

# MINKEN

---

## EMPLOYMENT LAWYERS



# Key Employment Law Decisions 2011 & 2012



Minken Employment Lawyers

May 3, 2012

Richmond Hill Country Club  
8905 Bathurst St., Richmond Hill, Ontario



# ISSUE: ENFORCEABILITY OF TERMINATION PROVISIONS

---

*Wright v. Young and Rubicam Group of  
Companies (Wunderman)*, 2011 ONSC 4720  
(Ont. Superior Court of Justice)

Justice W. Low

August 8, 2011

# Issue: Enforceability of Termination Provisions

---

## *Wright v. Young and Rubicam Group of Companies (Wunderman)*

### **Facts**

- Termination Clause - Notice for 5 years = 13 weeks base salary, inclusive of all compensation.
- Provided above notice and full benefits, LTD and LI stopped at end of statutory period.
- Notice in clause less than statutory minimums in some cases.
- No benefits in clause.

# Issue: Enforceability of Termination Provisions

## *Wright v. Young and Rubicam Group of Companies (Wunderman)*

### **Decision**

- Termination Clause Struck
- 12 months notice and benefits throughout
- ESA s. 5(1) no contract out or waiver of employment standards
- *Machtinger v HOJ Industries Ltd.*, S.C.R. - presumption of reasonable notice not rebutted if agreement doesn't comply with minimum statutory notice requirement.
- ESA s. 61(1) benefit plan contributions to be maintained during the notice period.

# Issue: Enforceability of Termination Provisions

---

## *Wright v. Young and Rubicam Group of Companies (Wunderman)*

### **Lessons**

Termination clauses fail that don't guarantee ESA minimums.

- S. 57 Notice
- S. 61 Pay in lieu
- S. 61 Benefits – continue to make benefit plan contributions and maintain benefits
- S. 64 Severance – lump sum

# ISSUE: DISABILITY BENEFITS THROUGHOUT NOTICE PERIOD

---

*Brito v. Canac Kitchens,  
A Division of Kohler Canada Co.*  
2012 ONCA 61 (Ont, Court of Appeal)

Justices Cronk, Blair, Strathy

January 31, 2012

# Issue: Disability Benefits Throughout Notice Period

---

*Brito v. Canac Kitchens, A Division of Kohler Canada Co.*

## **Facts**

- Termination without cause
- 24 year service cabinetry maker aged 55
- Only statutory notice provided including disability benefits
- Disability occurred 16 months after termination
- No disability benefits provided beyond 8 weeks

# Issue: Disability Benefits Throughout Notice Period

*Brito v. Canac Kitchens, A Division of Kohler Canada Co.*

## Decision

- Notice period of 22 months
- Damages for disability benefits to age 65
- Employer must "make the employee whole" for the common law period of reasonable notice
- *Bardal v. Globe & Mail Ltd* - reasonableness of notice decided with reference to each particular case, having regard to the character of employment, the length of service, age and availability of similar employment having regard to the experience, training and qualifications



# Issue: Disability Benefits Throughout Notice Period

---

*Brito v. Canac Kitchens, A Division of Kohler Canada Co.*

## **Lessons**

- Continue full benefits throughout the reasonable period of notice
- Contact insurer to ensure their cooperation
- Utilize an iron clad Employment Agreement to limit benefits to statutory only

# ISSUE: FRUSTRATION OF CONTRACT

---

*ALTMAN v. STEVE'S MUSIC STORE INC.*  
2011 ONSC 1480  
(Ont. Superior Court of Justice)

Justice K.B. Corrick

March 8, 2011

# Issue: Frustration of Contract

---

## *Altman v. Steve's Music Store Inc.*

### **Facts**

- Office Manager, age 59, 30 years service, diagnosed with cancer
- 1 month medical leave after surgery; reduced hours during chemotherapy, radiation
- treatment ends, still working reduced hours
- letter from bailiff - work full time or be terminated
- 3 month medical leave, extended for another 3 months
- ready to return to work
- receives 2<sup>nd</sup> letter from bailiff – termination without notice due to frustration of contract

# Issue: Frustration of Contract

---

## *Altman v. Steve's Music Store Inc.*

### **Decision**

- Employment contract not frustrated at time of termination
- Illness not permanent; no medical evidence of disability when terminated; tenure of over 30 years; others in same role to assist when necessary
- Awarded 22 months notice, \$35,000 for mental distress, \$20,000 in punitive damages
- Employer callous & insensitive in manner of dismissal

# Issue: Frustration of Contract

---

## *Altman v. Steve's Music Store Inc.*

### **Lessons**

- Disability assessed at termination, not thereafter
- Never withhold pay without employee's consent
- Have written policies regarding sick days
- Do not propose a work or financial arrangement to employee, then back out later
- Have direct, open communications with employees first; do not ambush through letters from lawyers/bailiffs
- Complete disability forms in timely manner
- Provide ROE in timely manner
- Do not withhold statutory notice

# ISSUE: WORKING NOTICE

---

*Mattiassi v. Hathro Management Partnership*

2011 O.J. No. 4774  
(Small Claims Court)

Deputy Justice Z.J.C. Prattas

October 25, 2011

# Issue: Working Notice

---

## *Mattiassi v. Hathro Management Partnership*

### **Facts**

- Legal Assistant/Secretary terminated after 28 years
- 54 weeks working notice, followed by lump sum payment of 8.67 weeks notice = total of 62.67 weeks
- Hired and paid by Hathro Management Partnership, provided services to Thomson, Rogers
- Action for 26 weeks statutory severance (less 8.67 weeks already paid)

# Issue: Working Notice

---

## *Mattiassi v. Hathro Management Partnership*

### **Decision**

- Notice of termination (s. 54, s. 57) and severance (s. 64, s. 65) are two separate minimum entitlements
- no set off
- Severance is cumulative; payable in addition to other *ESA*, 2000 payments
- Employee entitled to balance of severance owing
- Liability shared between both Defendants; “effective control” by Thomson, Rogers



# Issue: Working Notice

---

## *Mattiassi v. Hathro Management Partnership*

### **Lessons**

- Statutory severance must be paid in lump sum; cannot be satisfied by working notice
- Providing more working notice does not satisfy obligation to provide statutory severance
- Ensure statutory minimums met before providing additional notice
- Mitigation earnings cannot be deducted from statutory notice
- Working notice must be implemented properly!

# ISSUE: WORKING NOTICE

---

*Di Tomaso v. Crown Metal Packaging Canada LP*  
2011 ONCA 469  
(Ont. Court of Appeal)

Justice A. MacPherson

June 22, 2011

# Issue: Working Notice

## *Di Tomaso v. Crown Metal Packaging Canada LP*

### **Facts**

- Mechanic, age 62, service of 33 years, terminated
- Working notice, followed by statutory severance
- Working notice extended 4 times over 5 months
- 5 written notices of termination, 4 termination dates
- On last day, received statutory severance, no pay in lieu of notice
- Employer argued 1<sup>st</sup> notice valid, temporary employment “working notice”; cap of 12 months notice for unskilled workers
- Motion Judge: 1<sup>st</sup> notice not valid, entitled to 22 months notice

# Issue: Working Notice

---

## *Di Tomaso v. Crown Metal Packaging Canada LP*

### **Decision**

- Appeal dismissed
- Employment cannot be extended for more than a single period of 13 weeks from the original notice unless fresh notice of termination is provided (O. Reg 288/01, s. 6(1) of *ESA, 2000*)
- Multiple extensions of termination date created uncertainty; termination date not “clear and unambiguous”
- No 12 month cap for unskilled workers in non-managerial positions

# Issue: Working Notice

---

## *Di Tomaso v. Crown Metal Packaging Canada LP*

### **Lessons**

- Be realistic in anticipating termination date
- Try to minimize extensions of termination date and try to ensure no more than 13 weeks or fresh notice required
- Character of employment one of many factors determining notice, should not be provided more weight than other factors

# ISSUE: WORKING NOTICE

---

*GIZA v. SECHELT SCHOOL  
BUS SERVICE LTD.*

2012 BCCA 18  
(BC Court of Appeal)

Justice Chiasson

January 13, 2012

# Issue: Working Notice

---

## *Giza v. Sechelt School Bus Service Ltd.*

### **Facts**

- Bus Driver, age 61, service of 5 years, terminated
- 5 weeks working notice
- Employee refused working notice, sues for wrongful dismissal instead
- Trial Decision: employer failed to provide proper notice but employee repudiated the contract by failing to work during working notice period; no entitlement to notice

# Issue: Working Notice

---

## *Giza v. Sechelt School Bus Service Ltd.*

### **Decision**

- Appeal allowed
- Failed to give adequate notice of termination
- Decision to refuse working notice does not displace employee's entitlement to proper notice
- Working notice period deducted from additional notice owing
- Awarded 6 months notice less working notice = 5 months



# Issue: Working Notice

---

## *Giza v. Sechelt School Bus Service Ltd.*

### **Lessons**

- Cannot be forced to work during working notice period
- Cannot force employer to convert working notice period to a lump sum payment of notice
- Period of working notice will be deducted from additional notice awarded
- Employers “get credit” for working notice even if employee refuses to work during that period

# ISSUE: BILL 168

---

*Kingston (City) v. Canadian Union of  
Public Employees, Local 109  
(Hudson Grievance)*  
2011 CanLII 50313 (ON LA)

Elaine Newman, Arbitrator

August 18, 2011

# Issue: Bill 168

---

## *Kingston (City) v. Canadian Union of Public Employees, Local 109 (Hudson Grievance)*

### **Facts**

- History of non-disciplinary and disciplinary warnings
- Attended Bill 168 training
- Threatened union's Local President's life
- Completed anger management counseling two days prior to threat

# Issue: Bill 168

---

## *Kingston (City) v. Canadian Union of Public Employees, Local 109 (Hudson Grievance)*

### **Decision**

- Four ways Bill 168 has impacted on process to determine appropriate penalty for acts of workplace violence:
  1. Language referencing the end of a person's life = violence
  2. Threats must be reported, investigated and addressed
  3. Questions to be considered when assessing the reasonableness of discipline
  4. Workplace safety
- Termination for cause was justified

# Issue: Bill 168

---

## *Kingston (City) v. Canadian Union of Public Employees, Local 109 (Hudson Grievance)*

### **Lessons**

- Clarity in application of Bill 168
- How Employers should assess possible acts of workplace violence
- Workplace violence under Bill 168 = termination for cause

# ISSUE: BILL 168

---

*Conforti v. Investia Financial Services Inc.*

2011 CanLII 60897 (ON LRB)

Brian McLean, Vice-Chair

September 23, 2011

# Issue: Bill 168

---

## *Conforti v. Investia Financial Services Inc.*

### **Facts**

- Alleged that he was being harassed at the workplace
- Believed employer did nothing in response
- Terminated after complaint
- Filed application with Ontario Labour Relations Board for violation of the *Occupational Health and Safety Act* (“OHSA”) - reprisal

# Issue: Bill 168

---

## *Conforti v. Investia Financial Services Inc.*

### **Decision**

- Section 50 of *OHSA* = dismissal for acting in compliance of the *OHSA*
- No allegations that Employer did not fulfill obligations under the *OHSA*
- No allegations that Employee was discharged for seeking to enforce provisions under the *OHSA*
- No obligation under the *OHSA* to keep the workplace harassment free
- No jurisdiction to hear issue



# ISSUE: BILL 168

---

*Harper v. Ludlow Technical Products Canada Ltd.*  
2011 CanLII 73172 (ON LRB)

Susan Serena, Vice-Chair

November 18, 2011

# Issue: Bill 168

---

## *Harper v. Ludlow Technical Products Canada Ltd.*

### **Facts**

- Alleged that she was harassed at the workplace
- Filed complaint with Employer
- Claims that Employer failed to investigate complaint and did not comply with its harassment policy
- Filed application claiming Employer breached s. 50 of *OHSA*

# Issue: Bill 168

---

## *Harper v. Ludlow Technical Products Canada Ltd.*

### **Decision**

- Considered decision in *Conforti v. Investia Financial Services Inc.*
- Adopted same decision
- OLRB does not have jurisdiction over an application claiming a company did not comply with its workplace harassment policy and/or Employee subject to reprisal for filing harassment complaint

# Issue: Bill 168

---

*Conforti v. Investia Financial Services Inc.*  
&  
*Harper v. Ludlow Technical Products Canada Ltd.*

## **Lessons**

- Limitations of Bill 168 amendments to the *OHSA*
- Requirement of establishing policy
- Legislature could have easily stated that Employer has the obligation to provide a harassment free workplace
- Seek remedy through grievances or Courts

# ISSUE: *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005* (“AODA”)

---

# Issue: *Accessibility for Ontarians with Disabilities Act, 2005* (“AODA”)

---

- Most recent past deadline = January 1, 2012
- Applicable to all Employers in Ontario
- Two categories of Employers:
  - 1-19 Employees
  - 20 and up Employees

# Issue: *Accessibility for Ontarians with Disabilities Act, 2005* (“AODA”)

---

- Requirements for Employers with 1-19 Employees:
  1. Assistive Devices
  2. Communication
  3. Service Animals
  4. Support Person
  5. Temporary Disruption
  6. Training for Employees
  7. Feedback from Public
- Additional requirements for Employers with at least 20 Employees

# ISSUE: ENFORCEABILITY OF RESTRICTIVE COVENANTS

---

*Mason v. Chem-Trend Limited Partnership*  
2011 ONCA 344 (Ont. Court of Appeal)

Justice A. Feldman

May 3, 2011



# Issue: Enforceability of Restrictive Covenants

## *Mason v. Chem-Trend Limited Partnership*

### Facts

- Restrictive Covenant
- 17 year technical sales representative
- “I agree that if my employment is terminated for any reason by me or by the Company, I will not, for a period of **one year** following the termination, directly or indirectly, for my own account or as an employee or agent of any business entity, **engage in any business** or **activity in competition** with the Company by providing services or products to, or **soliciting** business from, any business entity which **was a customer of the Company during the period in which I was an employee of the Company**, or take any action that will cause the termination of the business relationship between the Company and **any customer**, or solicit for employment any person employed by the Company.”

# Issue: Enforceability of Restrictive Covenants

---

## *Mason v. Chem-Trend Limited Partnership*

### **Decision**

- Restrictive covenant struck
- Complete prohibition on competition for 1 year overly broad
- Lack of spatial limit appropriate due to worldwide nature of business
- Temporary limit of 1 year reasonable
- No way to know which potential customers prohibited from doing business with given 17 years of service
- Restriction not limited to own customers, but any customers
- Restrictive covenant unreasonable and unenforceable

# Issue: Enforceability of Restrictive Covenants

---

## *Mason v. Chem-Trend Limited Partnership*

### Lessons

- Consider:
  - Proprietary interests to protect
  - Geographical scope (spatial limits)
  - Time period (temporal limits)
  - Activity restricted (types of business)
  - Reasonable restriction – not prohibiting competition generally

# ISSUE: BREACH OF FIDUCIARY DUTY & CONFIDENTIALITY, RESIGNATION NOTICE

---

*GASTOPS LTD. v. BRADLEY FORSYTH,  
DOUGLAS BROUSE, JEFFREY CASS, ROBERT  
VANDENBERG, AND MXI TECHNOLOGIES LTD.  
a.k.a. 1197543 ONTARIO LIMITED  
2012 ONCA 134 (Ont. Court of Appeal)*

Justices Goudge, Juriansz, Rouleau

March 1, 2012

# Issue: Breach of Fiduciary Duty & Confidentiality, Resignation Notice

*GASTOPS LTD. v. BRADLEY FORSYTH, DOUGLAS BROUSE, JEFFREY CASS, ROBERT VANDENBERG, AND MXI TECHNOLOGIES LTD. a.k.a. 1197543 ONTARIO LIMITED*

## **Facts**

- 2 weeks notice of resignation by 4 senior management employees
- Unable to fulfill existing contracts and continue business opportunities
- Set up identical software company pursuing existing and potential customers
- Successfully usurped business opportunities including US Navy
- Profits over 10 years valued at \$13 M

# Issue: Breach of Fiduciary Duty & Confidentiality, Resignation Notice

*GASTOPS LTD. v. BRADLEY FORSYTH, DOUGLAS BROUSE, JEFFREY CASS, ROBERT VANDENBERG, AND MXI TECHNOLOGIES LTD. a.k.a. 1197543 ONTARIO LIMITED*

## **Decision**

- Employees breached Fiduciary Duty
  - Non-Competition, Non-Disclosure, Non-Solicitation, and Misappropriation of Trade Secrets or Confidential Business Information
  - Usurpation of Business Opportunities
- Reasonable Notice of Resignation – 10 months
- Damages \$12,306,495.00
- Interest \$3,039,944.00
- Costs \$4,252,920.24

# Issue: Breach of Fiduciary Duty & Confidentiality, Resignation Notice

*GASTOPS LTD. v. BRADLEY FORSYTH, DOUGLAS BROUSE, JEFFREY CASS, ROBERT VANDENBERG, AND MXI TECHNOLOGIES LTD. a.k.a. 1197543 ONTARIO LIMITED*

## **Lessons**

- Landslide decision for damages
- Employment Contract – length of notice of resignation
- Restrictive Covenant – Non-Competition, Non-Solicitation
- Take a firm stance
- Litigate when necessary
- Stay Tuned...Has the pendulum now swung?

# Thomson Carswell Reuters & HRPA – June 27 Webinar

## June 27 Webinar

- Court of Appeal Awards \$19 Million Against Employees for Breach of Fiduciary Duties and 10 Months Notice of Resignation!! – Has The Pendulum Now Swung?



**HRReporter**  
CANADIAN



**MINKEN**  
EMPLOYMENT LAWYERS