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FMC ONTARIO EMPLOYMENT LAW BULLETIN MARCH 2011

By FMC Ontario Employment | Labour Group

Active Employee Wins Constructive Dismissal Suit, Gets Damages for Pay Cut

Court sets out required process for implementing pay cuts and other significant changes

In an important decision, an Ontario judge found that an employee whose pay was cut could bring a constructive dismissal suit while still actively working.

Kerr Bros Ltd., well-known candy manufacturer, was in financial difficulty. The new president decided that all employees were overpaid. All employees were given pay cuts. Four employees, including Lorenzo Russo, were thought to be particularly overpaid and were thus subject to deeper pay cuts.

Russo had 37 years of service and was the warehouse manager. He was told that his total compensation pay would be cut by nearly 50% - from \$114,000.00 to \$60,000.00 - by way of a salary reduction, termination of bonus, and dissolution of the pension plan.

Russo kept working for Kerr and sued for constructive dismissal. He then filed a motion for summary judgment – quick judgment without a trial.

The Ontario Superior Court decided that Russo had the right to sue for constructive dismissal while he was still employed. Russo kept working in order to “mitigate” his constructive dismissal

damages. However, if Russo kept working for Kerr after the reasonable notice period had expired, he would be considered to have accepted the pay cut as of that date.

Employers are free to ask an employee to accept a significant pay cut. However, if the employee rejects that cut, the employer cannot impose the cut immediately without paying damages for constructive dismissal (which will be the amount of the difference between the old and new compensation level over the reasonable notice period). According to the court, the proper approach is to give the employee reasonable working notice that his or her current employment contract will terminate, and then “offer” the employee a new contract (with the lower pay level) as of that termination date. If the employee does not accept the offer of the new contract, he or she may leave but will not be entitled to constructive dismissal damages (apart from severance pay under the *Employment Standards Act* as applicable).

For employers, pay cuts can now be fraught with risk. If the pay cut is large enough to qualify as a constructive dismissal - the cases show that a cut greater than 10% can, in some circumstances, qualify – the employee can stay and sue the employer for the pay difference over the employee’s reasonable notice period. The employee does not even need to leave at the end of the reasonable notice period – although if the employee stays after the notice period, he or she will have accepted the lower pay level. As such, pay cuts may not result in savings to the employer until the end of each employee’s reasonable notice period.

The lesson for employers who wish to impose immediate pay cuts is to either convince employees to accept the pay cut immediately, for the good of the company and the security of their jobs, or to ensure that the pay cut is small enough as to not be a constructive dismissal. Otherwise, the employer will need to provide reasonable

notice of termination and impose the pay cut at the end of the notice period.

Russo v. Kerr Bros. Limited (Ontario Superior Court)

<http://www.canlii.org/en/on/onsc/doc/2010/2010onsc6053/2010onsc6053.pdf>

Backlog Drives Changes to Ontario’s Employment Standards Complaint Process

Employees must tell employer before filing a claim and new ESA resources have been rolled out

Faced with a backlog of approximately 14,000 employment standards complaints, the Ontario government has made the following statutory and policy changes to the complaint process under the *Employment Standards Act*:

Employees Must Tell Employer before Filing MOL Complaint. Employees are now required, before the Ministry of Labour will process an employment standards complaint, to tell their employer about the “basis for [the employee’s] view that this Act has been or is being contravened and, if he or she is of the view that wages are owed, the amount of the wages”.

According to MOL policy, however, an employee who is a young worker, has a language barrier, “has a fear of an employer”, is owed money that is more than five months due, or worked at a business that has closed, is not required to tell his employer before filing a Ministry of Labour complaint. One wonders how broadly “fear of an employer” will be interpreted.

The requirement to tell your employer before filing a complaint, allows employers the opportunity to settle an issue before it becomes a costly – and potentially broader– formal complaint to the Ministry of Labour which might expand to include a group of employees.

Encouraging Settlements. The *Employment Standards Act* now expressly permits Employment Standards Officers to work with the parties to settle. Settlements will terminate the complaint, the MOL's investigation, and all other proceedings regarding the complaint (excepting prosecutions).

Backlog Taskforce. The government also announced that it is investing \$6 million over two years to create a task force to eliminate the employment standards claims backlog.

New Multilingual ESA Resources. The government has also developed a series of multilingual resources on employment standards. Through a new web portal and an improved Employment Standards Information Centre, employees can now access a variety of educational resources in 23 different languages, from Arabic to Vietnamese.

New Web-Based ESA Tools. These developments come on the heels of the Ontario government's introduction of several web-based tools designed to help employers and employees calculate public holiday pay as well as statutory termination and severance pay.

The government's fact sheet on its employment standards "modernization strategy" is at: http://www.labour.gov.on.ca/english/news/bg_escampaign.php.

The new multilingual employment standards web portal is at: <http://www.labour.gov.on.ca/english/multi/index.php>.

Court Overturns Award of Lost Wages until Retirement

Worrisome decision seen as "Another Honda" overturned and SCC will not hear appeal

Ontario employers cannot be liable for negligent infliction of emotional distress, the Ontario Court of Appeal has ruled, setting aside a damage award that included lost wages until retirement. The Supreme Court of Canada has declined to hear the matter.

Another Honda. The case, *Piresferreira v. Ayotte and Bell Mobility*, was seen as another "Keays v. Honda" after the employer was hit with a huge damage award that surprised lawyers and caused anxiety for HR professionals.

Facts. To boil down the facts, the employee, Piresferreira, was accused by her manager, Ayotte, of not doing her job. Piresferreira tried to show Ayotte an e-mail on her BlackBerry to prove that she had done what she was supposed to have done. Ayotte shoved her, subsequently telling her "to get the hell out of his office." When she returned to the office a few days later, she was given a Performance Improvement Plan that she refused to sign. She lodged a formal complaint with the human resources department. After an investigation, Human Resources disciplined Ayotte and ordered that he receive counselling on communication and conflict management. Piresferreira was subsequently diagnosed with post-traumatic stress disorder; she went on sick leave and never returned to work. Approximately 16 months after the shoving incident, Bell Mobility sent her a letter saying that she was deemed to have resigned from her position.

Surprising Trial Award. The trial judge ordered Bell Mobility to pay damages for constructive dismissal, assault and battery, intentional and negligent infliction of emotional distress and mental suffering, failing to provide employees

with a safe and harassment-free working environment, failing to sufficiently investigate the incident, and imposing disciplinary measures on Ayotte that were “inappropriately mild.” The damages included lost wages up to retirement and amounted to more than \$700,000.00 including legal costs.

Appeal Decision Rolls Back Damages. On appeal, the Court of Appeal ruled that employers cannot be liable for negligent infliction of mental suffering, noting that such a duty would be a “considerable intrusion by the courts into the workplace.” There was also no basis to support a finding of intentional infliction of mental suffering. While egregious, Ayotte’s conduct did not reach the necessary legal threshold, that is, it was not “calculated to produce harm.” Finally, the damages for assault and battery were too remote: “Piresferreira’s psychological disabilities and her inability to work in any employment were largely caused by matters other than the battery itself.”

Final Result. In the end, the appeal court awarded Piresferreira 12 months’ pay in lieu of notice for constructive dismissal, plus \$15,000 in damages for the battery, and \$45,000 for the mental suffering related to the manner of her dismissal – a total of approximately \$147,855– plus \$120,000 net in costs.

Costs of Harassment. This saga, which resulted in years of effort and legal costs, demonstrates the cost of harassment in the workplace. Even though the damages were significantly reduced on appeal, the legal and reputational costs to the employer were no doubt significant.

Piresferreira v. Ayotte and Bell Mobility
(Ontario Court of Appeal)
(<http://www.canlii.org/en/on/onca/doc/2010/2010onca384/2010onca384.pdf>)

IT Employee’s Security Breach Justified Termination

Prohibited downloading and access-granting to family and friends justified dismissal

An arbitration board has upheld the dismissal of an IT “infrastructure analyst” with Sheridan College who breached system security.

For ten years, Steve Rowe had used his work computer to download pornography, videos, music and games and engage in sexually explicit online chats with his girlfriend. Rowe also gave family, friends and co-workers access to his Sheridan computer and distributed downloaded materials to them.

His role at the College included responsibility for network security so he had a high level of access to college computers which were linked to the college’s network servers.

Shortly after he was dismissed, Rowe posted on Facebook a picture of the backside of a mountain climber with a caption telling his manager to “kiss this.” He removed the picture and apologized when the union advised him to do so.

The arbitration board found that Rowe had occupied a position of trust and had violated that trust. He had signed the College’s handbook, which contained rules for computer use, and he was well aware of the rules. Further, during the College’s investigation, Rowe had attempted to delete the offending material and lied about the extent of his personal use of the computer. In addition, his “kiss this” Facebook post demonstrated a lack of remorse for his conduct.

The decision illustrates that adjudicators are increasingly understanding of the importance of computer security in a networked world. Employers will be justified in imposing strong discipline against employees– particularly IT employees – who violate security.

Sheridan College Institute of Technology and Advanced Learning v. Ontario Public Service

Employees Union (Ontario Labour Arbitrator)
(<http://www.canlii.org/en/on/onla/doc/2010/2010canlii72611/2010canlii72611.pdf>)

Facebook Firing Upheld

Postings that employer staffed by “crooks” and “hosed customers” justified terminations

In what some are calling a first in Canada, the British Columbia Labour Relations Board has upheld the dismissal of two employees for Facebook posts about their employer.

The BCLRB determined that West Coast Mazda had cause to dismiss two unionized employees for Facebook postings referring to their supervisor as “a complete Jack-Ass” and suggesting that their employer was staffed by “crooks” that were out to “hose” customers.

Because the two employees had 100 and 377 Facebook friends respectively, including present and former coworkers, the BCLRB ruled that they did not have a serious expectation of privacy over their Facebook postings. Instead, the comments were akin to comments made on the shop floor and thus were insubordinate. Thus, the employer could act on the postings.

The BCLRB found that the terminations were not motivated by anti-union animus. The employees’ clean disciplinary record did “...not outweigh the fact that the Employer had never encountered similar conduct, and the work offence was serious insubordination and conduct damaging to the Employer’s reputation.” The employees compounded their misconduct when they lied during the investigation by denying making the statements and accusing others of logging onto or hacking into their personal Facebook accounts.

The case shows that employers can discipline employees for postings on Facebook or social media – just as for utterances in the workplace – where the postings are widely accessible and

harm the employer’s business or reputation. Employers’ discipline cases will be stronger if they have reasonable Internet / social media policies that set out where – and how – employees can communicate publicly about the employer and their coworkers.

Lougheed Imports Ltd. v. UFCW (B.C. Labour Relations Board)
(<http://www.canlii.org/en/bc/bclrb/doc/2010/2010canlii62482/2010canlii62482.pdf>)

HR Professionals Bill Causes Controversy in Ontario

Bill would restrict use of professional designations, regulate HR advisory firms, and allow inspections and investigations

“This Act does not affect or interfere with the right of any person who is not a member of the Association to practise in the field of human resources.” So says Bill 138, which would create the *Registered Human Resources Professionals Act*. But controversy about this Bill remains.

The Bill would give the Human Resources Professional Association legal authority to set qualification requirements to be admitted as a member of the HRP. The Bill would prohibit any person who is not a member of the HRP to use the designations Registered Human Resources Professional, Associate Certified Human Resources Professional, Certified Human Resources Professional, Senior Human Resources Professional, Certified Industrial Relations Counsellor, or the French equivalents.

The Bill would also permit the HRP to grant or refuse to grant – or place restrictions on – the ability of a firm to practice in the field of human resources.

Much of the controversy around the Bill focuses on the Bill’s complaint process against HR professionals, the broad powers given to the HRP to conduct investigations and inspect the

practices of HR practitioners, and the perceived lack of consultation on the Bill.

Further, the Bill gives broad by-law making power to the HRP. Those by-laws will set out the detailed requirements for education, registration, and other matters.

The Bill passed second reading on March 3, 2011 and has been referred to the Standing Committee on General Government.

Bill 138, *Registered Human Resources Professionals Act, 2010*:

(http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2436)

Pay Equity Commission Conducting Random, Province-Wide Compliance Audits

Pay equity compliance was not a one-time event. The Pay Equity Commission of Ontario has stepped up enforcement

When the Ontario *Pay Equity Act* was first passed, it led to a flurry of activity as employers selected job comparison systems, evaluated jobs, negotiated pay equity, and posted pay equity plans. Where necessary, wage adjustments were made. Pay equity did not end there, however. The *Pay Equity Act* imposes ongoing obligations to maintain compensation practices that provide for pay equity. In addition, no employer or union may bargain for or agree to compensation practices that do not provide for pay equity.

Many employers have forgotten about these ongoing pay equity obligations and very few have a system in place to monitor compliance.

You need to be aware that the Ontario Pay Equity Office runs a monitoring program under which it selects employers and sends them a detailed questionnaire asking about their pay equity compliance. In the past, the Pay Equity Office focused on various geographic areas (for example,

in 2008, retail, hotel and motel establishments in Peel Region) or industrial sectors (for example, manufacturing in 2004 and food processing in 2002). Their selection of employers is now random and province-wide.

As a result, it is important for an employer to keep copies of its original pay equity documentation. In addition, keep in mind the pay equity consequences and requirements when establishing new job classifications, reclassifying positions, eliminating male job comparators, using a new job evaluation system, restructuring an organization, purchasing a business, negotiating wage increases with a union, or substantially changing benefit plans. A good idea is to conduct a self audit of your pay equity compliance. Remember, your organization can be selected for an in-depth audit by the Pay Equity Office at any time.

The Pay Equity Office has posted a "Compliance Self-Audit Tool" at http://www.payequity.gov.on.ca/peo/english/pubs/mp_selfaudit.doc.

Occupational Health and Safety Act Amendments Coming

New certified member training requirements coming and Codes of Practice provide wider defence

The Ontario government has introduced amendments to the *Occupational Health and Safety Act* resulting from the recent report of an expert panel. Bill 160 received first reading on March 3, 2011.

The two changes most likely to directly impact employers are: (1) the Minister of Labour will be given the authority to establish standards for health and safety training of health and safety representatives and certified joint members of joint health and safety committees, and (2) Codes of Practice approved by the Minister may now be

used to prove compliance with the OHS Act itself (for instance, employers' general duty to take reasonable precautions) rather than with the regulations only (for instance, guarding requirements in the Industrial Regulations).

The Bill will also allow an MOL inspector to refer a reprisal issue to the Ontario Labour Relations Board, where the employee consents, instead of requiring the employee to file a reprisal complaint – alleging that he or she was punished for raising safety issues – him or herself.

Under the Bill, the Minister may assign the Office of the Worker Adviser and the Office of the Employer Adviser the authority to advise workers and employers with fewer than 100 employees, respectively, on health and safety matters, rather than simply on workers' compensation matters. This change could provide a real benefit to small employers.

The MOL will assume responsibility for prevention of injuries and accidents. Previously, the OHS Act did not explicitly make this a responsibility of the MOL.

There will be a new Chief Prevention Officer for Ontario who will be tasked with providing leadership on the prevention of workplace injuries and occupational diseases.

The Minister of Labour will also be given oversight power over the province's health and safety associations under the leadership of the Chief Prevention Officer.

Bill 160, *Occupational Health and Safety Statute Law Amendment Act, 2011*
(http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2463)

Canadian Unionization Numbers Increase Slightly

Newfoundland and Labrador and the public sector have the highest unionization rates

A recent Statistics Canada report shows that 4.2 million employees belonged to a union in Canada during the first half of 2010 – an increase of 64,000 from the same period in 2009. This translates into a national unionization rate of 29.6% of workers.

Among the provinces, Newfoundland and Labrador has the highest unionization rate at 37.9% and Alberta the lowest at 22.6%. Ontario checks in at 26.5%. Employees in public sector industries were most likely to be unionized with the public administration (68.5%) and education (67.0%) sectors leading the way.

The report goes on to note that unionized workers are generally paid more than their non-unionized counterparts, with one study estimating the wage premium to be approximately 7.7%.

To read the report, please visit:
<http://www.statcan.gc.ca/pub/75-001-x/2010110/pdf/11358-eng.pdf>.

Recent Presentations

Members of FMC's Ontario Employment group regularly lead presentations for our clients and at professional events and industry associations. We have recently given the following presentations:

- Canadian Employment Law 101 for U.S. Legal and HR
- How to Conduct a Bullet-Proof Workplace Investigation
- Hiring, Firing and Retiring: Employment Law in a Nutshell

- Pardon Me? Police Records Checks, Background Screening and Workplace Violence
- Health and Safety Due Diligence for Supervisors
- Accident Response, Legal Duties and Due Diligence - Ontario
- 10 Things You Need to Know About Law, Ethics and Social Media

We would be happy to lead an in-house training session on these or any other employment law topics for your team. Please feel free to ask any member of our group.

Contact Us

For further information, please contact a member of our Ontario Employment | Labour Group:

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