Executive Employment

a journal devoted to employment and related contract, dismissal and liability issues

Volume IX, No. 3 2002

Highlights

WRONGFUL DISMISSAL

bad faith dismissal and increased damages

Courts are very protective of employees, especially at the time of dismissal when they are most vulnerable. A recent decision of the Ontario Court of Appeal, *Prinzo v. Baycrest Centre for Geriatric Care*, outlines the parameters for awarding mental distress and punitive damages as well as for increasing the period of reasonable notice due to an employer's poorly handled dismissal. Joe Conforti reviews this case and provides guidelines to employers. 506

SEVERANCE PACKAGES

discrimination on the basis of age

Are severance packages which differentiate between employees on the basis of age discriminatory? That is the question considered by Bruce Grist, further to a recent B.C. human rights case. Although the complaint at the centre of the case was dismissed, the human rights tribunal left open the question of whether a severance plan or package based solely on age is discriminatory. 511

EMPLOYMENT CONTRACTS

continued employment can uphold contract

It has been thought for some time that continued employment is inadequate consideration, by itself, to render a new contract enforceable by the courts. However, in *Techform Products Ltd. v. Wolda*, the Ontario Court of Appeal held otherwise. Janice Payne and Steven Levitt review the case and discuss whether it represents a change in the law. 515

EMPLOYEE ABSENTEEISM

attendance management programs

In an effort to reduce costs arising out of employee absenteeism, employers often implement attendance management programs. A recent decision of the B.C. Labour Relations Board has set the standard for employers seeking to establish such programs. Andrew Wood and Heidi Lipetz review a case that, as they note, reinforces the validity of such programs, while providing guidance to employers. 517

LABOUR STANDARDS

Quebec Labour Standards Act amendments

The Quebec government has commenced a process of consultation over proposed amendments to the Labour Standards Act, many of which are designed to offer employees, including senior managers, better protection. Robert Bonhomme and Sébastien Lorquet examine the contemplated changes, noting that there is a division of opinion over whether the amended Act will provide greater protection to employees or simply reduce productivity. 521

Federated Press

WRONGFUL DISMISSAL

Bad Faith Dismissal and Increased Damages

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Introduction

Two key principles underlie current Canadian employment law.

Firstly, in the typical workplace relationship, virtually all facets of an employment relationship are informed by "an unequal balance of power" such that employees comprise a "vulnerable group in society."[1]

Secondly, the status of being employed is of paramount societal importance; in the words of the Supreme Court of Canada:

> Work is one of the most fundamental aspects of a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.[2]

As such, an employment relationship is not an ordinary commercial contract and cannot be summarily terminated as such. Given that employees are in even a more vulnerable position at the time of termination, employers are held to an obligation of "good faith and fair dealing in the manner of dismissal" so as to minimize the potentially devastating effects (both economic and personal) of a loss of position.[3]

Employers who ignore these fundamental principles do so at their peril.

Prinzo v. Baycrest Centre for Geriatric Care[4] is a recent example of the additional costs to an employer of an improper or "bad faith" discharge.

Facts

The employer, Baycrest Centre for Geriatric Care ("Baycrest"), is a not-for-profit organization operating healthcare facilities for the elderly.

The employee, Ms. Prinzo, operated Baycrest's hairdressing shop and was employed for approximately 17 1/2 years. At the time of termination, Ms. Prinzo was 49-years old, earning a salary of $30,500.

Although most of Ms. Prinzo's time involved hairstyling for staff and residents, she was also the manager of the beauty shop, responsible for accounting, financing, hiring and training hairdressers, supervising volunteers, scheduling of appointments, etc. For the most part, Ms. Prinzo was considered to be a model employee.

As part of a series of cost-cutting measures, however, Baycrest decided to eliminate Ms. Prinzo's position. On November 27, 1997, Ms. Prinzo received a "letter of layoff" indicating that her position was being eliminated because of financial constraints. The letter stated: "The effective date for elimination of the position will be determined in our discussions over the next few weeks."

About one week before receiving the layoff letter, Ms. Prinzo had fallen and hurt herself in Baycrest's parking lot. Although in pain, Ms. Prinzo continued to work through her injuries on light duties. However, from November 28, 1997 (the day after the letter) and continuing to February 9, 1998, Ms. Prinzo was absent from work; this absence was medically authorized as her physician confirmed to Baycrest that, as a result of her injuries, Ms. Prinzo was "medically unfit for any form of work during this period of time."

Throughout Ms. Prinzo's absence, Baycrest, through Ms. Prinzo's immediate supervisor as well as an occupational health nurse, called Ms. Prinzo on several occasions to inquire about her ability to return to work and to urge her to return to Baycrest to perform modified work. Even though Ms. Prinzo's physician had indicated that she was totally disabled, Baycrest implied (falsely) that the physician had agreed that she could return to work to perform some duties. Baycrest also

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[1] *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at 741.
[2] *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at 1002.
[3] *Wallace*, supra note 1 at 742.
[4] [2002] O.J. 2712 (C.A.).

indicated that, if Ms. Prinzo did not return to work immediately, it would be treated as a "work refusal."

The medical evidence at trial was to the effect that the manner in which Ms. Prinzo had been treated caused her emotional upset, heightened blood pressure, weight gain and heightened diabetes symptoms.

Ms. Prinzo returned to work on February 9, 1998 after which, on March 11, 1998, Baycrest delivered a letter to her confirming her termination and advising that her last day of employment would be March 31, 1998 (which was the end of the employer's fiscal year).

The Decisions of the Trial Judge and the Court of Appeal

There were several key issues in the case:

Issue 1: The Date From Which Reasonable Notice Should Be Calculated

An effective notice of termination commences the period of reasonable notice. The earlier the working notice of termination is provided, the less payment in lieu of notice that the employer must provide.

The trial judge determined that Ms. Prinzo was given notice of termination on November 27, 1997, that is, when she received the initial layoff letter stating that her position was being eliminated. Despite that letter's ambiguity and the confusion caused by Baycrest in its attempts to get Ms. Prinzo back to work, the trial judge concluded that Ms. Prinzo realized that she was being dismissed, leaving only the issues of her actual departure date and the amount of her severance package to be determined in the future.

The Court of Appeal disagreed.

While there is no specific format for a notice of termination, an effective notice must be clear and unambiguous and must lead a reasonable person to conclude that his or her employment is at an end as of some certain date in the future.

In this case, there was no evidence that Ms. Prinzo knew or ought to have known that her employment would end as of March 31, 1998. Until the March 11, 1998 letter, that date was not ever mentioned as an outside date for termination, nor was there any indication that her job would end by Baycrest's fiscal year-end.

As a result, the effective date for notice of termination was determined by the Court of Appeal to be March 11, 1998. This had the effect of adding an additional 3 1/2 months' notice (and, therefore, severance pay) to Ms. Prinzo's damages.

Issue 2: Appropriate Length of Reasonable Notice

The purpose of requiring an employer to give reasonable notice of termination is to provide the employee with reasonable time to seek alternative employment or payment in lieu of notice.

The trial judge determined that given Ms. Prinzo's age, years of service and position, Ms. Prinzo was entitled to 18 months' reasonable notice of termination, that is, calculated from the effective date notice of termination was given. In arriving at this conclusion, the trial judge intimated that Baycrest was being somewhat disingenuous in its reasons for dismissal in that it sought to dismiss a "problem" employee and save her salary under the guise of eliminating her position.

The Court of Appeal reduced this award and concluded that Ms. Prinzo was entitled to 12 months' reasonable notice of termination.

Although confirming that there is no "upper limit" of 12 months for even non-managerial employees, the Court of Appeal determined that 18 months would be unreasonably high for someone in Ms. Prinzo's position, especially given that she did have some advance knowledge that her employment would soon end (even though there was no specific notice of termination). The Court of Appeal also reinforced that an employer's reason for termination of employment was not a relevant consideration in determining the length of notice; that is, an employer may terminate an employee at any time provided that appropriate notice is given.

Issue 3: Damages for Mental Distress

Mental distress is a form of "aggravated damages" which may be awarded in a wrongful dismissal action. The purpose of such damages is to compensate the employee for intangible losses.

As a result of recent decisions of the Supreme Court of Canada, mental distress damages in wrongful dismissal actions had become less prevalent. To justify an award, there must be a separate, actionable wrong which is independent from the termination of employment. Furthermore the damages must arise from the dismissal itself and not from any pre- or post-dismissal conduct.[5]

It was Ms. Prinzo's contention that Baycrest had, indeed, committed an independent wrong, namely the tort of "intentional infliction of mental suffering."

The trial judge accepted that Ms. Prinzo suffered emotional and physical symptoms, including emotional upset, loss of self esteem and distress, on a disabling basis for several months after leaving her position. The trial judge determined that the actions of Baycrest constituted harassment which were "so extreme and insensitive that they constituted a reckless and wanton disregard for the health of [Ms. Prinzo] and, therefore, would provide a basis for a separate cause of action." The trial judge determined that Baycrest was well aware of the effect that its conduct was having on Ms. Prinzo, yet persisted with "harassment with almost sadistic resolve." As a result, the trial judge awarded $15,000 for "aggravated damages."

The Court of Appeal reviewed the necessary elements of this tort: (a) conduct that is flagrant and outrageous; (b) calculated to produce harm; and (c) resulting in a visible and provable injury.

Agreeing with the trial judge's decision, the Court of Appeal accepted that each of these elements were met:

(a) Baycrest's repeated communications to Ms. Prinzo and constant importunings for her to return to work were "so extreme and insensitive that they constituted a wanton disregard for the health of the plaintiff [Prinzo]." Given this finding and the trial judge's characterization of Baycrest's actions as "sadistic" the Court of Appeal had no difficulty in determining that this was "flagrant and outrageous" conduct.

(b) Baycrest knew that Ms. Prinzo was physically and emotionally fragile as a result of her health yet it nonetheless persisted in its "harassment." In such circumstances, Baycrest must be taken to have intended or to have known of the adverse consequences to Ms. Prinzo that would follow. This, substantiated that Baycrest had "calculated to produce harm."

(c) The Court of Appeal readily accepted that Ms. Prinzo had suffered a "visible and provable injury." Ms. Prinzo testified as to her own "emotional distress." Her physician testified that Baycrest's conduct caused her emotional upset, increased her blood pressure, resulted in significant weight gain and increased her diabetes symptoms. This was more than "mere injury to feelings" or the "temporary and transient upset" that would accompany any dismissal; rather, it was emotional distress to such an extent that it was manifested in physical and medically supportable illnesses.

The Court of Appeal upheld the trial judge's award of $15,000 for mental distress.

Issue 4: Should the Period of Reasonable Notice Be Extended Due to the Manner of Dismissal?

The Supreme Court of Canada has determined that breach of an employer's obligations of good faith and fair dealing (a "bad faith discharge") is compensable by an increase in the period of reasonable notice. This increase has come to be known as the "*Wallace* factor."

As the Supreme Court of Canada stated:

> Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment. *However, in my view, the intangible injuries are sufficient to merit compensation in and of themselves. I recognize that bad faith conduct which affects employment prospects may be worthy of*

[5] *Vorvis v. Ins. Corp. of B.C.*, [1989] 1 S.C.R. 1085.

> *considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable.*[6] [emphasis added]

The trial judge did not directly deal with this issue, preferring to award mental distress damages to compensate Ms. Prinzo for her harsh treatment.

Although not necessary for its decision either, the Court of Appeal also remarked on Baycrest's lack of candidness and forthrightness respecting its supposed intention of having Ms. Prinzo return quickly to modified duties – only to terminate her expressly thereafter – and on Baycrest's insensitivity to her. In short, according to the Court of Appeal, Baycrest conducted the dismissal in such a way as to cause more than injured feelings and emotional upset; it was humiliating and damaging to the self esteem of a long-term employee. As such, Baycrest's conduct was sufficiently egregious to have breached its duty of good faith and fair dealing. According to the Court of Appeal, this bad faith discharge would have warranted an increase in the notice by six months (from 12 to 18 months which is approximately the same as the $15,000 actually awarded for mental distress) so as to compensate for the emotional and intangible injuries to Ms. Prinzo had the trial judge not awarded similar mental distress damages to Ms. Prinzo.

It is germane to note that the Court of Appeal does, essentially, equate aggravated/mental distress damages with the bad faith discharge damages, implying that the latter should not be subject to mitigation by earnings from new employment.

Issue 5: Are Punitive Damages Warranted?

Punitive damages are to be reserved for exceptional cases of "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency." The Supreme Court of Canada has affirmed that punitive damages can be awarded for breach of an employment contract where an employer's conduct amounts to an actionable wrong separate from the breach of contract.[7] However, an award of punitive damages must serve a rational purpose; that is, they are to be awarded only if compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation. The question is whether more punishment is rationally required to achieve these objectives – whether to award punitive damages at all, and if so, the quantum.[8]

The trial judge awarded punitive damages of $5,000 given Baycrest's "egregious treatment" of Ms. Prinzo.

In contrast, the Court of Appeal determined that Baycrest's misconduct had already been compensated for by the mental distress damages. The Court of Appeal determined that punitive damages were not necessary for deterrence purposes and would serve no other rational purpose. As a result, the trial judges award of punitive damages was set aside.

Conclusion

Canadian courts continue to be very protective of employees who have been dismissed. *Prinzo v. Baycrest Centre for Geriatric Care* is only the latest in a line of recent decisions striving to minimize the financial and personal damage and dislocation caused by dismissal.

While courts continue to address various issues that arise in connection with dismissal, there will be some flux and uncertainty as the case law develops with respect to bad faith discharge and the "*Wallace* factor," mental distress damages and punitive damages.

Although the *Prinzo* case does not create new law, it does serve as a useful guideline to employers on key issues:

- To be effective, a notice of termination should be clear and unambiguous and provide a date certain for the termination; although not stated in the judgement, an effective notice will almost always be in writing.
- Where a specific (and effective) notice of termination cannot be given, any advance notice that a dismissal is imminent or that the employee's job is in jeopardy will be a factor in reducing the applicable notice/severance required.

[6] *Wallace*, supra note 1 at 746.
[7] Ibid.
[8] *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4th) 257 (S.C.C.).

- In creating severance packages, employees should be aware that there is not a 12-month cap on reasonable notice – even for non-managerial employees.
- Mental distress damages and punitive damages may be awarded in wrongful dismissal actions where the conduct is especially egregious and results from conduct which is independent of the dismissal itself.
- An employer should be especially careful when dealing with employees who are known to have health concerns as any conduct which exacerbates a pre-existing condition may increase damages or justify mental distress damages. An employer should not rush a sick or injured employee back to work only for the purpose of terminating him or her.

Above all, it is clear that employers must treat their employees with honesty and respect at all times, especially at the time of dismissal. Where an employer fails to do so, it will find itself exposed to increased financial liability.