TOP 10 CANADIAN EMPLOYMENT LAW CASES OF 2015

Article by Ryan Campbell and Heather Kindness

With 2015 now behind us and our sights set on 2016, we have compiled the following list of ten significant Canadian employment law cases from 2015.

This roundup is a cross-section of decisions from across the country, in no particular order, and includes novel decisions and those that have set a new high watermark in damage awards.

While hindsight may be 20/20, this review will provide employers, business leaders and human resources professionals with additional foresight to mitigate risk, increase reward and enhance relations with employees in 2016 and beyond.

1. *Potter v. New Brunswick Legal Aid Services Commission,* 2015 SCC 10.

Jurisdiction: All (originating in New Brunswick).

Suspension with pay may constitute "constructive dismissal".

Mr. Potter was the Executive Director of the New Brunswick Legal Aid Services Commission. While the parties were negotiating a buyout of Mr. Potter's contract, Mr. Potter commenced a sick leave. In response, the employer wrote to Mr. Potter to advise him not to return to work until he was provided further direction. In the meanwhile, Mr. Potter was suspended with pay, and his powers were delegated to someone else. Mr. Potter sued for constructive dismissal.

The Supreme Court of Canada agreed with Mr. Potter, finding that Mr. Potter had been constructively dismissed, "[i] n light of the indefinite duration of the suspension, of the fact that the Commission failed to act in good faith insofar as it withheld valid business reasons from Mr. Potter, and of the Commission's concealed intention to have Mr. Potter terminated."

2. *Styles v. Alberta Investment Management Company,* 2015 ABQB 621.

Jurisdiction: Alberta.

Employers owe a duty of good faith when determining Long-Term Incentive Plan entitlements post-termination.

After approximately three years of employment, Mr. Styles was terminated on a without cause basis. Pursuant to the terms of his employment agreement, Mr. Styles was paid three months of salary.

However, during the course of his employment, Mr. Styles became eligible to participate in (and did participate in) the Defendant's Long Term Incentive Plan. Upon termination, Mr. Styles was advised that "[a]s per policy, no further payment on Annual Incentive Plan (AIP) or Long Term Incentive Plan (LTIP) will be made."

Despite the fact that the LTIP plan required Mr. Styles to be "actively employed" on the date that the monies were paid, Mr. Styles sued his former employer, citing, among other things, the fact that he had been dismissed shortly before the payout date.

Deciding in favour of Mr. Styles, the Court ordered an LTIP payout in the amount of $444,205 as a part of Mr. Styles' severance on the basis that the employer's strict reliance on the wording of the LTIP provision would violate the duty of good faith contractual performance that it owed to Mr. Styles (as recently established by the Supreme Court of Canada). In particular, the court held that "[w]hen an employment contract includes a condition for the receipt by an employee of a benefit under the contract and the employer has the discretion, pursuant to the terms of the contract, to frustrate the satisfaction of that condition, it becomes even more important for that discretion to be exercised fairly, reasonably and not arbitrarily."

3. *O.P.T. v. Presteve Foods,* 2015 HRTO 675.

Jurisdiction: Ontario.

New high-water mark in general damages award for human rights violations.

The Applicants, O.P.T. and M.P.T. were temporary foreign workers who had been employed by Presteve Foods for approximately nine months. Following their termination, the Applicants complained of several human rights violations by Presteve Foods, contrary to the Human Rights Code.

In its decision, the Human Rights Tribunal of Ontario (the "HRTO") determined that, during the course of their employment, the Applicants were subjected to "a persistent and ongoing pattern of sexual solicitations and advances" by the owner and principal of Presteve Foods, who "knew or ought reasonably to have known that these sexual solicitations and advances were unwelcome, particularly in light of the fact that O.P.T [and M.P.T.] expressly resisted and rejected his solicitations and advances on many occasions."

Likewise, the HRTO concluded that "given that the personal respondent was the owner and principal of the corporate respondent at the time of the events at issue, there is no question that he was part of the directing mind of the corporate respondent. Accordingly, [...] the corporate respondent is also liable for all violations of [the Human Rights Code that the HRTO has] found as against the personal respondent." On account of the severity of the contraventions of the Human Rights Code , the HRTO awarded O.P.T. and M.P.T. damages for injury to dignity, feelings and self-respect in the aggregate amount of $200,000.

4. *Commission de la santé et de la sécurité au travail v. Caron,* 2015 QCCA 1048.

Jurisdiction: Quebec.

Scope of duty to accommodate expanded for Quebec employers.

In the course of his employment, Mr. Caron developed tennis elbow, which required surgery. Following the injury, Mr. Caron was assigned to a temporary position.

A few years later, Mr. Caron's temporary position was abolished. His employer indicated that it could not offer another suitable or available position. Ultimately, Mr. Caron's employment was terminated. On behalf of Mr. Caron, the union commenced a claim, alleging that the employer had failed to comply with Quebec's Charter of Human Rights and Freedoms (the "Charter"). In particular, the union argued that Mr. Caron's injury amounted to a handicap and that the employer had failed to accommodate Mr. Caron to the point of undue hardship, despite the fact that such accommodation was not required by Quebec's Act Respecting Industrial Accidents and Occupational Diseases (the "Act"). The administrative tribunal disagreed with the union.

However, the administrative tribunal's decision was subsequently overturned by both the Superior Court of Quebec and the Quebec Court of Appeal. The argument that the Act constitutes its own autonomous process of accommodation was dismissed by both courts. Ultimately, the Court of Appeal held that the quasiconstitutional right to accommodation in the workplace prescribed by the Charter constitutes a preeminent standard that transcends the law, employment contracts, and collective agreements.

5. *Evans v. Avalon Ford Sales (1996) Limited,* 2015 NLSCTD 100.

Jurisdiction: Newfoundland and Labrador.

Duty of good faith may require employers to provide employees with "cooling-off period" to reconsider resignation: failing to do so may constitute constructive dismissal.

After being reprimanded by his employer, Mr. Evans had an acute stress reaction. Ultimately, Mr. Evans advised the employer "I'm done", and placed his cell phone and keys on his supervisor's desk.

The next day, Mr. Evans attempted to contact his supervisor, but was unable to speak with the supervisor directly. In any event, the supervisor had concluded that Mr. Evans had resigned from his position.

For the following three weeks, Mr. Evans sought medical treatment. Thereafter, Mr. Evans provided his supervisor with a letter explaining why he had left and indicating that his departure had been involuntary.

In this case, the Supreme Court of Newfoundland and Labrador found that "the implied term of good faith and fair dealings which applied to both parties and to the employment contract required the employer to give Mr. Evans time to cool off and reconsider", and that the employer's "failure to do so represents a breach of the implied major term of good faith and fair dealings", "regardless of whether [Mr. Evans] involuntarily resigned [...] or voluntarily resigned but in circumstances of confusion or uncertainty."

On account of the employer's breach of the duty of good faith and fair dealings, the court held that the employer had breached a fundamental term of the employment contract, and therefore constructively dismissed Mr. Evans. For that reason, Mr. Evans was awarded damages for pay in lieu of notice in the amount of $46,201.87.

6. *Michela v. St. Thomas of Villanova Catholic School,* 2015 ONCA 801.

Jurisdiction: Ontario.

Employer's financial circumstances not relevant in determining employee's notice entitlements upon termination.

Following Ms. Michela's termination, she (and others) commenced a wrongful-dismissal action against her employer, a private school, seeking pay in lieu of reasonable notice of termination.

On a motion for summary judgment, the employer argued that its financial circumstances were relevant in determining Ms. Michela's termination entitlements. For that reason, the motion judge found that Ms. Michela's reasonable notice period was 12 months but reduced her claim for notice by half, to six months.

However, Ms. Michela successfully appealed the decision of the motion judge to the Ontario Court of Appeal. In its decision, the Court of Appeal held that "the motion judge erred in considering an employer's financial circumstances as part of the "character of the employment." The court went on to observe that "[a]n employer's financial circumstances may well be the reason for terminating a contract of employment - the event that gives rise to the employee's right to reasonable notice.

But an employer's financial circumstances are not relevant to the determination of reasonable notice in a particular case: they justify neither a reduction in the notice period in bad times nor an increase when times are good."

Therefore, the court awarded Ms. Michela twelve months of reasonable notice together with her costs in the amount of $68,573.42.

7. *R v Kazenelson,* 2015 ONSC 3639.

Jurisdiction: Ontario.

Supervisors can be criminally charged for criminal negligence causing death and bodily harm.

Mr. Kazenelson was a project manager for a construction company in Toronto, Metron Construction Incorporated ("Metron").

Six workers employed by Metron under Mr. Kazenelson's supervision were working on a swing stage when it suddenly collapsed. Only one of the six workers was attached to a lifeline as required by both the law and industry practice. Unfortunately, the other five workers fell more than 100 feet to the ground. Four of them died, and the fifth sustained serious injuries.

Although Mr. Kazenelson was aware that there were only two lifelines available for the six workers and that only one lifeline was in use, Mr. Kazenelson took no steps to ensure that lifelines were available for all the workers and that the workers were using lifelines.

Following the incident, Mr. Kazenelson was charged with four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm under section 217.1 of the Criminal Code. In 2015, Mr. Kazenelson was convicted on those four counts.

Since that conviction, Mr. Kazenelson has been sentenced to three and a half years imprisonment.

8. *Baroch v. Canada Cartage Diversified GP Inc.,* 2015 ONSC 40.

Jurisdiction: Ontario.

Overtime class action certification.

Mr. Baroch was an employee that worked as a shunter for Canada Cartage Diversified GP Inc. ("Canada Cartage"). Mr. Baroch brought an action against Canada Cartage alleging that, as a matter of policy or practice, Canada Cartage did not follow the statutory requirements for overtime in Ontario. Mr. Baroch sought to certify his action as a class action.

The Ontario Superior Court of Justice certified Mr. Baroch's action as a class action against Canada Cartage on behalf of all the employees of Canada Cartage. Mr. Baroch was able to satisfy the court that the requirement of commonality under the Ontario Class Proceedings Act had been met by framing his action around the systemic policies or practices of Canada Cartage rather than on the individual entitlements of any one member of the proposed class.

Ultimately, the common issues regarding the employment agreements, the employer's policy, good faith and honesty, negligence, unjust enrichment, aggregate damages, and punitive damages were all certified as a part of the class action. The proposed common issues regarding breach of the employment agreements and remedies were not certified.

The Ontario Divisional Court has refused to grant Canada Cartage leave to appeal the decision.

9. *Silvera v. Olympia Jewellery Corp.,* 2015 ONSC 3760.

Jurisdiction: Ontario.

Human rights damages award for sexual assault.

Ms. Silvera was an administrative employee of Olympia Jewelry Corp. ("Olympia"). Over the course of her employment, Ms. Silvera was subjected to three separate serious instances of sexual assault by her boss, Mr. Morris Bazik, and ongoing sexual harassment. Mr. Bazik touched Ms. Silvera's breasts on several occasions, touched her buttocks, insisted she wear jewelry so he could touch her, and gave her massages. Mr. Bazik would require Ms. Silvera to stay late at work after other employees had left for the day (which was unpaid time) and used the time alone to assault Ms. Silvera and harass her with questions and comments about her personal life. Ms. Silvera began to suffer significant emotional damage as a result of this ongoing sexual harassment.

Ms. Silvera was terminated from Olympia as a result of a leave she was required to take for a dental emergency and unfounded allegations of misconduct. Ms. Silvera brought an action for damages for sexual assault, battery and harassment against Olympia and Mr. Bazik personally following her termination. Neither Olympia nor Mr. Bazik participated in the trial and, consequently, their defence was struck and all of the factual allegations pleaded in Ms. Silvera's claim were therefore deemed to be admitted by Olympia and Mr. Bazik.

Ultimately, the Ontario Superior Court awarded damages of nearly $300,000 to Ms. Silvera for sexual assault, battery, wrongful termination, and violation of her rights under the Human Rights Code. Among other things, the damages were intended to compensate Ms. Silvera for costs of future therapy care and future loss of income. The court also awarded damages of $15,000 to Ms. Silvera's daughter pursuant to the Ontario Family Law Act for loss of guidance, care and companionship.

10. *Keenan v. Canac Kitchens Ltd.,* 2015 ONSC 1055.

Jurisdiction: Ontario.

Dependent contractors are entitled to termination pay.

Marilyn and Lawrence Keenan (the "Keenans") are a husband and wife team who carried on business under the name Keenan Cabinetry. The Keenans worked for Canac Kitchens Ltd. ("Canac") for 32 and 25 years respectively, as foremen and supervisors of installers.

The Keenans were initially employees of Canac but, in 1987, Canac advised them that they would cease to be employees and would become independent contractors. The Keenans continued working for Canac until 2007 when they were both terminated without notice as a result of a slowdown in work. While working for Canac from 1987 to 2007, purportedly as independent contractors, the Keenans enjoyed employee discounts, wore shirts with Canac logos, had Canac business cards, and were given gifts from Canac for long service. Canac customers and installers believed the Keenans were Canac representatives.

Following their terminations, the Keenans brought an action for wrongful dismissal seeking pay in lieu of notice of their termination.

In response, Canac argued that the Keenans were not entitled to notice of termination because they were independent contractors.

The Ontario Superior Court of Justice concluded that the Keenans were "dependent contractors" rather than independent contractors and, therefore, were entitled to reasonable notice of their termination. In reaching that conclusion, the court relied upon the following evidence:

- There was a high level of exclusivity as the Kennan's did not feel free to work for anyone else until it was economic necessity and Canac acquiesced
- Canac set the Keenan's rates, dictated work, set deadlines, and provided instructions and legal to support them;
- The Keenan's supplied tools but had also done so as employees, and Canac provided pagers, phones and office space;
- The Keenan's had no genuine chance profit of risk of loss; and
- The business arrangement was established almost entirely for Canac's benefit

On account of the Keenans' total length of service to Canac, the court awarded each of them 26 months' pay in lieu of notice of their termination. This decision has recently been upheld by the Ontario Court of Appeal.

*

RYAN CAMPBELL BIOGRAPHY
Ryan Campbell is an associate at DLA Piper (Canada) LLP in Toronto where he practises employment law. He regularly advises local and multinational employers on a broad range of workplace issues including occupational health and safety, workers' compensation, employment contracts, performance management, accommodation, terminations, social media in the workplace, and employment-related litigation. Ryan also advises targets and acquirers regarding employment matters arising in corporate/M&A transactions.

HEATHER KINDNESS BIOGRAPHY
Heather Kindness practises employment and labour law as an associate at DLA Piper (Canada) LLP in Toronto. Heather advises clients and supports senior counsel in all areas of employment, labour, occupational health and safety, human rights and disability law, as well as workplace safety and insurance law. She is counsel to both national and international organizations.

About DLA Piper (Canada) LLP
DLA Piper (Canada) LLP provides unparalleled value to clients by combining the deep resources of a global firm with the highest level of personal service in the business. The firm's historic areas of focus include energy, natural resources, infrastructure, development, litigation, transportation and the related corporate and finance areas. DLA Piper is one of the world's leading law firms with more than 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East.

About Trisura
Trisura Guarantee Insurance Company is a Canadian-based Property and Casualty insurance company, incorporated under the Insurance Companies Act (Canada). As a Canadian owned and operated company, Trisura is uniquely positioned to satisfy mid-market risks in Contract Surety, Commercial Surety, Directors' and Officers' Liability, Fidelity, and Professional Liability including Media Liability. Trisura is rated A- (Excellent) by A.M. Best Company.