MANAGEMENT
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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Ontario Court Rejects Constructive Dismissal Class Action

In a decision recently released by the Ontario Superior Court of Justice, *Kafka v. Allstate Insurance Company of Canada* (*"Allstate"*), the Court considered whether a claim for constructive dismissal by a *group* of insurance agents should be certified as a 'class'. The Court answered that question 'no' on the basis the law of constructive dismissal requires an *individualized* assessment of each plaintiff's claim; and this type of assessment is inconsistent with the purpose of Ontario's class action regime. The decision is under appeal and, unless and until it is overturned, it is good news for employers.

The Class Action Regime – *In a nutshell*

The *Class Proceedings Act* was introduced in Ontario in 1992. The *Act* allows two or more individuals with similar claims against one or more defendants to join together as a 'class' to bring the claims in one legal proceeding. Before a claim is permitted to proceed as a 'class action' the court must be satisfied there are issues in common among the proposed 'class' which can be decided without requiring an individualized assessment of each claim. If an individualized assessment is required each claimant must bring his or own individual claim.

The Facts of *Allstate*

A claim for constructive dismissal was launched by agents formerly employed by the Allstate Insurance Company of Canada ("Allstate Insurance"). The company had sought to make a number of business changes including a change to the agents' system of compensation. Prior to the change agents were paid based wholly on commission with no distinction between new sales and renewals from existing clients. With the change agents would be paid in part based on commissions from new sales and in part based on a performance-related bonus which depended on a number of factors including location, market conditions and staff competency. On balance, agents with a history of generating new business were better positioned to earn greater income under the new model.

In the summer of 2007, Allstate Insurance gave its agents 24 months written notice it would be making the changes. In response, a group of agents resigned their employment and sought to certify a class action against Allstate Insuranceon the basis the company had made "unilateral and fundamental" changes to their employment contracts resulting in their constructive dismissal. The agents claimed

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for payment of notice and severance pay under the *Employment Standards Act, 2000 ("ESA")*, as well as for punitive damages resulting from their alleged constructive dismissal; they did not claim reasonable notice under the common law.

The Decision

The Court denied the application to certify the agents as a class on the basis a claim for constructive dismissal required an *individualized* assessment of each plaintiff's claim; and that this type of assessment was inconsistent with the purpose of Ontario's class action regime.

In reaching this conclusion, the Court made the following significant findings regarding the relationship between constructive dismissal and a class action:

- **Fundamental Change**: Constructive dismissal requires an employee to show the employer has made a unilateral "fundamental change" to the employee's terms or conditions of employment. Whether or not a "change" rises to the level of a "fundamental change" depends on the impact of the change on the individual employee. This is a "contextual, relative and individual assessment" that requires an examination of the "individual and the unique circumstances of each plaintiff and each [a]gent".
- **Reasonable Notice**: An employer can unilaterally impose a fundamental change so long as the employer provides "reasonable notice" of the change. However, a determination of what length of time will suffice as "reasonable notice" requires consideration of inherently individual factors including age, length of service, character of employment, experience, training and qualifications (commonly known as the "*Bardal*" factors).
- **Mitigation**: An employee who suffers a loss as a result of the termination of employment has a "duty to mitigate". This requires the employee to look for alternate employment and accept alternate employment where it is reasonable to do so (even with the employer alleged to have wrongfully or constructively terminated the employment relationship). The *ESA* contains a similar concept which requires an employee to accept an offer of "reasonable alternative employment". If an employee rejects such an offer, the employee may lose his or her entitlement to termination and severance pay.

  To analyze these factors a court must consider an employee's individual circumstances including the particulars of an offer of alternative employment and whether on balance the individual employee rejected an offer of "reasonable alternative employment" in the circumstances. This consideration requires an individualized assessment, not consistent with the purpose of the class action regime.

Lessons Learned

The *Allstate* decision is currently under appeal. Until the Court conclusively defines the boundaries of this type of employment-related class action lawsuit, the decision reinforces how important it is for an employer to carefully plan any change to the terms and conditions of an employee's employment to minimize the risk of exposure to a successful constructive dismissal claim. Specifically, employers should consider the following best practices:

1. **Build flexibility into the employment contract at the outset**. Where possible, include in the employment contract provisions that give to the employer discretion to make changes to key terms and conditions including (but not limited to) compensation, work location, reporting arrangement, *etc*. These provisions can be evidence the changes did not represent a fundamental alteration of the terms and conditions of employment, but instead were contemplated and agreed to by both employer and employee at the time the employment contract was formed.

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2. **Document the individualized nature of the employment relationship**. Document any amendments to the terms or conditions of employment by way of a written amendment to the agreement, signed by both parties. This is especially important for an organization that uses template employment contracts at the time of hiring.
3. **Go 'above and beyond' when providing reasonable notice of a fundamental change**. If the employer intends to modify business operations in a manner that may result in a "fundamental change" to the terms and conditions of employment, give advance notice equal to or greater than the period of reasonable notice to which an employee would be entitled upon termination of employment. This will reduce the risk of liability for constructive dismissal for failing to provide common law notice.
4. **Ensure the employee accepts the change**. When changes are made, confirm the employee has accepted the change as of the implementation date. If an employee is permitted to continue to work under the old terms and conditions the employer may be found to have acquiesced to the employee's refusal to accept the new terms, in which case the old terms of employment may continue to apply.

To learn more, or for assistance planning and implementing a change to terms and conditions of employment, contact a member of the Sherrard Kuzz LLP team.

Employee on leave not entitled to greater job security than any other employee - so says Ontario Labour Relations Board

Many managers continue to operate under the misconception an employer is forbidden from terminating the employment of an employee while the employee is absent on a statutorily protected leave (*i.e.* pregnancy leave). Not only is this not (nor has it ever been) the state of the law in Ontario, the Ontario Labour Relations Board has recently punctuated this fact in its decision in *Just Energy Corp. v. Baldeesh (Lisa) Dhillon* ("Just Energy").

While an employer is not permitted to refuse to reemploy an individual as a result of the individual having taken a leave, that employee is not provided any greater job security or employment rights than any other individual in the workplace.

The decision is important because it clarifies for employers and employees that while an employer is not permitted to refuse to reemploy an individual as a result of the individual having taken a leave, that employee is not provided any greater job security or employment rights than any other individual in the workplace. Specifically, if a change occurs in the workplace that results in the elimination of an individual's position, and no comparable *vacant* position exists upon the completion of the leave, the employer may well be in a position to terminate the employment of the individual on a without cause basis.

The Pregnancy and Parental Leave Facts

In *Just Energy*, Ms Dhillon was an Ontario-based Regional Sales Manager whose job duties included providing support and strategic direction to the company's offices in Illinois and Indiana.

Prior to Ms Dhillon commencing a pregnancy and parental leave in August 2008, Just Energy hired a full-time employee, Ms Siddiqui, to perform Ms Dhillon's role while she was on leave. Ms Siddiqui was hired on a permanent basis and assured when Ms Dhillon returned from leave Ms Siddiqui would transition to another position providing support to the company's offices in its growing New York region.

While Ms Dhillon was on leave, a lawsuit was filed against the company in Illinois. As a condition of the settlement of that lawsuit the company agreed to hire a local manager in Illinois. Consequently, Ms Dhillon's position no longer existed and the company terminated her employment. At the same time, the company transferred Ms Siddiqui from the Illinois/Indiana role to the New York region role, the same position that had been promised to her when she commenced employment.

Ministry of Labour - Employment Standards Branch

In response to the termination of her employment, Ms Dhillon filed a complaint with the Employment Standards Branch of the Ministry of Labour alleging Just Energy failed to abide by its reemployment obligation. The Ministry of Labour found in Ms Dhillon's favour and ordered Just Energy to pay her $37,458.92 in damages. Just Energy appealed the decision to the Ontario Labour Relations Board.

Appeal to Ontario Labour Relations Board

The Ontario Labour Relations Board allowed Just Energy's appeal and rescinded the order to pay. The Labour Board accepted Just Energy's argument that, as a result of the settlement of the lawsuit in Illinois, Ms Dhillon's position no longer existed and the company was under no obligation to create a comparable job or terminate the employment of an employee who was occupying a comparable job. The Labour Board then clarified an employer's reemployment obligations under the *Employment Standards Act, 2000* by stating, "*the [Employment Standards Act, 2000] does not require the termination of another person's employment in order to comply with the obligation to reinstate to comparable alternate employment unless the individual was hired only to replace the person on leave.*"

Should an employee's position be legitimately eliminated during the period of leave, the employer is under no obligation to create a comparable job to accommodate that employee's return.

Implications for Employers

The decision is important for employers because it reinforces that should an employee's position be legitimately eliminated during the period of leave, the employer is under no obligation to *create* a comparable job to accommodate that employee's return. Likewise, the employer is not required to terminate the employment of an employee occupying a comparable job to accommodate the returning employee unless that employee was hired to perform the work formerly performed by the returning employee. Instead, the employer is permitted to maintain its existing workforce without regard to the employee on leave.

To learn more or for assistance addressing leave issues in your workplace please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

The Customer Service Standard under the *Access for Ontarians with Disabilities Act* applies to private sector organizations as of January 1, 2012 (designated public sector organizations were required to comply by January 1, 2010). If your organization provides goods or services to the public or other third parties compliance is required by law.

To learn more, and/or for assistance, contact a member of the Sherrard Kuzz LLP team.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Help! There's been an accident.

A workplace accident can be a stressful and confusing time for an employer. A worker has been injured and all energy is focused on assisting that individual. When the dust settles and immediate medical treatment has been given, an employer may face liability under the *Occupational Health and Safety Act, Criminal Code* and/or *Workplace Safety and Insurance Act*. However, an employer can take steps to minimize and in some cases avoid liability. The first step is to know your employer rights.

At this *HR*eview Seminar we will tackle these issues and more:

1. Help! There's been an accident!
- Guidelines for compliance with deadlines and forms
- Employer investigations

2. As the dust settles
- The return to work process
- Changes to WSIB non-compliance and re-employment obligations
- Ministry of Labour inspections and investigations

3. The aftermath
- Defending OHSA and criminal charges
- Are policies, programs and training enough?
- Proposed changes to the OHSA (Bill 160)

4. Keeping it together
- Tips, traps and best practices for dealing with workplace injuries
- Remaining sympathetic and smart

DATE: **Wednesday September 21, 2011; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre,** 75 Derry Road, Mississauga, Ontario, L5W 1G3

COST: Please be our guest

RSVP: **By Friday September 9, 2011** to 416.603.0700 or register on-line at *www.sherrardkuzz.com/seminars.php* (for emergencies our 24 Hour Line is 416.420.0738)

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

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

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