EMPLOYMENT LAW

Recent decisions underscore key considerations

Andy Pushalik and Sabrina Serino,
Dentons Canada LLP

Recent employment law decisions will shape workplace policy now and in the future.

A number of interesting legal developments in 2015 will impact workplaces for years to come. The cases canvassed below warrant special mention.

Potter decision

In *Potter v. New Brunswick (Legal Aid Services Commission)* ("*Potter*"), the Supreme Court of Canada clarified the common-law test for constructive dismissal. The Court noted that the test for constructive dismissal has two branches. Under the first branch, the court must determine whether a breach has occurred.

This exercise requires the court to consider whether there is an express or implied term that gives the employer the authority to make the change. If the employer has the authority to make the change or the employee consents to the change, there will be no breach because the change will not be considered a unilateral act.

If a breach has occurred, the court must consider whether a reasonable person would have felt that the essential terms of the employment contract were being substantially changed.

Under the second branch, the court will consider whether the employer has engaged in conduct that, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract.

In *Potter*, the Court held that an employee on an indefinite suspension with pay was constructively dismissed by his employer and, as such, was entitled to damages for wrongful dismissal.

Kielb and *Paquette* decisions

In *Kielb v. National Money Mart Co.* ("*Kielb*") and *Paquette v. TeraGo Networks Inc.* ("*Paquette*"), the Ontario Superior Court of Justice clarified that an employee can be denied a bonus payment upon termination based on the provisions of an employment contract.

In *Kielb*, the plaintiff commenced employment with the defendant employer under the terms of an employment contract that provided that any bonus which may be paid is discretionary, does not accrue, and is only earned and payable on a date determined by the employer.

The defendant terminated the plaintiff on a "without cause" basis before the bonus payment date provided for by the defendant. As such, the plaintiff did not receive any bonus payment in respect of the current fiscal year.

The court held that despite the fact that the bonus payment formed an integral part of the plaintiff's compensation, the plaintiff was not entitled to the bonus payment based on the clear and unambiguous language of the employment contract. The court confirmed that,

> the harshness of [a] provision does not make it invalid if both parties have agreed to it.

Similarly, in *Paquette*, the plaintiff sought entitlement to a bonus after being dismissed without cause by the defendant employer. The defendant's bonus program required employees to be

See Employment Law, page 95

"actively employed" on the date of the bonus payout to be eligible for a bonus.

The court held that although the bonus payment was integral to the plaintiff's compensation, the terms of the bonus program clearly limited eligibility to those employees who were actively employed on the payout date.

While the plaintiff may have "notionally" been an employee during the reasonable notice period provided, he was not an "active employee" and, therefore, did not qualify for the bonus.

Wilson decision

In *Wilson and Atomic Energy of Canada Ltd., Re* ("*Wilson*"), the appellant employee filed a complaint against the respondent employer under s. 240 of the *Canada Labour Code* (the "*Code*") stating that he was unjustly dismissed.

The employee was terminated on a "without cause" basis after over four years of service with the employer and received a severance package equal to six months' pay.

The employee submitted that an employee who is dismissed without cause is, by that reason alone, unjustly dismissed within the meaning of the *Code* and is therefore entitled to a remedy. The adjudicator concluded that the employee was dismissed without cause and had made out a complaint of unjust dismissal under the *Code*.

The employer applied to the Federal Court for judicial review. The Federal Court quashed the adjudicator's decision and remitted the matter back to the adjudicator. The employee then appealed to the Federal Court of Appeal.

On appeal, the Federal Court of Appeal held that "without cause" dismissals are not automatically deemed to be "unjust" under the provisions of the *Code*. As such, adjudicators must examine the circumstances of each particular case to decide whether a dismissal is unjust. Note that this case is under appeal to the Supreme Court of Canada.

Keenan decision

In *Keenan v. Canac Kitchens Ltd.*, the plaintiffs, a husband and a wife, both worked for the defendant as employees from 1983 to 1987. In 1987, the defendant notified the plaintiffs that they would no longer be employees; instead, they would carry on their work as independent contractors.

The defendant ultimately closed its operations in 2009 and informed the plaintiffs that it no longer required their services. The plaintiffs argued that they were dependent contractors and were entitled to reasonable notice at common law.

Given that the business arrangement was almost exclusively for the defendant's benefit, the court concluded that the plaintiffs were dependent contractors and awarded them 26 months' pay in lieu of notice.

The cases noted above provide important lessons for employers that will shape workplace policy now and in the future. Viewed together, the decisions highlight crucial considerations for employers at all points of the employment relationship.

Gordon decision

In *Gordon v. Altus Group Ltd.*, the defendant employer dismissed the plaintiff for just cause; however, the court found no basis for the just cause termination of the employee. In the court's view, the employer's claims about the employee's misconduct were improperly exaggerated to support a claim of just cause.

The court stated that the conduct of the employer was

> outrageous because [the employer] got mean and cheap in trying to get rid of an employee.

As a result, the court awarded the employee $100,000 in punitive damages, plus approximately nine months' pay in lieu of notice.

Significance

The cases noted above provide important lessons for employers that will shape workplace policy now and in the future. Viewed together, the decisions highlight crucial considerations for employers at all points of the employment relationship.

To limit liability, employers should continue to take steps to ensure that employment contracts are drafted using clear and unambiguous language, and that all legal and contractual obligations are considered when terminating an employment relationship.

We have no doubt that this year will yield new legal developments that will continue to keep employers (and their counsel) on their toes!

REFERENCES: *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, 2015 CarswellNB 87, 2015 CarswellNB 88 (S.C.C.); *Kielb v. National Money Mart Co.*, 2015 ONSC 3790, 2015 CarswellOnt 9377 (Ont. S.C.J.) at para. 38, additional reasons 2015 ONSC 6460, 2015 CarswellOnt 16552 (Ont. S.C.J.); *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189, 2015 CarswellOnt 9801 (Ont. S.C.J.), additional reasons 2015 ONSC 4932, 2015 CarswellOnt 11949 (Ont. S.C.J.); *Wilson and Atomic Energy of Canada Ltd., Re*, 2015 FCA 17, 2015 CarswellNat 64, 2015 CarswellNat 4803, (*sub nom.* Wilson v. Atomic Energy of Canada Ltd.) [2015] 4 F.C.R. 467 (F.C.A.), leave to appeal allowed 2015 CarswellNat 2531, 2015 CarswellNat 2532 (S.C.C.); *Keenan v. Canac Kitchens Ltd.*, 2015 ONSC 1055, 2015 CarswellOnt 2322 (Ont. S.C.J.), affirmed 2016 ONCA 79, 2016 CarswellOnt 965 (Ont. C.A.); *Gordon v. Altus Group Ltd.*, 2015 ONSC 5663, 2015 CarswellOnt 13871 (Ont. S.C.J.), additional reasons 2015 ONSC 6642, 2015 CarswellOnt 16313 (Ont. S.C.J.).