Labour Notes®

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COURT OF APPEAL APPROVES 26 MONTHS' NOTICE FOR CONTRACTORS

— Kristin Taylor, Partner, Cassels Brock. © Cassels Brock & Blackwell LLP. Reproduced with permission.

In January, Ontario's highest appellate court dismissed an appeal by Canac Kitchens of a decision awarding two of its contractors each 26 months' notice.[1] Canac Kitchens has become a notorious litigant for having provided employees with only their minimum statutory entitlements on the closure of its business and having now lost over a dozen cases on what constitutes reasonable notice.

In this particular case, Canac Kitchens provided no notice or pay in lieu of notice whatsoever when it advised two long-term contractors of the termination of their relationship. The contractors, a married couple, had worked for Canac Kitchens installing and then supervising the installation of cabinets for 32 and 25 years. They were 63 and 61 years old. Both of their relationships with Canac Kitchens had started out as employment until, approximately 20 years prior to termination, Canac Kitchens decided that they would be treated as independent contractors going forward. In the last couple of years of their relationship, the contractors had picked up a little work from other cabinet companies, but were otherwise exclusive to and dependent on Canac Kitchens.

The Court of Appeal determined that the additional work performed by the contractors for companies other than Canac Kitchens, in the context of a lengthy relationship of exclusivity, did not change their status as dependent contractors. The Court of Appeal also determined that the original award of 26 months' notice was appropriate given the ages, lengths of service and positions performed. These circumstances were found to justify an award in excess of 24 months' notice.

The take-away for employers from the latest Canac Kitchens decision are: (1) reasonable notice is required on the termination of dependent contractors and should be calculated using the same method used for employees; (2) dependent contractors need not be entirely exclusive for the duration of their relationship as the overall context will be considered; and (3) a finding of "exceptional circumstances" is not essential to support an award in excess of 24 months' notice. Perhaps the greatest lesson of all is that a strategy of flouting common law obligations to employees and contractors means an employer will spend a great deal of money on both its legal fees and those of its employees.

[1] *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79.

PROGRESS OF LEGISLATION

Federal Government Bill that Would Restore Certification Procedures and Repeal New Reporting Obligations for Labour Organizations Progresses

Bill C-4, *An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act*, received second reading in the House of Commons on March 7, 2016.

If passed, Bill C-4 would restore the procedures for certification and decertification of bargaining agents that existed before the *Employees' Voting Rights Act*, SC 2014, c. 40 (formerly Bill C-525), came into force on June 16, 2015. It would also repeal new *Income Tax Act* reporting obligations for labour organizations imposed by *An Act to amend the Income Tax Act (requirements for labour organizations)*, SC 2015, c. 41 (formerly Bill C-377).

Bill C-4 received first reading on January 28, 2016. For a more detailed discussion of its proposed amendments, see *Labour Notes* no. 1540, dated February 19, 2016.

British Columbia Bill that Would Add New Offences under *Labour Relations Code* Progresses

Bill 5, the *Miscellaneous Statutes (Signed Statements) Amendment Act, 2016*, which proposes amendments to a variety of Acts in British Columbia, including the *Labour Relations Code* (the "Code"), received second reading on March 1, 2016.

The proposed amendments to the Code would replace language requiring affidavits and statements verified by statutory declarations in sections 149 and 150 with the requirement of signed statements. Additionally, a proposed amendment would create two new offences under the Code: for providing false or misleading information related to a material fact contained in a signed statement; and producing or relying upon the signed statement of another person while knowing the statement "to be false or misleading with respect to a material fact contained in the signed statement".

Bill 5 received first reading on February 10, 2016. If passed, it would come into force by regulation of the Lieutenant Governor in Council.

Manitoba Bill that Would Establish New Leaves of Absence Progresses

Bill 8, *The Employment Standards Code Amendment Act (Leave for Victims of Domestic Violence, Leave for Serious Injury or Illness and Extension of Compassionate Care Leave)*, was introduced on November 25, 2015 and received third reading on March 3, 2016.

Bill 8 would amend *The Employment Standards Code* to create a new leave of absence available to employees who are victims of domestic violence and a new leave of absence available to employees who are seriously ill or injured. Bill 8 would also modify Manitoba's existing compassionate care leave and include amendments to various other leaves to clarify that the entitlements are unpaid.

Bill 8 received first reading on November 25, 2015 and second reading on December 3. For a more detailed discussion of its amendments, see *Labour Notes* no. 1537, dated December 23, 2015.

Proposed Quebec Public Sector Whistleblower Bill, Which Would Amend *Act Respecting Labour Standards*, Progresses

Quebec's Bill 87, *An Act to facilitate the disclosure of wrongdoings within public bodies*, received second reading on February 18, 2016.

If passed, Bill 87 would expand the protection against reprisals section found at section 122 of the *Act respecting labour standards* to capture employees who have made a disclosure of a wrongdoing in accordance with *An Act to facilitate the disclosure of wrongdoings within public bodies* or who have co-operated in an investigation or audit with respect to such wrongdoing.

FAMILY FEUD LEADS TO DAMAGES FOR WRONGFUL DISMISSAL

— David S. Louie of Roper Greyell LLP.

In *TeBaerts v. Penta Builders Group Inc.*, 2015 BCSC 2008, the Supreme Court of British Columbia awarded nearly $94,000 in damages to a 32-year-old project consultant and account manager after finding she was wrongfully dismissed by her employer, a family-run business.

Background

The plaintiff, Karena TeBaerts, was employed by Penta Builders Group Inc. ("Penta") for approximately 11 years. Penta is involved in the business of building homes as well as real estate development. Penta also employed TeBaerts' brother and father. In addition, Penta's president's two daughters and son-in-law were employed by the company.

In November 2014, TeBaerts learned that the president's son-in-law resigned from his employment with Penta and, during his exit, engaged in a verbal altercation with TeBaerts' brother. After his resignation, the son-in-law remained engaged in work for one of Penta's associated companies for which Penta performed services, Oaktree Farms Ltd. ("Oaktree"). TeBaerts was relieved from her duties on a certain group of Oaktree homes and was advised that another designer would be hired for those projects.

Shortly thereafter, TeBaerts deleted files, which included specifications, related to the Oaktree projects. On learning of the file deletion that same day, Penta requested that TeBaerts take the necessary steps to reinstate the deleted information. She explained that she deleted the files based on her assumption that they were no longer needed, and that she regularly engaged in cleanup of the server in order to keep it organized and relevant. She maintained that it was her understanding that Penta would no longer be involved in the construction of Oaktree homes and that someone else would be engaged to do the specifications. TeBaerts arranged with IT for the files to be recovered, which was done successfully later that day.

Penta then accessed TeBaerts' work email account and found an email exchange between TeBaerts and her mother, wherein the latter indicated she was looking for alternative jobs for TeBaerts' father. Her father was a senior project manager at Penta and an important employee. TeBaerts suggested that her mother contact a recruiter for him. In this email exchange, TeBaerts also wrote about the deletion. Regarding the son-in-law, she stated, "I went in and deleted all of the other design work I had done for 'his' houses so he can't use it or refer to it". She also said that the son-in-law was "getting rewarded for his asshole behavior as per usual and it's ridiculous".

As a result, Penta terminated TeBaerts' employment for what it claimed was just cause. TeBaerts brought an action against Penta for wrongful dismissal which included a claim for aggravated and punitive damages, and a claim for breach of privacy under the British Columbia *Privacy Act* due to Penta's intrusion into her work email account.

Penta maintained that it had to terminate TeBaerts' employment because she deleted the files with malicious intent, was not forthright and honest in her explanation for her reasons for the file deletion, and breached her duty of loyalty and good faith by advising her mother to seek a recruiter for her father.

Decision

On the issue of whether there existed just cause for termination, the Supreme Court of British Columbia applied the traditional contextual approach, acknowledging the need for proportionality between an employee's conduct and the sanctions imposed by the employer. The Court accepted that, to the extent TeBaerts' motivation in deleting the files was to prevent the son-in-law from using or benefiting from those files, that was an error in judgment that was not driven by spite or malice. Although TeBaerts did not disclose this reason to Penta, her explanation was merely "incomplete" and did not rise to the level of dishonesty. The Court held that TeBaerts' suggestion that her father utilize a recruiter "did not come close" to breaching her duty of loyalty and good faith.

The Court concluded that Penta's decision to summarily discharge TeBaerts was "significantly disproportionate to her conduct" and awarded her damages equivalent to 12 months of salary, vehicle allowance, loss of benefits, and loss of management bonuses as well as costs. The Court did not award any aggravated or punitive damages.

With respect to TeBaerts' breach of privacy claim, the Court noted that the totality of the circumstances should be examined to determine whether the plaintiff had a reasonable expectation of privacy. Some of the factors that the Court considered in answering that question were:

- the computer was owned by Penta;
- there were very relaxed security procedures to protect against unauthorized access to employee computers;
- employees often left their computers unlocked without passwords; and
- other employees knew TeBaerts' password and used her computer.

The Court concluded that there was no reasonable expectation of privacy and Penta did not breach TeBaerts' right to privacy as set out in the *Privacy Act*. Accordingly, her breach of privacy claim was dismissed.

Takeaways

The facts of this case demonstrate that conflicting family dynamics can give rise to serious workplace issues. As well, uncertainty around the treatment of work files as well as appropriate standards of computer use and security can be a recipe for workplace conflict.

This case also confirms that employees do not have an absolute right to privacy at work. Rather, the totality of the circumstances will be considered when assessing whether an expectation of privacy is reasonable. Pursuant to Supreme Court of Canada authority, that expectation of privacy may be diminished when personal information is stored on a workplace computer. Employers can also navigate these challenges by implementing, communicating, and consistently enforcing clear workplace policies regarding technology use.

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RECENT CASES

Court of Appeal Affirms that it Was Not Discriminatory To Terminate Disabled Employee for Making Violent Threats

Ontario Court of Appeal, June 24, 2015

Windsor Factory Supply Ltd. ("WFS") had been accommodating Bellehumeur for various disabilities, including alcoholism and thyroid and cardiac issues. After being off work for medical reasons, WFS allowed Bellehumeur to work in the warehouse instead of the counter. After Bellehumeur made violent threats to fellow employees, he was terminated for cause. The trial judge found that WFS was unaware of Bellehumeur's mental disability, that the threats constituted workplace violence, and that the termination for cause was not discriminatory. Bellehumeur appealed.

The appeal was dismissed. The trial judge determined that Bellehumeur's mental disability, unknown to WFS at the time of his termination, played no role in the reason for the termination. Bellehumeur was terminated because he made violent threats against fellow employees, which amounted to just cause for dismissal.

Bellehumeur v. Windsor Factory Supply Ltd., 2016 CLLC ¶ 210-011

Termination Clause in Employment Agreement Signed Nine Months After Employee's Hire Was Not Enforceable

Ontario Court of Appeal, November 10, 2015

Holland accepted a written offer of employment for a sales position with Hostopia.com Inc. ("Hostopia"). The offer included details about salary, commissions, benefits, and vacation, and indicated that he would be required to sign an

employment agreement. Nine months later, Holland signed the employment agreement, which included a termination provision providing for termination without cause with notice as required under the *Employment Standards Act, 2000* ("ESA"). Holland was terminated seven years later, and was paid an amount at least equal to the requirements under the ESA. An action for wrongful dismissal was dismissed, as the trial judge determined Holland was limited to his rights under the ESA, and that he was not entitled to commissions on sales he was working on at the time of his termination. Holland appealed.

The appeal was allowed, in part. The offer letter, which constituted a complete contract of employment, was not consistent with the employment agreement. Holland was employed pursuant to the offer letter for nine months prior to signing the employment agreement. It was an implied term of the offer letter that Holland was entitled to reasonable notice prior to termination, and the employment agreement included an inconsistent term limiting his entitlement to notice to the statutory minimum. Holland was not informed of this change, or given any consideration for the new term. Therefore, the employment agreement term could not displace the implied term of reasonable notice in the offer letter. While the trial judge incorrectly considered how quickly Holland obtained new employment in determining the notice period, the award of eight months' reasonable notice was within the reasonable range. There was no legal error in the trial judge's interpretation of the commission plan, or in determining there was no right to equitable compensation on unjust enrichment principles with respect to the commissions in dispute.

Holland v. Hostopia.com Inc., 2016 CLLC ¶ 210-012

Court of Appeal Affirms that Wrongful Dismissal Claim Was Not Statute-Barred for Being Out of Time

Ontario Court of Appeal, November 20, 2015

Reddy, an employee of Freightliner Canada Inc. ("Freightliner"), was required to go on short-term disability as a result of pericarditis. He returned to work, but was unable to function well. He was terminated, and soon after suffered a stroke. Reddy's application for long-term disability benefits was rejected by Co-Operators Life Insurance Company ("Co-Operators") since he was no longer employed by Freightliner. Reddy brought an action against Freightliner and Co-Operators for long-term disability benefits. Freightliner defended the action, and in his reply Reddy claimed he had been wrongfully terminated. Freightliner moved for summary judgment, since wrongful dismissal was a new cause of action that was statute-barred for being out of time. The motion judge dismissed the motion. Freightliners and Co-Operators appealed.

The appeal was dismissed. The claim of wrongful dismissal was not a surprise for Freightliner, as it defended the claim on the basis that Reddy was terminated for cause. Reddy claimed there was an employment relationship and contract which was breached as a result of termination without notice, and that damages, including the loss of long-term disability benefits, flowed from the breach.

Reddy v. Freightliner Canada Inc., 2016 CLLC ¶ 210-013

Preliminary Motion Seeking To Dismiss Duty of Fair Representation Complaints Was Dismissed

Saskatchewan Labour Relations Board, November 2, 2015

C.B., H.K., and R.D. (the "employees") worked for the City of Regina and were members of the Canadian Union of Public Employees, Local 21 (the "union"). The employees filed multiple harassment complaints with the City about co-workers, who were also union members. Prior to the investigator releasing his report, the employees asked the union to file grievances, which the union declined. The employees also filed discrimination and human rights complaints under *The Saskatchewan Employment Act*, and the union was not a party to these applications. When the investigator's report was released, it substantiated many of the complaints, including the allegations of personal and sexual harassment of the employees by their co-workers. The union filed grievances on behalf of the employees, as well as grievances on behalf of the union members found to have engaged in harassing behaviour. The union and the City entered into memoranda of settlement with respect to all of the complaints, and the employees signed releases. The employees filed applications with the Saskatchewan Labour Relations Board (the "Board") alleging that the union failed in its duty of fair representation. The union brought a preliminary motion to dismiss the applications, claiming the Board lacked jurisdiction.

The preliminary motion was dismissed. At issue in the preliminary motion was whether the duty of representation imposed on trade unions by section 6-59 of *The Saskatchewan Employment Act* was different than the duty imposed by section 25.1 of the former *The Trade Union Act*. As the Board had made no determination on this issue, a preliminary application was not the proper forum for making such a determination. In addition, determining whether the union interfered with the resolution of the employees' complaints could not be determined on a preliminary motion. While the releases signed by the employees comprehensively settled all disputes with the City, they did not release the union from claims by the employees. The issues raised by the applications included important legal questions which it was in the public interest to resolve, regardless of whether the issues between the parties were moot.

C.B. v. CUPE, Local 21, 2016 CLLC ¶ 220-011

Board Had Jurisdiction To Order Binding Arbitration After Finding that Employer Failed To Bargain in Good Faith

Federal Court of Appeal, November 4, 2015

The Canada Industrial Relations Board (the "Board") found that the Listuguj Mi'gmaq First Nation Council (the "Council") breached the duty to bargain in good faith by failing to communicate its reasons for not ratifying a tentative agreement until the Board hearings. The Council's main reason for the refusal was given several months after the start of the hearing, and appeared to be a desire by the Chief and Band Council to obtain the authority to summarily dismiss any bargaining unit member when a member of the First Nation was available and qualified for employment in a bargaining unit position. The Board's order required the Council to provide the Public Service Alliance of Canada (the "union") with a written explanation of its position. In addition, the parties were required to resume bargaining, and if no agreement could be reached in 60 days the union could refer the matter to the Board for binding method of resolution. The Council brought an application for judicial review to set aside the requirement for a binding method of resolution.

The application for judicial review was dismissed. The Board had the jurisdiction to direct a method of binding arbitration to resolve the terms in dispute after finding a breach in the duty to bargain in good faith. It was also not an unreasonable order. The Board could assist the parties in reaching an agreement during the 60 days prior to arbitration, and the order was directed at the Council's conduct in raising a new and highly contentious issue as an impediment to agreement months after the tentative agreement was concluded.

Listuguj Mi'gmaq First Nation Council v. PSAC, 2016 CLLC ¶ 220-012

Employer Was Justified in Requiring an Independent Medical Investigation for Employee Seeking To Return to Work After Sick Leave

Human Rights Tribunal of Ontario, September 4, 2015

Bottiglia was the Superintendent of Schools for the Ottawa Catholic School Board ("OCSB"). He became upset when a position within the OCSB was filled by appointment, rather than an open competition, and this triggered his depression. Bottiglia went on sick leave, using his accumulated sick days and vacation days to provide income until they ran out two years later. At that point, Bottiglia and his physician indicated that he was ready to return to work, although his physician requested a very slow return to work over a number of months. The OCSB requested an independent medical examination ("IME"), which Bottiglia agreed to, and the OCSB provided the independent physician with background information about Bottiglia's employment, leave, and proposed return to work. Bottiglia's counsel complained that the information provided left the physician unable to prepare an independent and objective report. Bottiglia refused to attend the IME, and brought a human rights complaint. After running out of sick leave, Bottiglia contacted the OCSB to claim his pension entitlements, which he considered to be a letter of resignation, although OCSB did not take it as a resignation.

The complaint was dismissed. Bottiglia suffered from a unipolar disorder, with anxiety, which was clearly a disability. He requested accommodation from the OCSB, and as part of that process he was expected to provide information to allow the OCSB to assess how or if he might be accommodated. It was reasonable for the OCSB to request additional information about Bottiglia's medical condition, prognosis, restrictions, and potential accommodations through an IME.

Bottiglia had been off work for two years, and only two months earlier he had claimed he could not return to work without a serious risk of relapse. It was appropriate for the OCSB to question whether the gradual return to work plan was adequate or appropriate, and to question a return to work request that coincided with the end of Bottiglia's paid leave. The OCSB requested the IME to ensure it had adequate, consistent, and reliable information about Bottiglia's health, ability to return to work, and possible accommodation. It was reasonable for the OCSB to provide information to the physician performing the IME about why it believed the exam was necessary. The accommodation requested was unclear, and potentially complex, and the OCSB was justified in seeking additional information about diagnosis and treatment to appropriately identify and meet Bottiglia's accommodation needs. The IME request did not unreasonably delay the return to work process, and the refusal to accept Bottiglia's letter as a resignation was not a deliberate act to delay access to pension benefits since it was not clearly evident that the letter was meant to be a resignation. The OCSB was acting in good faith during the accommodation process.

Bottiglia v. Ottawa Catholic School Board, 2016 CLLC ¶ 230-008

Court Affirms Tribunal's Finding that Employee's Discrimination Complaint Was Timely Since It Was a Continuing Contravention

Supreme Court of British Columbia, September 17, 2015

Kenworthy worked for Brewers' Distributor Ltd. ("Brewers") as a warehouse employee. After becoming pregnant in January 2010, she was given administrative duties, at which point she claimed that she was subject to hostile and intimidating conduct by fellow employees. She was told by her manager that nothing could be done about the harassment. When Kenworthy returned from maternity leave she alleged that the harassment escalated, and that she was subject to sexually explicit comments, innuendos, and conduct. She was required to take several stress leaves, the last one from December 2012 to March 2013. When she returned, Kenworthy alleged she was sexually harassed again, and also claimed in two instances she was denied statutory leave either directly or indirectly as a result of having to look after her child. Finally, she alleged that she was scheduled for graveyard shifts which failed to accommodate her child care needs. Kenworthy brought a human rights complaint alleging discrimination on the basis of sex and family status. Brewers alleged the complaint was filed outside of the six-month time limit. The British Columbia Human Rights Tribunal (the "Tribunal") found that the complaint was a continuing contravention and was filed within the time provided (see 2015 CLLC ¶ 230-009). Brewers brought an application for judicial review.

The application for judicial review was dismissed. The test for a continuing contravention used by the Tribunal was correct, as it captured the concept of separate contraventions of the same character. The earlier allegations, which involved acts of sexual harassment, and the later allegations, which were based on family status, were still related and of the same character. The two types of alleged discrimination were allegations of discrimination in employment, and it was not patently unreasonable to find that all of the events were connected and of the same character.

Brewers' Distributor Ltd. v. Kenworthy, 2016 CLLC ¶ 230-009

THE ECONOMY

The statistics below provide a convenient overview of the latest Consumer Price Index (CPI) and other economic and labour indicators of interest. Do you need detailed CPI figures for all of Canada, individual provinces, regional cities, or specific goods and services (e.g., housing, food, and transportation)? If so, you can find the detailed CPI figures in the "Consumer Price Index" tab division of Volume 1 at ¶ 26 *et seq*.

Cost of Living — *Up*

The Consumer Price Index figure for December 2015 on the 2002 = 100 time base, was 126.5, up 1.6% from the December 2014 figure of 124.5. On a monthly basis, the December 2015 percentage figure was down 0.5% from November 2015. On the 1992 = 100 time base, the December 2015 All-Items figure was 150.6.

Industrial Production — *Down*

The preliminary, seasonally adjusted figure of industrial production for the month of November 2015, in chained 2007 dollars, was estimated at $345,870 million, down 3.2% from the revised November 2014 figure of $357,370 million.

Weekly Earnings — *Up*

In November 2015, the average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level were $950.71, up 1.4% from $937.90 in November 2014, according to a preliminary estimate based on a sample survey of reporting units.

Unemployment — *Up*

For January 2016, the seasonally adjusted number of unemployed persons totalled 1,390,300, up 3,900 from December 2015, with an unemployment rate of 7.2% of an active labour force of 19,395,500. The employment level in January 2016 was 18,005,200.

Work Stoppages — *Down*

For major collective bargaining agreements (those with 500 or more employees) in December 2015, there were 7,760 person days lost from 8 work stoppages. For December 2014, there were 45,340 person days lost from 58 work stoppages.

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