decision of the trial judge that based upon consideration of all relevant factors, the employee's contract was not frustrated as at the date of her termination. Her absence from the workplace was not permanent and her work history was such that the employer ought to have continued to await her return. The dismissal was not justified; hence, damages for wrongful dismissal were upheld as awarded at trial.

Wilmot v. Ulnooweg Development Group Inc. [2007] CarswellNS 183 (N.S.C.A.).

Employer Refusal to Pay Reasonable Notice Justifies Increased Costs Award

The Honourable Mr. Justice Seigel noted at the conclusion of trial that an employer's failure to offer an adequate severance package when it knew that it had failed to do so, was an "important consideration" in the quantum of the award of costs.

The employer had, one month prior to termination of the employee, lost another wrongful dismissal case following trial.

Seigel J. noted:

"The evidence before the Court does not permit the Court to conclude whether Canac's expectation that the plaintiff would accept whatever was given to him was simply incompetent, or intentionally heavy-handed. In either case, I think the action was abusive to the plaintiff. The defendant paid the plaintiff an inadequate severance package and forced him to sue to recover his reasonable entitlement."

This is an important message to employers and all who represent them.

Somir v. Canac Kitchens (2007), 56 C.C.E.L. (3d) 248 (Ont.S.C.J.).

No Injunction to Prevent Employment Termination

In a "thinking outside the box" attempt at creativity, a dismissed employee on working notice sought an interim injunction preventing termination of his employment pending trial. The British Columbia Court refused to grant the relief sought on the basis that damages would provide an adequate remedy.

The employee held a position of public appointment, namely that of Chief Constable with the West Vancouver Police Department. He was appointed for a five year term. Following eleven months of service, he was advised that his performance did not meet expectations and he was provided with two months' working notice. He would be paid six months' pay thereafter, the amount prescribed by the Employment Agreement.

The employee commenced legal proceedings asserting that insofar as the Employment Agreement permitted his termination, such provisions were of no force and effect as they violated his rights as a holder of a "public office" and the relevant legislation in relation thereto. He applied to the Court for an injunction preventing his termination prior to trial.

The Court applied the test for considering the granting of an injunction, namely:

- 1) the strength of the plaintiff's case;
- 2) whether irreparable harm will result if the injunction is not granted; and,
- 3) the balance of inconvenience to the parties.

It concluded that in what was essentially a wrongful dismissal claim, losses are capable of quantification in monetary terms; accordingly, damages would be an adequate remedy and thus the case for an injunction was not established notwithstanding the employee having demonstrated a strong case.

In view of the legislative interpretation here, requests for injunctions in other wrongful dismissal cases would be likely to fare similarly. Reinstatement is available as a remedy in certain legislative contexts by seeking relief before the relevant tribunal; however it appears that the Court will not grant injunctive relief in similar wrongful dismissal cases in the common-law context.

Armstrong v. West Vancouver Police Board (2007), 56 C.C.E.L. (3d) 191 (B.C.S.C.).

Need not be Sale of Business as a “Going Concern”

The Ontario Court of Appeal recently considered the application of the “going concern” test to the “sale of a business” provisions of the *Employment Standards Act, 2000* under which there is deemed continued employment and termination and severance pay are not required.

The Court held that the expansive definitions of “sells” and “business” in the Act ought to be afforded a broad and liberal interpretation in order to achieve their stated purpose of providing protection to individual rights and to preserve continuity of seniority. It refused to find that the sale of all or part of a business as a going concern was required by the Act.

It was found that where, as in this case, employment was accepted with the new entity, the Act provided for deemed continuity. It did not need to find that the portion of the business sold was sold as a “going concern” in order for such continuity to apply.

Abbott v. Bombardier Inc. (2007) 56 C.C.E.L. (3d) 165 (Ont.C.A.).

This edition of Employment News has been sent to you either via ordinary mail or email. Should you at any time wish to change your preferred method of receipt of this Newsletter, please take the time to either reply to this email or return this page to us indicating your selected method of delivery.

Further please note, profiles of this newsletter’s editors, past issues of Employment News, as well as our other firm newsletters, including Commercial Counsel, Practice Tips, and Talking Union may be viewed on our website at www.kmlaw.ca

I prefer to receive Employment News by mail at: _____

I prefer to receive Employment News by email at: _____

Name: _____

Firm/Company: _____

Please return to Uma Ratnam by fax: (416) 204-2897, or mail to Koskie Minsky LLP, 20 Queen St. W., Suite 900, Toronto, Ontario, M5H 3R3