Fitzgibbon Workplace Law Newsletter, Volume 2, Issue 4

The summer and summer vacation (or hiatus) is finally here.

Legal developments don't take a holiday, and May/June were active months on that front.

This issue of the Newsletter contains 10 fairly weighty articles covering topics raging from evidentiary rules, bonus and bonus calculations, employment contracts, the enforceability of releases, restrictive covenants and human rights. There's lots going on and, let's hope, things slow down a little as many of us pull up stakes for the summer and try to focus on more mundane things!

I hope you enjoy the newsletter and I wish you all a fun, relaxing and safe summer.

In this Edition

Drag Along Your Employment Contracts - Or Else

The recent Saskatchewan case of *McKercher v Stantec Architecture Ltd.*, 2019 SKQB 100 (CanLII) is a timely reminder of the risks associated with promotions and the enforceability of termination clauses in employment contracts.

The plaintiff worked for the employer for 11 years at which time his employment was terminated without just cause. He sued claiming damages for wrongful dismissal.

The employer defended, in part, on the basis of a termination clause in an employment agreement that limited his entitlement on termination.

The plaintiff argued that the termination clause was unenforceable. He argued, in part,"the nature, circumstances and responsibility of his employment had changed such that the limit could no longer stand." This is what we call the *substratum* argument.

There were other interesting issues that are dealt with in the case, including who was the plaintiff's employer, but I want to focus on the *substratum* argument here.

The plaintiff began his employment as a Staff Architect. He signed an employment agreement at the time and this agreement contained a termination provision that applied in the event his employment was terminated without just cause. The plaintiff was promoted a number of times over the course of his 11 years of employment. At the time of his termination he:

> …. was the Business Centre Sector Leader in Saskatoon, reporting directly to one of SAL's vice-presidents. The position paid an annual salary of $134,004, exclusive of bonus and benefits. As Business Centre Sector Leader, the plaintiff's responsibilities included business strategy, financial growth, managing and expanding client base, business development forecasting, attending networking events to promote SAL's businesses, human resources and staff supervision (including hiring and dismissals). The plaintiff also exercised signing authority on proposals and operational responsibilities.

The plaintiff regularly received bonuses. He was, at the time of his termination, 51 years old. He was unable to find other work by the time the summary judgment motion was heard.

Changed Substratum Argument

The *substratum* doctrine was considered in *MacGregor v. National Home Services* 2012 ONSC 2042 (CanLII). The employer brought a motion for summary judgment arguing that there was "no genuine issue for trial" since MacGregor and the employer were parties to a binding and enforceable employment agreement that limited his entitlement on termination.

MacGregor argued, in part, that the employment agreement was unenforceable because the *substratum* of the contract had changed. Although the court dismissed the motion for summary judgment, it made the following instructive comment:

> The changed substratum doctrine is a part of employment law. The doctrine provides that if an employee enters into an employment contract that specifies the notice period for a dismissal, the contractual notice period is not enforceable if over the course of employment, the important terms of the agreement concerning the employee's responsibilities and status has significantly changed. *Rasanen v. Lisle-Metrix Ltd.* (2002) CanLII 49611 (ON SC); *Toronto Dominion Bank v. Wallace* (1998) CanLII 4150 (ON CA); *Collins v. Kappele, Wright & MacLeod Ltd.* (1983) 3 C.C.E.L. 228 (Ont. Co. Ct.), aff'd(1983) 3 C.C.E.L. 240 (C.A.).
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> The idea behind the changed *substratum* doctrine is that with promotions and greater attendant responsibilities, the substratum of the original employment contract has changed, and the notice provisions in the original employment contract should be nullified.

In *Sharpe v. Computer Innovations Distribution Inc.* 1993 CanLII 7309 (NB QB) upheld by the Court of Appeal at 1994 CanLII 5241 (NB CA) the defendant hired the plaintiff in 1986 as the District Sales Manager for New Brunswick. The employment contract referred to the plaintiff's position. It also contained a termination clause that provided for the payment of three months' salary upon termination. In 1988 the plaintiff was promoted to the position of Manager for Atlantic Canada, which entailed greater responsibility and compensation.

The position was eliminated in 1990 and the plaintiff was reassigned to his former position at a slightly higher salary. In 1993 the plaintiff's employment was terminated. The defendant pleaded the termination clause in its defence. The Court found that the defendant could not rely on the contractual term because it had not effected the termination according to the contract. The court also found as follows:

> Furthermore, the contract has been overtaken by events and was no longer in force. It was a skeletal contract at best. While it contained several clauses for the employer's benefit it did little for the employee. For instance, it made no mention of vacations and left "benefits" to the discretion of the Board of Directors of the Defendant. Although prepared on a blank or standard form with space left for insertion of the employee's responsibilities, that space was left blank. The change in Mr. Sharpe's status in 1988 effectively put the contract at an end for he then ceased to hold the position specified in the contract.

The Court in *McKercher* considered a number of cases and found that the termination clause in the employment contract signed at the beginning of the employment relationship, had been overtaken by events and was rendered unenforceable. His job changed considerably, according to the court, over the course of his 11 years of employment. As noted in the above quote from *Sharpe* "the contract has been overtaken by events".

Furthermore, the Court commented that:

> More importantly, there is no evidence that SAL made it clear to the plaintiff that the notice of termination provisions were intended to apply to the positions to which he was promoted. The employment agreement contains no express wording to this effect, nor does it contain any wording to support the inference of such an intent. Further, and in keeping with the analysis in *Schmidt*, the Court received no evidence that, as it promoted the plaintiff, SAL reasserted its understanding and expectation that the notice of termination limit would remain in effect.
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> * * *
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> In the present case, I am satisfied that SAL did not protect the notice limit set out in the employment agreement. It follows that the changes and advancement in the plaintiff's job duties and responsibilities had overtaken the notice limit set out in the agreement, rendering it unenforceable.

In the circumstances, the Court considered the factors in *Bardal v Globe & Mail Ltd.* (1960), 1960 CanLII 294 (ON SC) and held that the period of reasonable notice of termination was 12 months and awarded damages to the plaintiff in the total amount of $171,814.00, less amounts previously paid by the employer for a total award of $143,467.00.

Random Thoughts

Written contracts are an important in the employment relationship. They have, of late, come under attack through judicial activism and an approach to employment contract interpretation that is more alive to inequalities of bargaining power as between employer employee, and the reality that employment relationships are different from commercial relationships.

A number of rules have developed over the years to bring effect to these differences. The *substratum* doctrine as applied to the employment relationship reinforces that employers should clearly "drag along" termination clauses as the employment relationship evolves or risk a finding similar to that in *McKercher.*

Truth is, with the change in judicial approach to the interpretation of termination clauses in employment contracts, rather than "dragging" the old termination clause in the prior contract forward at the time of a promotion or material change in the employees job and of course where there is consideration for the new contractual terms, employers would be wise to use the opportunity to revise and update the clause to ensure, as best they can, that it complies with the law as it exists at the time.

Termination clauses in employment contracts are a "crap shoot" on the best day from an enforceability perspective, but that shouldn't stop employers from at least trying, when the opportunity presents, to right the ship if they can.

All this is from a legal perspective. At a practical level, the employer will need to consider the implications of either introducing a termination clause or changing a termination clause where there is an existing employment relationship and where, for example, a promotion (and consideration) is taking present. But that is a much longer discussion best left for another day.

Reduction in Reasonable Notice But Not Bonus

I have written a number of times about the challenges faced when determining the common law reasonable notice period for long-service employees. Most recently, I discussed the case of *Dawe v. Equitable Life Insurance Company*, 2018 ONSC 3130 (CanLII) in an article entitled *Reasonable Notice and the Long-Service Employee* in Volume 2, Issue 2 of this Newsletter.

Well, the employer appealed the *Dawe* decision and the Ontario Court of Appeal, in the context of the *Dawe* appeal, had occasion to consider the law applicable to assessing the reasonable notice period of an older, long-service employee who was planning on working until "retirement". The Court also discussed the law applicable to awarding bonuses in wrongful dismissal cases. The case is *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512 (CanLII).

The plaintiff was employed as a Senior Vice President with the defendant for 37 years. He was terminated without just cause at which time he was 62 years of age. He testified that he planned on working until he was 65.

At the time of his termination, the employer offered him a severance package consisting of a 24 month period of reasonable notice, and "the Terminal Awards under the LTIP and STIP. His combined Terminal Award payments under both plans amounted to a little over $400,000."

He rejected the offer and sued, alleging that he had been wrongfully dismissed (i.e. the employer had failed to terminate him with appropriate common law reasonable notice and compensate him appropriately).

Both parties moved for partial summary judgment on two issues:

1. the proper notice period; and
2. the plaintiff's entitlement under Equitable Life's bonus plans.

The plaintiff also claimed punitive and moral damages, which were left to be determined at trial.

The motion judge held that 30 months was the appropriate notice period and that the plaintiff was entitled to bonus payments over this period.

The employer appealed. It argued that the notice period was unreasonable and excessive in the circumstances. It also argued that the plaintiff's entitlement to a bonus was limited by a termination provision contained in Equitable Life's bonus plans.

Court of Appeal

The Reasonable Notice Issue

There is no hard upper limit on reasonable notice in Ontario. The leading case is *Lowndes v. Summit Ford Sales Ltd. (2006)*, 2006 CanLII 14 (ON CA) where the Court of Appeal noted that while there is "no absolute upper limit or 'cap' on what constitutes reasonable notice, generally *only exceptional circumstances* will support a base notice period in excess of 24 months".

This has been endorsed by many subsequent cases, such as *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79 (CanLII), 29 C.C.E.L. (4th) 33 and *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 (CanLII). In Ontario, therefore, there is a soft-cap on reasonable notice of 24 months that can be exceeded where there are "exceptional circumstances" present in the individual case.

In the *Dawe* case, the motion judge awarded a reasonable notice period of 30 *not* because of exceptional circumstances, but "based on his perception of broader social factors" regarding retirement. According to the motion judge:

> For many years, the usual retirement age was considered to be 65. Pension plans improved as a result of the labour movement, introducing, for example, an 80 factor for most employees in the public sector and many in large companies in the private sector. That lead [sic] to some individuals retiring between the age of 50 and 60. But many were not ready to fully retire. They sought out additional employment or simply continued to work in their existing position. Further, mandatory retirement was abolished in 2006 in Ontario to protect against age discrimination. Many employees have continued past 65. In result, it is important to recognize that each case is unique. Presumptive standards no longer apply.

In the end, the motion judge would fully compensate the plaintiff "just beyond his 65th birthday".

The Court of Appeal rejected the motion judge's approach. They said he should have applied *Lowndes* rather than his own perception regarding a changed societal attitude about retirement. There was no evidence before the judge to support such a sweeping statement.

Of particular interest is the Court of Appeal's comment that the plaintiff's "plans regarding retirement are not determinative in ascertaining Equitable Life's obligations towards him." Absent some sort of agreement, no employee is guaranteed employment until retirement (see *Strudwick*).

The Court agreed that the plaintiff in *Dawe* was entitled to a substantial period of reasonable notice looking at the *Bardal* factors. However, it did not agree that there were exceptional circumstances present in the case to justify an award of greater than 24 months. The common law period of reasonable notice was reduced from 30 months to 24 months.

The Bonus Issue

Was the plaintiff entitled to damages as compensation for the loss of his bonus entitlements during the notice period?

The motion judge said that he was entitled to such damages. The employer argued that the bonus plans were completely discretionary. This argument was rejected by the motion judge and that finding was not appealed.

The Court cited the principle of damages in employment law cases as set out in the leading case of *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 (CanLII). The Court in *Dawe* summarized these principles:

> In *Paquette*, at paras. 30-31, this court articulated a two-part test for determining whether a wrongfully dismissed employee is entitled to damages for the loss of bonus entitlement: (1) was the bonus an integral part of the employee's compensation package, triggering a common law entitlement to damages in lieu of bonus?; and (2) if so, is there any language in the bonus plan that would specifically remove the employee's common law entitlement?

The bonus in *Dawe* was integral, so consideration turned to whether there was language in the plan that removed the common law entitlement to a bonus payment through the reasonable notice period.

In looking at this, the bonus plan must be considered as a whole, rather than in a piecemeal way. The combined effect of the language in the bonus plan must be reviewed.

The plan provided for "Terminal Awards" in circumstances of retirement, death, and termination for cause. Terminal Awards are essentially pro-rated awards, determined by a complicated calculation set out paragraph IX.C.(a)(iv) of the plan.

The Court of Appeal set out the following paragraph as being "at the heart of the appeal":

> Termination without Cause: An Eligible Participant terminated without cause will be entitled to receive only Terminal Awards calculated in sub-paragraph (a)(iv) (below), pro-rated to the last day of active employment, regardless of whether notice of termination is given or not given and regardless of whether the termination is lawful or unlawful, and only if the Eligible Participant provides the Corporation with a Full and Final Release in the manner required in the Eligible Participant's termination letter. [Emphasis added.]

The Court also cited the following provision titled "Restrictions":

> Awards earned and awards actually paid shall not be considered in determining any entitlement to termination, severance or common law notice or payments in lieu of notice. Upon termination without cause and with or without notice, the Eligible Participant's only entitlements under this Plan shall be the Terminal Awards set out in section IX C.(a)(iv) (above).

The Court of Appeal held that the words in the *Dawe* plan were similar to those in *Paquette* which involved a provision requiring "active employment". The Court said,

"I note that the "active employee" term in the bonus plan at issue in *Paquette* is similar to the definition of "Eligible Participant" in this case quoted in para. 54 above."

That being said, "the employer was not permitted to exploit the "actively employed" term by not permitting the employee to work through the reasonable notice period."

In other words, an employer when terminating an employee without cause always has the option of providing the employee with reasonable advance working notice of termination (in which case, the employee would receive the bonus and anything else the employee would have received as an employee at work) or terminate, immediately, with pay in lieu of working reasonable notice. The employer should not be able to benefit by its decision to terminate the employee immediately by relying on words like "active employment" in a bonus plan, for example.

The evidence was that "had Mr. Dawe worked through his notice period, he would have been entitled to normal (i.e., non-Terminal Award) payments under the LTIP and STIP."

The Court of Appeal held:

> In this case, the LTIP and the STIP went well beyond stipulating "active employment" as a precondition for bonus entitlement. The terms reproduced above address, with great precision, what happens to an eligible participant's bonus entitlement upon termination without cause. To repeat the words of van Rensburg J.A. in *Paquette*, the LTIP and STIP "anticipated the very event that occurred" – Mr. Dawe's dismissal without cause. This language unequivocally restricted his common law rights upon termination. The motion judge erred in finding otherwise. However, this does not end the inquiry. It is necessary to determine whether Mr. Dawe was properly informed of the termination provision unilaterally imposed by Equitable Life. [Emphasis added]

As noted above, the language appeared to unambiguously support the employers' argument, but, was the termination provision in the plan unilaterally imposed on the plaintiff, or did he agree to it?

The Court went through the evidence.

Equitable Life acknowledged that it unilaterally imposed changes to its compensation plan over the years. The employee could either accept the new terms or leave the company.

However, the law when fundamentally changing terms of employment was stated by the Court of Appeal in *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327 (CanLII). Faced with a fundamental change in the terms of employment, the employee has three (3) options:

1. accept the change either expressly or implicitly through acquiescence, thereby continuing employment under the newly imposed terms;
2. reject the changes and sue for damages if the employer insists on enforcing the new terms; or
3. notify the employer that the new term is rejected, leaving the employer the option of terminating the employee with proper notice and offering the employee re-employment on the new terms.

Equitable Life argued that, over many years, the plaintiff acquiesced and remained silent and thus he "readily accepted the bonuses he received" and, presumably, the terms under which he received them.

However, Dawe argued that no one specifically brought the termination paragraphs to his attention.

In *Paquette*, the Court commented, "[t]o the extent that there are limitations [on the payment of the bonus], the question may arise as to whether they were brought to the attention of the affected employees and formed part of their contract of employment."

More to the point, the Court in *Dawe* referred to their earlier decision in *Poole v. Whirlpool Corporation*, 2011 ONSC 4100 (CanLII), aff'd 2011 ONCA 808 (CanLII) and wrote:

> "There is no evidence that Mr. Poole at any time assented to or agreed to this limitation. Nor is there evidence that Mr. Poole was given a copy of the 2005 Bonus Plan, or advised of this limitation. Simply posting the Plan on Whirlpool's Intranet, without more, is insufficient." This finding was upheld on appeal. This court affirmed that the failure to establish that the limiting condition was drawn to the employee's attention at any time, either orally or in writing,

> precluded any "reliance by the [employer] on the precondition to defeat the [employee's] bonus claim". [Emphasis added]

As noted in *Wronko* and summarized in *Dawe* "where changes are imposed unilaterally by the employer, the essence of the problem is whether the employee accepted the newly imposed terms of employment" and further:

> In order to rely upon the limits created by the termination provisions, Equitable Life was required to prove that Mr. Dawe accepted these adverse, unilateral changes to an integral part of his compensation package. A pre-condition to acceptance is knowledge of the changes. On the record before the motion judge, he was entitled to find that Equitable Life failed to prove that Mr. Dawe knew about these changes, or that these changes were effectively communicated by Equitable Life to Mr. Dawe.

Here, the evidence was not present to support the conclusion that the terms in question were brought to Mr. Dawe's attention.

In the circumstances, the plaintiff was entitled to a bonus through the adjusted 24 month period of reasonable notice.

Employment Standard Act - Gratuitous (and Helpful) Comments from the Court of Appeal

The Court of Appeal sidestepped probably the tougher issue, namely, whether "Equitable Life was precluded from relying on the termination provision because it violated the provisions of the [*Employment Standards Act, 2000*] by insisting that Mr. Dawe sign a release as a precondition to receiving the severance package that he was offered."

Notwithstanding that the Court of Appeal was not required to consider this issue, they did go on to offer the following comment while noting that "these reasons should not be taken as an endorsement of the motion judge's conclusions regarding whether the release requirement contravened the ESA":

> In reaching his conclusion that Equitable Life breached the ESA, the motion judge acknowledged this court's judgment in *McNevan v. AmeriCredit Corp.*, 2008 ONCA 846 (CanLII), 94 O.R. (3d) 458, in which Epstein J.A. stated, at para. 57: "an offer of severance conditional on the execution of a release is not only standard but also wise corporate practice." Nevertheless, the motion judge found that the release in this case "went too far" because it required "Mr. Dawe to give up his common law rights to receive his statutory rights": at para. 67. He also held that the release infringed ss. 60 and 62 of the ESA because Equitable Life refused to pay the bonus during the notice period: at para. 67.
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> The motion judge provided very brief reasons for reaching these determinations that were largely conclusory. Assessing the correctness of both determinations would require reading in or assuming certain findings that were not explicitly made by the motion judge in his reasons. Given my conclusion on the notice issue, it is unnecessary to engage in such an analysis to dispose of the appeal.

Random Thoughts

The Court of Appeal, as the highest Court in the province, really does a great job with employment law cases. Their judgments provide guidance that can and should be put into practice by employers.

The take-aways from this case include the following:

1. There is a soft-cap on reasonable notice in Ontario of 24-months that will only be exceeded in exceptional circumstances and where the evidence is before the Court of these exceptional circumstances;
2. Employment until retirement is not a guarantee absent some sort of contractual agreement and the employees intention likely does not factor in;
3. If you have a bonus plan (or other compensation arrangement) and you have a termination clause in there that might serve to undermine the common law damages approach (*Paquette*), you had better clearly draft it and specifically draw it to the attention of the employee at the time and get their agreement to it (*Wronko*). Slipping in a clause and hoping to be able to rely on the employees silence is risky business; and

4. The *Employment Standards Act, 2000* issue is a fascinating one, but one that will have to wait for another day. The Court of Appeal seems to telegraph where its head is at on the issue, but has left the issue open for future consideration.

Pro Rated Bonus and Clear Language

The employer terminates an employee for just cause. The employee sues alleging that he was wrongfully dismissed and claims damages including an amount in respect of a pro rated bonus to the date of his termination. The employer defends on the basis that just cause for termination was present, and that the employee was not entitled to a pro rated bonus since he didn't work the entire bonus year.

The employee brings a motion for summary judgment on the bonus issue and the employer argues that summary judgment is not appropriate.

This is, largely, the issue that confronted the Alberta Court of Queens Bench in *Grainger v Pentagon Farm Centre Ltd*, 2019 ABQB 445 (CanLII) decided on June 18, 2019.

The Court found that summary judgment was an appropriate procedure for dealing with the bonus issue. The Court found that very few facts were in dispute, except on the issue of just cause which was unrelated to Grainger's entitlement to the bonus.

The bonus clause in issue read as follows:

> Annual performance bonus: 2% on increased growth over the first five millions dollars in total sales.

The employer argued, "annual" means "once per year". In other words, if an employee did not work the entire year, no bonus was payable. Pentagon further argued that:

> "performance" connotes more than completing sales, and that the term should be interpreted as requiring the employee to successfully work for an entire year before becoming entitled to the bonus, citing *Nugent v Midland Doherty Ltd.* (1989), 1989 CanLII 5222 (BC CA), 65 DLR (4th) 694, 41 BCLR (2d) 249 (CA).

The question before the court in *Grainger* was whether the language in the bonus program clearly disentitled an employee to a pro rated bonus if he didn't remain through the entire bonus year. The Court gave as an example of such language the following from *Styles v Alberta Investment Management Corp*, 2017 ABCA 1 (CanLII):

> Unless otherwise stipulated, participants must be actively employed by AIMCo, without regard to whether the Participant is receiving, or will receive, any compensatory payments or salary in lieu of notice of termination on the date of payout, in order to be eligible to receive any payment.

The Court in *Grainger* concluded that:

> There is nothing like the clause in *Styles* expressly limiting payment to someone actively employed during the period in which the bonus was calculated. In fact, the use of the term "annual" is more consistent with setting out the period for calculating the bonus, not with setting out the period the employee must be employed to qualify for the Bonus.

The language, in other words, did not limit payment to Grainger only if he worked a full year.

The Court then considered whether the bonus was discretionary as argued by the employer. The court considered the following factors in deciding if a bonus was discretionary or non-discretionary in *Christie v CitiFinancial Canada Inc*, 2015 ABQB 487 (CanLII):

1. Is there a pattern of regular bonus payments?
2. Is the bonus large as a component of total remuneration?
3. Is the bonus calculated according to a "widely known formula"?
4. Is there any evidence of the parties' intention regarding the entitlement and quantification of the bonus?

The Court in *Grainger* was integral and not discretionary and awarded the employee $150,988.95 as a pro rated bonus for 2016. The balance of the issues, including whether there was just cause, would proceed to trial.

Random Musings

This case highlights that clear and precise language that has been agreed to, is required to limit an employee's entitlement to a bonus on termination (including a pro rated bonus where the employee is terminated during the vacation year).

As Stacey Ball, author of a leading Canadian text, *Canadian Employment Law* at para. 22:65 said:

> In *Daniels v. Canadian Tire Corp.* 1991 CanLII 7342 (ON SC) McMurtry A.C.J.O.C. held that if a bonus scheme has become an integral part of an employee's compensation, and it relates to profits and not the employee's performance, there is no presumption that the employee has to be employed at the end of the fiscal year to be entitled to the bonus. If the employer wishes to include a condition of continuing employment, then it must make the condition known to the employee as a specific term of employment, in order to avoid paying a prorated share.

Bonus plans can be complex, and careful drafting and roll out, may be all that can be done to attempt to avoid bonus liability, but each case turns on its own facts (or course).

Signed, Sealed and…. Unenforceable?

On a good day, the enforceability of written employment contracts seems to be a open question. Ontario Court of Appeal in *Ariss v. NORR Limited Architects & Engineers*, 2019 ONCA 449 (CanLII) considered the enforceability of a written employment contract that purported to waive an employee's years of service, his presumptive right to reasonable notice under the common law, and his full entitlement to termination and severance pay under the *Employment Standards Act, 2000* ("ESA"). Big issues and important ones.

The plaintiff commenced full-time employment in February 1986 as an architect with Dominik Thompson Mallette, Architects and Engineers Inc. ("DTM"). In November 2002, DTM sold its business to NORR.

On September 6, 2002, DTM advised the plaintiff that his employment would be terminated because of the sale of its business to NORR and, on the same day NORR extended an offer of employment to Ariss. NORR's offer of employment did not contain a termination clause however, a termination provision was contained in another document entitled "Conditions of Work and Group Benefits for Pay Code 4" which formed part of the offer of employment. According to the Court of Appeal, this document:

> …. purported to limit its employees' notice and severance entitlements to the minimum statutory provisions under the ESA. Included in Pay Code 4 is a chart of the periods of employment and corresponding notice periods stipulated under s. 57 the ESA and an express reference to payment of severance in accordance with s. 64 of the *ESA*.

Ariss accepted the terms of NORR's offer of employment and time marched on until June 2006 when Ariss asked NOOR to increase his hours of work from 35 hours to 40 hours. NOOR agreed, and his base salary increased to $87,110. On June 27, 2006, Ariss signed NORR's June 21, 2006 letter acknowledging the amendments to his employment agreement, including the "new Conditions of Work and Group Benefits under Pay Code 3".

According to the Court of Appeal:

> Under "Termination Policy", Pay Code 3 provided that in the case of termination of employment without cause, notice of termination would be provided in accordance with the ESA:
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> > [NORR] will provide notice of termination in writing to the employee in accordance with the Ontario *Employment Standards Act*. The *Employment Standards Act* provides one week for every year of service to a maximum of 8 weeks.

As with the initial offer of employment from 2002, this one contained a chart setting out various entitlements on termination. Again, according to the Court of Appeal:

> Mr. Ariss agreed that he had read and understood Pay Code 3, including the waiver of his common law notice entitlement to reasonable notice of dismissal. There was no suggestion that the increase in his work hours to a 40-hour week and his augmented remuneration were

> inadequate consideration for the waiver of his common law notice entitlements.

Time marched on, seemingly uneventfully, until 2013 when the plaintiff asked NORR if he could transition from full-time employment to part-time employment. Negotiations ensued and Ariss started working under the part-time arrangement with reduced compensation on or around July 15, 2013. Discussions with respect to the specifics of the part-time arrangement continued.

The Court of Appeal reviewed some of the context of the discussions as follows:

> NORR was not prepared to agree to Mr. Ariss' transition from full-time to part-time employment unless he resigned from his employment, entered into a new employment agreement, waived his years of service, limited his notice entitlement to the date of the signing of the new agreement, and forewent any accrued entitlement to severance pay for his past years of service with NORR. NORR made clear, through a series of emails and voicemails, that Mr. Ariss' resignation and acceptance of new terms of employment were non-negotiable if he wanted to secure part-time hours.

The plaintiff got some legal advice and, on July 17, 2013 sent the following acknowledgement of the agreement between the parties:

> Please accept this letter as notice of my wishes to reduce my work week and resign from my full time position as Senior Architect from the NORR Kingston office. This is conditional on acceptance of a new offer of employment for part time hours, conditions which have been discussed with and agreed to by Brian Gerstmar.
>
> I understand that the new employment terms will be in accordance with the *Employment Standards Act* of Ontario. Termination, notice and severance for my past employment will not form part of the new terms of employment. [Emphasis from the Court of Appeal]

The plaintiff signed the employer's "Offer of Casual Employment" on July 31, 2013. Adjustments were made to his hours, though his position and duties remained essentially the same. His compensation changed to an adjusted hourly rate. Attached to the Offer of Casual Employment were "Conditions of Work and Group Benefits". The Court noted:

> Under "Termination", the attachment simply stated: "As per letter of offer". The offer letter set out the following termination provisions:
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> > Either party may terminate this agreement by providing the minimum notice required under the *Employment Standards Act* of Ontario.

There was no mention in the offer letter of any severance pay obligation or entitlement upon termination from employment.

The plaintiff was dismissed without cause from his part-time employment with the defendant, NORR. NORR paid him the minimum entitlements to statutory notice but did not provide him with severance pay under the ESA. In support of this position, the employer relied on the terms of the written contract in which the plaintiff agreed to waive his years of service as well as his entitlement to common law reasonable notice.

Summary Judgment Motion

The plaintiff sought to have the issues determined on a summary judgment motion. The reasons of Justice Sylvia Corthorn are reported at *2018 ONSC 620 (CanLII)*. The judge commenced her decision with the following observation:

> This case demonstrates the care and attention required of long-standing employees and their employer when the employee transitions from full-time to part-time status. Regardless of the reason for the transition, it is important that both the employee and employer clearly communicate their respective expectations.
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> This case also highlights that misunderstandings may arise when negotiations are carried out by email, the communication is less fulsome than might occur in person or through letters, and the parties do not reduce all of the terms negotiated to a single document.

> One or both of the employer, who attempts to limit their potential liability to the employee, and the employee, who attempts to maximize his or her entitlement on termination without cause, may be surprised by the net effect of the negotiations.

The judge concluded that the plaintiff's employment with NORR is deemed to have commenced in 1986 and that he did not resign from his employment with NORR in 2013. With respect to the termination clause in the contract, the motions judge held, as the Court of Appeal put it, the plaintiff "had waived his entitlement to common law notice in 2006 when his hours and remuneration increased, and that the historical termination provision from the 2006 agreement continued to apply in 2013 when he changed to part-time hours". The motion judge further held on this point that the termination clause:

> … is sufficiently clear to rebut the presumption of entitlement to notice in accordance with the common law. The termination provision is explanatory; it sets out in chart form the number of weeks' notice of termination to which employees are entitled based on their years of service. There is no ambiguity in the wording of the termination provision.

The judge awarded the plaintiff his entitlement to termination pay and severance pay under the ESA.

The plaintiff appealed to the Court of Appeal.

Court of Appeal

The Court agreed with the motions judge to the effect that the plaintiff's "employment was continuous … because NORR continued to employ Mr. Ariss following its purchase of DTM's business in 2002." Further, the Court agreed that the resignation and attempt to waive his prior years of service contravened section 5(1) of the *Employment Standards Act, 2000* (there will be no contracting out of the minimum ESA standards and any such contracting out is void). The resignation was ineffective and his service continued.

In this case, according to the Court, "there is no dispute that the 2006 waiver of the plaintiff's common law entitlement to reasonable notice was clear and unequivocal" and "there was no change to this term by "the events in 2013"".

The Court considered the issue of whether there was sufficient consideration for the amendments to the employment agreement. The Court found that there was and observed that "the 2013 amendments were at Mr. Ariss' behest." In fact, the 2006 amendments were at his request. He wanted to move from full-time to part-time, which was not NORR's preference.

In the circumstances, the Court agreed that the plaintiff had waived his right to reasonable notice of termination at common law. There was adequate consideration present to support the contract.

The Arris' appeal was dismissed as was NORR's cross appeal on the issue of mitigation.

Some Musings

The case reinforces what we all know - you can't contract out of the ESA and any agreement reached that seeks to do so or waives the minimum standards in the ESA will be void and unenforceable. So, in *Arris*, when the parties purported to waive prior years of service in the context of a sale within the meaning of the ESA that agreement was void.

On the issue of consideration, the case highlights that consideration must be present to support a contract (or in the case of an existing employee and a changed relationship, "fresh consideration" - *Francis v. Canadian Imperial Bank of Commerce*, 1994 CanLII 1578 (ON CA)).

Consideration was found in the *Arris* case (query whether this was easier for the Court to reach this conclusion because the employee, not the employer, initiated the changes). In any event, the point is that consideration must be present to support a contract of employment, and where consideration is not present, the contract will be unenforceable.

The other point that is worth mentioning is that conducting negotiations through email is dangerous. I may be dating myself, but, in my professional life, the days of face-to-face discussions over hard issues seem to be giving way to text messages or email. The reality is that direct, in person, discussions are all the more

necessary where the issues are complex, are tough or potentially controversial.

Similar Fact Evidence - What's the Test?

In our evidence course at law school we learn about similar fact evidence. This was a very long time ago for me, but, oddly, I do remember it. In practice, we sometimes try to apply the concept, but it's not easy, but very useful where allowed.

An early case from the U.K. was penned by the great jurist, Lord Denning, in *Mood Music Publishing Co. v. De Wolfe Ltd.* (1975), [1976] 1 All E.R. 763 (Eng. C.A.) where he stated as follows:

> The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is an issue: provided that it is not oppressive or unfair to the other side and also that the other side has fair notice of it and is able to deal with it. [Emphasis added]

The leading Canadian case comes from the Supreme Court of Canada in *R. v. Handy*, 2002 SCC 56 (CanLII), where the Court stated as follows:

> Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

The decision maker must, in other words, weigh the probative value of the so-called similar fact evidence against it's prejudicial effect. This will require that the adjudicator weigh the benefits of the evidence against the potential prejudice to the hearing process and the other party.

In the unionized setting, Brown and Beatty in their excellent text *Canadian Labour Arbitration* (5th Edition) at 3:4000 put the issue starkly as follows:

> Although evidence of "similar facts" may be admitted, on most occasions it has been held to be inadmissible for the same reason it is rejected in criminal cases, namely, on the grounds of fairness and because it tends to waste time and involve the arbitrator in hearing and determining collateral issues.

According to the Human Rights Tribunal of Ontario in *Sinclair v. London (City)*, 2008 HRTO 48 (CanLII) request for reconsideration dismissed at *2009 HRTO 162 (CanLII)*:

> Various factors may affect this balancing process, depending upon the issues in the case: see *Handy*, supra at paras. 49-97. Probative value often, but not always, arises from the degree of similarity of the alleged similar facts in relation to the disputed issues in the case. Prejudicial effect generally arises from the fact that it may lead to distraction from the central issues in the case, inordinate consumption of hearing time, and reasoning based on the general character of a witness. As noted by the Supreme Court, "[i]ts potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value".

This is yet another example of the balancing approach that is common in many employment law cases.

The Ontario Labour Relations Board most recently considered the issue in *Guy Morin v Huawei Technologies Canada Co.*, 2019 CanLII 56957 (ON LRB) which was a case under section 50 of the *Occupational Health and Safety Act* where the employee alleged that he had been terminated as a reprisal contrary to the Act. Specifically, he alleged that he had filed a workplace harassment complaint under the Act and took personal emergency leave under the *Employment Standards Act, 2000* and that he was discharged as a result.

The Applicant wanted to call as a witness "the individual whose harassment complaint against [his supervisor] was *not* substantiated and who was subsequently fired immediately following the issue of the report of the

internal staff investigation into the complaint." The issue was whether the applicant would be permitted to call this evidence under the "similar fact evidence" principles.

According to the Vice-Chair under section 50 of the Act:

> …. the analysis involves the determination of whether a complainant has attempted to enforce a right under the Act, whether there has been an alleged reprisal, and whether there is a causal link between the two. The analysis is very fact specific and does not involve an investigation into the underlying allegations of harassment.

Importantly, the Vice-Chair discussed "why" the applicant wanted to call this evidence because:

> …. how the company dealt with other harassment complaints against [the manager] could assist in demonstrating a pattern of behaviour by the company supporting the veracity of his allegation and/or an inference that Huawei's action when terminating his employment was affected by his enforcement of his right to make a harassment complaint under Huawei's Harassment Policy. In the applicant's submission, since reprisal is subtle and difficult to prove, evidence of a pattern, which may arise through Huawei's response in dealing with harassment complaints against the manager involved, is relevant and important in proving the allegation.

The Board noted that, under the reprisal sections, there is a "reverse onus" meaning that the employer must prove, to a high standard, that its conduct does not contravene the reprisal sections of the Act. In discussing the balancing of interests, the Board had this to say:

> … there would be next to no probative value of evidence showing that on one occasion more than two years prior to the applicant's termination an employee reporting to [the supervisor] was terminated after an investigation into the employee's harassment complaint concluded the complaint had not been proven. Such evidence would not assist me in any helpful way to sort out whether, in this case, the company fired Morin because, or at least partly because, he raised a statutorily protected right to complain about workplace harassment.

Further, admitting this evidence would require that the Company shore up the supervisors character by calling evidence that rebuts the evidence called by the applicant, which would take a lot of valuable time, but add little to the decision making.

The Company's objection to the applicant calling this evidence was allowed.

Random Musings

These evidentiary issues are interesting and important, but subtle, nuanced and sometimes complex. While many of these cases arise in situations where the plaintiff/complainant wants to call evidence of "similar facts" to show a pattern or to attack character, employers can and have also sought to call evidence of "similar fact evidence" in labour and employment cases.

For example in the *Toronto Transit Commission* (2015), 262 L.A.C. (4th) 187 (Shime), the arbitrator admitted evidence of similar facts to demonstrate that the employee committed the misconduct at issue.

There are many more evidentiary rules that can apply in these cases. The point is to be alive to the issue of "similar fact" evidence and the manner in which that evidence will be dealt with by a decision maker in deciding whether or not to admit it.

Difference Between Just Cause and Wilful Misconduct

The Ontario Human Rights Tribunal has fallen into line with a growing body of cases that have held that there is a difference between just cause and wilful misconduct or wilful neglect of duty under the *Employment Standards Act, 2000*. The case is *Johnson v. Regional Municipality of Peel*, 2019 HRTO 1028 (CanLII).

I have written about this complex and potentially costly issue on a number of occasions and in different places.

The leading case is *Plester v. Polyone Canada Inc.*, 2011 ONSC 6068 (CanLII) affd by the Court of Appeal at *2013 ONCA 47* where the trial judge said:

> Both counsel seemed to be slightly bemused by the recent authorities that distinguish between the definition of just cause and willful misconduct. In my view, however, the distinction is quite obvious: Just cause involves a more objective test, albeit one that takes into account a contextual analysis and therefore has subjective elements. Wilful misconduct involves an assessment of subjective intent, almost akin to a special intent in criminal law. It will be found in a narrower cadre of cases: cases of willful misconduct will almost inevitably meet the test for just cause but the reverse is not the case.

In *Johnson*, the HRTO considered, among other issues, whether a release signed by an employee was sufficient to bar his human rights application.

Emterra (the applicant's employer) alleged that it had terminated the applicant for just cause and, as such, it had no legal obligation to pay him anything. Notwithstanding that position, the employer offered to provide the applicant with one week's wages conditional upon his signing a full and final release in favour of the employer. He signed that release and he was paid under the terms agreed to.

He subsequently filed a human rights application against the employer, among others, and the employer held up the release as a complete answer to the application.

The applicant took the position that the release was unenforceable. Specifically, he argued that although the employer alleged that it had just cause for terminating his employment, the alleged conduct being relied upon did not rise to the level required to avoid providing notice or termination pay under the *Employment Standards Act, 2000*. The *Act* provides that an employer is not required to provide notice or termination pay to an employee who has "been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer". That is not, the argument goes, the same as just cause and, in fact, imposes a higher standard.

In other words, there is a difference between just cause at common law and the exemption under the *Act* and the payment made by the employer was only the minimum required under the *Act*, assuming that the behaviour fell within the exemption under the *Act*.

Putting it more simply (or not), the employer paid the minimum under the *Act* as it was required to do if there was no willful misconduct within the meaning of the *Act* and, as such, there was no consideration to support the release. The employer only paid what the law required and that's not consideration (*i.e.* giving the employee something of value in exchange for the release).

The HRTO referred to the Ontario Labour Relations Board case of *James Caldwell v Noble Corporation*, 2018 CanLII 44825 (ON LRB), at paragraph 12, quoting from the much earlier employment standards decision of *VME Equipment of Canada Ltd. (Re)*, [1992] OESAD No 230, where there was a discussion of wilful misconduct under the Act and regulations:

> The concept of "wilful misconduct, disobedience or wilful neglect of duty" is a term of art distinguishable from that of "just cause" in the wrongful dismissal cases or in the arbitral jurisprudence under a collective agreement. A much-cited articulation of its meaning is that found in *VME Equipment of Canada Ltd. (Re)*, [1992] OESAD No 230 (QL) where the Referee wrote:
>
> > There are two general categories of serious misconduct. There will be single acts: insubordination, theft and dishonesty, and physical violence against other employees, for instance, which may, standing on their own, meet that standard of seriousness. As well, there will be less serious repetitive forms of misconduct, which if handled properly by the employer, will also meet this standard of seriousness. The employer, in this scenario, must have explained to the employee after each occurrence that the conduct in question was not acceptable and that if continued would result in termination and there must be, subsequent to these warnings, a culminating incident.
> >
> > In addition to proving that the misconduct is serious, the employer must demonstrate, and this is the aspect of the standard which distinguishes it from 'just cause', that the conduct complained of is 'wilful'. Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not

> meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose.

See also *1786237 Ontario Inc o/a Blinds with Flair v Mostafa Bougria*, 2017 CanLII 22967 (ON LRB) where the more recent case law to the same effect is reviewed.

The HRTO in *Johnson* discussed the allegation giving rise to the termination and noted that it was based on "triple hearsay" and it said "I do not see that Emterra could reasonably have considered it could avoid paying the applicant his ESA entitlement without first establishing that he was guilty of wilful misconduct, which it did not purport to do."

In the result, the applicant would have been entitled to termination pay under the Act "even had he not signed the release, and as such he did not receive any consideration for doing so. The release is therefore void for want of consideration."

The case proceeded.

Practice Points

The double-standard is confusing, and creates legal and practical issues. The government really should amend the *Employment Standards Act, 2000* to bring in a uniform standard of just cause at common law for all purposes, though because of the purpose of the *Act* and the underlying policy upon which it is based, that might be a tough sell.

I discussed some of the confusion and the case law in my article *Just Cause, the ESA and Enforceability of Employment Contracts* in Volume 2, Issue 2 of this newsletter.

For example, the enforceability of signed releases where the employer alleges just cause, but provides the employee with some severance (even minimum severance under the *Act*) in return for a release.

Another challenge relates to the enforceability of certain termination clauses in employment contracts.

Where the employer is considering asserting "just cause", but paying something "out of the goodness of its heart and not as an admission that just cause is not present", it might consider providing more than the Act requires.

Enforcing Restrictive Covenants is Still Possible - Sometimes!

Restrictive covenants, such as non-solicitation and non-competition provisions in employment contracts are *prima facie* void and unenforceable as a restraint on trade. Courts (and society) want to encourage people to work as, how and where they want, and not impose restrictions on their ability to pursue the work they want to. Restrictive covenants do just that by imposing limits on their activities when the employment relationship comes to an end.

Companies rarely seek enforcement of restrictive covenants in employment agreements partly because the law is generally against them, the uncertainty of the outcome and the costs involved. That said, on occasion, the issue gets litigated and, sometimes (gasp!), the former employer actually wins. Such was recently the case in *Stress-Crete Limited v. Harriman*, 2019 ONSC 2773 (CanLII).

Stress-Crete Limited and King Luminaire Company, Inc. (collectively "StressCrete" or the "Applicant"), sought an order to prevent Stephen Harriman (the "Respondent") from engaging in employment with Cyclone Lighting, ("Cyclone"), a direct competitor of StressCrete.

The Respondent started working for StressCrete on August 15, 2011 as Regional Sales Manager. He was promoted to the position of Sales Manager of U.S. Northeast and Canada on September 22, 2014, where he became responsible for achieving sales targets and the management of all Regional Sales Managers in his territory.

The Respondent resigned his employment on October 22, 2018. At the time, he told StressCrete that he was looking at "numerous offers of employment, some of which were from non-competitors of StressCrete."

StressCrete tried to entice the Respondent to stay, and it offered him "continued employment until such time that he obtained alternative employment with a non-competitor of StressCrete." It did not offer him a position in Ontario, which was important for the respondent and his family. StressCrete offered to help him find non-competitive employment.

On October 26, 2018, the Respondent advised he was accepting a sales representative position with Cyclone.

The Respondent was party to a written employment agreement that provided, in part, as follows:

> I shall not, for a period of two (2) years after the termination of my employment for any reason whatsoever, be employed by a director, officer, shareholder, principal, agent or partner of, operate, act as consultant to, invest in, loan money to, or directly or indirectly engage or be involved in, any person, corporation, association, firm, partnership, or business which has all or part of its undertaking the manufacture, sale or lease of:
>
> (a) poles used to carry utility services; or
> (b) lighting fixtures; or
> (c) any other products manufactured or sold by StressCrete or any of the StressCrete association corporations, (King Luminaire Co. Inc.), at the time of my termination of my employment, or
> (d) any or products similar to, or competitive with the products described in (a) (b) or (c) within a 750-mile radius of any StressCrete Ltd, StressCrete Inc. or King Luminaire Co. Inc. production facilities.
>
> I shall not, for a period of two (2) years after the termination of my employment for any reason whatsoever:
>
> (a) Solicit or entice, or attempt to solicit or entice, either directly or indirectly, any of the employees of StressCrete to enter into employment or service with any business described in Clause 2 above; or
> (b) Contact any person, firm, corporation, or governmental agency who was a customer of StressCrete at any time during my employment with StressCrete.
>
> Upon termination of my employment for any reason, I shall immediately return to StressCrete all customer lists, notes, records, files, communications and memory equipment, tapes, drawings and copies in my possession or control, which contain or refer to the confidential information listed above.

The Motion

StressCrete sought an injunction to restrain the respondent from engaging in employment with Cyclone. The judge summarized the principles to be applied as follows:

> As a general rule, restrictive covenants in employment agreements are unenforceable, unless they are reasonable between the parties and not adverse to the public interest.
>
> The first question to ask is whether there is ambiguity in the interpretation of the restrictive covenant. A restrictive covenant that is ambiguous as to time, activity, or geography is *prima facie* unreasonable and unenforceable. An ambiguous covenant is prima facie unreasonable and unenforceable: *Shafron v. KRG Insurance Broker*s 2009 SCC 6 (CanLII) at para. 43.
>
> If found to be unambiguous, the validity of a restrictive covenant can be determined upon a holistic analysis of the clause in question, the overall agreement, and the surrounding circumstances, having regard to some of these considerations:
>
> (a) Whether the employer has a proprietary interest entitled to protection;
> (b) Whether the temporal or spatial limits of the clause are too broad; and
> (c) Whether the covenant is unenforceable because it prohibits against competition generally and not just solicitation of the employer's customers.

The onus is on the employer seeking to enforce the restrictive covenant to justify "it as being no more than is reasonably required to protect its valid proprietary interests." In other words, it must not be overly broad in the circumstances of the particular case.

The Court concluded that the non-competition provision was unreasonable. In reaching this conclusion, the Court observed:

> The scope of the restrictive geographical boundary is not clearly defined as it relates to the various production facilities across North America. In other words, the restriction covered by this clause is not just delineated or restricted to the Burlington head office location, which was likely the intention for clause 2. Clause 7 of the Agreement cannot remedy the ambiguity for the non-competition restriction. As such, the specific provision is unreasonable.

The Court then turned to the non-solicitation clause and noted the difference between a non-solicitation clause and a non-competition provision. Solicitation is, of course, not the same as competition and courts have held that a non-competition provision will be found unenforceable where it is determined that a non-solicitation provision would reasonably protect the employers' proprietary interest. In saying that, the Court commented:

> However, a valid non-solicitation clause must clearly advise the former employee which customers are off limits to her or him. In cases where the specific customers that are not to be solicited have not been clearly identified, restrictive covenants have been found to be ambiguous in their practical implementation and therefore, unenforceable and void: *ThyssenKrupp Elevator (Canada) Ltd. v. Amos*, [2014] O.J. No. 3155 at paras. 31 and 32; *Mason v. Chem-Trend Limited Partnership*, 2011 ONCA 344 (CanLII) at para. 30.

The non-solicitation clause did not prohibit the Respondent from earning a living, just from enticing or soliciting StressCrete's business. Interestingly, the judge observed that, the Respondent had already accepted the offer with Cyclone when it had the terminal discussion with StressCrete and that he "admitted to being dishonest to employees of StressCrete regarding his status of employment at the time of his resignation." The Respondent did not come to the "hearing with 'clean hands'". It isn't clear how, if at all, this affected the result.

The Respondent argue that the non-solicitation clause was "unreasonable because it is unworkable in practice and effectively prohibits the respondent from competing with the applicants." The Court disagreed. It held that he knew who the clients were and that he "has or will attempt to solicit clients of StressCrete immediately after his resignation from the applicants' business."

The Court also found that the employment agreement was not unconscionable and unenforceable because of an inequality of bargaining power or because the Respondent didn't get legal advice. According to the Court "[t]here was no pressure exerted on him by StressCrete. He was also given the opportunity to read and sign the Agreement, without restriction." Further, he was given the opportunity to get legal advice, and he did not do so.

The non-solicitation provision was not unreasonable.

With respect to confidential information, the Court helpfully noted:

> In respect of confidential information, it does not make a difference if a departing employee has information that allows him to correspond with and solicit former clients, to the extent that he is doing so from memory. Committing to memory or on his computer, the names of clients, their contacts, the clients' needs or preferences, and the rates that the clients were willing to pay, is confidential information and exploiting such information to solicit former clients "is tantamount to the physical asportation of a client list" and its use is prohibited: *Quantum Management Services Ltd. v. Hann*, 1989 CarswellOnt 124 (S.C.J.) at paras. 43-44; aff'd. 1992 CarswellOnt 1707 (C.A.) at para. 3, *Sheehan & Rosie Ltd. v. Northwood*, 2000 CarswellOnt 670 (S.C.J.) at paras. 52-53.

The Court considered the issue of whether the Respondent possessed confidential information. He denied in his sworn affidavit dated "to possessing StressCrete's proprietary information" however, during the cross-examination on his affidavit on February 5, 2019, he "admitted to possessing StressCrete's information, contrary to his previous sworn evidence and in violation of the provisions of the Agreement with respect to the return of confidential information"

The non-solicitation and confidentiality provisions in the employment agreement were reasonable and not ambiguous. The Respondent "clearly and objectively" had "an intention to solicit business" and further "use of confidential information to facilitate solicitation is a breach in and of itself".

The Court found that the Respondent's employment with Cyclone would cause irreparable harm to StressCrete "as he will deliver to Cyclone an unfair competitive advantage in pricing and product marketability" and this cannot be remedied in damages.

With respect to the balance of convenience in awarding or not-awarding an injunction, the Court held:

> In my opinion, in considering where the balance of convenience lies, it would be inequitable to permit a wrongdoer who had voluntarily signed and potentially benefitted from a breach of a non-solicitation or confidentiality covenant to claim that he would be more hurt by the granting of an interlocutory injunction. I am satisfied that the balance of convenience lies with the applicants to restrain the respondent's activities with respect to the non-solicitation and confidentiality provisions of the Agreement.

The Court granted StressCrete's request for a permanent injunction and made the following order:

- The Respondent is prohibited or restrained from soliciting or contacting any StressCrete employee, person, firm, business, corporation or governmental agency who was a customer of StressCrete at any time during his employment with StressCrete. Such restriction shall continue for a period of two years from the date of his resignation - in accordance with clause 3 - and shall encompass a region within 750 miles of Burlington, Ontario, (with adoption of the relevant segments of clauses 2(a) to 2(d), as the case may be).
- The Respondent shall not use, employ or disclose any confidential or proprietary information, customer lists, suppliers, pricing, production methods or trade secrets of StressCrete or any other private information as specified in clause 1.
- In accordance with clause 4, the Respondent shall return to the applicants all of StressCrete's information or other confidential or private records or documents in whatever format, forthwith.

Some Thoughts

This is really an excellent case in that it provides a roadmap when considering contractual restrictive covenants and their enforceability. Enforcing restrictive covenants is costly and disruptive. In the end, it is a business decision that has to be made in each case after weighing, among other things, the costs and benefits, risks and rewards.

The *StressCrete* case confirms that enforcing non-competition covenants in employment agreement remains a tough sell (not impossible, just tough given the law). Non-solicitation clauses that are properly drafted and entered into can be enforced, again, depending on the particular circumstances of the case.

Another take-away is to give the prospective employee or employee time to consider the contract and get legal advice, if they wish, and to enter into the contract with consideration (in the case of a prospective hire) or with fresh consideration (in the case of an existing employee). Fresh consideration is tremendously misunderstood, and employers should not assume that what is being "provided" will be found to be "fresh consideration".

Articles of Interest

Decline in Sexual Harassment Reports

According to a *Bloomberg* report that references some data from a crisis consulting firm, *Sexual Harassment Reports in Steep Decline After #MeToo Peak*.

Human Rights Commission Targets Facebook Ads

We have all seen the news about concerns that targeted job ads on Facebook could violate human rights legislation (Use of Facebook targeting on job ads could violate Canadian human rights law, experts warn). Litigation was filed in the Quebec Superior Court (Facebook ads face legal scrutiny) and now the Canadian and Ontario human rights commissions have weighed in by writing a letter to Facebook (Human rights commissions targeting Facebook over job ads).

You can read the joint letter at *Addressing Discriminatory Advertising on Facebook in Canada*.

Ministry Looking for Input on Overtime Averaging

The *Restoring Ontario's Competitiveness Act, 2019* ("ROCA") recently made changes to the *Employment Standards Act, 2000* rules in the area of "overtime averaging":

1. Prior to ROCA, there was no limit on the number of weeks over which an employer and employee could agree to average hours of work for the purpose of calculating overtime pay. ROCA set a cap of four weeks as the maximum period over which hours of work can be averaged.
2. ROCA eliminated the requirement that employers obtain approval from the ministry to average overtime. Some of those pre-ROCA ministry approvals permitted averaging over a period that was longer than the current four-week maximum.

The Ministry of Labour is seeking input on whether to give unionized parties the ability to negotiate agreements that average an employee's hours of work over periods greater than four weeks. This possible change would only apply to employees covered by a collective agreement. Non-unionized employees and their employers would continue to be subject to the four-week cap.

The government would like submissions with respect to the following:

- Do you support changing the four-week cap as it applies to unionized workplaces? Why or why not?
- What do you think would be the best approach to take if the government proposed changes to the cap? For example, do you think that there should be no cap or that a higher cap should be imposed instead?

There is information available at *Employment Standards Act, 2000 - Overtime Averaging in Unionized Workplaces* including submission deadlines.

Employers Should Have to Foot the Bill for Mandatory Sick Notes

You've heard this debate before. Doctors are concerned that time spent completing forms for their patients takes resources away from the application of clinical skills. They worry about getting involved in the employers attendance management program. They want to get paid to write these notes.

Employees say they should be at home recovering from their short-term illness instead of running out to a clinic to get a note or coming into work to spread their cold or flu, for example.

Employers, for their part, want employees who say that they can't come to work because they're sick, to confirm that, objectively, with a note from a doctor.

The Canadian Medical Association has slammed the Ford government when they reintroduced the ability to request medical notes under Bill 47. They engaged Ipsos to conduct a survey in the context of the Ford governments proposed amendments to the personal emergency leave provisions of the *Employment Standards Act, 2000*. There is no need, they say, for doctors' notes for in support of short term illnesses.

These notes, it should be observed, are not paid by the government and, unless the cost is passed on by the physician to their patient or the employer, the time spent completing these notes is unpaid. All sorts of reasons are provided to support not requiring an employee who is absent because of a short-term illness, like a cold, to get a doctors note.

A recent opinion piece published on the CBC website entitled Employers should have to foot the bill for mandatory sick notes renews the discussion. The author says:

> While doctors' notes can be important when there is a major medical condition requiring workplace accommodation, a significant number of notes are written to excuse absences for minor illnesses. This is widely acknowledged to be an employee management strategy, a way to reduce absenteeism by forcing the worker to "prove" his or her illness.

As the author (a physician) says, "we don't perform sophisticated medical tests to verify a cold". That goes without saying. In fact, many of these notes are written after-the-fact and are based solely on the self-report of the patient.

According to *Ipsos*:

> …. 8 in 10 Ontarians say they would likely come to work when ill if their employer required a sick note, rather than going to a health care provider to get a note (83%) – with nearly half saying they would be very likely to come into work sick (47%).

More people will come to work sick, they say.

The author of the opinion piece raises this concern:

> Really, what should happen is the doctor sends an invoice to the employer for both the visit and the note. We send invoices to insurance companies or lawyers all the time for non-medicare-covered services (usually to write a medical opinion or complete insurance forms), so this would follow the same idea.

I find the entire debate confusing and driven by agenda and perspective.

If you have an employee that regularly attends work and calls in sick, will you require that employee to run to the clinic to get a doctors note? Should you? What about the employee who misses a lot of work for a variety of illnesses? After a point, is it reasonable to ask for a note? The situations are not the same.

This article raises many questions and a comes at the debate from a particular point of view. Each of the parties to the debate has its own interests. It will be interesting to see if the government directly and definitively intervenes regarding “who pays” for these notes where a short-term illness is involved.

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