Labour & Employment Law Bulletin

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Welcome Chris Beneteau

Lawson Lundell is pleased to announce that Chris Beneteau has joined our Labour and Employment Group as an associate.

Chris practices in all areas of labour and employment law, advising clients on a range of matters including wrongful dismissal, employment standards, labour relations, and human rights and privacy issues.

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Federal Employee Disabled by Work Related Injury Protected Indefinitely

An employee of a federally regulated business was off work for over 20 years due to a work related injury (amputation of his arm). Over the years the employee maintained his employment status and the employer made health and welfare and pension plan contributions on behalf of the employee. Approximately 20 years later the company was sold and the purchaser inquired into whether the employee was able to return to work. When the employee reported that he was unable to return to work due to the injury, the employer terminated his employment.

The employee grieved his termination on the basis that section 239.1(1) of the *Canada Labour Code* (the "Code") which provides that "no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence from work due to work-related illness or injury" prohibited the employer from terminating his employment, even after over 20 years.

Arbitrator Slotnick concluded that section 239.1 of the Code indicated a "clear intention to protect the employment status and benefits of workers who are injured on the job" and precludes an employer from dismissing a worker because of "absence from work due to work-related illness or injury." As a result, the Arbitrator ordered the employee reinstated to non-active status and for his benefits and pension payments to be reinstated.

The implication for federal employers is that it will be extremely difficult, if not impossible, to terminate the employment of an employee who is off work due to a work related injury or illness.

Teamsters, Local Union 91 v. Kingsway Transport.

Refusal to Return to Work Constitutes Just Cause

In *Staley v. Squirrel Systems of Canada Ltd.,* 2012 BCSC 739, an employee, Mr. Staley, who worked at Squirrel's Burnaby head office for approximately 15 years requested to work for Squirrel remotely from Montreal due to his wife being transferred. Squirrel temporarily permitted this arrangement. However after approximately six months the parties were unable to come to an agreement with respect to how the employment relationship would operate. At this time Squirrel wrote to Mr. Staley advising that if he did not return to work on a set date his employment would be terminated.

Mr. Staley did not return to work and his employment was terminated for cause. The employer agreed that the employee was a good and diligent employee with no discipline record.

The Court held that Mr. Staley's failure to report to work at Squirrel's head office was an act of wilful disobedience and insubordination and "amounted to a repudiation of a fundamental term of the employment relationship."

This case highlights that insubordination is a serious workplace offence and can constitute just cause for dismissal even for long service diligent employees with no discipline record.

Injunction Not Granted for Breach of Non-Solicitation Clause

The British Columbia Court of Appeal overturned a lower court judgement granting an interlocutory injunction for violation of a non-solicitation clause by a former employee in *Edward Jones v. Voldeng,* 2012 BCCA 295.

Mr. Voledeng was an investment advisor with Edward Jones for approximately 10 years. He had a six month non-solicitation clause in his employment agreement. Mr. Voldeng and his assistant left Edward Jones to work for RBC and prior to departing either Mr. Voldeng or his assistant made copies of client records. Once at RBC Mr. Voldeng solicited his former clients in breach of his non-solicitation agreement resulting in approximately $20.2 million in clients' funds being transferred to RBC.

The lower court ordered that Mr. Voldent refrain from soliciting the clients of Edward Jones for a six month period and avoid initiating any contact with those clients. In addition Mr. Voldeng and his assistant were restrained from using the confidential information of Edward Jones and were ordered to return all confidential information to Edward Jones.

The Court of Appeal overturned the lower court with respect to the solicitation and contact with former clients. The Court held that irreparable harm is required in order to grant an interlocutory injunction and such harm could not be established where damages were calculable. Although Edward Jones had argued that the magnitude of the loss of $20.2 million equalled irreparable harm, the court disagreed. According to the court, irreparable harm refers to the nature of the harm not the magnitude. If the applicant could show that its business potentially would be destroyed by the conduct of the defendant, then it would be open to argue irreparable harm. Given that Edward Jones operates in locations across Canada and in other locations near the office in question, it was not at risk of having its business destroyed by the conduct of Mr. Voldent. As a result, only the orders with respect to the use and return of confidential information were upheld.

This case establishes a precedent that will make it more difficult for employers to obtain interlocutory injunctions for breach of non-solicitation agreements, particularly for larger organizations with multiple locations.

Refusal to Bargain Monetary Issues Constitutes Bargaining in Bad Faith

In *Insurance Corporation of British Columbia and Canadian Office and Professional Employees Union, Local 378,* BCLRB No. B143/2012, the Union applied under sections 11 and 47 of the Labour Relations Code that ICBC had failed to bargain in good faith and had failed to make every reasonable effort to conclude a collective agreement.

The collective agreement between the parties expired June 30, 2010. The parties agreed to commence negotiations in January 2011. One of the Employer's proposals, the Claims Hierarchy Proposal, related to a transformation program which could result in the closure of offices and the loss of jobs. At first ICBC said the proposal was monetary and then changed it to non-monetary.

In April 2012, ICBC informed the Union that it would not be able to obtain a monetary mandate from the provincial government until the government completed its core review process for crown corporations which was estimated to be completed in late August 2012. As a result, ICBC was not prepared to discuss any monetary issues with the Union until after it obtained its mandate from the government.

The Board found that ICBC's refusal to bargain monetary items until the government finished its core review process was a violation of its duty to bargain in good faith. It was not open to one party to refuse to bargain or to restrict the scope of bargaining until some third party meets a condition. The fact that the actions of third parties affected bargaining in substantial ways did not relieve ICBC from its obligation to make a reasonable effort to conclude a collective agreement. ICBC was ordered to withdraw its refusal to negotiate monetary items and to bargain towards an agreement on all issues.

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