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It's a Two-Way Street: Employees are Required to Give Notice of Resignation

by Dave J.G. McKechnie, Adam Kaukas, Tyson Gratton, Linda Yang, Student-at-Law

In *Consbec Inc v Walker*,[1] a family drama played out publicly in the Supreme Court of British Columbia. The Court reminded both Canadian employers and employees of the (limited) obligations employees owe employers *after* resigning from employment.

Background

In 1997, Walker was hired by his uncle Rick to work as the Western Division manager for Consbec. Walker's job was to "grow the business" and lead Consbec's bids for contracts to provide blasting and drilling services. There was neither a written employment contract nor a separate non-competition or non-solicitation agreement.

On June 10, 2002, Walker sent his uncle a letter of resignation that was effective immediately. Shortly after leaving Consbec, Walker incorporated his own blasting and drilling company and successfully bid on several contracts in direct competition with Consbec. Consbec alleged that Walker had an obligation not to compete with Consbec and sued Walker for damages suffered in connection with: the loss of the value of the contracts; and, insufficient notice of his resignation.

[1] *Consbec Inc v Walker*, 2014 BCSC 2070.

Competing Against a Former Employer

Canadian courts generally favour free competition and an individual's ability to make a living. Therefore, an employee can always freely compete with a former employer unless the employee: (1) is subject to an enforceable non-competition agreement, (2) is a fiduciary of the employer, or (3) uses the employer's confidential information.

As there was no non-competition agreement between Walker and Consbec, the Court proceeded to consider whether he was a fiduciary of Consbec. Certain employees have a fiduciary duty to act in the best interest of their employer, including a duty to refrain from competing against the employer. To determine whether an employee is a fiduciary, courts will look at the role of the individual and consider whether the person exercised significant control and authority over the operations of the employer. If the employee is a fiduciary, a Court may find that the employee is restricted from competing unfairly against the former employer (e.g. soliciting the former employer's customers)

In *Consbec*, the Court found that Walker did not exercise significant authority and control. Despite his position as the area manager for Western Canada, Walker did not have influence over other Consbec divisions, was not privy to corporate decision-making, did not determine salaries or bonuses, did not have signing authority for company cheques, and reported his bids to his direct supervisor at all times. He was therefore not a fiduciary employee.

The Court also dismissed Consbec's alternative argument that Walker misused its confidential information. Consbec alleged that Walker misappropriated the Consbec client list and used that information to compete with Consbec. This argument failed, however, because Consbec was unable to prove even the existence of a client list, let alone that Walker had misused it.

Further, in the blasting and drilling industry, almost every project is awarded by bid and tender. As such, projects are usually awarded to the lowest bidder, not a regular contractor, so the very idea of a confidential client relationship in this case was difficult to fathom.

Damages for Lack of Notice of Resignation

In the only win for Consbec, and one that could be helpful for employers in similar circumstances, the Court found that Consbec was entitled to reasonable notice of Walker's resignation.

An employee is obliged to provide reasonable notice of resignation even if there is no written contract. Since Walker gave no notice, this was clearly unreasonable. The Court declined to determine what would have been reasonable notice in the circumstances since that would only lead to speculation as to what Consbec would have done if it had been given notice. Instead, the Court moved directly to the issue of damages and determined that the test for damages is one of opportunity, not loss of earnings. Walker, by giving insufficient notice, denied Consbec the opportunity to retain a replacement employee. The Court awarded damages of $56,116.11, which were expenses incurred by Consbec to (1) send an employee from Ontario to BC to cover Walker's position and (2) relocate another employee and his family permanently from Ontario to BC.

What This Means for Employers

This case is a reminder to always have an enforceable written employment contract providing for the terms and conditions of the employment relationship, including restrictive covenants and notice periods. As a matter of public policy, Courts will favour freedom of competition and mobility and be reluctant to impose restrictions on employees absent a clear legal basis to do so.

However, employers must keep in mind that restrictive covenants, and non-competition clauses in particular, are difficult to enforce and must be drafted carefully or else they risk being struck by courts. An employer should seek legal advice to make sure the employment agreement is properly drafted and provides sufficient protection in the case of a departing employee.

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Ontario Human Rights Commission Comments on Sexual Harassment in the Workplace

by Kyle Lambert, George Waggott

In response to various recent events in which the issue of sexual harassment has obtained national focus, the Ontario Human Rights Commission ("Commission") published on November 25, 2014 an *information bulletin* on sexual harassment in the workplace.

The Commission's policy on sexual harassment is not new, with the most recent version (the "*Policy on Preventing Sexual and Gender-Based Harassment*") having been published in 2013. However, the Commission's most recent publication is a reminder to employers and employees alike of the seriousness of the issue. The Commission is also mindful of the increasing scrutiny now being brought to bear on numerous workplaces, with a focus not only on potential misconduct, but also on how such concerns are investigated and addressed.

Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19, specifically forbids sexual harassment, including in the workplace:

> "**7(2)** Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee."

As a result, the Commission makes clear in its bulletin that Ontario employers have a legal duty to prevent and respond to sexual harassment. Organizations that do not take steps to prevent sexual harassment can face potential legal liability and expenses, along with less tangible risks like decreased productivity, low morale and increased absenteeism.

When deciding if an employer has responded appropriately to a sexual harassment complaint, a Human Rights Tribunal vice-chair is likely to look at a number of factors, including the employer's procedures for addressing harassment, the employer's handling of the complaint and the employer's history.

How can employers prevent sexual harassment?

Employers can often avoid cases of sexual harassment by taking one or more of the following fundamental steps, all of which are strongly recommended by the Commission:

1. Having a clear, comprehensive anti-sexual harassment policy in place;
2. Ensuring all employees have the policy and are aware of their rights, and their responsibilities not to engage in harassment; and
3. Training everyone in positions of responsibility on the applicable policy and their respective human rights obligations.

Ultimately, each employer will want to address workplace sexual harassment in a manner which meets its own unique needs. McMillan LLP's *Employment and Labour Relations Group* has a wealth of experience in helping employers address workplace risks such as sexual harassment, including through drafting or reviewing appropriate workplace policies and handbooks, and by providing training to better enable managers to recognize and address such problems.

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The Price to Entice: Three-Year Employee Awarded 14 Months of Notice

by Dave J.G. McKechnie, Stefanie Di Francesco

While there is some element of courtship at the beginning of every employment relationship, the Ontario Superior Court of Justice (the "Court") in *Rodgers v CEVA Freight Canada Corp*. provides a caution for employers who entice away employees from secure employment. Although the employee's short service and the length of the notice period may cause employers to do a double-take, this decision illustrates the potential exposure when dismissing a short-service employee who has been enticed away from another position.

Inducement Cancels Out Short-Service

Rodgers had been the President of a transportation company for 11 years, earning in excess of $320,000 per year, when he was approached by CEVA about a job opportunity. After seven interviews, Rodgers turned down CEVA's employment offer. Thereafter, CEVA made a second offer with a higher salary and a $40,000 signing bonus, which was accepted by Rodgers.

As a condition of employment, Rodgers purchased shares in CEVA Investments for $102,000 – the equivalent of 4.5 months' salary. After his employment was terminated, Rodgers was first advised that he could not sell his shares and later advised that his shares were worthless.

Based on the foregoing facts, Rodgers argued that he had been induced away from secure employment by CEVA, which cancelled out his short service in determining the period of reasonable notice.

The Court reviewed the circumstances of the recruitment and found that there was "some measure" of inducement to leave his previous position and join CEVA. Although CEVA did not give Rodgers a specific assurance of long-term job security, based on the required investment, the Court found that there was a least an implied representation that Rodgers was about to embark upon a long-term employment relationship with CEVA.

Determining the Notice Period

The Court looked at Rodgers' age, his position as the Canadian manager of CEVA's operations, his limited education, the fact that his work experience was confined to a single industry, the limited number of similar positions, the fact that Rodgers was required to make a significant investment with CEVA, and his recruitment in general in setting a notice period of fourteen months. While his employment with CEVA was for a short period, this was the only factor that would point towards a shorter notice period.

Lesson for Employers

Although the appropriate period of reasonable is determined on a case-by-case basis, this decision serves as an important reminder of three key considerations employers should take into account when contemplating recruiting or terminating an employee:

- **Termination Clause**. Although some employers are hesitant about drafting termination clauses at the outset of an employment relationship, a carefully drafted and negotiated termination clause is a powerful tool that can limit or at least expressly quantify the employer's liabilities in respect of an employee at the termination of the employment relationship. Termination clauses do not have to be limited to the minimums provided for under provincial employment standards legislation – they can be more generous than the minimums. However, without express language dealing with an employee's entitlements upon termination, an employer's liabilities are left to the common law and judicial discretion, which are difficult to predict.

- **Length of Service**. While length of service is certainly one of the most easily quantifiable factors in setting the notice period, absent express contractual language indicating otherwise, there is no assurance that a short service employee will be awarded damages based on a short reasonable notice period. Courts are becoming more generous to short-service employees so employers have to change their thinking and recognize that short-service employees could be entitled to a disproportionate notice period.
- **Inducement**. Even where job security is not expressly promised, or even discussed, the method of recruitment and offer of employment itself can create the implied promise of job security and amount to inducement. If there is no clause in the employment agreement that deals with termination entitlements, the employer is taking the risk that a Court will set a disproportionate notice period.

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28 Years Later: Constitutional Right to Strike Confirmed by Supreme Court

By Paul Boshyk, Tyson Gratton

Nearly 28 years after former Chief Justice Brian Dickson wrote passionate – yet dissenting – reasons in favour of extending constitutional protection to the right to strike, the Supreme Court of Canada has taken up his call. In *Saskatchewan Federation of Labour v. Saskatchewan*,[1] the Supreme Court has held that the right to strike is an essential component of the freedom of association guaranteed by the *Canadian Charter of Rights and Freedoms* ("*Charter*").

Background

At issue before the Court was whether legislation prohibiting designated employees from participating in strike action amounted to a substantial interference with their right to participate in meaningful collective bargaining. Specifically, the Court was asked to consider the constitutionality of two statutes:

1. *The Public Service Essential Services Act* ("PSESA"), which imposed narrow limits on the ability of public sector employees who perform "essential services" to strike; and
2. *The Trade Union Amendment Act, 2008* ("TUAA"), which imposed changes to the union certification process and the rules regarding communications between employers and employees.

The PSESA gave public employers unilateral authority to determine whether and how essential services are to be maintained and therefore which employees could not strike. In the view of Court, the PSESA did not provide for an acceptable review mechanism or a meaningful dispute resolution mechanism.

The Right to Strike

A majority of the Court found that the PSESA was unconstitutional and that the ability of employees to take strike action played a crucial role in meaningful collective bargaining. The majority also found that the right to strike helped balance the "deep inequalities" that exist between employers and employees. The Court held that the right to strike is protected under s. 2(d) of the *Charter*.

The majority also confirmed that the broad restrictions in the PSESA were neither minimally impairing nor proportionate and went beyond what is reasonably necessary in order to ensure the delivery of essential services to the community during labour disputes.

Regarding the TUAA, however, the Court held that introducing amendments to the process by which unions obtain and/or lose bargaining representative status did not substantially interfere with the freedom of association.

Remaining Questions

The largest question that remains from this decision was raised by Justices Rothstein and Wagner in their dissent: what is the scope of this new constitutional right to strike? Is this new right only available to public employees and unionized members of the private sector? Will governments now have to rationalize existing statutory limits on the right to strike?

We will be following the impact of this decision closely as legislatures and employers alike pivot to rebalance the scales of the Canadian labour ecosystem.

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[1] 2015 SCC4.

The Most Important Question is Why: the SCC Revisits Constructive Dismissal

by Kyle Lambert, Tyson Gratton, Linda Yang, Student-at-Law

The Supreme Court of Canada recently handed down *Potter v New Brunswick Legal Aid Services Commission*,[1] ruling that an employer had constructively dismissed an employee when it suspended him without justification, while he was on sick leave. This decision, which overruled both judgments from the New Brunswick Court of Queen's Bench and the New Brunswick Court of Appeal, clarifies the common law test for constructive dismissal and has important implications for employers. This article will focus on Justice Wagner's majority decision.[2]

Background

Mr. Potter was appointed to his position for a seven-year term as Executive Director of Legal Aid in New Brunswick. Halfway through the term, he and the employer began negotiating a buyout. The negotiations were ongoing when Mr. Potter went on sick leave. A week before Mr. Potter was due to return to work and unbeknownst to him, the employer had recommended his dismissal for cause. The employer then wrote to Mr. Potter's lawyer, advising that Mr. Potter was suspended with pay. This was apparently done to facilitate a buyout of Mr. Potter's employment contract. Eight weeks into the administrative suspension, Mr. Potter commenced the action for constructive dismissal. In response, the employer stopped Mr. Potter's salary and benefits, claiming that Mr. Potter had, by launching the legal action, effectively resigned from his position.

Clarifying Constructive Dismissal

The Court sets out a two-branch test for constructive dismissal, which, broadly speaking, occurs when an employer indicates an intention to no longer be bound by the employment contract. Constructive dismissal often takes the form of fundamental and unilateral changes to the nature of a person's employment. Since the employee has not been formally dismissed, the act is called "constructive dismissal."

The First Branch

The first branch requires a court to determine the form of the constructive dismissal, of which there are two:

1. **Single unilateral act**, which has its own two-part test:

   (a) Did the employer breach of an express or implied term of the employment contract?

   (b) If yes, does the breach substantially alter an essential term of the employment contract?

2. **Series of acts**, the cumulative effect of which shows that the employer no longer intended to be bound by the employment contract. Courts are asked to take a flexible approach here.

In *Potter*, the Court determined that Mr. Potter's administrative suspension was a single unilateral act that breached and substantially changed the employment contract. The determinative factor was that the employer did not have authority, either express or implied, to suspend Mr. Potter in the first place. The Court went so far as to say that where suspensions are found to be unauthorized, "a finding that the suspension amounted to a substantial change is inevitable."[3]

[1] 2015 SCC 10.

[2] Justice Cromwell wrote additional reasons on his own and Chief Justice McLachlin's behalf but concurred in the result.

[3] 2015 SCC 10 ¶ 106.

The lack of authority aside, the employer in this case was also unable to show that the administrative suspension was reasonable and justified for the following reasons:

- Although administrative (non-disciplinary) suspensions must be justified, no reasons were provided to Mr. Potter for the suspension. The Court found this to show a lack of good faith on the employer's part;
- There was no evidence of a legitimate business reason for denying Mr. Potter work; and
- The suspension was indefinite, which exacerbated the uncertainty created by the failure to provide reasons for the suspension.

The Second Branch

The second branch of the test for constructive dismissal asks the question: Would a reasonable person in the same situation as the employee have felt that the essential terms of the employment contract were being substantially changed when the breach occurred?

The Court found that on the facts of the case in *Potter*, this second branch was easily met, stating that:

> "If the employer is unable to show the suspension to be reasonable and justified, there is little chance, to my mind, that the employer could then turn around and say that a reasonable employee would not have felt that its unreasonable and unjustified acts evinced an intention no longer to be bound by the contract."[4]

The Supreme Court did, however, note that an exception is often made if the suspension period was short. In *Potter*, however, the suspension was indefinite.

What This Means for Employers

This case should serve as a caution for employers when suspending an employee, even when the employee is suspended with pay.

Before suspending the employee, an employer should consider the terms of the employment contract and applicable workplace policies, such policies regarding employee conduct and discipline. Potter also suggests that, wherever possible, reasons for a suspension should be provided. The lack of reasons provided to the employee in Potter allowed the Court to make a key distinction from other and often more justifiable employer actions, such as economic layoffs, disciplinary suspensions and suspensions for administrative reasons that are unrelated to conduct (i.e. due to a work shortage or technological changeover).

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[4] Ibid.

Up and Atom: Victory for Federally Regulated Employers as Court Okays Without Cause Dismissals

by Paul Boshyk

For decades, adjudicators appointed under the Canada Labour Code to consider unjust dismissal complaints under section 240 have differed on whether the statute permits federally regulated employers to dismiss employees without cause, absent a lay off due to a "lack of work" or the "discontinuance of a function". In *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, the Federal Court of Appeal has settled the dispute "once and for all", subject to a successful appeal to the Supreme Court of Canada. Its decision arrives as welcome news to employers.

Background

Atomic Energy of Canada Limited (AECL) is a Crown corporation, and one of Canada's largest nuclear science and technology laboratories. Wilson was a former procurement supervisor at AECL who was dismissed without cause following four and a half years of service. Despite AECL's offer to pay six months of pay representing both statutory and common law severance, Wilson opted to make an unjust dismissal complaint under Division XIV of the Code.

Specifically, Division XIV establishes a procedure for making complaints against dismissals that employees consider unjust. Where an adjudicator appointed under the Code agrees that an employee has been unjustly dismissed, the adjudicator has broad powers to require the employer to compensate the employee, reinstate the employee or grant any other suitable remedy in order to "counteract" the consequences of the dismissal.

While the correct interpretation of these provisions has been hotly debated since the late-1970s, popular belief held that employees could only be dismissed due to just cause, a lack of work or the elimination of the employee's position (or in a handful of other prescribed circumstances). This was the line of reasoning adopted by the adjudicator in the present case, who held that Wilson's complaint was made out because he had been dismissed by AECL without cause.

Without Cause Dismissals Not (Automatically) Unjust

In the Wilson decision, the Court of Appeal agreed with the Federal Court and held that without cause dismissals are not necessarily unjust under the Code. Rather, Division XIV requires adjudicators to examine the specific facts of each case and then determine whether the dismissal was unjust in the circumstances. In the words of the Court, employees do not have a "*right to a job in the sense that any dismissal without cause is automatically unjust*."

The Court concluded that Division XIV of the Code supplements (as opposed to ousts) the common law doctrine of reasonable notice. As provincially regulated employers already know, this doctrine holds that an employee who is dismissed without cause but provided with reasonable notice of termination or pay in lieu thereof is, in general, not wrongfully dismissed.

However, the Court was cautious to point out that just because an employer has provided an employee with reasonable notice of termination or pay in lieu thereof does not necessarily mean that the employee is without further relief under Division XIV. The Court said:

> "…, it bears noting that an adjudicator under the Code does not have free rein to find a dismissal 'unjust' on 'any basis'. As I have suggested above, 'unjust' is a term that sits alongside and gathers much, if not all, of its meaning from well-established common law and arbitral cases concerning dismissal. It is also a term whose meaning must be discerned using accepted principles of statutory interpretation …. It is for Parliament's chosen decision-makers in this specialized field – the adjudicators – to develop the jurisprudence concerning the meaning of 'unjust'

> on an acceptable and defensible basis, not 'any basis'. It is for us to review the adjudicators' interpretations for acceptability and defensibility when they are brought before us."

Whether an employee is entitled to such relief will of course depend on the specific facts of each case.

Lessons for Employers

Federally regulated employers can finally relax, as the *Wilson* decision has breathed considerable latitude into the running of day-to-day operations of an employer's business. That said, employers must take care to treat employees fairly and reasonably whenever severing employment. Failing to provide adequate severance pay or otherwise treat an employee justly could invite complaints under Division XIV of the Code, which may in turn result in more extreme forms of relief.

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Family Status Quo: Failure to Reinstate Employee After Maternity/Parental Leave Breaches Human Rights Legislation

by Stefanie Di Francesco

In a *recent bulletin*, we advised readers of the Federal Court of Appeal ("FCA") decision in *Johnstone v. Canadian Border Services Agency* ("*Johnstone*"), which affirms that parental childcare obligations are included under the protected ground of family status under the *Canadian Human Rights Act*.

In another *recent bulletin*, we advised readers of the Ontario Superior Court of Justice (the "Court") decision in *Partridge v. Botony Dental Corporation* ("*Partridge*"), which was the first decision to apply the four-part test articulated by the FCA in *Johnstone* to a discrimination claim on the basis of family status relating to childcare obligations under Ontario's *Human Rights Code* (the "*Code*").

Significantly, in *Bray v. Canadian College of Massage and Hydrotherapy*, another recent decision, the Court awarded damages for discrimination on the basis of sex and family status, when an employer failed to reinstate an employee to her former position following her maternity leave. This decision is another important reminder to employers of both the importance of abiding by the requirement to fully reinstate employment following maternity or parental leave, and the liability risks under the Code for failing to do so.

The Facts

Ms. Bray was employed by the College as an Instructor for nine years, working approximately 25 hours per week. Ms. Bray took a one-year maternity leave following the birth of her first child, which ended in October 2013, one month into the September term. When the College went about preparing the September term schedule, it neglected to include Ms. Bray.

When Ms. Bray contacted the College to discuss her return to work, she was advised she would be reinstated as a Teaching Assistant, with less hours, less responsibilities, and a lower rate of pay than her former position. When Ms. Bray reminded the College of its obligation to reinstate her to her former position, she was told to "see how this term goes and see if you find it ok with even being in 4 classes and having to be a mother at the same time. It will be a big adjustment".

Ms. Bray reacted by filing a complaint with the Ministry of Labour ("Ministry"). When Ms. Bray's maternity leave ended, she returned to work as a Teaching Assistant. Ms. Bray worked for the first semester in a "very strange" and "odd" environment, as the Ministry had informed the College of Ms. Bray's complaint. Then, at the commencement of the second semester, Ms. Bray was advised that "[a]t this time we simply do not require your services for the upcoming term".

Ms. Bray then withdrew her complaint with the Ministry and commenced a constructive dismissal action against the College in which she also alleged that she was discriminated against on the basis of her status as a new mother, and that her termination was a reprisal for filing a complaint with the Ministry. The Court agreed.

The Findings

With respect to Ms. Bray's constructive dismissal claim, the Court affirmed the well-established principle that an employer has no inherent right to lay off an employee, even temporarily. While such a right can be created by the terms of an employment agreement, this right was not included in Ms. Bray's employment contract. The Court found that by demoting Ms. Bray following her maternity leave and removing her from the schedule, the College had constructively dismissed Ms. Bray. As a result, Ms. Bray was awarded 8 months pay in lieu of reasonable notice.

With respect to the *Code*, Ms. Bray alleged that the reduction in her hours, pay, and responsibilities amounted to discrimination in employment on the basis of sex and family status. Referring to the Ontario Court of Appeal decision in *Peel Law Association v Pieters*, the

Court confirmed that in order to establish a breach of the *Code*, Ms. Bray was required to prove: (i) that she is a member of a group protected by the *Code*, (ii) that she was subject to adverse treatment, and (iii) that the protected characteristic was a factor in the adverse treatment.

First, the Court found that as a woman and new mother, Ms. Bray was a member of a group protected by the *Code*. Second, the Court found that Ms. Bray was subject to adverse treatment when her responsibilities, hours, and income were reduced following her maternity leave and when she was laid off. Third, the Court found that the employer's statement that working and "having to be a mother at the same time…will be a big adjustment" coupled with the resulting demotion clearly and plainly established that Ms. Bray's sex and family status were factors in the College's adverse treatment. Consequently, the Court awarded Ms. Bray $20,000 in damages for injury to feelings, dignity and self-respect.

Lessons for Employers

The Court's decisions in *Partridge* and *Bray* confirm that post-*Johnstone*, a refusal to reinstate an employee following a pregnancy or parental leave can amount to a breach of the family status protections of the *Code*, whether or not the claim for discrimination on the basis of family status relates to childcare obligations.

To ensure compliance with both the *Employment Standards Act*, 2000 (the "ESA") and the *Code*, employers should be aware of their reinstatement obligations under section 53 of the ESA and the consequences of reprisal under section 74 of the ESA. Employers should also refrain from making unilateral decisions about the needs of a parent returning to work from a maternity or parental leave.

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Employment Contracts: Choice of Law Not Same as Imposing Jurisdiction

by George Waggott

Many employers and dismissed employees incorrectly assume that the law stipulated in a contract determines where legal proceedings can be commenced. The decision in *Christmas v. Fort McKay*, 2014 ONSC 373 (CanLII) confirms that simply selecting which legal regime governs does not end the matter. Instead, jurisdiction needs to be reviewed based on conflict of laws principles as opposed to blind adherence to contract wording.

Background – Contract Refers to Ontario

Prior to his employment with the Fort McKay First Nation, Bernd Christmas ran his own successful Canadian legal practice in Toronto, Ontario. In January 2012, he accepted an offer of employment to work for Fort McKay for a position based in Alberta. The employment agreement which Christmas accepted was signed back and sent by him to the employer via e-mail from Ontario to Alberta. The agreement stated that it was governed by the laws of the province of Ontario.

Termination and Ontario Lawsuit

In May 2012, Christmas was terminated and the employer claimed that there was cause. He proceeded to move back to Ontario to restart his legal practice. A lawsuit claiming wrongful dismissal was then commenced in the Ontario courts.

Employer Obtains Dismissal Order – Alberta More Appropriate Forum

Fort McKay then filed a motion to either stay or dismiss the Ontario claim based on their argument that the Ontario Superior Court did not have jurisdiction. This position, which is referred to as the *forum non conveniens* argument, is based on Ontario having no real and substantial connection to the cause of action.

Christmas argued that the Ontario courts had jurisdiction because the employment agreement had been made in Ontario when he signed back the offer. This argument was rejected, with the Court holding that an employment contract is actually considered to be made in the jurisdiction where acceptance is received. In this case, that meant that the contract was made in Alberta when Fort McKay received the signed offer by email.

A further argument raised by Christmas was that the Ontario Court had jurisdiction *simpliciter* (ie. in any event) based on the Choice of Law provision in the contract. The Court also dismissed this argument, noting that established law refers to other factors based on the defendant's connection to the jurisdiction. In this case, the employer conducted business in Alberta, any allegedly improper acts (ie. the dismissal) occurred in Alberta, and the contract had been made in that province. In these circumstances, imposing Ontario court jurisdiction on Fort McKay solely as a result of agreement to choice of law would, said the Court, unfairly broaden the scope of its contractual agreement.

Takeaways for Employers

This decision highlights the importance of carefully reviewing jurisdiction issues before defending a case on its merits. In many cases, a business will agree to a particular choice of law in a contract based on a variety of reasons, including what is requested or the desire for uniformity. That choice is not, however, necessarily conclusive about where proceedings may be commenced, and which courts or tribunals ultimately have jurisdiction.

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