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Labour and Employment Law Update

Robertson v. West Fraser Timber Co. Ltd., 2009 BCSC 602

Employee not constructively dismissed when employer's unilateral reduction in his remuneration was small and he waited too long to complain about changes to his duties.

Robertson was employed by West Fraser Timber ("WFT") and its predecessor Weldwood for twenty-nine years. He had no written employment contract but over the years his job duties had evolved to include managerial and supervisory responsibilities. He received a yearly management bonus of about 5% of his base salary.

After WFT acquired Weldwood in 2005, WFT made a number of changes to the company which resulted in Robertson's management responsibilities being gradually eroded and his management bonus removed. The issue on trial was whether the loss of his management status and corresponding bonus entitlement amounted to constructive dismissal by WFT.

The court found that it was an implied term of Robertson's contract that his employer was entitled to unilaterally change his job responsibilities, including his management and supervisory duties. The evidence showed that from 1998 onward, the employer had changed Robertson's duties and responsibilities as necessary without any corresponding change in salary or position and without any protest from the employee. Although Robertson's management responsibilities were removed by WFT, those duties had not been a significant part of his position and Robertson continued to work without protest.

The trial judge also found it was not a term of the employment contract that Robertson was entitled to a certain level or dollar amount of annual bonus. Payment of bonuses was within the discretion of the employer. As well, given that Robertson was entitled to an alternative bonus to the management bonus, the net change in his overall remuneration was less than 5%.

Robertson argued that the cumulative effect of changes made by the employer over a two year period resulted in a breach going to the root of his employment contract. The court disagreed. While it may be reasonable for an employee to wait several months to see the effect of changes to his employment, a period of two years was not reasonable particularly where Robertson did not make it clear to his employer that any of the changes were unacceptable.

As a result, the judge held that Robertson was not constructively dismissed.

Imperial Oil Ltd. v. Communications, Energy & Paperworkers Union of Canada, Local 900, 2009 ONCA 420

Employer's policy of random drug testing absent reasonable cause of employees in safety sensitive positions found discriminatory, unreasonable, and in violation of dignity provisions in collective agreement. Arbitration board entitled to interpret employer's drug and alcohol policy in light of parallel policies evidenced in arbitral jurisprudence submitted by parties.

The Ontario Court of Appeal has issued the latest chapter in the long story of Imperial Oil's attempts to institute a random drug testing policy for employees in safety sensitive positions at its Ontario petroleum refinery. In 1992, Imperial Oil introduced a policy that provided for random drug and alcohol testing of employees in safety sensitive positions. A human rights challenge of that policy eventually reached the Ontario Court of Appeal which held in part that random drug testing was not reasonably necessary to achieve the goal of a safe workplace because drug testing by urinalysis could not measure on-the-job impairment but only past drug use. As a result the random drug testing provisions of the policy were found to have violated the provisions of the Ontario *Human Rights Code* that prohibit discrimination based on handicap. Random breathalyzer alcohol testing of employees in safety sensitive positions however was found to be a reasonable workplace requirement to achieve a work environment free of alcohol. (See *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18.)

Following that decision, Imperial Oil ceased random urinalysis drug testing of its employees until 2003, when it received expert advice that saliva drug testing could show current impairment by cannabis. Imperial Oil revised its drug and alcohol testing policy to incorporate this new technology and resumed random drug testing of employees in safety sensitive positions at the refinery. The Union filed a grievance challenging the drug and alcohol testing policy as a whole.

In an award dated December 11, 2006, an arbitration board found the Union had waited too long to file a grievance concerning the breathalyzer alcohol testing and had thereby acquiesced to the testing. The board upheld the for-cause, rehabilitative, and post-incident drug testing provisions of the drug testing policy. However, the board found that the provisions of the policy that allowed random drug testing of employees absent reasonable cause violated the respect and dignity provisions in the collective agreement and were null and void. Imperial Oil appealed this ruling. The Divisional Court upheld the arbitration award and Imperial Oil then appealed from that judgment.

In a decision issued on May 22, 2009, the Ontario Court of Appeal dismissed Imperial Oil's appeal and awarded costs to the Union. The court found that the majority of the arbitration board had properly applied information from the arbitral jurisprudence to provide a backdrop to Imperial Oil's general deterrence justification for its testing policy.

In addition, the board was within its jurisdiction when interpreting the collective agreement through the lens of a so-called "Canadian model" for alcohol and drug testing in safety sensitive workplaces. The comparison between the drug testing undertaken in other industrial workplaces and that implemented by Imperial Oil was a reasonable analytical approach to the interpretation of the collective agreement.

In addition to these findings, the court upheld the board's interpretation of the collective agreement. Imperial Oil's contractual obligation to treat its employees with dignity and respect was not limited to the grounds set out under the *Human Rights Code*. The award had provided several cogent reasons for concluding that the testing in question offended the collective agreement including that the method of testing did not permit the immediate detection of impairment from cannabis but took several days to provide results and that Imperial Oil had an obligation to respect employees' expectation of privacy absent consent or reasonable cause for a random drug test. The court found that the arbitration board had ample justification for its conclusion that random drug testing absent reasonable cause offended the collective agreement and the arbitration award was upheld.

It is not known at this time whether Imperial Oil will seek leave to appeal this decision of the Ontario Court of Appeal.

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