MANAGEMENT COUNSEL

Employment and Labour Law Update

"Failure to discharge the duty of fairness may result not only in an award of damages, as in the case of wrongful dismissal, but more importantly in reinstatement of the dismissed employee."

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SHERRARD KUZZ LLP

Employment & Labour Lawyers

Public Service Employees: Duty of Fairness Owed on Termination

Recently, the Federal Court of Canada overturned the decision of the Governor General in Council (Cabinet) to terminate the employment of then Chair of VIA Rail Jean Pelletier. Mr. Pelletier had been fired from his position after making disparaging remarks about Olympian Myriam Bedard, who had testified about the sponsorship scandal last year.

The decision confirmed the legal principle that certain public service employees (those whose service is "at the pleasure" of the government) are entitled to procedural fairness when being dismissed. That is, they must receive reasons for the dismissal and an opportunity to respond to those reasons.

While this legal principle is not novel, the decision serves as an important reminder to public and quasi-public employers that the "duty of fairness":

1. Is very much alive and well.
2. Exists regardless whether there is cause to terminate the particular employee.
3. If breached, may result in reinstatement of the employee.

THE FACTS

Myriam Bedard, a former Olympian, was employed by VIA Rail in its marketing department. In February of 2004, Ms. Bedard sent a letter to Paul Martin in the midst of the fallout from the sponsorship scandal outlining contentious practices of which she was aware while working for VIA Rail in 2001. Ms. Bedard said when she questioned bills the Crown corporation received, saying they appeared out of line with the work actually done, she was sidelined and forced to resign from the organization.

An arbitrator ultimately found that Ms. Bedard had resigned voluntarily. Nevertheless, Mr. Pelletier was quoted in the newspaper making various derogatory comments about Ms. Bedard, including that she was taking advantage of the sponsorship scandal for her own personal gain, was "*lying shamelessly*" and that her status as a single mother was to be pitied: *"I don't want to be mean….This is a poor girl who deserves pity, who doesn't have a spouse, as far as I know. She is struggling as a single mother with economic responsibilities. I pity her, in the end….. But you know, Olympic medalists are people who find it difficult after being acclaimed at the Olympics, when they find themselves back in the real world. It's not easy to be a regular person, for these people who have been in the spotlight."*

Within days Mr. Pelletier was dismissed from his post.

THE LAW

Historically, public service employees who served "at the pleasure" of the government could be dismissed without notice

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and without the kind of "cause" normally required to discharge an employee. Canadian courts have thus developed the duty of fairness as a means of controlling the broad discretion given to public employers to dismiss without cause or notice. Generally, in the case of employment "at pleasure" the duty is considered minimal - the employer must at least communicate to the employee the reasons for the dissatisfaction and give the employee an opportunity to be heard. Failure to discharge the duty of fairness may result not only in an award of damages, as in the case of wrongful dismissal, but more importantly in reinstatement of the dismissed employee.

In Mr. Pelletier's case, the Federal Court overturned the decision to terminate him on the grounds that the termination had been carried out in a manner that was contrary to the duty to act fairly. The evidence showed that Mr. Pelletier had little to no knowledge that disciplinary action was being contemplated, was never made aware of the reasons for Cabinet's dissatisfaction, and was never given the opportunity to respond to the allegations against him. To the contrary, Mr. Pelletier did not become aware of the reasons for dissatisfaction until he read a press release announcing his removal.

In its reasons the Court was careful to make its point without creating onerous obligations on government employers:

> *The Court's objective is not to require that the Governor General in Council follow complex, costly procedures that are incompatible with that body's nature; rather, it is to ensure that the procedure is not violated with impunity under the guise of feasibility.*
>
> *I do not believe that finding for the applicant [Pelletier] amounts to expanding or narrowing the minimum procedural guarantees that apply in the case of individuals appointed to hold office during pleasure. The evidence was that the process was neither fair nor open. On the contrary, it was conducted in an opaque and hasty manner, without the applicant being informed that disciplinary action was being considered against him.*

Ultimately Mr. Pelletier was reinstated - and then terminated again - this time apparently in accordance with the duty of fairness. That is, he was given actual notice of the intention to terminate his employment (although he clearly had *de facto* notice by this point) and an opportunity to be heard. Not surprisingly, Mr. Pelletier has now commenced a $3.1-million civil suit against the government and VIA Rail Canada for wrongful dismissal.

"Historically, public service employees who served 'at the pleasure' of the government could be dismissed without notice and without the kind of 'cause' normally required to discharge an employee."

LESSONS LEARNED

In the case of public sector employees, the duty to act fairly is assessed in light of three factors:

1. The nature of the decision made by the authority.
2. The relationship between that authority and the individual.
3. The effect of the decision on the rights of the individual.

Some public employees are entitled to reasons for the contemplated dismissal and an opportunity to respond to those reasons.

Underlying all of these factors is the notion that the purpose of the duty of fairness is to ensure that administrative decisions are made using a fair and open procedure. Breaching the duty of fairness exposes an employer to an order "reinstating" the employee.

If you would like to consider how the duty of fairness may affect your organization, please contact any member of our legal team.

Let Bygones Be Bygones

A brief, but important, decision of the Ontario Labour Relations Board (the "Board") highlights why an employer must be careful not to intimidate or penalize former employees.

THE FACTS

Carol Chafe unsuccessfully complained to the Board that she was constructively dismissed from her employment with Home Base Non-Profit Housing ("Home Base"). In her complaint, Ms. Chafe had sought an award of termination pay pursuant to the Employment Standards Act (the"ESA).

The ESA provides that an employee who disagrees with the decision of an Employment Standards Officer ("Officer") has thirty days to appeal the Officer's decision. Although Ms. Chafe did appeal the Officer's decision, she did not do so within the thirty day appeal period. Instead, Ms. Chafe waited approximately ninety days to file her appeal because, she stated, she believed she was emotionally unable to cope with a further hearing. Ms. Chafe had also secured subsequent employment and as such had substantially mitigated her damages.

In all of the circumstances, the Board dismissed Ms. Chafe's appeal as untimely. This is not particularly remarkable, given that the Board only exercises its discretion to extend the timeline for an appeal of an Officer's decision in limited circumstances, including for example: where the delay in filing the appeal is short, where the delay is as a result of inadvertence, where there is an acceptable explanation for the delay and the delay would not prejudice any party, and where the delay was incurred in good faith.

The more interesting part of this decision is the Board's warning to Home Base regarding certain actions it took after Ms. Chafe began working for her new employer. After Ms. Chafe's termination from Home Base, she obtained new employment in the very same building. Shortly thereafter, Ms. Chafe received a letter from Home Base which referenced Ms. Chafe's initial ESA complaint, stated that her former co-workers held "antipathy" towards her, and concluded with the statement "It is unfortunate that you are working at 417 Bagot Street. Please do not visit the Home Base offices or work areas if at all possible". A representative of Home Base also spoke with Ms. Chafe's new employer.

It was this letter, combined with the conversation between Home Base and her new employer, which caused Ms. Chafe to file her appeal of the Officer's decision. According to her testimony, she feared that her new job was being threatened, and hoped that by filing the appeal Home Base might be deterred from intimidating her or speaking about her with her new employer.

THE BOARD'S DECISION

Section 74 of the ESA prohibits an employer from intimidating or penalizing an employee who has filed a complaint under the ESA. A breach of section 74 can have profound consequences for an employer. For example, section 74 combined with section 104 of the ESA allows the Board to compensate or reinstate an employee who has been penalized because he or she sought to exercise rights under the ESA.

In this case, the Board's warning to Home Base is noteworthy:

> *It is worthwhile to remind Home Base Non-Profit Housing that section 74 of the Act prohibits an employer from intimidating or penalizing an employee who has brought a complaint under this Act. Home Base Non-Profit Housing could be held liable for consequences to the applicant's present employment that were linked to actions taken by Home Base Non-Profit Housing as a result of the applicant having filed a complaint. In other words, just because the applicant is working elsewhere does not mean that Home Base Non-Profit Housing is free to criticize the applicant or interfere in her new employment relationship.*
>
> *In the unlikely event that Home Base Non-Profit Housing does not heed the Board's warning about the consequences of any future conduct, the applicant could bring a fresh complaint, alleging that she has suffered a reprisal as a result of having brought her initial complaint.*

LESSONS LEARNED

In this case Ms. Chafe brought her appeal in an effort to deter her former employer from intimidating her and interfering with her current employment. The merits of her case were not heard by the Board because of timeliness. However, the Board's warning to Home Base is an important reminder that a former employer must not interfere with the economic relations of a former employee. Should interference take place the former employer may be exposed to an order against it under the ESA.

[See a related discussion in our **Management Counsel Vol. IV, No. 5** *"Don't Put Yourself Behind The Reference 8 -Ball".]*

DID YOU KNOW?

The amendments to the Ontario Human Rights Code effectively abolishing mandatory retirement come into effect on December 12, 2006. Prudent employers must plan ahead. To find out how these changes may affect your organization and how you can take proactive steps now, contact any member of the Sherrard Kuzz team.

MANAGEMENT COUNSEL

Employers Cautioned (Again) Re: Participation in E.I. Appeals

Under the *Employment Insurance Act*, if an applicant is denied benefits (often because he or she voluntarily quit their employment, or was terminated due to willful misconduct), the applicant has a right to appeal. That appeal can include a hearing before the E.I. Board of Referees or an Umpire. While employers have the right to participate in these appeal processes, they are not required to attend the hearing or to adduce evidence.

Some employers choose to attend and participate in E.I. Appeal hearings, often because of their strong feelings concerning the misconduct committed by the employee or because they perceive a need to defend their decision to terminate the employee for willful misconduct.

However, there may be significant consequences to an employer that participates in an E.I. Appeal hearing. Courts in several Canadian jurisdictions (including both Ontario and most recently British Columbia) have ruled that where an employer has participated in an E.I. Appeal hearing and contested whether there was cause to terminate an employee, the employer is bound by the results of the E.I. hearing if the employee's appeal is successful. This means that the employer loses the right to contest that same issue (whether there was cause to terminate the employee) in the context of a civil suit where the employee alleges that he or she was wrongfully terminated.

Essentially, the courts have said that where the same two parties (the employer and the employee) have litigated the issue of the employee's misconduct and where a final decision has been issued (including an E.I. Appeal decision), that issue has been conclusively decided and cannot be relitigated.

The net result is that despite an understandable desire to defend the decision to terminate an employee for cause, an employer should carefully consider whether it should participate in an E.I. Appeal hearing. There is little (if any) upside to participation and the downside can be significant.

For more information about an employer's obligations in the E.I. process, contact any member of the team at Sherrard Kuzz LLP.

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BREAKFAST SEMINAR

Next in our series of employment and labour law updates:

HReview Seminar Series

TOPIC: BILL 211: MANDATORY RETIREMENT ENDS - IMPLICATIONS AND PROACTIVE SOLUTIONS

- Legal implications for employers in Ontario
- Impact on defined benefit and defined contribution pension plans
- Managing the older worker: performance evaluation, termination of employment and reasonable accommodation
- Employment policies and practices: compensation, benefits and training
- Implications for company culture

SPECIAL GUEST SPEAKERS:

- Wendy Mizuno and Iain Morris, Principals, *Mercer Human Resources Consulting*

DATE: Tuesday March 21, 2006, 7:30 a.m. — 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)

VENUE: The Toronto Board of Trade, Airport Centre, 830 Dixon Rd., Toronto, ON M9W 6Y8 416.798.6811

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Providing management with practical strategies that address workplace issues in proactive and innovative ways.