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

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TEACHING AN OLD DOG NEW TRICKS OR CONSTRUCTIVE DISMISSAL?

Recently, the British Columbia Court of Appeal upheld a decision finding a 66 year old employee to have been constructively dismissed when she was required to train for additional duties and felt forced to retire.

The employee, Ms. Fisher, worked for Lakeland Mills, a lumber manufacturer, for 17 years as a switchboard operator/receptionist. She was 48 years old when she commenced her employment and was part of an office staff of three, plus a part-time back up to fill in for vacations and emergencies.

At age 65, Ms. Fisher was constantly asked by visitors to the office when she was going to retire. However, she was told by the President of Lakeland that she could stay with and work for the company as long as she liked.

When one of the office staff left the company, Ms. Fisher was asked to undergo training so as to fill in as the back-up in the office. The training included learning various computer-based skills with which Ms. Fisher was not comfortable. Ms. Fisher felt that if she did not agree to learn and take on these new responsibilities, the company would hire someone else to do so and take over some of Ms. Fisher's previous duties as well. When Ms. Fisher approached the President advising that she was not able to take on the new duties and, as a result, would have to retire, the President did not advise her that she could return to her old duties.

While the trial judge did not find that the company sought to force Ms. Fisher to retire, it was concluded that the actions of the company amounted to a unilateral change to a fundamental term of Ms. Fisher's employment. Ms. Fisher was constructively dismissed; she was awarded her 10 months' notice.

This case suggests that employers should be careful in how they address duties and training requirements for older employees, particularly with respect to the addition or change of the employment duties those employees were originally hired to perform.

Fisher v Lakeridge Mills Ltd., [2005] B.C.J. No. 98, per Crawford J., affirmed [2008] B.C.J. No. 170 (B.C.C.A.) per E.C. Chaisson J.A.

PERSONNEL AGENCY LIABLE FOR ACTIONS OF EMPLOYEE IT PLACED

In a ground-breaking decision released by the Ontario Court of Appeal last June, a personnel agency was found liable for the fraudulent actions of an employee which it placed.

Drake International placed an administrative assistant without checking her references. After the employee resigned two years later, it was discovered by the employer that the employee had defrauded it of over \$250,000. The employee was criminally convicted. She was also sued civilly by the employer and judgment was obtained. The employer then sued Drake for negligence and breach of contract.

There was evidence that if the employee's references had been checked they would have been very negative. The Court of Appeal upheld the trial judge's finding that the failure to check her references caused or contributed to the employer's loss and the consequent finding of liability of Drake on the basis of negligence or breach of contract.

The Court also upheld the conclusion that because of the employer's contributory negligence in failing to adequately supervise the employee, liability should be apportioned at 50%.

Drake was held liable for \$131,000. The Court of Appeal did indicate that nothing operated to prevent Drake from itself claiming against the employee for contribution and indemnity.

This case certainly sends a stern warning to all recruiters and agencies to exercise prudence in fulfilling the function of reference checking.

Treaty Group Inc. v. Drake International Inc. (2007) 86 O.R. (3d) 366 (Ont.C.A.).

SALE OF A BUSINESS AND DISPOSITION

The Ontario Superior Court of Justice recently considered the sale of a business deeming provisions of Section 9 of the *Employment Standards Act, 2000*, under which if an employer sells (including leases, transfers or disposes of) all or part of a business and the purchaser employs an employee of the seller, the employee is deemed not to have been terminated or severed for the purposes of the *Act*, subject to the hiatus exemption in Section 9(2).

The employee was employed by Blastech Corp. commencing on August 28, 1995 for a period of approximately nine years. He was then laid off and paid termination pay and severance pay based only upon his nine years service.

The employee claimed entitlement under the *Act* based upon his 17 years of prior service with Erectoweld which had subsequently sold part of its business to ECL.

As part of the sale to ECL, Erectoweld had retained the land and equipment and leased them to ECL. Among other things, Erectoweld retained a lien on ECL's accounts receivable. ECL subsequently became insolvent and Erectoweld took possession of the operation. At that time Blastech Corp. entered into an agreement with Erectoweld to lease the land which housed ECL's business; to purchase from Erectoweld the equipment formerly used by ECL; and to purchase ECL's bank lien on its accounts receivables. On August 28, 1995, one day prior to ECL filing for bankruptcy, Blastech moved into ECL's former premises, hired ECL's employees at the same rate of pay and completed work formerly undertaken by ECL.

ECL had given its employees no termination notice, no termination pay and no Record of Employment.

The purchaser denied liability for the employee's service prior to August 28, 1995 claiming that it had acquired ECL's business from a third party, Erectoweld, and therefore s.9(1) was not triggered.

The Court found that the purchaser had acquired ECL's business as a going concern by buying the bank's lien on ECL's accounts receivable, which it held to be a significant asset, thereby acquiring a creditor and debtor relationship with ECL. Thus, ECL was found to have "disposed of" its property to the purchaser by defaulting on the lien obligations, thereby triggering s.9(1) of the *Act*. As such, the purchaser was held liable for the employee's full 17 years service.

This case illustrates that the Court will apply a broad interpretation of the deeming provisions to protect employees' notice/severance entitlements in the event of a sale of a business.

Macdonald v. Blastech Corp. [2008] O.J. No. 835

EMPLOYEE'S FAILURE TO MITIGATE DAMAGES AND REFUSAL TO SETTLE PROVES COSTLY

A recent decision in Ontario held an employee, who was successful at trial, nevertheless liable for costs of the employer which exceeded his recovery, based on an offer to settle.

Dorin Plotogea commenced an action against his former employer Heartland Appliances Inc. alleging wrongful dismissal following his 11 year career as a design engineer. In its defence of the action, Heartland alleged it had cause to terminate Plotogea and that, in any event, Plotogea had failed to take reasonable steps to mitigate his damages.

After an 11 day trial, the Honourable Mr. Justice Reilly found that Heartland did not have cause to terminate Plotogea and that reasonable notice in the normal course would have been nine months. However, the Court also found that Plotogea's efforts to mitigate his damages by seeking alternative employment were "woefully inadequate", therefore reducing the notice period awarded from nine months to two months or \$8,309.32.

Given the mixed success at trial and the existence of Heartland's offer to settle prior to the start of the trial for \$15,000, the Court determined in a separate cost award that Heartland was entitled to \$12,500.00 in costs for that portion of the trial which dealt with the issue of mitigation. In issuing its decision, the Court stated that "this was a case that cried out for settlement" and that "this case should serve as a notice to litigants that they are well advised to settle the issues in a case such as this, which could have and should have been settled without the necessity of a trial."

This case underscores the vital importance of mitigation. It also serves as a stern warning to both employees and employers that proceeding to trial, when settlement is the better and more appropriate option, will always be a costly endeavour.

Plotogea v. Heartland Appliances Inc. (2007), CanLII 26615 and 36828 (Ont. S.C.J) per Reilly J.

EXECUTIVE PROTECTED BY BUSINESS JUDGMENT RULE

The Court held that utilizing the "reasonable business judgment" rule is the appropriate consideration to employ in determining whether there is "cause" for termination.

A former Vice-Chair of a group of companies employed under a fixed term contract brought an action for damages for wrongful termination of his employment. The employer asserted just cause for the termination of the employee's employment, and also counterclaimed for damages alleged to be a direct result of the employee's negligence and breaches of fiduciary duty. The key issue for the Court was whether the employee's job performance in a senior executive position was such that the employer was entitled to peremptorily dismiss him.

The Court analysed the employee's job performance against the standard of care expected of a CEO, director or officer of a company: prudence on a "reasonably informed basis". Courts will not hold executives to a standard of perfection but rather, they will give deference to business judgments that are reasonably made.

The employer impugned a number of the employee's business decisions, all of which the Court held to be protected by the "business judgment" rule. The Court also failed to find that there had been any breach of fiduciary duty by the employee. The Court concluded that there was no evidence of misconduct or incompetence by the employee, and the employer had therefore failed to discharge its burden of proof in establishing the existence of just cause. In addition, the counterclaim was dismissed.

Puhl v. Katz Group Canada Ltd., [2008] O.J. No. 66 (S.C.J.)

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