Employment Law: Key Decisions From 2017

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We revisit noteworthy cases in labour and employment law from 2017

The year 2017 brought forth numerous significant decisions in employment law across the country. We have summarized several of these impactful decisions below.

Part 1 — Québec

Sylvestre v. *Distribution Zone Électronique inc.*, 2017 QCTAT 3655

After an employee announced his intention to resign his job 11 months later, his employer decided to terminate his employment before the announced termination date, deciding that the notice of resignation period was too long. Applying the ruling of the Supreme Court of Canada in the case of *Asphalte Desjardins inc.*, the *Tribunal administratif du travail* recalled that an employer that shortens the period of work announced in the notice of termination given by an employee is in fact breaking the contract of employment unilaterally. In Québec, a just and sufficient cause is required to terminate the employment of any employee having more than two years of service. Since the employer here had no serious grounds for shortening the notice of resignation given by the employee, the *Tribunal administratif du travail* of Québec concluded that the employer was obligated to keep the employee on its staff until the announced date of his resignation. It should be noted that this decision is now the subject of a pending judicial review application in the Superior Court of Québec. We reported and summarized this decision in our December newsletter.

Delgadillo v. *Blinds To Go Inc.*, 2017 QCCA 818

In Québec, the *Act respecting Labour Standards* prohibits any member of “senior managerial personnel” from filing a complaint to contest their dismissal believed to be without just and sufficient cause. The concept of “senior managerial personnel” is interpreted restrictively by Québec courts, and in the context of the particular facts of each case. With that in mind, in this decision, the Court of Appeal of Québec revisited the concept of “senior managerial personnel” within the meaning of the Act, finding that although a plant manager had authority over only one department (in this case, over one of the company's two manufacturing plants), that individual could nevertheless be considered part of the “senior managerial personnel” and thus excluded from exercising the statutory remedy. This judgment also highlights the importance of taking into

account the particular context of the business concerned. We reported and summarized this decision in our September newsletter.

Bayouk v. *ADT Canada inc*., 2017 QCTAT 1301

This decision is an excellent application of the principles governing constructive dismissal, especially in the context of a change of company ownership. This case confirmed that an employer is entitled to alter an employee's duties and responsibilities at any time, but only insofar as their working conditions are not substantially changed. Here, the employer had made some changes to the employee's duties after the company was integrated into the newly purchased company, and had assigned him to work in a somewhat different position. However, the *Tribunal administratif du travail* concluded that this change was not tantamount to a constructive dismissal, because the employee had not been downgraded to a lower status nor had there been any major alteration of his responsibilities. The *Tribunal administratif du travail* held that [Translation] “employment contracts have a dynamic nature”, and that that was especially true in the context of the sale of a business, it being understood that the responsibilities of managers may always be subjected to certain modifications without their constituting any form of constructive dismissal.

Part 2 — Ontario

Wood v. Fred Deeley, 2017 ONCA 158

The Ontario Court of Appeal held that an employer's conduct upon termination or during the notice period cannot remedy an otherwise illegal and unenforceable termination clause.

In this case, the employee signed an employment agreement the day after she commenced work for Fred Deeley. While the Court concluded that signing a written employment agreement the day after the employee commenced work did not render the agreement unenforceable, it found that the termination clause contained in the employment agreement improperly excluded the employee’s minimum statutory entitlement to benefits continuation during the notice period. The Court also stated that the termination clause improperly combined statutory notice of termination with statutory severance pay, resulting in an ambiguous provision. Namely, the termination provision improperly created several possible scenarios, some of which were not compliant with the *Employment Standards Act, 2000* ("ESA"). Accordingly, the termination clause was void and unenforceable.

Finally, the Court concluded that even by providing the employee with more than her minimum entitlements under the ESA upon termination, including benefits continuation and severance pay, an unenforceable termination clause cannot be remedied after the fact upon termination. An employee will be entitled to reasonable notice of termination at common law in these circumstances equivalent to nine months. For more information about this case, please see our article in our May newsletter.

Adam Papp v Stokes Economic Consulting Inc. and Ernest Stokes, 2017 ONSC 2357

In *Adam Papp v. Stokes Economic Consultation Inc. and Ernest Stokes*, the Ontario Superior Court of Justice addressed when a former employer may be held liable,

including personally liable, for an unfavourable reference. The Court concluded that the employer made an honest reference in good faith and, accordingly, was not liable for defamation.

In this case, a former employee used a former employer as a reference for his new job application. The former employer gave a negative review, and the former employee did not get the job. He commenced an action against his former employer for defamation. However, the former employer succeeded at trial on both the defences of justification and of qualified privilege. The Court concluded that the reference was justified because it was based on objective and verifiable facts. The Court further concluded that a defence of qualified privilege exists when a former employer provides a reference. Employers are permitted to provide a negative reference as long as the employer is not motivated by malice. As a result, the Court dismissed the claim. For more information about this case, please see our article in our May newsletter.

Nagribianko v. Select Wine Merchants Ltd., 2017 ONCA 540

In *Nagribianko v. Select Wine Merchants Ltd*., the Ontario Court of Appeal examined the enforceability of probationary clauses and ultimately concluded that if parties to an employment contract agree to a probationary period, the right to common law reasonable notice can be rebutted where the employee is terminated during the probationary period.

In its decision, the Court concluded that even a very brief probationary clause, “Probation…Six months”, was enforceable. It stated that the status of a probationary employee has “acquired a clear meaning at common law”, enabling an employer to terminate an employee without common law notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for the position. Accordingly, the employee was only entitled to his minimum entitlements under the ESA in these circumstances. While employers are encouraged to draft more precise probationary clauses for employment agreements, this case affirms that the term “probation” has a well-established meaning that permits an employer to terminate an employee without reasonable notice after making a good faith assessment about his or her suitability for a position where a probationary clause has been included in the employment contract.

Part 3 — Alberta

Styles v. Alberta Investment Management Corporation, 2017 ABCA 1

An employee was terminated without cause after three years and the key issue in this wrongful dismissal case was whether the employee was entitled to payments from a long-term incentive plan ("LTIP") which would not vest until after the fourth year, given the fact that the plan clearly stated that active employment was a condition of the LTIP entitlements.

This decision from the Alberta Court of Appeal is significant for employers as it confirmed that employers are not bound by any common law duty to reasonably exercise discretionary contractual power. In reversing the lower court’s decision and finding that the employee was not entitled to the LTIP entitlement, the Alberta Court of Appeal rejected the idea of the duty to reasonably exercise contractual power,

confirming that the decision to terminate an employee without cause need not be justified by the employer. The Court further confirmed that the courts must enforce the terms of freely negotiated employment contracts when the language and meaning is clear.

Part 4 — British Columbia

Buchanan v. Introjunction Ltd., 2017 BCSC 1002

In a significant decision of the British Columbia Supreme Court, an employee who was terminated before his first day of work was awarded wrongful dismissal damages despite a probationary clause in his employment agreement.

In this case, Introjunction Ltd. offered Mr. Buchanan full-time employment pursuant to an employment agreement dated October 16, 2016, with his work scheduled to begin on November 1, 2016. The agreement contained a clause providing for “a probation period of three months beginning on the Effective Date” during which the employment could be terminated without notice. Introjunction then changed its mind about its staffing needs and attempted to retract Mr. Buchanan’s offer of employment two days before he was to start work. Instead, it offered him some short-term work. Mr. Buchanan sued for wrongful dismissal. The Court held that the probationary clause did not apply because it did not commence until the “Effective Date” of November 1, 2016, and the offer was retracted prior to that date. Moreover, even absent that language, the Court held that the probationary clause could not have been applied because the purpose of a probationary period is to allow an employer to engage in a good faith assessment of an employee's suitability for the job, and that was not possible here since Mr. Buchanan had not worked for a single day. As a result, the Court concluded that Mr. Buchanan had been wrongfully dismissed and held that he was entitled to six weeks’ pay in lieu of notice. For more information about this case, please see our article in our October newsletter.

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