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Employment and Labour Law Update

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Christmas and Good Friday: Must Non-Christians Receive Two Additional Paid Days Off?

In a recent decision, the Human Rights Tribunal of Ontario ("Tribunal") confirmed that employers are not necessarily obliged to provide employees who do not observe Christmas and Good Friday with two days of paid religious leave to mirror those public holidays (Markovic v. Autocom Manufacturing Ltd.).

The Facts

The Complainant, Mr. Markovic, was a member of the Serbian Orthodox Church, which celebrates Eastern Orthodox Christmas roughly two weeks after Western Christmas. Mr. Markovic made a complaint to the Ontario Human Rights Commission ("Commission") alleging that his employer, Autocom, discriminated against him on the basis of his creed by failing to pay him when he took time off to observe Eastern Orthodox Christmas.

Subsequent to Mr. Markovic's complaint, Autocom developed a policy to address requests for time off for religious observance. The policy provided employees with a "menu of options" that primarily allowed for scheduling changes, including:

- taking time off and making up time at a later date when the employee would not ordinarily be scheduled to work
- taking time off and making up time by working on a secular holiday when the workplace is operating, subject to the *Employment Standards Act, 2000*
- switching shifts with another employee
- adjusting the employee's shift schedule where possible
- applying outstanding paid vacation time
- taking a leave of absence without pay

The question before the Tribunal, was whether Autocom's policy was contrary to the *Human Rights Code* ("*Code*") and case law regarding religious accommodation.

A key argument against Autocom's policy was the fact that the Commission had a long-standing, non-binding, policy of its own entitled *Policy On Creed and the Accommodation of Religious Observances*. This *Policy* requires employers to provide to employees who are members of non-Western Christian religions at least two days paid leave to mirror the public holidays on Christmas Day and Good Friday. The Autotcom policy offered a range of options to non-Western Christian employees. However, the policy did not offer two days *paid* leave as required by the Commission's *Policy*.

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The Tribunal found that the public holidays of Christmas Day and Good Friday "although [they] … originated in Western Christian observances … are now considered secular pause days".

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The Tribunal's Decision

The Tribunal upheld Autocom's policy, finding that it was not contrary to the *Code* or applicable case law. This decision is particularly helpful to employer's whose workforces are becoming increasingly diverse.

The Tribunal's decision is based on two key findings: First, the Tribunal found that the public holidays of Christmas Day and Good Friday "*although [they] … originated in Western Christian observances … are now considered secular pause days*". As such, the Tribunal concluded, it is not discriminatory that these specific days are public holidays. However - and this is the Tribunal's second finding - a *work schedule* which permits Western Christians time off to celebrate two of the most important Christian holidays, but which requires non-Christians to work on *their* holy days, *is* discriminatory. In other words, the discrimination arises out of the *work schedule*.

The solution, said the Tribunal - relying on the Court of Appeal's decision in *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U.* (*Tratnyek)* – is to provide an opportunity for non-Western Christians to observe their holy days without a loss of pay. This does not necessarily require an employer to grant two days paid leave: "*To put it simply, where the "problem" is the need for time, the solution is the enabling of time*". Adjustments to work schedules could in most cases provide an appropriate accommodation.

Lessons Learned

An employer has an obligation to design workplace standards that recognize and accommodate workplace diversity. In the case of religious observance, the Tribunal confirmed that this goal can be met by providing employees with a range of options that do not result in loss of pay (e.g. the majority of Autocom's menu of options).

That is not to say that scheduling changes will always be a reasonable and appropriate accommodation. The nature of some jobs and occupations may not allow for the rearrangement of an employee's schedule. In those cases, the solution may be that the employer must offer a paid day off.

To learn more, or to discuss how the Tribunal's decision may apply to your workplace, please contact a member of our team.

Employees: *To Have and To Hold* RBC ats. Merrill Lynch

In a much anticipated decision, the Supreme Court of Canada substantially expanded the scope of the implied duty of good faith departing employees owe to their employers.

In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, the Supreme Court held that a company manager had breached a contractual duty of good faith to his employer by orchestrating a mass exodus of employees. He was found liable for all losses caused by the collective departure in the amount of nearly $1.5 million.

At the same time, the Supreme Court confirmed that, as a general rule, a departing employee is free to compete against his/her former employer immediately after leaving, even if the employee fails to give reasonable notice.

This case has broad implications for any business operating in an environment where competition, especially by former employees, is a concern.

Background

In 2000, RBC Dominion Securities and Merrill Lynch were the principal and competing securities firms in Cranbrook, British Columbia. During the spring of that year, the regional manager of Merrill Lynch approached RBC's Branch Manager, Don Delamont, to spark an interest in joining Merrill Lynch.

Following this initial conversation, Mr. Delamont helped to organize a series of recruitment meetings between investment advisors ("IAs") at RBC and senior staff at Merrill Lynch. That fall, without providing any notice, Mr. Delamont and virtually all the IAs left their employment with RBC and moved to Merrill Lynch. Prior to leaving, they surreptitiously copied RBC's client lists and confidential client records and transferred them to staff at their soon-to- be new employer.

None of the departing employees were bound by a restrictive covenant (such as a non-competition or non-solicitation clause) and none were considered to be a "fiduciary" of RBC.

The orchestrated departure crippled the RBC branch and it was only able to retain 15% of its previous clientele. RBC responded to these actions by suing its former branch manager, Don Delamont, all of the departing IAs, Merrill Lynch, and Merrill Lynch's regional manager.

The Trial Decision

At trial, Don Delamont and the former IA's were ordered to pay an aggregate $40,000 for failing to give RBC reasonable notice of their departure - which the Court determined should have been 2.5 weeks.

The Court went further, finding that each of the defendants, including Merrill Lynch and its regional manager, had competed unfairly with RBC and consequently, were liable for loss of profits, including future losses that extended beyond the 2.5 week notice period. According to the trial judge, the departing IA's engaged in a "frenetic campaign" to move clients from RBC to Merrill Lynch, the most troubling part of which was the misuse and improper removal of RBC's client records. For their part in inducing the RBC employees to compete unfairly, Merrill Lynch and its regional manager were found to be jointly and severally liable for the resulting damage. The trial judge concluded that had it not been for the defendants' actions, RBC would have had the opportunity to retain much more of its client base. This warranted compensatory damages in the amount of $225,000. The Court also awarded punitive damages in the amount of $330,000 (divided among the defendants) for the conversion of RBC's client records.

The Court made its largest award ($1,483,239) against Don Delamont personally. This amount was calculated based on five years of damages assessed by experts for the lost business and collapsed operations of the branch. The trial judge found that, as branch manager, Don Delamont had an implied contractual duty of good faith which included retaining RBC employees. He not only failed to do so but actively promoted and co-ordinated the departure and encouraged their mass defection. Despite the finding that he was not a fiduciary employee, the Court concluded that this conduct constituted a breach of the duty he owed to RBC by virtue of his position.

The Court of Appeal

On appeal, the damages for unfair competition ($225,000) as well as the $1.5 million award against Don Delamont personally were quashed.

"Employees: To Have..." continued from left

The Court of Appeal explained that, as difficult as it may be for employers to accept, in the absence of a contractual non-competition clause, fiduciary duty or misuse of confidential information, there is no duty not to compete with an employer once an employee has left. Consequently, the IA's were within their rights to entertain other offers of employment while still employed by RBC, and further, were permitted to plan for their eventual departure by contacting clients and preparing client lists. The only wrong committed by the departing IA's was that they gave records belonging to RBC to the competition. For this Court of Appeal upheld the punitive damage award.

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Significantly, each level of court disapproved of the taking of RBC's client records, but only the trial judge was troubled by the taking of client lists. Neither the Court of Appeal nor the Supreme Court of Canada found the taking of clients' contact information a breach of any duty owed to RBC. According to the Court of Appeal, the distinction arises from the fact that an investment advisor builds her own book of business, within which clients are owed a duty of honesty and competence. As such, at the earliest possible opportunity, a client has the right to know that their advisor is leaving her employment. This is consistent with the Court of Appeal's finding that RBC did not have a property right in any client. The employees could therefore prepare their own client contact lists and remove these lists from the office. However, the same could not be said for RBC's client documents; these were the property of RBC.

In overturning the award against Don Delamont, the Court of Appeal noted that he was not a fiduciary employee and there was no reason at law for him to be treated differently than the other IA's.

The Supreme Court of Canada

RBC appealed the decision to the Supreme Court, asking the Court to reinstate the damages for unfair competition and those against Don Delamont for the breach of his duty of good faith.

The Supreme Court agreed with the Court of Appeal that the IAs were not liable for damages arising out of the alleged "unfair competition". In the absence of an employment contract restricting their right to compete, the IAs were at liberty to compete with their former employer.

However, the Supreme Court reinstated the award against Don Delamont. The Court concluded that in orchestrating the mass departure of IA's from RBC, Mr. Delamont breached an implied duty of good faith owed to his employer. That is, Mr. Delamont's job description included the recruitment of investment advisors. A logical extension of that duty, admitted by his own evidence, was the obligation to make reasonable efforts to retain those advisors. By instigating and orchestrating their departure, Mr. Delamont therefore breached a duty of good faith owed to RBC.

A Dissenting Voice

Madame Justice Abella, was the Supreme Court's lone dissenting voice. She would have refused to reinstate the award against Don Delamont. Her opinion, which has received critical acclaim in the legal community, is that the courts should not impose restrictive covenants on parties retroactively nor create a "quasi-fiduciary" category of liability. As a sophisticated employer, it was open to RBC to insist on the inclusion of non-competition clauses in its employment contracts. For business reasons RBC chose not to do so. In the absence of such a clause, Mr. Delamont had the right to compete with RBC following the termination of the employment relationship. A corollary of that right is the right to plan for future opportunities while he was still employed and to discuss those plans with his co-workers.

Lessons Learned

This case carries some broad implications for any business operating in an environment where competition, especially competition by former employees, is a concern:

(1) **A non-fiduciary employee does not have a duty to compete fairly with a former employer**. An employer whose business would be significantly jeopardized by the loss of a particular employee or class of employees should consider protecting its interests by including a non-competition and/or non-solicitation clause in its employment contracts. That said, courts have made it clear that there are strict do's and don'ts regarding the language and scope of a non-competition clause. To be sure your workplace is protected consult with an experienced employment lawyer.

(2) **Employees have an obligation to give to their employer reasonable notice of their departure. However in most cases, the required notice period will be brief**. An employer whose business would be significantly jeopardized by the abrupt departure of a key employee or employees should consider protecting its interests by including in its employment contracts a notice-of-resignation requirement.

(3) **Employees owe a duty of confidentiality to their employers.** Courts will not hesitate to punish employees for blatant breaches of the duty of confidentiality particularly if the breach includes the taking of client documents.

(4) **The duty of confidentiality does not necessarily extend to the protection of client contact lists. This is especially so when the continuity of client service is at stake**. There is no property right to a client. An employer whose business would be significantly jeopardized by the loss of a client list should consider protecting its interests by including in its employment contracts a duty of confidentiality clause that includes the protection of such lists. That being said, the courts in this case found that brokerage houses, because of the nature of the relationship between investment advisors and clients, can never put their own interests ahead of clients'. As such, it is unclear whether an employment contract which prohibited the taking of a client list would have been sufficient to stop the IAs from doing just that. To be sure your workplace is protected consult with an experienced employment lawyer.

(5) **Spear-heading a mass departure that may devastate an employer may be contrary to an employee's common law duty of good faith.** The scope of this duty depends upon the employee's role within the company, but it does not require the employee to be a fiduciary. Significantly, courts will award damages to compensate for lost business for a period of time beyond the notice period itself.

To learn more about how you can protect your organization, please contact a member of our team.

DID YOU KNOW?

The Ontario government intends to make WSIB coverage mandatory for construction industry workers, including independent operators.

To find out more about how this proposed legislation may impact your business, contact a member of the SK team.

HReview Seminar Series

Next in our series of employment and labour law updates:

Mental Health and the Workplace:

A New Challenge/ A Different Approach

1.) Framing the Issue
- a) The Facts about Mental Illness
- b) The "Invisible Disability"- Why employees don't self-identify. Why employers fail to see the signs.

2.) Accommodation
- a) When does mental illness constitute a disability?
- b) The employee's responsibilities.
- c) The employer's responsibilities.
- d) When is an employer deemed to have constructive knowledge of the disability?
- e) Workplace prejudice and obstacles to accommodation.
- f) Is accommodation possible for subjective fears in the workplace?

3.) Managing Medical Information
- a) Obtaining the "right" medical information.
- b) How to deal with subjective medicals.
- c) Can an employer insist on medical treatment and/or medication?
- d) Independent Medical Assessments.

4.) Case Law and Comment
- a) The employee's duty to participate in their own accommodation.
- b) What do arbitrators have to say?
- c) Where do we go from here?

DATE: **Wednesday, January 21, 2009, 7:30 – 9:30 a.m.** (program at 8:00 am; breakfast provided)

VENUE: **Holiday Inn Hotel & Suites Toronto-Markham,** 7095 Woodbine Avenue (Woodbine & Steeles), 905.307.3047

COST: Please be our guest

RSVP: By Friday, January 9, 2009 to info@sherrardkuzz.com or 416.603.0700

HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HReview Seminar*.

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