Ius Laboris Canada Global HR Lawyers
MathewsDinsdale

Employers' Advisor

WORKPLACE NEWS COAST TO COAST

July 2019

INSIDE:

Wave of Change?: A Look into Termination, Incentive Plans, and *Ocean Nutrition Canada Inc. v Matthews*

Incentive plans are often very effective tools for employee retention. But what happens when the employment relationship ends? This question was recently before the Nova Scotia Court of Appeal in *Ocean Nutrition Canada Inc. v Matthews*, 2018 NSCA 44.

David Matthews was the Vice-President, New and Emerging Technologies of Ocean Nutrition Canada Inc. ("Ocean"). Part of Mr. Matthews' compensation package included the enrolment in a Long Term Incentive Plan ("LTIP"). Under the terms of the LTIP, a payout was provided upon the happening of what the parties dubbed a "realization event", which included the acquisition of Ocean by another company. The LTIP contained provisions regarding termination of employment, specifically stating the company had "no obligation" to make the payout unless the employee was a full-time employee on the date of a "realization event".

Approximately ten years into Mr. Matthews' tenure with Ocean, the company hired a new CEO. Tension began between Mr. Matthews and the CEO, resulting in a change in Mr. Matthews' title, a reduction in his work and responsibilities, and a change in reporting structure. In light of this, Mr. Matthews considered himself to have been constructively dismissed and resigned. Thirteen months later, Ocean was purchased by another company. Not long after, Mr. Matthews commenced legal action against Ocean.

The trial judge found that Mr. Matthews had been constructively dismissed and awarded damages for common law reasonable notice in the amount of fifteen (15) months. The trial judge also found that there was a common law right to damages for loss of the payout under the LTIP because, but for Mr. Matthews wrongful dismissal by Ocean, he would have been employed during the notice period and would have been entitled to the payout arising from Ocean's acquisition. As a result, Mr. Matthews was awarded damages for the loss of the payout in the amount of $1,086,893.36.

On appeal, a majority of the Nova Scotia Court of Appeal found that Mr. Matthews had been constructively dismissed and affirmed the award of 15 months' notice. On the issue of entitlement to damages for loss of payout under the LTIP, the majority found that the trial judge erred in finding that entitlement to damages for loss of payout under the LTIP was a common law right, and rather entitlement to payout or damages for loss of payout was a contractual right derived from the language of the LTIP. As per the language of the LTIP, entitlement to a payout was contingent on Mr. Matthews being a full-time employee at the date of the realization event. Furthermore, the language of the LTIP also stated that employees would not be entitled to the payout on termination of employment without cause and upon resignation, and that payouts were not to be included in employee compensation for termination or severance purposes. Given the clear,

unambiguous language in the LTIP disentitling employees to a payout at the end of the employment relationship, the majority determined that Mr. Matthews was not entitled to damages for loss of payout under the LTIP.

Despite the majority's employer-friendly decision, one member of the panel disagreed with the majority regarding damages for loss of a payout under the LTIP. While he agreed with the majority regarding constructive dismissal and notice, Justice Scanlan concluded that Mr. Matthews was entitled to damages for loss of payout under the LTIP based on the implied duty of good faith and honesty in contracting addressed in *Bhasin v Hrynew*, 2014 SCC 71. Justice Scanlan found that Mr. Matthews had been pushed out of his role with Ocean intentionally through the deceptive conduct of the CEO, which was designed to prohibit him from recovering under the LTIP. Justice Scanlan opined that Ocean should not be able to benefit from the egregious conduct its CEO.

Mr. Matthews appealed the decision of the Nova Scotia Court of Appeal to the Supreme Court of Canada and has been granted leave. The Supreme Court of Canada is set to hear this matter in October 2019.

For now, this case suggests that clear and unambiguous language specifically denying entitlement to payouts from incentive plans on termination of employment will be upheld. Be sure to keep an eye on this case to see which way the highest court will go.

BC Employers, Take Note! Significant *Labour Relations Code* and *Employment Standards Act* Changes Now in Effect

Employers across British Columbia are adjusting to the new amendments to both the *Labour Relations Code* and *Employment Standards Act*, which were quickly pushed through the legislature and received Royal Assent on May 30, 2019. Many of the amendments are already in effect and having a significant operational impact on the province's businesses.

Under the amended *Labour Relations Code*, the following changes are now in force:

- Significant restrictions on employer speech during union organizing campaigns;
- Reduced timeframe for certification votes, down to five business days from date of application;
- Lowering the bar for "remedial certification" (i.e., certification without a vote) when an unfair labour practice has been committed;
- Extending the "statutory freeze" (during which an employer is very restricted from altering terms and conditions of employment) following certification, from four to twelve months;
- Making it easier for unions to have first collective agreements imposed by arbitration;
- Imposing union successorship (i.e. the transfer of union certification and existing collective agreements) upon the retendering of contracts in the health, cleaning, security, food services and bus transportation sectors, retroactive to April 30, 2019;
- Imposing new timelines and decision requirements on the expedited arbitration process under the *Code*, which significantly erode a party's right to a fair hearing and a reasoned decision; and
- Education has been eliminated as an "essential service," thus removing certain restrictions regarding the ability of unionized workers in the public education sector to go on strike.

Under the amended Employment Standards Act, the following changes are now in force:

- Statutory provisions relating to hours of work or overtime, statutory holidays, annual vacation and vacation pay, termination of employment, and special clothing now apply to unionized workplaces, and must be met or exceeded in all future collective agreements;
- The ability of an employer to deduct money from an employee's wages to pay off debts owed to the employer has been further restricted;
- Employers are prohibited from withholding, deducting from, or requiring an employee to return, any gratuities they receive;
- Two new job protected unpaid leave periods have been created:
    - Critical illness or injury leave, which is an unpaid leave an employee may use to provide care or support to a family member whose life is at risk as a result of an illness or injury (up to 36 weeks if the family member is a minor or up to 16 weeks if the family member is an adult); and
    - Leave respecting domestic or sexual violence, which is unpaid leave an employee may use for a variety of purposes relating to the experience of domestic or sexual violence, including seeking medical attention, obtaining counselling, social services, or assistance from law enforcement, and temporarily or permanently moving (employees have an

entitlement of up to 17 weeks of such leave per calendar year, subject to certain restrictions as to how such leave may be scheduled); and

- Record-keeping obligations have been lengthened to four years following the date of the record's creation.

In addition, certain amendments to the *Employment Standards Act* will come into force on a later date set by regulation, including the following:

- Temporary help agencies will be required to be licensed under the *Act*, and if an employer engages the services of an unlicensed agency, that employer will be deemed to be the employer of each employee whom performs work on its behalf for all purposes under the *Act*; and
- Subject to limited exceptions, youth under the age of 14 will be prohibited from working generally, and children under the age of 16 will be prohibited from working in "hazardous industries" and from performing "hazardous work", which will be further defined by regulation.

There is no question that these amendments have significantly changed the legislative framework in which both unionized and non-unionized employers operate in BC. As many of these changes are already in force, employers should review workplace policies, procedures and employment contracts as soon as possible in order to ensure their continued compliance with the *Act*. Employers with a unionized workforce may wish to consider the impact of the new minimum requirements on collective bargaining in the future. Whether unionized or not, employers may wish to educate managers and supervisors (or update previous training) on what constitutes an unfair labour practice and the potential impact of such complaints.

Ontario Human Rights Tribunal in the Midst of a "Mediation Blitz"

In an effort to alleviate a significant backlog of cases, the Human Rights Tribunal (the "HRTO" or the "Tribunal") has devoted its available resources to a summertime mediation blitz. The blitz is expected to last through August 2019.

Background: Staffing Challenges at the HRTO

In recent years, delays at the Tribunal have been steadily worsening. This is a result of staffing shortages and a substantial increase in the number of applications being filed.

From April 2017 to October 2018, the HRTO experienced an unprecedented 25% increase in its caseload. It receives approximately 4,500 new human rights applications each year, the majority of which arise out of the employment context. This increased caseload is complicated by the fact that the HRTO is also suffering from a shortage of adjudicators.

Employers defending against a human rights application are therefore experiencing longer than usual wait times before mediations or hearings are scheduled. There have also been occasions where previously-scheduled mediations and hearings were simply cancelled and rescheduled on short notice, such as in circumstances where a Vice Chair has abruptly left the Tribunal.

The result is that the Tribunal is no longer meeting its service standards for the timely scheduling of mediations and hearings. For example, hearings are, on average, scheduled for 181 days after the application is ready to proceed.

From mid-September 2018 to the end of 2018, the Tribunal cancelled 53 mediations, 11 summary/preliminary hearings, and 4 merits hearings. The Tribunal expects such cancellations to continue unless the staffing shortage is addressed. In addition, the number of mediations and hearings being scheduled each month (prior to the blitz) was significantly reduced due to the staffing shortages.

There are currently approximately 800 cases in queue for mediation. The Tribunal therefore announced earlier this year that it will be holding a "blitz" to alleviate the backlog. The Tribunal will devote essentially all available resources to mediations in June, July and August in the hopes of reducing the number of applications waiting to be mediated. Where cases are successfully mediated, they will not require a hearing and can be closed by the Tribunal.

What to Expect during the Blitz

With the Tribunal hosting so many mediations at once, there are likely to be accompanying logistical challenges. For example, room availability may be limited when parties attend mediation, thus compromising parties' abilities to have private breakout spaces. Where employees and employers may have previously been in separate rooms throughout the mediation, they may now be forced to share a single room, holding private discussions in adjacent hallways.

Even worse, some mediations will be conducted via teleconference. The lack of face-to-face discussion, and the potential inability of adjudicators to speak with the parties separately, will reduce the efficacy of such teleconference mediations.

In addition, mediations during the blitz may be conducted by mediators who are cross-appointed from other tribunals. Because these cross-appointed mediators are coming from a

different area of practice, they may not offer the same level of expertise in human rights matters. This will mean that mediators assigned to your case may not have as strong a grasp on the legal nuances of, for example, an employer's duty to accommodate.

The mediation blitz may also result in further delays to other types of proceedings. For example, the scheduling of hearings may be postponed until after August 2019 while the mediation blitz is underway.

Finally, the Human Rights Legal Support Centre (which is similar to Legal Aid but specific to human rights proceedings) has reported that it is expecting budget cuts which will limit the number of mediations that HRLSC counsel can attend. This results in more self-represented applicants attending mediation.

Impact on Employers

As a result of the delays, some applicants are avoiding the HRTO altogether and deciding not to file applications. Instead, they are opting to file actions or complaints before the courts, the Ministry of Labour, or another administrative tribunal. Some applicants have even withdrawn their existing HRTO applications – after years of litigation – only to start fresh in another forum. This can result in increased costs to employers, as well as the risk of having human rights issues litigated before an adjudicative forum that does not have special expertise in human rights.

The delays at the Tribunal will result in increased risk to employers in cases where they face potential ongoing liability (such as cases dealing with the termination of an employee). The backlog also prevents employers faced with meritless allegations from being able to vindicate themselves at a hearing in a timely manner.

Another trend emerging as a result of the HRTO backlog is a move toward private, third-party mediation. Rather than waiting for the Tribunal to schedule and conduct a mediation, some parties are opting to jointly hire a private mediator to conduct the mediation outside of the usual HRTO process. While this is an added cost, it is typically much more expeditious than mediation at the Tribunal, and the parties are able to choose their mediator in advance to ensure he or she will be both qualified and effective.

About Mathews Dinsdale

Mathews Dinsdale is Canada's only national boutique labour and employment law firm. With six offices across Canada, and connections to the Ius Laboris global network of HR law firms, we are uniquely positioned to assist employers with all their local, national or international workplace law needs

If you have questions about any of these topics or any other questions relating to workplace law, please do not hesitate to contact a Mathews Dinsdale lawyer.