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NO SUGAR IN CONSTRUCTIVE DISMISSAL LAWSUITS

By: Alix P. Herber, partner, and Jessica Schnurr, articling student, of Fasken Martineau LLP. This article originally appeared in the Fasken Martineau bulletin THE HR SPACE. *© Fasken Martineau LLP. Reproduced with permission.*

Think an employee has to quit before suing his or her employer for constructive dismissal? Think again – says the Ontario Superior Court. An employee may pursue a constructive dismissal claim without quitting. Traditionally, faced with a unilateral change to a term or condition of employment, an employee had two options: resign and pursue a claim for constructive dismissal or accept the change and continue working under the new terms. According to the Ontario Court in *Russo v. Kerr Bros. Ltd.* [2011 CLLC ¶210-017], that may no longer be the case.

Employee Keeps Working

The plaintiff, Lorenzo Russo, was a 53 year old employee who had worked at Kerr – a candy manufacturer – for 37 years. Holding the position of warehouse manager, Russo made $114,000 annually.

Kerr was experiencing serious financial losses. In April 2009, the new president decided that the compensation packages for the employees were more than what was necessary to stay competitive. The president asked all employees to accept a 10% reduction in their compensation packages. The president then decided that more changes were required and approached Russo and three other employees, asking them to accept additional pay decreases.

In July 2009, Russo's salary was reduced by almost half – to $60,000. That same day, Russo hired a lawyer. The lawyer wrote to Kerr advising that the reduction in salary amounted to constructive dismissal and that Russo did not accept the change in compensation. Rather than quit as most employers would expect, Russo continued to work while suing Kerr for constructive dismissal. His rationale? He was mitigating his damages. In contrast, Kerr argued that by continuing to work, Russo had accepted his new salary.

Inside

The Court's Decision

Since the parties agreed that the reduction in compensation was a clear case of constructive dismissal, the action proceeded by way of summary judgment. That meant that the evidence went in by way of affidavit, with no verbal evidence being called. The summary judgment hearing occurred 18 months after the salary change.

The Court decided that Russo rejected the changes of his terms of employment. Further, Russo's continuing to work could not be viewed as acceptance of the new terms. Applying the recent Ontario Court of Appeal decision in *Wronko v. Western Inventory* [2008 CLLC ¶210-020], the Court concluded that Kerr had a choice in responding to Russo's claim of constructive dismissal. Once Kerr was told that Russo did not accept the salary change, Kerr should have either:

- asked Russo to leave and provide him with reasonable notice or damages; or
- kept the old terms in place for the period of Russo's reasonable notice and thereafter re-employed Russo on the new terms.

Of interest is the Court's conclusion that if an employee chooses to mitigate his or her damages by continuing to work, he or she may only do so during the period of reasonable notice. If Russo had stayed at work beyond the period of reasonable notice, he would have been deemed to accept the new contract of employment under the amended terms.

At the end of the day, the Court said Russo was entitled to 22 months notice. Because the notice period was still ongoing when this decision was rendered, Kerr was only ordered to pay damages for the period of the pay cut up to the decision. The parties are to assess the rest of the damages once the notice period expires.

Significance

Although a decision from Ontario, this may be an important decision for employers all across Canada. If other provinces accept the Ontario Court's conclusions, employers across the country will not be able to ignore an employee's express rejection of a unilateral change to employment terms, no matter how necessary it may be to the viability of the business. As long as the employee informs the employer that these new terms are not acceptable, the employee can continue to work under the new terms without actually accepting them. Employers should not assume that they are free from liability if an employee continues to work once alterations have been made to the terms of employment.

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For CCH Canadian Limited

JAIME LATNER, B.A. (Hons.), LL.B., Senior Editor
(416) 224-2224, ext. 6318
e-mail: Jaime.Latner@wolterskluwer.com

SHAUNA CADE, B.A., Editor
(416) 224-2224, ext. 6425
e-mail: Shauna.Cade@wolterskluwer.com

KELLY BETTENCOURT, B.A., Editor
(416) 224-2224, ext. 6441
e-mail: Kelly.Bettencourt@wolterskluwer.com

DAVID IGGULDEN, B.A., M.L.S., Associate Editor
(416) 224-2224, ext. 6369
e-mail: David.Iggulden@wolterskluwer.com

RITA MASON, LL.B., Director of Editorial
Legal and Business Markets
(416) 228-6128
e-mail: Rita.Mason@wolterskluwer.com

JIM ITSOU, B.Com., Marketing Manager
(416) 228-6158
e-mail: Jim.Itsou@wolterskluwer.com

JANINE GEDDIE, B.A., LL.B.
Contributor

90 Sheppard Ave. East, Suite 300
Toronto, Ontario M2N 6X1

PROGRESS OF LEGISLATION

Newfoundland and Labrador

Labour Relations Act Amendments

Bill 10, *An Act to Amend the Labour Relations Act*, which aims to improve the province's collective bargaining process, has received third reading.

The Bill proposes that the right to strike or lockout will cease where the Labour Relations Board has advised that it will impose a first agreement. As well, where a first agreement has been imposed by the Board, it shall be effective for a minimum of 18 months and a maximum of 36 months.

The Bill also introduces two new procedures to create efficiency in the settlement of workplace disputes: (1) after exhausting the grievance procedure specified by the collective agreement, the parties may agree to refer a dispute to the Minister for resolution by expedited arbitration, if the

dispute arises out of the interpretation, application, administration, or alleged violation of the collective agreement; and (2) the parties may agree to refer a grievance to a grievance mediator who will resolve the dispute in an expeditious and informal manner (i.e., mediation).

Bill 10 received first reading on March 28, 2011, second reading on April 4, and third reading on April 7. Readers will be informed when the Bill receives Royal Assent.

Prince Edward Island

Human Rights Act Amendments Introduced

Bill 40, *An Act to Amend the Human Rights Act*, proposes to update the definition of "disability" under the Act in order to clarify that the term includes mental disabilities.

If passed, the new definition of disability will read:

> "disability" means a previous or existing disability, infirmity, malformation or disfigurement, whether of a physical, mental or intellectual nature, that is caused by injury, birth defect or illness, and includes but is not limited to epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on an assist animal, wheelchair or other remedial device;

The Bill also proposes an amendment which would allow the Human Rights Commission to refuse a complaint made by someone other than the alleged victim of the compaint, unless the victim consents.

Bill 40 received first reading on April 13, 2011. Readers will be kept informed of its progress.

Q & A

Are employees entitled to time off work for voting in elections?

Section 132 of the *Canada Elections Act*, S.C. 2000, c. 9, provides that employees who qualify as electors in a federal election are entitled to **three consecutive hours**, while the polls are open, during which to vote. If an employee's hours of work do not allow for this, then the employer must grant the employee additional time off as necessary to provide three hours for voting. Any time off may be scheduled at the employer's convenience, and the employee is entitled to be paid for the time that he or she is absent.

The hours during which the polls are open on election day vary across the country from time zone to time zone, and are as follows:

- 8:30 a.m. to 8:30 p.m. in the Newfoundland and Labrador, Atlantic, or Central time zones;
- 9:30 a.m. to 9:30 p.m. in the Eastern time zone;
- 7:30 a.m. to 7:30 p.m. in the Mountain time zone; and
- 7:00 a.m. to 7:00 p.m. in the Pacific time zone.

Note: if the polling day occurs during the period of daylight saving time, then the voting hours in **Saskatchewan** are 7:30 a.m. to 7:30 p.m. in the Central time zone and 7:00 a.m. to 7:00 p.m. in the Mountain time zone.

Any employer who interferes with granting an employee the required time off for voting is guilty of an offence under the Act and is liable to a fine of up to $1,000 and/or imprisonment for up to three months.

Similar requirements exist for provincial elections and, in some jurisdictions, municipal elections. These are discussed in the CANADIAN LABOUR LAW REPORTER beginning at ¶6132.

Recent Cases

NOTE: The full text of these cases can be found in the "New Matters" tab division of Volume 5 at the paragraph number indicated at the end of each summary.

Managerial employee was entitled to overtime pay for time spent performing non-managerial tasks

• • • **Ontario** • • • Sanago was the head chef at Glendale. The Golf Club did not have enough staff to run the kitchen, which required Sanago to work overtime hours. While Glendale viewed Sanago's position as managerial, and therefore not eligible for overtime, it made a payment of $5,000 in recognition of all the hard work, long hours, and overtime that Sanago had worked while the kitchen was understaffed. When he resigned from his position, Sanago claimed that he had worked overtime hours for which he was not paid, and that more than 50 per cent of his overtime was taken up with non-supervisory or non-managerial tasks. The Employment Standards Officer awarded overtime and vacation pay in the amount of $10,000. Glendale brought an application for judicial review before the Board.

The application for judicial review was dismissed. The fundamental character of the executive chef position at Glendale was managerial or supervisory. Sanago was required to perform non-supervisory or non-managerial tasks, such as line cooking, for 55 per cent of his overtime hours. Even though the kitchen staff shortage lasted for two months, the events which resulted in Sanago performing non-managerial or non-supervisory duties were exceptional. Therefore, subsection 22(9) of the *Employment Standards Act* applied to the situation during the five weeks when Sanago spent more than half of his overtime hours performing line cooking. Sanago was awarded just under $10,000, with the $5,000 payment deducted from that amount.

Glendale Golf and Country Club, Limited v. Sanago, 2011 CLLC ¶210-016 (Ont. L.R.B.)

Constructively dismissed employee was entitled to continue working for employer as a means of mitigating damages

• • • **Ontario** • • • Russo worked for Kerr Bros. for 37 years, and had been the warehouse manager since 1977. When Kerr Bros. began experiencing financial difficulty, it decided to reduce compensation for all employees by 10 per cent, as well as dissolve the pension plan, in order to save the business. Further, Russo and four other employees were approached to accept a pay decrease, and the bonus program was discontinued. Russo's salary, which was formerly $114,000, including bonus, was reduced to $60,000. Russo brought an action for constructive dismissal, although he continued working for Kerr Bros. at the reduced rate of pay. He also brought an application for summary judgment.

The action for constructive dismissal was allowed. Russo accepted the changes to his terms and conditions of employment as a repudiation, or constructive dismissal, although he remained in his employment under the new terms as a means of mitigating his damages. Kerr Bros. could have terminated Russo, or kept the old terms and conditions in place for the period of reasonable notice. Instead, it allowed Russo to remain in the workplace. Russo was entitled to remain in the workplace as a means of mitigating his damages during the period of reasonable notice, and therefore he was entitled to damages. Russo was awarded 22 months' reasonable notice.

Russo v. Kerr Bros. Limited, 2011 CLLC ¶210-017 (Ont. S.C.J.)

Court granted injunction limiting number of picketers in order to prevent injury to replacement workers

• • • **Ontario** • • • The union was engaged in a legal strike against ECP for over two years. During the strike, ECP exercised its legal right to bring in replacement workers. There had been a number of incidents on the picket line, and a number of court decisions had attempted to control the situation. On September 16, 2010, approximately 100 picketers and their supporters obstructed a bus carrying replacement workers attempting to enter the premises. The picketers placed banners in front of the bus windows, and banged on the windows and sides of the bus, causing those inside to fear for their safety. ECP brought an action seeking an injunction to ban picketing, in order to prevent the risk of serious harm and injury.

The action was allowed, and the number of picketers was limited to seven. Existing orders were not working, and the situation had escalated to a point where action was required in order to stop misconduct and reduce the risk of serious harm and injury. However, a complete ban on picketing would create an imbalance that would seriously harm the union. Therefore, the Court granted an injunction limiting the number of picketers to seven. In addition, three

individual employees were found in contempt of court orders, and were banned from the picket line for 10 days. Another employee was banned for 60 days for making threatening comments on his Facebook site.

ECP, Engineered Coated Products v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local I-500, 2011 CLLC ¶220-020 (Ont. S.C.J.)

Arbitration board erred in upholding a grievance against the employer's random alcohol testing policy

• • • **New Brunswick** • • • Irving Pulp & Paper instituted a random testing policy for alcohol and drug use. Under the policy, employees in "Safety Sensitive Positions" would be subject to unannounced random alcohol use tests. Day, a member of the union, was randomly selected and tested for alcohol during work hours. He brought a grievance, claiming there were no reasonable grounds to test, as there had been no significant accident or incident to justify the drug and alcohol testing policy. The arbitration board identified the main issue as a conflict between the right of the employee to privacy and the right of the employer to make workplace rules. The arbitration board upheld the grievance. Irving brought an application for judicial review.

The application for judicial review was allowed. The majority of the arbitration board distinguished between a dangerous workplace, where a random alcohol test would only be reasonable if the employer could demonstrate a history of alcohol-related incidents, and an ultra-dangerous workplace, where no history was required to justify a random alcohol testing policy. This distinction was not a reasonable basis for rejection of the policy. Irving's mill was a dangerous work environment in normal operation, and a history of accidents was not required in a dangerous workplace where the potential for catastrophe existed. The testing method was minimally intrusive and applied to a limited number of employees in safety-sensitive positions, and therefore it was not out of proportion to the benefits. Prevention of one catastrophe would be enough to make it a reasonable policy. Therefore, the arbitration board's decision was unreasonable.

Irving Pulp & Paper, Limited v. Communications, Energy and Paperworkers Union of Canada, Local 30, 2011 CLLC ¶220-021 (N.B.Q.B.)

Female drywaller was paid less for substantially similar work

• • • **British Columbia** • • • Pennock was hired by Centre City Drywall as an unskilled entry-level helper. Over time, she was able to perform more drywalling skills. This progression was no different than other male novices working for the company. Eventually, Pennock believed that she was being paid at a lower rate relative to her male colleagues for a substantially similar job. She filed a human rights complaint alleging discrimination on the basis of sex with respect to rate of pay. The Tribunal found that the duties performed by Pennock were similar or substantially similar to the duties performed by male workers, who received a higher rate of pay. City Centre Drywall brought an application for judicial review.

The application for judicial review was dismissed. The Tribunal determined that Pennock could perform most of the tasks in the drywalling process, although she did not use some of the tools that would have improved her efficiency. The evidence supported the conclusion that Pennock performed a substantially similar function to male workers, although with differences in duties, methods, and efficiencies. These differences did not justify a lower wage rate.

Kraska v. Pennock, 2011 CLLC ¶230-014 (B.C.S.C.)

Adjudicator did not disclose a rational basis for the conclusion that there was discrimination

• • • **Ontario** • • • Saadi identified herself as a Bengali-Canadian Muslim woman who was legally blind. She was hired on a probationary basis by Audmax as an intake worker for a federally funded project to assist women new to Canada in finding work. Audmax had a workplace environmental sensitivity policy, which included a ban on using the microwave to reheat foods with a strong odour. The company also had a written dress code requiring business attire at work. Saadi wore a hijab to cover her hair, and she was asked in a meeting to wear appropriate clothing. She was subsequently terminated for lack of "organizational fit". Saadi brought a human rights complaint, alleging that she was discriminated against and harassed because of her race, colour, ancestry, place of origin, disability, creed, and sex, and that these factors contributed to her dismissal. The Tribunal dismissed most of the allegations. However, the Tribunal determined that the enforcement of workplace policies on dress code and rules for using the staff microwave were discriminatory against Saadi on the basis of ancestry, ethnic origin, creed, and sex. In addition, the discipline used was discriminatory, and Audmax failed to

properly accommodate Saadi's religious attire. This discrimination was found to have contributed, in part, to her dismissal, and she was awarded general damages and lost wages. Audmax brought an application for judicial review.

The application for judicial review was allowed. With respect to the microwave policy, the reasons of the adjudicator did not disclose a rational basis for the conclusion that there was discrimination against Saadi. With respect to the clothing issue, the adjudicator's reasoning was incomplete and flawed, and there was an absence of important factual findings. Conforming to the employer's business attire dress code could not be said to conflict with Saadi's religious beliefs. The reasons disclosed no basis for finding that the imposition of discipline, with respect to the dress code, was in any way directed at, or connected to, Saadi's race or religion. The decision of the adjudicator was patently unreasonable. Finally, the determination that Saadi's ethnic or religious background was a contributing factor in her termination was not sustainable.

Audmax Inc. v. Human Rights Tribunal of Ontario,
2011 CLLC ¶220-015 (Ont. S.C.J.)

Presumption of non-availability rebutted through proof of exceptional circumstances

• • • **Canada** • • • The umpire dismissed an appeal from a decision of the Board of Referees. The Attorney General brought an application for judicial review, claiming that the Board failed to properly apply the test regarding availability for work, and the presumption of non-availability in the case of full-time students.

The application for judicial review was dismissed. Both the Board and the umpire appreciated the presumption of non-availability, and that the presumption could be rebutted through proof of exceptional circumstances. The Board reviewed the evidence before it, concluded that the claimant was credible, and determined that her evidence rebutted the presumption of non-availability. Therefore, the Board's determinations fell within a range of possible, acceptable outcomes.

Attorney General of Canada v. Cyrenne,
2011 CLLC ¶240-003 (F.C.A.)

DID YOU KNOW . . .

. . . That new digital technology is being introduced to help speed up criminal reference checks?

Many applicants seeking to work with children or other vulnerable people must undergo fingerprint screening as part of the criminal reference check process. Canadian employers typically have to wait weeks for police background checks to verify the identity of candidates who would be working or volunteering with vulnerable individuals.

New technology is being introduced that will allow fingerprints to be sent digitally to the RCMP and cross-checked against the RCMP's database. An electronic response to the check will then be generated within minutes. This technology is intended to reduce the current wait times associated with mailing in prints and waiting for the results to be mailed back. The technology has been implemented by the Halton Regional Police in Ontario as part of their background check process, and it has been reported that the Ottawa police and police departments in approximately 20 other jurisdictions will follow suit.

(*Source*: Public Safety Canada News Release: **www.publicsafety.gc.ca/media/nr/2011/nr20110215-eng.aspx**.)

THE ECONOMY

The statistics below provide a convenient overview of the latest Consumer Price Index (CPI) and other economic and labour indicators of interest. Do you need detailed CPI figures for all of Canada, individual provinces, regional cities, or specific goods and services (e.g., housing, food, and transportation)? If so, you can find the detailed CPI figures in the "Consumer Price Index" tab division of Volume 1 at ¶26 *et seq*.

Cost of Living – *Up*

The Consumer Price Index figure, on the 2002 = 100 time base, was **119.4** for March 2011, up 3.3% from the March 2010 figure of 115.6. On a monthly basis, the March 2011 figure was up 1.1% from February 2011. On the 1992 = 100 time base, the March 2011 All-items figure was **142.1**.

Industrial Production – *Up*

The preliminary, seasonally adjusted figure of industrial production for the month of January 2011, in chained 2002 dollars, was estimated at $256,200 million, up 6.9% from the revised January 2010 figure of $239,747 million.

Weekly Earnings – *Up*

The average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level in January 2011 were $870.33, up 4.2% from $835.50 in January 2010, according to a preliminary estimate based on a sample survey of reporting units.

Unemployment – *Down*

In March 2011, the seasonally-adjusted number of unemployed persons totalled 1,435,000, down 13,500 from January 2011, with an unemployment rate of 7.7% of an active labour force of 18,663,100. The employment level in March was 17,228,100.

Strikes and Lockouts – *Down*

For major collective bargaining agreements (those with 500 or more employees), in December 2010, there were 15,250 person days lost from one work stoppage, compared to 108,520 person days lost from 6 work stoppages reported for December 2009.

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CCH Canadian Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 • 1 800 268 4522 tel
416 224 2243 • 1 800 461 4131 fax
www.cch.ca