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Key Employment Law Decisions 2012 & 2013

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BIO – Ron Minken, B.A. (Hon.), LL.B.

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Ron heads Minken Employment & Labour Lawyers – a Global Award Winning Employment & Labour Law Boutique located in Markham in the GTA. With 23 years of experience as a lawyer, and mediator, he is well known by clients – employees and employers – and the business community, locally, nationally and in the United Kingdom and the United States, as heading a leading edge team, and as an energetic and passionate proponent for HR and Employment & Labour Law. For many years, Ron has also been recognized as one of Canada's Top Employment Lawyers by *Canadian HR Reporter* in its *Canada's Employment Lawyers Directory*. Ron regularly contributes to legal, business and HR publications such as *Canadian HR Reporter*, *Canadian Employment Law Today*, *Law Times* and *Magazine for Business* and has been quoted in publications such as *The Toronto Star* and *The Financial Post*.

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BIO – Sara A. Kauder, LL.B.

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Sara has been an associate of Minken Employment Lawyers and a critical part of the team since 2006, having initially joined the firm in 2004. Sara is an employment law expert known for helping HR Professionals, both locally and nationally, with the legal challenges they face, including matters relating to wrongful dismissal, constructive dismissal, human rights issues, workplace violence and harassment as well as the drafting of employment contracts and policies. Sara has represented clients in the Superior Courts as well as before the Human Rights Tribunal and the Ministry of Labour. She has a clear-sighted objectivity and reputation for presenting the bottom line that clients find invaluable in a trusted advisor. Sara has co-authored papers for a variety of publications and has participated as a guest speaker at various corporate functions and professional development seminars.

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BIO – Kyle D. Burgis, B.A. (Hon.) LL.B.

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Kyle initially joined Minken Employment Lawyers in 2008, and became an associate shortly thereafter. His practice focuses exclusively on employment law issues, such as employment terminations, employment contracts and workplace policies. He has the distinction of having his first work published while still in law school, and has also co-authored papers that have been presented at educational seminars hosted by the Ontario Bar Association and the Law Society of Upper Canada. Kyle has represented the firm's clients, both employers and employees, on a number of matters before various Courts, Tribunals and Boards, including the Ontario Superior Court of Justice, the Ontario Small Claims Court, the Ontario Human Rights Tribunal, and the Ontario Labour Relations Board.

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PROFIT SHARING BONUS THROUGHOUT STATUTORY PERIOD

Sandu v. Solutions 2 Go Inc.

Ontario Superior Court of Justice

Justice L. Ricchetti J.

Judgment: April 2, 2012

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PROFIT SHARING BONUS THROUGHOUT STATUTORY PERIOD
– *Sandu v. Solutions 2 Go Inc.*

Facts

- Termination without notice May 25, 2010
- Statutory notice until June 22, 2010
- Fiscal year – April 1, 2009 – March 31, 2010
- Profit Sharing Bonus announced June 18, 2010
- No Profit Sharing Bonus provided in termination package

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PROFIT SHARING BONUS THROUGHOUT STATUTORY PERIOD
– *Sandu v. Solutions 2 Go Inc.*

Decision

- ESA – s. 54 written notice in accordance with section 57 and 61
- s. 57(d) notice of termination at least 4 weeks before the termination
- s. 60(1)(a) During notice period employer shall not reduce the employee's wage rate or alter any other term or condition of employment
- Employee to receive Profit Sharing Bonus as would otherwise have been entitled to receive during the statutory notice period

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PROFIT SHARING BONUS THROUGHOUT STATUTORY PERIOD
– *Sandu v. Solutions 2 Go Inc.*

Lessons

- Ensure that Profit Sharing Bonus provided through statutory period if would otherwise be paid
- Keep employee whole during statutory notice period
- s. 1 “wages” – not include “bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency”
- Rizzo & Rizzo Shoes Ltd. (Re) S.C.C. - ESA “benefits-conferring legislation”, “interpreted… broad[ly] and generous[ly]”, “”doubt resolved in favour of [employee]”

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PRIVACY

R. v. Cole

Supreme Court of Canada

McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ.

Judgment: October 19, 2012

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PRIVACY
– *R. v. Cole*

Facts

- High School teacher permitted to use work-issued laptop computer for incidental personal purposes
- Technician doing maintenance discovers folder containing nude photographs of student
- Employer copied photographs and internet files which police reviewed without warrant
- Employee charged under the Criminal Code

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PRIVACY
– *R. v. Cole*

Decision

- Employee has a reasonable, yet diminished expectation of privacy in personal information, where personal use is permitted or reasonably expected on a work computer
- Ownership of computer not determinative
- Context in which personal information is placed on workplace computer
- Totality of circumstances to determine whether privacy is a reasonable expectation
- Operational and technological realities deprive exclusive control and access to personal information diminishing employees' expectation of privacy

PRIVACY
– *R. v. Cole*

Lessons

- Policies, practices, custom should eliminate or reduce reasonable expectation of privacy
- Clearly state limitations or removal of privacy in Employment Agreement
- Permitting personal use and employee having password weighs for reasonable expectation of privacy
- Exercise caution in accessing employees' personal information on work computer

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TORT OF INTRUSION UPON SECLUSION

Jones v. Tsige

Ontario Court of Appeal

W.K. Winkler C.J.O., R.J. Sharpe J.A.
and J.D. Cunningham A.C.J.S.C.J.

Judgment: January 18, 2012

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TORT OF INTRUSION UPON SECLUSION
– *Jones v. Tsige*

Facts

- Bank employees working at different branches
- Jones did all personal banking at branch where worked
- Over 4 years and on 174 occasions Tsige accessed and reviewed Jones private banking records
- Tsige disciplines by bank
- Jones sued Tsige alleging tort of breach of invading her privacy

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TORT OF INTRUSION UPON SECLUSION
– *Jones v. Tsige*

Decision

- Key features of tort of intrusion upon seclusion:
- Defendant's conduct had to be intentional or reckless
- Defendant must have invaded, without lawful justification, the Plaintiff's private affairs
- Reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish
- Proof of harm to economic interests not required to be made
- Damages up to $20,000 for non-pecuniary loss as symbolic, plus aggravated & punitive damages

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TORT OF INTRUSION UPON SECLUSION
– *Jones v. Tsige*

Lessons

- Caution in accessing personal information at workplace
- Employer liability to employee for accessing personal information
- Employee conduct may constitute grounds to terminate
- Care to be exercised with employee privacy rights

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CLASS ACTIONS FOR OVERTIME PAY

Fulawka v. Bank of Nova Scotia
Fresco v. Canadian Imperial Bank of Commerce
McCracken v. Canadian National Railway Co.
Supreme Court of Canada

W.K. Winkler C.J.O., et al.
Judgment: March 21, 2013

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CLASS ACTIONS FOR OVERTIME PAY
– *Fulawka v. Scotiabank*

- 5,000 employees
- $350 Million

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CLASS ACTIONS FOR OVERTIME PAY
– *Fresco v. Canadian Imperial Bank of Commerce*

- 31,000 employees
- $600 Million

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CLASS ACTIONS FOR OVERTIME PAY
– *McCracken v. Canadian National Railway Co.*

- 1,550 employees
- $300 Million

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CLASS ACTIONS FOR OVERTIME PAY
– *Fulawka v. Scotiabank, Fresco v. CIBC*

Background

- Overtime policies impose more restrictive conditions for receiving overtime than the Canada Labour Code.
- Requirement for prior approval for overtime work used to avoid requirement to pay overtime under s. 174 of Code for excess hours required or permitted to work.

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CLASS ACTIONS FOR OVERTIME PAY
– *Fulawka v. Scotiabank, Fresco v. CIBC*

Background

- Pre-approval contrary to s. 174 Canada Labour Code:
- "When an employee is required or permitted to work in excess of the standard hours of work, the employee shall…be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages."
- Eg. meetings outside of work hours, serving customers through lunch or after closing, balancing tills before and after shifts, supervision, returning cash to vaults
- Failure to implement proper record-keeping systems for recording overtime hours
- Failure to implement system for monitoring and preventing employees from working overtime

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CLASS ACTIONS FOR OVERTIME PAY
– *McCracken v. CNR*

Background

- Misclassification of employees as managers to avoid obligation to pay overtime

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CLASS ACTIONS FOR OVERTIME PAY
– *Fulawka v. Scotiabank, Fresco v. CIBC, McCracken v. CNR*

Class Action Law for Certification

Class Proceedings Act, 1992, s. 5(1):

- The pleadings disclose a cause of action (plain and obvious that cannot succeed at Trial)
- There is an identifiable class
- The claims raise common issues (failure to pay systemic rather than individual)
- A class proceeding would be the preferable procedure for the resolution of the common issues (avoid individual trials, fear of reprisal vs. anonymity/protection, weakness and limitations in Code procedures – eg no jurisdiction to investigate alleged violations of overtime policy, no alternative procedures provide efficient means of resolution)
- There are appropriate representative plaintiffs who could produce a workable litigation plan

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CLASS ACTIONS FOR OVERTIME PAY
– *Fulawka v. Scotiabank, Fresco v. CIBC, McCracken v. CNR*

Supreme Court of Canada Decisions

- Bank class actions to proceed
- CNR class action to not proceed

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CLASS ACTIONS FOR OVERTIME PAY
– *Fulawka v. Scotiabank, Fresco v. CIBC, McCracken v. CNR*

Lessons

- Overtime claims on radar of Supreme Court of Canada
- Review overtime policy and overtime legislation (CLC, ESA 2000) for compliance
- Implement a record keeping system for recording overtime hours
- Implement a system for ***monitoring*** and ***preventing*** employees from working overtime

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INVALIDITY OF SIGNED RELEASE

Rubin v. Home Depot Canada Inc.

Ontario Superior Court of Justice

Justice Lederer

Judgment: May 25, 2012

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INVALIDITY OF SIGNED RELEASE
– *Rubin v. Home Depot Canada Inc.*

Facts

- 63 year old employee terminated after 20 years without cause, no termination clause
- Offered 28 weeks notice (a few days more than *ESA*), some benefits for 8 weeks
- 1 week to review offer; signs Release in termination meeting, later argues Release invalid

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INVALIDITY OF SIGNED RELEASE
– *Rubin v. Home Depot Canada Inc.*

Decision

- Release unconscionable, unenforceable; employee entitled to 12 mo notice
- 4 elements of unconscionability: (1) grossly unfair transaction; (2) victim's lack of independent legal advice or other suitable advice; (3) overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, illness, disability; and (4) other party knowingly taking advantage of this vulnerability
- Employer failed to inform *ESA* entitlement would be provided if Release not signed
- Termination letter implied no notice, including *ESA*, unless Release signed

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INVALIDITY OF SIGNED RELEASE
– *Rubin v. Home Depot Canada Inc.*

Decision

- Offer only a few days more than *ESA* notice; only 6 mo for 20 yr employee at end of working life
- No legal advice prior to signing
- Offer presented as having only 2 options – accept as is or direct a portion to RRSP
- Imbalance of bargaining power, employer aware of imbalance
- Employee's lack of business sophistication

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INVALIDITY OF SIGNED RELEASE
– *Rubin v. Home Depot Canada Inc.*

Lessons

- Ensure Release provided, signed in right way so it will be legally binding, enforceable!
- Do not directly, indirectly pressure employee to sign Release
- Provide employees with opportunity to obtain legal advice
- Suggest employee take time to review documents before signing
- Do not make *ESA* entitlements conditional on a signed Release!
- Inform employees they will receive *ESA* entitlements even if Release not signed
- Language critical, but so is the way the documents are presented & signed
- Have properly drafted termination clauses that limit or exclude common law notice

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HUMAN RIGHTS – FAMILY STATUS

Devaney v. ZRV Holdings Limited

Ontario Human Rights Tribunal

Adjudicator Eyolfson
Judgment: August 17, 2012

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HUMAN RIGHTS – FAMILY STATUS
– *Devaney v. ZRV Holdings Limited*

Facts

- 27 year employee terminated for excessive absences
- Most absences due to eldercare responsibilities to ill mom
- Employer aware of care responsibilities despite no formal request for accommodation
- Employee working from home, evenings to perform duties while caring for mom
- Employer insisted employee be in office during business hours, if not, termination
- Before termination, employer informed mom accepted to nursing home
- Employee terminated, provided with notice
- Application for discrimination due to family status

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HUMAN RIGHTS – FAMILY STATUS
– *Devaney v. ZRV Holdings Limited*

Decision

- Employer failed to accommodate employee
- Employer aware of eldercare responsibilities, duty to explore accommodation
- Accommodating would not have caused undue hardship
- Employee able to work from home, performing duties
- Insistence that employee attend work regardless of eldercare responsibilities violation of *Code*
- Employer failed to distinguish between *Code*-related and other absences
- Remedy: $15,000 for injury to dignity, feelings & self respect; employer must develop, implement workplace human rights policy, providing training

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HUMAN RIGHTS – FAMILY STATUS
– *Devaney v. ZRV Holdings Limited*

Lessons

- Family status includes eldercare responsibilities
- Not necessary for employee to prove all absences due to protected ground to show discrimination
- Explore accommodation even if no formal request
- Rigid workplace policies may be discriminatory
- Consider options prior to terminating

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HUMAN RIGHTS – FAMILY STATUS

Johnstone v. Canada (Border Services)
Federal Court of Canada

Justice Mandamin
Judgment: January 31, 2013

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HUMAN RIGHTS – FAMILY STATUS
– *Johnstone v. Canada (Border Services)*

Facts

- Full time Customs Supervisor required to work irregular rotating shifts as per policy
- Husband also works rotating shifts; employee primary parent caring for 2 children
- Employee not able to arrange childcare around irregular shifts
- Requested full time static shifts after each maternity leave, accommodation denied
- Offered part time work with fixed schedule
- Pension, benefits, advancement only available for full time employees
- Application for discrimination due to family status

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HUMAN RIGHTS – FAMILY STATUS
– *Johnstone v. Canada (Border Services)*

Decision

- "Family status" includes parental childcare responsibilities
- Unwritten policy accommodating shifts for medical, religious reasons, but not childcare discriminatory
- Childcare responsibilities manageable had accommodation been granted
- Shift policy negatively affected employment opportunities, including promotion, training, benefits based on family status
- Remedy: full time wages, benefits for 1 year; $15,000 for general damages for pain, suffering; $20,000 for special compensation (similar to punitive damages)

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HUMAN RIGHTS – FAMILY STATUS
– *Johnstone v. Canada (Border Services)*

Lessons

- Employers must work with employees to create solutions that balance parental obligations with work, short of undue hardship
- Family obligations are legitimate needs, accommodation must be explored
- If no *bone fide* occupational requirement or undue hardship, employer must accommodate
- Ensure accommodation for all enumerated grounds, not selected grounds

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HUMAN RIGHTS – DISABILITY

Fair v. Hamilton-Wentworth District School Board
Ontario Human Rights Tribunal

Adjudicator Joachim
Judgments: February 17, 2012 and March 14, 2013

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HUMAN RIGHTS – DISABILITY
– *Fair v. Hamilton-Wentworth District School Board*

Facts

- Supervisor, Regulated Substances Asbestos; medical leave after 16 years due to generalized anxiety disorder
- Disability due to highly stressful nature of job
- LTD for 2 yrs; later able to return to work, but not to prior position
- Employee wanted to return to different position; employer refuses, terminates
- Application for discrimination due to disability

HUMAN RIGHTS – DISABILITY
– Fair v. Hamilton-Wentworth District School Board

Decision

- Employer failed to actively, promptly, diligently canvass ways to accommodate
- Not open to canvassing alternate positions which were available; refused to meet with Insurer's vocational rehabilitation consultant; refused to provide essential duties of position; delayed in meeting with employee to discuss return to work for over 4 mo; insisted return to prior position or not at all; terminated despite medical evidence able to return to different position
- Remedy: reinstatement with up to 6 mo of training; payment of lost wages for 11.5 years (from date suitable position available but not offered, to date of reinstatement), less income received; recognized lost pension, CPP payments; out of pocket medical & dental expenses; $30,000 for injury to dignity, feelings, self-respect

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HUMAN RIGHTS – DISABILITY
– *Fair v. Hamilton-Wentworth District School Board*

Lessons

- Obligations on both employee, employer to canvass options for accommodation
- Meet with employee, doctors, insurers to discuss options
- Request medical information to determine options
- Employers may be responsible for cost of medical documents outlining accommodation needs
- Right to reinstatement does not diminish with passage of time!
- Significant exposure to liability arising from violations of *Human Rights Code*!

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DUTY TO MITIGATE AND TERMS OF EMPLOYMENT AGREEMENT

Bowes v. Goss Power Products Ltd.

Ontario Court of Appeal

Chief Justice W.K. Winkler
Judgment: June 21, 2012

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DUTY TO MITIGATE AND TERMS OF EMPLOYMENT AGREEMENT
– *Bowes v. Goss Power Products Ltd.*

Facts

- Employment Agreement containing termination clause which provided 6 months notice or pay in lieu of notice
- Termination clause did not state Employee's mitigation obligations over the 6 month notice period
- Employee terminated and offered 6 months notice subject to his mitigation efforts
- Within two weeks Employee obtained new employment
- Only the remainder of statutory minimums provided and not the balance of the 6 months

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DUTY TO MITIGATE AND TERMS OF EMPLOYMENT AGREEMENT
– *Bowes v. Goss Power Products Ltd.*

Decision

- Employee entitled to 6 months notice
- When an Employment Agreement contains a fixed period of notice, the parties have agreed to displace the common law period of reasonable notice, and as a result, there is no longer an implied duty to mitigate

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DUTY TO MITIGATE AND TERMS OF EMPLOYMENT AGREEMENT
– *Bowes v. Goss Power Products Ltd.*

Lessons

- Address all outcomes after an employee's departure in an Employment Agreement
- Include terms that would normally appear in a termination letter
- Never exclude the Employee's duty to mitigate regardless of notice entitlements

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VALIDITY OF EMPLOYMENT AGREEMENTS

Fasullo v. Investments Hardware Ltd.

Ontario Superior Court of Justice

Justice Sanderson
Judgment: May 10, 2012

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VALIDITY OF EMPLOYMENT AGREEMENTS
– *Fasullo v. Investments Hardware Ltd.*

Facts

- Employment relationship established in accordance with verbal contract
- Written contract provided to Employee two days later containing similar terms except for the inclusion of a termination clause restricting notice entitlements to the *Employment Standards Act, 2000* statutory minimums
- Employee terminated and seeks notice in addition to statutory minimums claiming termination clause is invalid due to lack of consideration

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VALIDITY OF EMPLOYMENT AGREEMENTS
– *Fasullo v. Investments Hardware Ltd.*

Decision

- As the Employer failed to provide consideration to the Employee in return for signing the written contract, the written contract, and termination clause therein, is invalid entitling Employee to common law notice

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VALIDITY OF EMPLOYMENT AGREEMENTS
– *Fasullo v. Investments Hardware Ltd.*

Lessons

- Consideration must be provided to make written contract valid
- Various forms of consideration – remuneration, vacation, benefits, etc.
- Flag consideration in written contract

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CONSTRUCTIVE DISMISSAL AND MITIGATION

Chandran v. National Bank of Canada

Ontario Court of Appeal

Justice MacPherson, Justice LaForme and Justice Pattilo
Judgment: March 27, 2012

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CONSTRUCTIVE DISMISSAL AND MITIGATION
– *Chandran v. National Bank of Canada*

Facts

- Appeal by Employer for award of $131,226.00 for wrongful dismissal
- Employer relieved Employee of supervisory duties after complaints made by co-workers Employer offered two reassignments to the Employee which did not involve supervisory duties
- Employee refused both reassignments and left employment
- Lower Court determined Employee was constructively dismissed and did not have to continue working with Employer to mitigate damages

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CONSTRUCTIVE DISMISSAL AND MITIGATION
– *Chandran v. National Bank of Canada*

Decision

- Lower Court decision upheld
- No duty to mitigate with Employer given atmosphere of embarrassment and or humiliation

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CONSTRUCTIVE DISMISSAL AND MITIGATION
– *Chandran v. National Bank of Canada*

Lessons

- Consider impact of any change in position
- Change in position may result in atmosphere of hostility, embarrassment and or humiliation
- Duty to mitigate argument has its limitations

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MINISTRY OF LABOUR SANCTIONS UNDER THE *EMPLOYMENT STANDARDS ACT, 2000*

R. v. Blondin

Ontario Superior Court of Justice

Justice Bubrin
Judgment: November 1, 2012

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Ministry of Labour Sanctions under the *Employment Standards Act, 2000* – *R. v. Blondin*

Facts

- Between March 2007 and October 2009, 61 employees employed by Mr. Blondin's 6 companies filed claims with the Ministry of Labour for unpaid wages
- Ministry of Labour found that wages were owed to all 61 workers issuing 112 Orders to Pay totaling $142,000.00
- Mr. Blondin's 6 companies failed to pay any of the Orders to Pay
- Mr. Blondin was the sole director of the 6 companies

Ministry of Labour Sanctions under the *Employment Standards Act, 2000* – *R. v. Blondin*

Decision

- Mr. Blondin pled guilty
- Sentenced to 3 months imprisonment
- $40,000.00 fine against Mr. Blondin personally
- Fined Mr. Blondin's 6 companies $240,000.00

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Ministry of Labour Sanctions under the *Employment Standards Act, 2000* – *R. v. Blondin*

Lessons

- Importance of complying with the *Employment Standards Act, 2000*
  - Section 132
  - Section 135
  - Section 136
- Severe penalties for both companies and directors

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OTHER KEY EMPLOYMENT LAW DECISIONS

Barton v. Rona – Ontario Superior Court of Justice, August 3, 2012

- Employee's termination for cause not justified on basis that it was disproportional to the Employee's misconduct, and casting doubt on workplace policies that provide for "zero-tolerance".

Dechene v. Dr. Khurrum Ashraf Dentistry Partnership Corp. – Ontario Superior Court of Justice, August 9, 2012

- Failing to keep employee's position available during the offered working notice period removes Employer's ability to argue a reduction in notice.

Stevens v. Sifton Properties – Ontario Superior Court of Justice, October 9, 2012

- Provides insight on the validity and enforceability of termination clauses, including wording that establishes a floor and ceiling for notice, reinforcing the decision in *Wright v. Young and Rubicam Group of Companies (Wunderman)*, and the impact of failing to correctly cite the *Employment Standards Act, 2000*

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OTHER KEY EMPLOYMENT LAW DECISIONS

Higgins v. Babine Forest Products Ltd. – Supreme Court of British Columbia, April 30, 2010 (Jury)

- $809,000.00 in damages, representing $236,000.00 for wrongful dismissal and $573,000.00 in punitive damages, after terminating Employee without notice after 34 years of service

Martin v. Concreate USL Limited Partnership – Ontario Court of Appeal, February 5, 2012

- Ambiguity in restrictive covenants with respect to what activity is prohibited, for how long, and or in what geographic area, resulting in unenforceability

Boucher v. Walmart Canada Corp. and Jason Pinnock – Ontario Superior Court of Justice, October 10, 2010 (Jury)

- Employee awarded $1.4 million on the basis of workplace harassment and violence which constituted constructive dismissal ($1 million punitive damages)

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QUESTIONS AND ANSWERS

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THE END – THANK YOU!

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