

## Roper Greyell Case Law Update – October 2009

### Lay-Off in the Non-Union Context and the Duty to Mitigate

This case law update focuses on the recent decision of Mr. Justice Harry Slade of the B.C. Supreme Court in *Besse v. Dr. A.S. Machner Inc.*, [2009] B.C.J. No. 1912 (S.C.). The judgment was released on September 25, 2009.

#### Facts

Dawn Besse, a 51 year old receptionist, was employed at a dental clinic located in Hope, B.C. for a period of 18 years. She was, by all accounts, a valued employee and was well-liked and respected by those with whom she worked.

Dr. Arthur Machner is the principal of Dr. A.S. Machner Inc., a professional corporation (the “Defendant”).

In October 2007, Mrs. Besse went on a medical leave of absence. She required surgery and her projected recovery time was between three and six months. On December 18, 2007, Mrs. Besse advised Dr. Machner that she would be medically fit to return to work on January 14, 2008.

Dr. Machner, however, had a problem. He had purchased the dental clinic and associated practice from another dentist in September 2007 and, with the change in ownership, there had been a loss in the momentum of the practice. Monthly billings had not yet reached the level achieved by Dr. Machner’s predecessor but monthly expenses remained unchanged after the change in ownership.

Dr. Machner found himself with no choice but to address the financial concerns around the practice. He contacted the B.C. Employment Standards Branch (the government body responsible for administering the *Employment Standards Act*, R.S.B.C. 1996, c. 113 and *Employment Standards Regulation*, B.C. Reg. 396/95) and, on the basis of a suggestion from a representative there, proposed reduced work hours to Mrs. Besse and another receptionist employed at the clinic. The other receptionist was amenable to working reduced hours. Mrs. Besse was not, however, receptive to the proposal.

Dr. Machner again contacted the Employment Standards Branch. He was provided with a link to an Employment Standards Branch fact sheet that stated, in part:

### “Temporary lay-off”

An employer is not required to give notice of termination or pay compensation if an employee is laid off temporarily ...

A temporary lay-off becomes a termination when:

- A lay-off exceeds 13 weeks in any period of 20 consecutive weeks ...

A lay-off other than a temporary lay-off is considered a termination.

There was a meeting between Dr. Machner and Mrs. Besse on January 7, 2008. At the meeting, Mrs. Besse remained unreceptive to the proposal to reduce her work hours. Dr. Machner proceeded to inform her that she would be laid off for a period of twelve weeks and six days, starting on January 14, 2008. Dr. Machner also told her that his decision to lay her off was purely a financial decision. Her rate of pay was \$23.50 per hour and the other receptionist’s rate of pay was \$16.00 an hour.

On January 14, 2008, Mrs. Besse received written notice from Dr. Machner that she was laid off, effective that date, for a period of “twelve weeks and six days ... [at] which time [she could] return to work”.

A lawyer, acting on Mrs. Besse’s instructions, wrote to Dr. Machner on January 28, 2008 with a demand for damages in lieu of notice. After receiving the demand letter, Dr. Machner sought legal advice and learned that, in all the circumstances of the case, he did not have the right to temporarily lay off Mrs. Besse. He thereafter offered Mrs. Besse the opportunity to return to her job, with full pay and benefits from the date she was medically fit to return to work.

Dr. Machner’s offer was rejected and Mrs. Besse commenced a B.C. Supreme Court action for wrongful dismissal against the Defendant.

### **Was Mrs. Besse Wrongfully Dismissed?**

Before the Court, the parties agreed that the question of whether an employer has the statutory right under the *Employment Standards Act* to temporarily lay off employees is answered by the following passage in the B.C. Supreme Court case of *Collins v. Jim Pattison Industries Ltd. (c.o.b. Jim Pattison Automotive Group)* (1995), 7 B.C.L.R. (3d) 13 (S.C.):

... In my view, the Act does not grant all employers the statutory right to temporarily lay off employees, regardless of the terms of their employment

contract. Rather than creating new rights, the Act appears to be qualifying employment agreements in which the right to lay off already exists. Therefore, unless the right to lay off is otherwise found within the employment relationship, the above cited sections of the Act are not relevant.

At trial, the Defendant did not take the position that it had an express or implied right under its employment contract with Mrs. Besse to impose a temporary lay-off on her. Rather, the Defendant said that it never had an intention to terminate Mrs. Besse's employment or "a clear intention to repudiate the employment contract". The Defendant highlighted that no reference was made to "termination", "permanent lay-off" or "severance" in Dr. Machner's communications with Mrs. Besse, and that Dr. Machner was operating under "the honest, mistaken belief that the *Employment Standards Act* conferred on employers the power to impose a temporary lay-off".

Mr. Justice Slade expressly found that "[t]he evidence [did] not support Mrs. Besse's belief that Dr. Machner intended to terminate her employment", "[t]he record of correspondence support[ed] Dr. Machner's assertion that it was at all times his wish that Mrs. Besse would return to work at the end of the lay-off period", and Dr. Machner "imposed [the temporary lay-off on Mrs. Besse] on an incorrect understanding of his rights and responsibilities as an employer".

Notwithstanding all of that, Mr. Justice Slade rejected the position taken by the Defendant. Making reference to the Supreme Court of Canada case of *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, the trial judge ruled:

It is not a condition precedent to a finding of constructive dismissal that an employer has manifested an unequivocal intention to repudiate a contract of employment.

In finding that "the imposition of [the] temporary lay-off [on Mrs. Besse] constituted wrongful dismissal", the judge stated:

There can be no question but that the imposition of a temporary lay-off constitutes, in the absence of a contractual provision permitting the same, a fundamental breach of contract ....

....

... [I]t is irrelevant whether Dr. Machner mistakenly or unintentionally repudiated Mrs. Besse's contract of employment, as a fundamental breach of contract occurred as a matter of fact. The defendant breached an essential term of Mrs. Besse's contract of employment, as the continued attendance of an employee at the place of work, for pay, is central to the employer-employee relationship ....

### Did Mrs. Besse Fail to Mitigate Her Damages?

The finding that Mrs. Besse was wrongfully dismissed from her employment was not, however, the end of the matter.

The Defendant's principal defence before the Court (and the defence on which most of the evidence and argument at trial focused) was that Mrs. Besse failed to mitigate damages arising out of the Defendant's failure to provide notice. In the Defendant's submission, Mrs. Besse failed to mitigate her damages by:

- refusing to return to her job, with full pay and benefits from the date she was medically fit to return to work; and/or
- failing to seek and accept reasonably similar employment with an employer other than the Defendant.

Mr. Justice Slade found in favour of the Defendant on both of the above issues. On the issue of Mrs. Besse's refusal to return to her job, Mr. Justice Slade held that she had not conducted herself reasonably. He reviewed the circumstances surrounding the imposition of Mrs. Besse's temporary lay-off:

- Dr. Machner's actions were motivated solely by financial considerations. The dental practice was not operating at the level achieved by Dr. Machner's predecessor and the temporary lay-off was imposed on Mrs. Besse because of Dr. Machner's "incorrect understanding of his rights and responsibilities as an employer".
- Dr. Machner "wish[ed] to find a solution that would be satisfactory for all concerned parties: himself, Mrs. Besse, and the other receptionist". The temporary lay-off was imposed on Mrs. Besse "only after Dr. Machner, in good faith, engaged Mrs. Besse and the other receptionist in an effort to find a workable solution to his concerns".
- Dr. Machner "offered Mrs. Besse the opportunity to return to employment on the same terms as previously applied, and to make good on any loss of income sustained in the interim".
- The tone of written communication from Dr. Machner to Mrs. Besse was at all times "considerate and caring" and "courteous and respectful".

According to Mr. Justice Slade, Dr. Machner's conduct, when viewed objectively, "reveal[ed] no good reason why a reasonable person in Mrs. Besse's specific circumstances" would, on a return to her job, "have experienced stigma or loss of

dignity” or “have valid concerns for the workplace atmosphere”.

With regard to the issue of seeking and accepting reasonably similar, alternative employment, Mr. Justice Slade cited the line of authority that says the duty to mitigate requires “a constant and assiduous application for alternative employment, an exploration of what is available through all means ...”

After noting that “Mrs. Besse appears well qualified to work as a receptionist in any professional office” and “[t]here is evidence that many such positions were advertised in Chilliwack, a short commute from Hope, between February and April 2008”, the trial judge concluded:

There is, on the evidence, a basis for finding a substantial likelihood that comparable alternative employment could have been achieved had Mrs. Besse expended a reasonable effort.

Because of Mrs. Besse’s failure to mitigate her damages, the damages award to which she was entitled on account of the wrongful dismissal was substantially reduced. She was only awarded damages for “lost income” for the period of time from January 14, 2008, the effective date of the temporary lay-off, to the date on which it was made clear to Mrs. Besse that she could return to her job, “on the same terms as previously applied” with compensation for “any loss of income sustained in the interim”. This is a period of time of around 4.5 weeks.

## Conclusion

As seen in *Besse v. Dr. A.S. Machner Inc.*, failure on the part of a dismissed employee to satisfy the duty to mitigate can have a significant impact on the outcome of wrongful dismissal litigation.

Even if the employee can successfully establish that he or she was wrongfully dismissed from employment, he or she must also be able to establish that reasonable steps were taken to mitigate damages arising out of the employer’s failure to provide notice. Otherwise, the employee runs a very real risk of, to put it colloquially, winning a battle but losing the war.

*If you have questions regarding the issues raised in this case law update and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.*

*Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at [www.ropergreyell.com](http://www.ropergreyell.com).*

**Counsel for Dr. A.S. Machner Inc.**

James D. Kondopoulos, an associate lawyer at Roper Greyell, was legal counsel for Dr. A.S. Machner Inc., the defendant employer in *Besse v. Dr. A.S. Machner Inc.*



James acts for, and provides legal advice to, employers in employment, labour relations and human rights matters. He also provides representation to employers and employees in wrongful dismissal actions, and investigates and reports on allegations of workplace harassment, bullying and code of conduct violations. James has represented, and appeared on behalf of, clients before a number of judicial and administrative bodies, including the B.C. Court of Appeal, Supreme Court, Provincial Court, Labour Relations Board and Human Rights Tribunal.

James can be contacted at (604) 806-3865 or [jkondopoulos@ropergreyell.com](mailto:jkondopoulos@ropergreyell.com).

For more information about James and our other lawyers, please visit the firm's website at [www.ropergreyell.com](http://www.ropergreyell.com).

\* Every effort has been made to ensure accuracy in respect of this case law update. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this case law update. \*