Top Employment Law Cases of 2016

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Regular readers of our Focus Alerts will likely recognize some of the cases we have chosen as the Top Employment Law Cases of 2016. These cases were all discussed in more detail at our "2016 Employment Law Year End Wrap Up" Breakfast Seminar presented by Jacques A. Emond and Porter Heffernan. We invite readers to register for future Focus Alerts, to keep on top of the latest developments, and to attend our free Breakfast Seminars throughout the year.

Oudin v Centre Francophone de Toronto, 2016 ONCA 514

The Court of Appeal upheld the Superior Court's decision that a provision providing for *Employment Standards Act* (*ESA*) minimums only upon termination was enforceable, despite that it did not specifically refer to benefits. This decision appears to contradict earlier decisions, in which Courts have consistently held that to be legally valid, a contract limiting notice entitlements to *ESA* minimums only must explicitly provide for all *ESA* entitlements, including benefits. Leave to appeal to the Supreme Court of Canada was dismissed with costs on February 2, 2017.

Howard v Benson Group Inc, 2016 ONCA 256

The Court of Appeal confirmed that where a fixed-term contract is terminated prior to the end of its term and there is no provision for early termination, the employee so terminated is entitled to damages for the amounts that would have been paid to the end of the term, without an obligation to mitigate. Employers seeking to terminate fixed-term contracts early, in the absence of a provision for early termination, cannot simply provide reasonable notice.

Misetich v Value Village Stores Inc, 2016 HRTO 1229

The Human Rights Tribunal of Ontario confirmed that the test for family status discrimination in Ontario is the same as for any other type of discrimination, rejecting the *Johnstone* test developed in the federal sector. Employers must be flexible in considering ways to accommodate the family-related needs of employees, and employees are obliged to cooperate in the process and provide pertinent information required to develop solutions.

Morison v Ergo-Industrial Seating Systems Inc, 2016 ONSC 6725

The Superior Court ordered the employer to pay $50,000 in punitive damages on the basis of the employer's bad faith conduct at termination, which included, among other things, alleging cause with no reasonable basis to support such an allegation, a two-month delay in providing a Record of Employment, and a lengthy delay in paying amounts owing under the *ESA*, in addition to twelve months' pay in lieu of notice. There was insufficient evidence of actual harm to merit an award of

aggravated damages.

Mezin v HMQ, 2016 ONSC 5171

The Superior Court ordered the defendant employer to provide particulars of its claim that it had terminated the employee for performance concerns, where the employee alleged that the reason for termination was discriminatory, in breach of the Ontario *Human Rights Code*. Where an employer is accused of violating statutory prohibitions against termination of employment, it must be prepared to demonstrate it was not motivated by a prohibited factor, even where the termination is without cause.

Donaldson Travel Inc v Murphy, 2016 ONCA 649

The Court of Appeal affirmed the Superior Court's dismissal of the plaintiff employer's claims for breach of contract, misappropriation of confidential information, inducing breach of contract, and interference with contractual relations. The restrictive covenant upon which the employer relied sought to prevent employees from soliciting or accepting business from any of the employer's clients. It was held to be unreasonable and thus unenforceable, on the basis that the prohibition on accepting business, which had no temporal limitation, in fact restricted competition, and went beyond non-solicitation. Courts will not sever offending portions of a restrictive covenant to remove offending words and create a legally enforceable agreement. Where a non-solicit clause amounts to a non-compete clause, it will not be upheld.

Benson Kearley and Associates Insurance Brokers v Valerio, 2016 ONSC 4290

The Superior Court dismissed the employer's motion for an interlocutory injunction to enforce a restrictive covenant, where the employer failed to establish on a *prima facie* basis that the clause was enforceable. In particular, the clause lacked a temporal limit, and the non-solicit clause prohibited solicitation of all of the employer's clients, thus amounting to a restriction on competition.

Paquette v TerraGo Networks Inc, 2016 ONCA 618

The Ontario Court of Appeal confirmed that in the absence of clear language in a bonus plan to the contrary, dismissed employees are entitled to their incentive payments during the reasonable notice period. An explicit contractual requirement for "active employment" at the time of incentive payment, without more, does not suffice to deprive an employee of a claim for incentive compensation that she would have otherwise received during the notice period.

Fleming v Massey, 2016 ONCA 70

The Court of Appeal held that an employee who was not covered by the *Workplace Safety and*

Insurance Act (*WSIA*) scheme could not contract out of his statutory right under that *Act* to sue his employer for a workplace accident, even where he had signed a waiver. The waiver was voided by the *WSIA*, since public policy demanded that uninsured employees not be permitted to contract out of *WSIA* protections.

Wilson v AECL, 2016 SCC 29

The Supreme Court of Canada settled the debate over the effect of s. 240 of the *Canada Labour Code,* holding that the *Code* does not permit dismissals of non-union, non-managerial employees on a "without cause" basis, even where adequate notice is provided, subject to limited statutory exceptions. Federally-regulated employers can only terminate for cause. An employer cannot rely on having provided a severance package, no matter how generous, where there is no cause for dismissal, and an adjudicator can award reinstatement and compensation for all losses arising from such an unjust dismissal.

Strudwick v Applied Consumer and Clinical Evaluations Inc, 2016 ONCA 520

The Court of Appeal awarded $165,000 in combination of aggravated, punitive, and human rights damages, and an additional $35,294 for intentional infliction of mental distress, for the employer's misconduct before and during termination, which included, among other things, delaying the plaintiff's outstanding pay, listing dismissal as for wilful misconduct on her Record of Employment, and harassing and belittling the employee after she lost her hearing.

Hamilton-Wentworth District School Board v Fair, 2016 ONCA 421

The Ontario Court of Appeal upheld an earlier HRTO decision, confirming that it was reasonable to order reinstatement despite that the employee had been out of the workplace for twelve years when the HRTO issued its remedial order. The Court of Appeal ordered the employer to pay the employee's loss of wages from the time of termination, in 2003, to the date of reinstatement, including pension contributions and accounting for tax, EI, and CPP implications, as well as general damages of $30,000, and interest from November 2004.

Keenan v Canac Kitchens Ltd, 2016 ONCA 79

The Ontario Court of Appeal upheld an earlier award of twenty-six months' notice for two dependant contractors in "exceptional circumstances," namely, their ages (63 and 61), length of service (32 and 25 years) and the supervisory character of their positions. This decision confirms there is no 24-month common law cap on reasonable notice and that reasonable notice may be payable even where a worker has been characterized as an "independent contractor."

Employers wishing to learn more about the developments in employment law are invited to contact Jacques A. Emond at 613-940-2730 or Porter Heffernan at 613-940-2764.