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Protect human rights through courts: Keays

Supreme Court appeal asks for work-related discrimination cases to be heard by courts

By Ronald Minken

On Feb. 20, 2008, the Supreme Court of Canada heard the appeal in the landmark case of *Keays v. Honda Canada Inc.* The appeal raised issues with respect to the relationship between human rights protections and the common law, in particular whether courts can apply common law principles to provide the same protections available through human rights legislation.

HUMAN RIGHTS

Currently, what prevents courts from hearing human rights complaints is the 1981 Supreme Court of Canada decision of *Seneca College of Applied Arts and Technology v. Bhadauria*, which held that the legislature intended to exclude the courts in favour of an administrative regime to achieve its human rights objectives through legislation precluding the use of courts as the primary forum for human rights complaints. When amendments to the Ontario *Human Rights Code* come into effect on June 28, 2008, courts may be able to entertain claims for breach of the code when they are connected to another claim that must be advanced through the courts, such as wrongful dismissal. If, however, there is no other claim, the only recourse is through the administrative regime of the human rights commission.

Keays has sought to refine the manner in which courts approach human rights violations in an employment law context by revisiting *Seneca College* to recognize a tort of discrimination and harassment. This would be accomplished by incorporating human rights codes into employment contracts and recognizing a duty on employers to prevent the creation of a poisoned work environment. Courts would have concurrent jurisdiction to ensure employees have direct access to a remedy with no loss of procedural safeguards or expertise and the courts would have direct means to remedy discrimination by awarding damages separate from existing damages for wrongful dismissal, bad faith, mental distress and punitive damages.

Honda objects to a common law action for a breach of the code — a breach of statutory duty — arguing for the greater expertise of tribunals as well as the need to avoid a multiplicity of proceedings creating a two-tier system to enforce human rights violations where courts are utilized by the wealthy for greater damage awards.

At the appeal, Keays argued Justice John McIssac of the Ontario Superior Court of Justice accurately accounted for all compensatory awards when he awarded punitive damages based on Honda's independent actionable wrong of discrimination and harassment. As compensatory awards were not suffi-

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CASE IN POINT: Employers caught in a tangled Web 2.0

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DND worker on sick leave for seven years fired after mediation

Problems with co-worker and supervisor led to panic attacks but adjudicator finds DND didn't investigate accommodation solutions

By Jeffrey R. Smith

ACCOMMODATION

The Department of National Defence (DND) discriminated against a worker when it terminated him after he was on sick leave for seven years without adequately investigating ways he could return to work, an adjudicator for the Canadian Public Service Labour Relations Board has ruled.

Michael Pepper joined DND as an apprentice in 1977 and was appointed full-time in 1981. He worked as a systems electronic technician since 1989 and was on staff at DND's fleet maintenance facility at Cape Scott, N.S.

New co-worker undermines seniority

In 1993, a female apprentice was brought in to the maintenance shop where Pepper worked under an equal employment initiative for women. After she completed her apprenticeship, she was classified one level higher than Pepper, despite the fact he had more seniority and experience. Pepper was often asked to review and redo her work, which frustrated him.

Pepper and other employees viewed the female co-worker as a "protected person," as she had been appointed over more senior male employees. She was able to advance without seniority, contrary to regular practice in the shop. She often said she would be around longer than the others, which made Pepper nervous about his job security.

In his 1995 performance review, where he received a high rating, Pepper's supervisor told him his co-worker had filed an unofficial complaint against him, claiming he had closed a door in her face. Pepper didn't recall it happening and the supervisor said "if two people could not get along, one of them could be removed." Pepper said he felt his job was being threatened but his supervisor told him to forget about it.

Pepper continued to get anxious about his job and the stress of compensating for his co-worker's shortcomings and finally, in December 1996, he became sick and took five months of sick leave. During his leave he met with the production manager and supervisor to discuss his concerns and they agreed to an action plan. However, nothing was done with the plan and Pepper returned to work in May 1997.

On Dec. 2, 1997, Pepper's frustration boiled over and he made a comment about her getting "darn good money to do electronic work and she had better darn do it." The co-worker asked for an apology, which was taken as an official complaint by the supervisor but no further action was taken.

On Jan. 23, 1998, Pepper asked his supervisor to resolve the complaint, but was told nothing could be done until the co-worker came back to work from medical leave due to a car accident.

Panic attacks lead to sick leave

In May 1999, the co-worker returned in an area adjacent to Pepper's. He bumped into her near the washrooms and it triggered a panic attack. After experiencing several other panic attacks, Pepper went on sick leave on June 8, 1999.

After multiple attempts while on leave, Pepper's request for an investigation was granted. DND found Pepper's harassment complaints were justified and recommended he be given the opportunity to return to his job in the shop or a similar position. Pepper's supervisors were ordered to take harassment prevention and resolution training but were allowed to stay in their positions.

Pepper's psychiatrist felt he could return to work within a few months if his workplace issues were resolved, but his problems would continue if he had to report to the same supervisor or was demoted to another position.

Mediation to negotiate return to work

After filing a grievance claiming his illness was the result of mistreatment at work, a mediation process was started in September 2003. The process resulted in a July 27, 2004, return-to-work proposal by DND with several options. However, none of them involved returning to his old job under a different supervisor and Pepper rejected them.

On March 17, 2006, DND presented the same options to Pepper and told him if mediation didn't resolve things, it would consider terminating him. After some attempts to get an update on a report from his psychiatrist discussed in the 2003-2004 mediation, DND determined he couldn't return to work because the workplace issues that

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ASK AN EXPERT WILL RETURN

Ask an Expert, which normally appears on this page, will return next issue. Have a question? Send it to carswell.celt@thomson.com.

Video surveillance of suspected fraud reasonable: Adjudicator

Office of Alberta privacy commissioner finds surveillance was for law enforcement purpose; allowed under privacy legislation

By Jeffrey R. Smith

PRIVACY

The Alberta Workers' Compensation Board (WCB) legally used video surveillance to determine if a disabled worker made a fraudulent claim, according to an adjudicator from the office of the Alberta information and privacy commissioner.

The worker was injured while working for the Calgary Police Service and went on disability benefits in 2002. However, the WCB suspected she had misrepresented the extent of her disability. It launched an investigation and contacted the highway patrol of the district of Rocky View, Alta., to get her legal land description. The WCB gave the municipality the worker's name and mailing address to get the land description and hired a private investigator to conduct video surveillance of her on May 14 to 17, 2002.

In June 2005, the worker obtained the information collected through an access request and filed a complaint, saying the WCB had violated Alberta's *Freedom of Information and Protection of Privacy Act* (FIPPA). She claimed obtaining her legal land description and the video surveillance were collections of her personal information without her consent.

The worker was also concerned the videotape and accompanying report remained in her file and were sent to a physician in January 2005, along with other personal information, as part of an examination of her medical status. Under the *Workers' Compensation Act*, such an examination requires background information about the worker, including "investigative/specialist and recent medical reports."

In addition, the worker complained the WCB had sent her personal information to the Calgary Police Service. Though she was working there at the time of her injury, she claimed her actual employer was the City of Calgary. Though the police service needed some information to accommodate her in the workplace, she argued it shouldn't have been sent medical or personal information unrelated to her workplace needs.

The adjudicator found FIPPA allows the collection of personal information for the purposes of law enforcement. Because the WCB is charged with administering the *Workers' Compensation Act* and was investigating a potential fraud under the act, its investigation was for law enforcement purposes. Despite the fact it didn't result in any sanctions, the adjudicator found there was that potential and "the question of the entitlement to benefits was still open when the video surveillance was conducted."

The adjudicator also found the WCB couldn't have been reasonably expected to inform the worker about its collection of her information in this case since it likely would have changed the way she behaved, rendering the information inaccurate.

Keeping the video and report on file was also reasonable, the adjudicator said. It was part of the record relevant to the workers' compensation claim and should be stored for a period of time.

However, the adjudicator did have an issue with the January 2005 disclosure of the video and report to the physician. The adjudicator found the WCB was determining the worker's existing medical condition, which was not the law enforcement purposes for which the surveillance was conducted. Though the WCB claimed including the video surveillance report was to help provide an indication of the worker's overall capabilities, the adjudicator found it wasn't a reasonable disclosure as it was three years later and wasn't related to the examination.

"If an individual is no longer under suspicion of misrepresenting her disability, she should be able to expect that personal information pointing to that suspicion will no longer be disclosed," the adjudicator said.

The adjudicator also found other information that didn't relate directly to her medical status that was sent to the physician, such as the worker's family status and financial situation, was unnecessary and a violation of her privacy under FIPPA.

Sending some of the worker's information to the Calgary Police Service was a reasonable disclosure, the adjudicator found, but not all of it. The city and the worker had both listed her employer as the police at the time of her injury so it was reasonable to send medical information to those responsible for arranging her return-to-work program. However, the report also contained information about other medical conditions, family and non-work-related activities, which was not an appropriate disclosure.

The adjudicator ruled the WCB could continue to keep the video surveillance report as a record of past adjudication of the worker's claim but to stop using it for other purposes, such as the 2005 examination. The police were also ordered to stop using the worker's personal information that was irrelevant to her accommodation. CELT

For more information see:

- *Office of the Information and Privacy Commissioner Order F2006-018 and F2006-019* (Dec. 17, 2007), W. Raaflaub Adjudicator.

CASE IN POINT: TECHNOLOGY

Employers caught in a tangled Web 2.0

The popularity of social networking sites and blogs is bleeding into the workplace, raising productivity and security concerns

BACKGROUND

Web 2.0 can hurt budget, security and image

THE TERM "Web 2.0" refers to the trend of web-based communities focused on collaboration and sharing among users, such as social networking sites. Popular Web 2.0 favourites such as MySpace, Facebook and blogs, have revolutionized the Internet. More than ever before, individuals are eager to carve out a space for themselves online and put their thoughts and opinions to family, friends or even the public at large.

However, Web. 2.0 is costing companies hundreds of millions of dollars in productivity. A September 2007 BBC News study, for example, estimated Facebook alone costs U.K. employers about $260 million Cdn a year in lost productivity. It's also raising the stakes for managing trade secrets and confidential information.

In addition, this phenomenon has resulted in a paradigm-shift in the world of marketing: Carefully polished brand images and reputations are now regularly tarnished by front-line employees who make Internet posts — and the news. Web 2.0 is fast becoming a new legal battleground between employers and employees.

By Mary Gleason and Anthony Moffatt

The widespread use of social networking sites and blogs has inevitably overlapped into the workplace as employees access and post on these sites from and about work. Employers and the courts are still developing ways to handle the work-related indiscretions that can result.

In January 2007, several employees of grocery chain Farm Boy were dismissed after making posts about the Ottawa grocery chain on one of several Facebook forums, or "groups," dedicated to discussing the employer. One such group, called "I got Farm Boy'd," was identified by the group administrator as a forum "for current and past employees of Farm Boy to share experiences, discuss topics and even have a place to express opinion as guaranteed under the Canadian *Charter of Rights and Freedoms*." One employee was fired for admitting theft in a posting and at least one other employee alleged he was terminated for his participation in the group.

More recent examples include a Tim Hortons Facebook group created for every employee "who gets fed up with (customers) who don't know what they want, and for workers who have to put up with this every day" and a group of Dairy Queen employees which contained, among other things, a video of an employee dropping his pants in the drive-through window.

Microsoft, Google, and Delta Airlines are other employers who have terminated American employees for posts on Web 2.0 sites.

The limits of discipline: What should employers accept?

Jurisprudence on Web 2.0 in the employment context has only begun to develop. However, employers can take solace from case law in other areas that indicates certain behaviour on Web 2.0 will not be tolerated by adjudicators.

Wasting hours on employers' equipment will be justifiable grounds for progressive discipline and eventual termination. Harassment of co-workers online will likely be seen as no different than harassment by phone or e-mail. Personal attacks against co-workers online that make working with colleagues impossible may warrant termination for cause and posting defamatory material about employers on Web 2.0 will be just as actionable as posting material on other Internet sites.

The case of *Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 217 (Clarke Grievance)*, confirms that posting confidential information online can be grounds for termination.

However, it appears it will be difficult for employers to justify terminating employees who gripe about their employer or supervisors online. Termi-

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CASE IN POINT: TECHNOLOGY

Talk to employees about the dangers of Web 2.0

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nation for insolence online may only be warranted if an employee makes comments which are found to be so irreverent as to undermine management's ability to effectively supervise the workforce. Case law in other contexts indicates an employer should look to both how damaging the comments were and the audience to which the comments were directed.

Employers will also have difficulty disciplining or terminating employees who conduct themselves in an unsavoury way online while identifying themselves with the company. Employers are not considered "custodians" of employees' private lives. Generally speaking, a dismissal will not be upheld unless the employer can establish the online conduct of an employee seriously damages the company's reputation or the ability of the employee to perform his job.

It is worth noting, however, that employers may more easily justify the dismissal of an employee for embarrassing or criminal behaviour online if the employee, by virtue of his position or responsibilities, must maintain an appropriate image in order to perform assigned duties and be of continuing benefit to the company, as in *Pliniussen v. University of Western Ontario*, where the dismissal of a finance professor was upheld because it was found that the faculty's reputation would have been damaged had it continued to employ him.

What's an employer to do?

On-duty Web 2.0 use. Blocker software remains the most effective and cost-efficient method of reducing unauthorized Internet use at work. It typically prevents employees from accessing certain categories of sites such as gambling, pornographic and social networking. Blocker software is widely used by employers and there appears to be no case law that would prevent an employer from prohibiting certain uses of their own equipment by employees on company time.

Off-duty Web 2.0 use. A good first step for employers is to engage in a dialogue with employees about the dangers Web 2.0 presents to employers and employees. Many employees are unaware writing about work on these types of websites could impact their careers, or mistakenly believe writing anonymously or omitting the names will prevent discipline or legal action. Others may think posting confidential or damaging information on blogs or social networking sites is fundamentally different from leaking information to a newspaper, television program or competitor.

Employers should also consider putting Internet policies, including a Web 2.0 policy, in place. This will help ensure all employees are formally notified that using Web 2.0 sites matters and provide an employer with additional protection should the employer choose to pursue progressive discipline or termination. A Web 2.0 policy, like all policies, should be unambiguous, in writing and disseminated throughout the workforce. All new employees should have the policy included in their employment contract and adherence made a condition of employment.

The future of Web 2.0

Employers who seek creative solutions to the issues of Web 2.0 today will be better equipped to face the challenges of tomorrow. For the tech-savvy younger generation who have grown up with computers, Web 2.0 is an essential element of social life and posts or discussions on its websites are often perceived as conversations or commentary made within the private sphere. As this generation enters the workforce — and become arbitrators and judges — employers may have an increasingly difficult time disciplining, terminating, or suing employees for what they view as Web 2.0 indiscretions. CELT

For more information see:

- *Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 127 (Clarke Grievance)* (2007), D.R. Williamson-Arb. (Ont. Lab. Arb. Bd.).
- *Pliniussen v. University of Western Ontario,* 1983 CarswellOnt 754 (Ont. Co. Ct.).

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CORRECTION

In the Jan. 16, 2008, issue's Case in Point, "Family Status: What should be accommodated?", the British Columbia *Human Rights Code* is referred to for the definition of family status. The definition is in fact quoted from the Ontario *Human Rights Code*.

Two-tier system for damages a danger: Honda

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cient to punish Honda for its misconduct, since they did not adequately achieve the objective of retribution, deterrence and denunciation, punitive damages were awarded to reflect a rational connection between the award and Honda's egregious misconduct.

The lower courts found Keays, who was disabled by chronic fatigue syndrome, was wrongfully terminated to evade Honda's duty to accommodate him under human rights law. They further found the decision to terminate Keays was "planned and deliberate" and "made in retaliation for his retainer of counsel to advocate for his human rights." Prior to termination, Honda asked Keays to attend a medical assessment after receiving medical notes from his physician that didn't satisfy it. Keays asked Honda to clarify the purpose of the assessment, which Honda refused to do and instead terminated him for his refusal to meet with the doctor who was to perform the medical assessment.

Justice McIssac found Honda's actions in failing to clarify the purpose of the medical assessment to be unreasonable, in bad faith, and were a "prelude to terminating" Keays' employment. The lower courts unanimously found Honda wrongfully dismissed Keays and "committed a litany of acts of discrimination and harassment" in relation to his request for accommodation despite the fact it was aware of its duty. Justice McIssac awarded 15 months' notice, a nine-month *Wallace* extension for Honda's egregious bad faith and hardball manner of dismissal, punitive damages of $500,000 (which was subsequently reduced to $100,000 by the Court of Appeal) and costs of $610,000.

Now the decision rests with the Supreme Court of Canada as to what it will do with the punitive damages award and what, if any, common law changes will be made to allow access to the courts for human rights violations in an employment law context.

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DND felt issues couldn't be resolved to worker's satisfaction

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caused his illness "will never be resolved to his satisfaction." As a result, it terminated Pepper on June 30, 2006.

Pepper filed a complaint of wrongful dismissal, claiming DND based its decision to terminate him on information from a confidential mediation process and it failed to accommodate his disability.

DND based termination on information from mediation

The adjudicator found Pepper and DND had signed an agreement for the September 2003 mediation emphasizing the confidentiality of the process. However, the recommendation to terminate Pepper's employment relied on several pieces of information that were in the mediation process, including: the psychiatrist's 2004 medical report, for which DND asked for an update before deciding to terminate him; the return-to-work options; the assessment of Pepper's ability to return to work; Pepper's wish to work with a different supervisor; and Pepper's rejection of the return-to-work options.

"It is clear the employer did not treat the mediation process as a means of resolving the precise dispute for which it had been set up," the adjudicator said. "Rather, the process was confused as merely a step within an entirely different process, namely, the decision to terminate (Pepper's) employment."

DND didn't try to resolve workplace issues

The adjudicator also found since Pepper's medical condition was a factor in the decision to terminate him, he was discriminated against and accommodation was required to the point of undue hardship.

The adjudicator agreed the termination decision met two of the *Meiorin* elements in that Pepper's attendance was rationally connected to his job performance and the standard was adopted in good faith and tied to a work-related purpose. However, the third element, that the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose, wasn't met as Pepper's psychiatrist had said he could return to work if the workplace issues were resolved or he was retrained. However, DND ignored these possibilities.

"The employer made up its mind to terminate (Pepper's) employment before obtaining any evidence of his complete disability," the adjudicator said. "Had the employer truly been concerned with accommodating his return to work, it would have become knowledgeable about his disability and examined the possibilities of accommodation as they existed (in 2006)."

The adjudicator ordered Pepper to be reinstated to his position and be entitled to the same wages and benefits.

For more information see:

- *Pepper v. Canada (Treasury Board — Department of National Defence)*, 2008 CarswellNat 401 (Can. P.S.L.R.B.).

MORE CASES

COMPILED BY JEFFREY R. SMITH

WRONGFUL DISMISSAL: Unsatisfactory performance not cause to fire radio host: Court

A SASKATCHEWAN radio station didn't have just cause when it fired a morning show host for unsatisfactory job performance, the Saskatchewan Court of Queen's Bench has ruled.

Grant Schutte was the program director and an on-air personality with a radio station in Swift Current, Sask., when he was recruited by a station in Melfort, Sask., in December 2001. The Melfort station, CJVR, approached Schutte about a similar role where he would host a morning show and oversee the station's change to a new format. Shutte agreed to an offer of $3,800 per month that would increase to $4,000 per month on Sept. 1, 2002. CJVR also agreed to pay expenses for his moving, temporary accommodation in Melfort and legal costs associated with the move.

In accepting the position, Schutte sent an e-mail saying he had never spent less than five years at a radio station and was willing to commit to "that same time scale" to CJVR. The station's general manager responded with the comment "commitment — five years would be a nice start."

As part of his job at CJVR, Schutte was given a plan to establish the new station format. Soon, however, station management grew unhappy with his performance. It gave him suggestions on how to bring about the change and eventually warned him he could be dismissed if he didn't improve. By February 2002, Schutte was performing the duties of three positions: program manager, music director and on-air host. This left him with little time to work on the format change.

On Sept. 1, 2002, CJVR increased his salary but only to $3,900 per month instead of the $4,000 originally agreed to because of its dissatisfaction with his performance. Schutte didn't dispute the decision.

On June 26, 2003, Schutte received a review of his performance that said he would be monitored for 30 days and if he didn't improve, he would be terminated. At the end of this period, CJVR didn't see the improvement it wanted and fired Schutte for cause on Aug. 15, 2003.

Schutte sued for breach of contract and wrongful dismissal, claiming he had agreed to a five-year contract and CJVR didn't have cause to fire him without any notice.

The court found Schutte and CJVR didn't agree to a five-year term and the reference to that period of time was just an indication of their hope it would be a long-term arrangement. Without a fixed term, the contract would be for an indefinite term subject to dismissal for cause or with reasonable notice.

However, the court found there wasn't sufficient cause to dismiss Schutte without notice. The station's performance review indicated to Schutte it believed he had "tremendous talent and experience" that shows it was unlikely Schutte had a level of serious incompetence that would be a ground for cause. A March 2003 review by a consultant also recommended assigning musical director duties to another employee to free up Schutte to work on other things.

"The inability or failure to perform may well be more related to inappropriate or inattentive hiring procedures or a change in employment climate rendering the employee less able to meet the employer's shifting goal rather than employee intransigence or incompetence," the court said. "To terminate without salary or notice in such event would be inequitable and contrary to the public's interest in maintaining a stable work force."

The court ruled Schutte was entitled to reasonable notice, which, considering his skills, the limited availability of alternate employment in Melfort and the fact he had been enticed from previous employment, was five months less his severance, or $15,900. See *Schutte v. Radio CJVR Ltd.*, 2007 CarswellSask 780 (Sask. Q.B.).

JUST CAUSE: E-mailing fired employee's termination letter violated privacy: privacy commissioner

AN ALBERTA company illegally violated a former employee's privacy when it e-mailed his termination letter to a prospective employee, the office of the information and privacy commissioner has ruled.

On Oct. 19, 2005, a staff member of Point Centric Inc., a Calgary-based systems integration and services company, was discussing a job candidate's potential duties if he was hired. The candidate's potential job duties were directly affected by the circumstances of the former employee's dismissal, so the staffer e-mailed a copy of the former employee's letter of termination to the candidate. After finding out, the former employee filed a complaint, arguing the disclosure of his personal information to a third party without his consent was contrary to Alberta's Personal Information Protection Act (PIPA).

Point Centric argued the disclosure was for business reasons as it was pertinent to the hiring of the prospective employee, but did not provide any direct evidence from the employee who did it as to why it was necessary.

The adjudicator found the termination letter contained personal information that is normally collected, used and disclosed for the purposes of managing or terminating the employment relationship. Since it was collected while the former employee still worked for the company, it was acceptable for Point Centric to have it, but the reason it was disclosed was not related to the reason it was collected. Because the employment relationship was over, Point Centric had no right to release it under PIPA.

The adjudicator ruled the personal information was inappropriately disclosed and ordered Point Centric to stop providing it to prospective employees. See *Office of the Information and Privacy Commissioner Order P2007-005* (Feb. 14, 2008), F. Work — Commissioner.

Mall manager asked to leave the store

This instalment of You Make the Call looks at a dispute over when an employee's notice of termination was given.

Catherine Bent, 41, worked for Atlantic Shopping Centres Ltd., a shopping centre operator in Eastern Canada. After starting as a building manager in 1990, Bent worked her way up to the position of manager of the Fundy Trail Mall in Truro, N.S., in 1993.

On Aug. 14, 1998, Bent lost her unborn child from complications with her pregnancy. She took two weeks off work to recover and, on her doctor's advice, added another eight weeks until mid-October to recover emotionally.

How would you handle this case?
Read the facts and see if the judge agrees

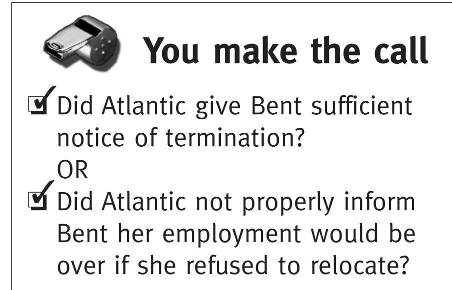
On Sept. 24, 1998, while still on leave, Bent met with Atlantic's regional manager, who told her the Fundy Trail Mall was going to be converted from an indoor mall to a strip mall. Once the renovation was complete, it would no longer need a manager and her position would end. Bent was offered an assistant manager position in Fredericton, N.B., and was given four days to consider.

Bent rejected the offer the next day because she couldn't relocate to Fredericton. Her husband was taking a course in Truro and would get a good job when he graduated.

Atlantic sent Bent a letter that day, confirming her position would end "no later than mid-1999" and its offer of the position in Fredericton. On Feb. 5, 1999, it sent her another letter confirming her rejection of the job offer and stating her termination date would be July 30, 1999, unless she could find alternate employment. Atlantic also said it would release her on short notice if she found a job.

In March 1999, Bent applied for two jobs at Atlantic-owned properties. She wasn't qualified for one and Atlantic hired someone else for the other. Bent was upset with the decision and went on sick leave but was turned down for short-term disability (STD). As a result, Atlantic stopped paying her as "we do not pay employees who are not at work and not on STD or LTD." However, it did keep her as an employee so she would be eligible for medical benefits.

On Aug. 9, 1999, Atlantic sent Bent a letter confirming July 30 had been her termination date. Bent claimed she didn't want to leave her employment with Atlantic and had never agreed to July 30 as her termination date. She said she believed there would be other employment with Atlantic available and had no understanding her career with the company would be over if she refused the Fredericton job offer.



You make the call

- ☑ Did Atlantic give Bent sufficient notice of termination?

OR

- ☑ Did Atlantic not properly inform Bent her employment would be over if she refused to relocate?

IF YOU SAID Bent was given sufficient notice, you're right. The court found the meeting and subsequent letter of Sept. 24 and 25, 1998, when Atlantic told her after mid-1999 it would no longer have a job for her unless she took the position in Fredericton was "clear and unequivocal" notice of her termination. Atlantic's suggestion of the possibility of other positions near Truro was just a suggestion, not a basis for arguing she wasn't being terminated. The court found a reasonable person would take the message of the meeting and letter as clear notice of termination.

"Bent had no future job offer with Atlantic beyond the Fredericton proposal," the court said. "The most that she could have reasonably anticipated was the possibility of continued employment, should job opportunities develop."

Having found the notice was given on Sept. 25, 1998 for a termination date of July 30, 1999, the court agreed 10 months was reasonable notice for someone of Bent's age with nine years of service and a "lower management responsibility."

The court also denied Bent's claims of bad-faith dealing by Atlantic as the company gave her more time than she took to make a decision on the Fredericton job offer and its refusal to pay her when she stopped working in March 1999 was a reasonable expectation. CELT

For more information see:

- *Bent v. Atlantic Shopping Centres Ltd.*, 2007 CarswellNS 446 (N.S. S.C.).

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