Employment and Labour Law Reporter

VOLUME 25, NUMBER 3 Cited as (2015), 25 E.L.L.R. JUNE 2015

• QUEBEC INVESTIGATING EMPLOYERS FOR PAY EQUITY OBLIGATIONS •

by Tania da Silva, DLA Piper LLP

A recent notice in the *Journal du Barreau* advised that Quebec's Pay Equity Commission is currently investigating employers who were required to complete their pay equity exercise by December 31, 2010, but have not yet done so.

• In This Issue •

QUEBEC INVESTIGATING EMPLOYERS FOR PAY EQUITY OBLIGATIONS
Tania da Silva 21

BC PRIVACY COMMISSIONER RELEASES REPORT ON USE OF EMPLOYEE MONITORING SOFTWARE
Larry Page 24

POTTER V. NEW BRUNSWICK LEGAL AID SERVICES COMMISSION: SUPREME COURT EXPANDS REACH OF CONSTRUCTIVE DISMISSAL
Karen R. Bock 25

Under Quebec's *Pay Equity Act*, CQLR, c. E-12.001 (the "PEA"), employers with 10 or more employees are required to compare predominantly female job classes with predominantly male job classes to determine whether aspects of female jobs were disregarded, resulting in wage gaps. If such a gap exists, employers must determine and pay the compensation adjustments required to correct gender based wage discrimination and maintain pay equity within its enterprise thereafter.

Although the PEA has been in force since 1996, the Ministry of Labour reported approximately ten years after PEA came into effect that many employers were not in compliance with its provisions. In order to address this situation, the Act to amend the *Pay Equity Act* ("Bill 25") was adopted. Among other things, Bill 25 established December 31, 2010, as the new deadline for accountable enterprises that had not completed a pay equity plan or determined compensation adjustments within the legal time limit to do so. Bill 25 also imposed pay equity audits at five-year intervals and set out how these were to be conducted.

EMPLOYMENT AND LABOUR LAW

Employment and Labour Law Reporter is published monthly by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Suite 700, Markham, Ontario L3T 7W8.

ISBN 0-409-91093-7 **ISSN 1183-7152**
ISBN 0-433-44669-2 (PDF)
ISBN 0-433-44383-9 (Print & PDF)

Subscription rates: $525 per year (print or PDF)
$610 per year (print & PDF)

Please address all editorial inquiries to:

Alexander Wiebe, Journals Editor
LexisNexis Canada Inc.
Tel. (905) 479-2665; Fax (905) 479-2826
E-mail: ellr@lexisnexis.ca.

HOW PEA WORKS AND PENALTIES FOR NON-COMPLIANCE

Depending on the size of the enterprise during its applicable reference period, employers subject to the PEA must either:

1. establish a pay equity plan; or

2. determine the adjustments in compensation required to afford the same remuneration, for work of equal value, to employees holding positions in predominantly female job classes as to employees holding positions in predominantly male job classes.

More specifically, it needs to be determined whether an enterprise employed 10 to 49 employees, 50 to 99 employees, or over 100 employees during its reference period in order to clearly determine which pay equity obligations it is subject to (e.g. whether or not a pay equity committee is required, the types of postings that are required, etc.)

The PEA foresees various offences and fines for failure to meet many of the obligations that it creates. For a second or subsequent offence, the fines are doubled. The PEA also provides that in determining the amount of a fine, the court must take particular account of the injury suffered and the benefits derived from the commission of the offence. The PEA also provides that penal proceedings for an offence against the PEA may be instituted by the Pay Equity Commission.

In addition to these fines, the PEA also foresees that various retroactive compensation adjustments can apply, and that interest and additional indemnities can be applied to late compensation adjustments.

QUEBEC EMPLOYERS SHOULD REVIEW PEA OBLIGATIONS AND WATCH THE MAIL

The recent notice in the *Journal du Barreau* states that employers concerned will receive a letter advising them of their obligations, of what they must do to fulfill such obligations and of the amount of time within which they must comply. The notice does not mention whether or not fines or other penalties will be imposed upon employers identified as part of these investigations. It is therefore important for all Quebec employers to ensure that they are compliant with their obligations under the PEA, and to take steps to be in compliance if that is not the case.

[***Tania da Silva*** *is an associate at the firm's Montreal office where she practises in the area of employment law and commercial litigation. Her employment law practice involves, amongst other things, assisting employers on matters such as wrongful dismissal claims, advising on Labour Standards, Human Rights and Privacy issues, enforcing restrictive covenants, drafting and reviewing employment contracts, employment policy manuals, and codes of conduct, assisting with the hiring, progressive discipline and termination of employees.*

Tania's litigation practice consists of representing numerous clients in a wide range of civil suits, including employment-related litigation, manufacturer's liability, enforcing of securities and all manner of contractual disputes. She has also been involved in several class action proceedings as defence counsel, specifically in competition law private actions brought under the Civil Code of Quebec and the Competition Act.]

• BC PRIVACY COMMISSIONER RELEASES REPORT ON USE OF EMPLOYEE MONITORING SOFTWARE •

by Larry Page, DLA Piper LLP

In January 2015, the mayor of Saanich publicly complained that the District of Saanich had installed "spyware" on his office computer. The BC Information and Privacy Commissioner initiated an investigation pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (the "Act"), in order to determine whether the District of Saanich had complied with the privacy requirements under the Act.

The Commissioner's investigation report was released on March 30, 2015. The Commissioner found that the District of Saanich had installed a monitoring program called Spector 360 on 13 employee workstations. The Spector 360 program provided for, inter alia, collection of the following data:

- automated screenshots at 30 second intervals
- monitoring of chat and instant messaging
- a log of all websites visited
- recording of all email activity
- a log of every keystroke

The District of Saanich allowed the employees to use their workstations for personal use. The employees therefore had a reasonable expectation of privacy with respect to any personal information that they entered on their computer or viewed on line.

That meant that the District of Saanich was collecting information concerning employees personal emails, online banking, messaging, and websites visited by the employee. The courts have ruled that websites visited by an employee are personal and private information. The employer is not permitted to collect that information.

The Commissioner stated that the "personal information that is accessed online during the routine daily activities of any individual can range from the mundane such as vacation planning through to the highly sensitive such as viewing medical laboratory results".

The Commissioner concluded that the collection of that personal information was not authorized by the legislation and was contrary to the Act. Because the personal information was inextricably intermingled with business information, the Commissioner advised the District to "destroy all information collected by the monitoring software". In addition, the Commissioner advised the District to "disable the keystroke logging, screenshot recording, program activity logging, email recording", and certain other aspects of the Spector 360 program.

The report by the Commissioner confirms that employers must respect the privacy rights of employees when those employees are using computers in the workplace. As we have previously reported, if employees are allowed even incidental personal use of the employer's computer systems, the employees then have a reasonable expectation of privacy with respect to any personal emails, data, websites visited, as well as any all other information that would be expected to be created when the employee is permitted to use the employer's computer system.

[***Larry Page*** *is counsel in the firm's Vancouver office and a member of the firm's employment group. He advises clients on all matters in respect of labour relations planning and strategy, and has practised labour law in B.C. for over 35 years*.]

• *POTTER V. NEW BRUNSWICK LEGAL AID SERVICES COMMISSION*: SUPREME COURT EXPANDS REACH OF CONSTRUCTIVE DISMISSAL •

by Karen R. Bock, DLA Piper LLP

In March of 2015, the Supreme Court of Canada addressed the issue of constructive dismissal from employment in the case of *Potter v. New Brunswick Legal Aid Services Commission*, [2015] S.C.J. No. 10, 2015 SCC 10. In doing so, the court has clarified the scope of constructive dismissal and updated the test for determining if a constructive dismissal has occurred. The court has also made it clear that the duty of good faith in contracts applies to all aspects of the employment relationship. Most significantly, the court has indicated that an employer has an implied contractual obligation to provide work to an employee. In short, this case has important ramifications for all employers in Canada.

FACTS OF THE CASE

Mr. David Potter was employed by New Brunswick Legal Aid Services Commission (the "Commission") as Executive Director and was appointed for a seven-year term. Unfortunately, the relationship between the Commission and Potter soured, and the parties began to negotiate an early end to Potter's contract. Before the negotiations could be completed, Potter left work on sick leave.

The Commission decided that if the buy-out negotiations with Potter were not completed by a certain date, the Commission would ask the Lieutenant-Governor in Council to revoke Potter's appointment for cause. Accordingly, just before Potter's return to work and unbeknownst to him, the Commission wrote to the New Brunswick Minister of Justice recommending that Potter be terminated for cause. At the same time, the Commission advised Potter that he "ought not to return to the workplace until further direction from the Commission."

Seven weeks later, Potter commenced an action for constructive dismissal. The Commission took the position that Potter had therefore resigned from his employment.

SUPREME COURT OF CANADA DECISION

TEST FOR CONSTRUCTIVE DISMISSAL REFRESHED

According to the court's decision in *Potter*, constructive dismissal can occur in two ways:

1. an employer may unilaterally breach a substantial express or implied term of the employee's employment contract; or
2. an employer may more generally demonstrate through its conduct that it does not intend to be bound by the employee's contract.

The test for such dismissal consists of two branches:

1. Has a breach of the employment contract occurred by a single unilateral act of the employer? If so:
   a. Does that breach substantially alter an essential term of the employment contract?
   b. Would a reasonable person in the same situation as the employee have felt that the essential terms of the employment contract were being substantially changed?

2. Has there been a series of acts that, taken together, show that the employer intended to no longer be bound by the employment contract?

REQUIREMENT OF GOOD FAITH

The court found that even if the Commission had the authority to suspend Potter, that authority was subject to a basic requirement of business justification. The Commission, in the court's view, had failed to establish that it had a sound business reason for suspending Potter.

The court also made it clear that the duty to act in good faith in contractual dealings means being honest, reasonable, candid, and forthright. In Potter's case, he was given no reason whatsoever for the suspension, which the court found was not forthright. In addition, the Commission's ostensible reason for the suspension—to facilitate a buy-out of Potter's employment contract—was undercut by the Commission's actions in trying to have Potter's employment terminated for cause.

DUTY TO PROVIDE WORK

Most interestingly, the court found that an employer generally has a duty to provide work to its employee. Justice Wagner wrote: "To the extent that the proposition that the employer's discretion [to withhold work] is absolute was ever valid it has been overtaken by modern developments in employment law". Such modern developments, in Justice Wagner's view, include the concept that work is now considered to be "one of the most fundamental aspects in 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".

LESSONS FOR EMPLOYERS

Constructive dismissal remains, as the court in this case admitted, a highly fact-based determination. Consequently, determining whether a particular act or omission, or series of acts or omissions, constitutes constructive dismissal remains frustratingly difficult to determine.

However, what is clear following *Potter*, is that a suspension will constitute constructive dismissal unless:

- the suspension is with pay;
- the suspension is relatively brief in duration;
- the employer has a legitimate and reasonable business purposes for imposing the suspension; and
- the employer honestly, candidly, and forthrightly communicates the reason for the suspension to the employee.

Alternatively, the employer may be well-advised to include in the written employment agreement or offer letter a provision that the employer has no obligation to provide the employee with work.

[***Karen R. Bock*** *is a partner in the Employment Group at the firm's Toronto office. Karen has a general management-side labour and employment law practice.*

Karen advises public and private-sector employers on matters, such as employment standards, arbitrations, wrongful dismissal actions, human rights complaints, workplace safety and insurance matters.]

CANADIAN CONTRACT LAW, 3RD EDITION

Angela Swan, B.Comm., LL.B., B.C.L. &
Jakub Adamski, B.A., B.C.L., LL.B., LL.M.

With the immense number of contracts cases out there today, busy practitioners need a practical, in-depth contracts text book that tells them what the important cases are, why they are important, and what the underlying principles are. This book fills that need.

Written by authors equally at home in academia and the legal practice, this book helps lawyers advise clients, draft agreements, and recognize the pitfalls and dangers in resolving contract disputes by carefully explaining the actual approach courts have taken to solving contractual disputes. All aspects of contract law are covered, so lawyers need not look elsewhere for an authoritative interpretation and practical guidance on Canadian contract law.

New to the Third Edition

- Analysis and discussion of new case law on the following topics:
    - Pervasive problem of good faith
    - Perennial problems of damages
    - Recent focus by the courts on what constitutes a "fundamental breach" of a contract
- Extensive re-thinking and analysis of the process of interpretation of contracts, including the approaches that characterize the courts' attitude to filling in, often by the implication of terms, the gaps that may exist in an agreement
- A focus on how individual cases illustrate the attitude that a court is likely to take in judging a case. (The book contains an index where the courts' statements on their attitude to interpretation, to damages, and to enforcement are noted.)
- Original paragraph numbering in the second edition has been retained in this text; new paragraphs in this edition appear as subparagraphs of the original paragraphs.

This book helps lawyers advise clients, draft agreements, and recognize the pitfalls and dangers in resolving contract disputes by carefully explaining the actual approach courts have taken to solving contractual disputes. All aspects of contract law are covered, so lawyers need not look elsewhere for an authoritative interpretation and practical guidance on Canadian contract law.

For further details of the publication or to subscribe,
go to *www.lexisnexis.com/store.*