

TO: CLIENTS AND OTHER INTERESTED PARTIES

**RE: ROPER GREYELL NEWSLETTER –
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RECENT DECISIONS OF IMPORTANCE IN THE AREA OF EMPLOYMENT AND LABOUR LAW

Introduction

In this newsletter, we take a slightly different approach to the one we usually take.

Rather than focusing on one particular decision, we summarize a number of recent decisions of importance in the area of employment and labour law. Those decisions are as follows:

- *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4;
- *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al.*, 2007 BCCA 22;
- *Asselstine v. Manufacturers Life Insurance Co.*, 2005 BCCA 292; and
- *Macaraeg v. E Care Contact Centers Ltd.*, [2006] B.C.J. No. 3211 (S.C.).

McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal

Facts:

In March 2000, after suffering a nervous breakdown, an employee was obliged to take a leave of absence from work. For more than two years, the employee made unsuccessful attempts to return to work. In July 2002, the employee was involved in an automobile accident which rendered her totally disabled and unfit to work. In March 2003, the employer terminated the employment relationship, citing the employee's prolonged absence and relying on a deemed termination clause in the collective agreement. That clause provided that after 36 months of absence, an employee would "lose his or her seniority rights and his or her employment" if he or

she was absent “by reason of illness or of an accident other than an industrial accident or occupational disease”.

The union filed a grievance on behalf of the employee. The termination was contested, and the employer was asked to negotiate a reasonable accommodation in respect of the employee. The union took issue with the deemed termination clause.

Arbitrator Jean Sexton dismissed the grievance. The arbitrator noted that the employer had already accommodated the employee by granting her a rehabilitation period more generous than the one provided in the collective agreement, and that the employee remained unable to return to work.

The Quebec Superior Court dismissed the union’s application for judicial review. The Quebec Court of Appeal reversed that decision, and remitted the case to the arbitrator to assess the issue of accommodation on an individualized basis. The employer appealed to the Supreme Court of Canada. The appeal was concerned with the scope of the duty to accommodate.

Decision:

The Supreme Court of Canada allowed the appeal.

Madam Justice Marie Deschamps – in delivering the judgment of the six-judge majority of the Court – recognized that parties to a collective agreement may negotiate deemed termination clauses. Such clauses ensure employees on leaves of absence return to work within a reasonable period of time. A deemed termination clause in a collective agreement does not necessarily violate the duty to accommodate. Such a clause will be applicable if it satisfies “the requirements that apply with respect to reasonable accommodation” and, more particularly, “the requirement that [a] measure be adapted to the individual circumstances of the specific case”.

In the view of Madam Justice Deschamps, Arbitrator Sexton was correct in concluding that the employer could not be expected to continue the employment of an employee who, by all accounts, would be disabled for an indeterminate period of time. The arbitrator considered all of the factors that had led to termination of the employment relationship, including the following:

- the accommodation actually extended by the employer;
- the state of the employee’s health; and
- the lack of evidence that the employee would be able to return to work.

Delivering the concurring judgment of the three-judge minority of the Court, Madam Justice Rosalie Abella ruled that a deemed termination clause in a collective agreement is not presumptively discriminatory, and does not automatically represent *prima facie*¹ discrimination.

According to Madam Justice Abella, the deemed termination clause in question was not discriminatory. Absent a finding of *prima facie* discrimination in *McGill University Health Centre*

¹ “*Prima facie*” is a Latin phrase meaning “on the face of it, at face value, or without further examination”.

(Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, the question of accommodation did not even arise.

We note the following significant statement of Madam Justice Abella:

“It is important ... to be clear about what discrimination is – and what it is not – so that employers know their duties and employees know their rights

The central issue is whether [the employee] has established *prima facie* discrimination, shifting the onus to the employer to justify its workplace standard or conduct

[T]here is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer’s conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

If such a link is made, a *prima facie* case of discrimination has been shown. It is at this stage that ... the onus shifts to the employer to justify the *prima facie* discriminatory conduct. If the conduct is justified, there is no discrimination

[I]f the conduct or standard is not discriminatory, on its face or in effect, no such burden of justification falls on the employer.”

RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al.

Facts:

The branch manager and investment advisors at the Cranbrook, B.C. branch of RBC Dominion Securities Inc. (“RBC”) moved to a nearby branch of Merrill Lynch Canada Inc. (“Merrill Lynch”). This was a carefully orchestrated, mass departure. There were only two junior advisors and two clerical workers left at the RBC branch.

Merrill Lynch recruited the investment advisors with the active participation of the RBC branch manager. Confidential client records were copied or removed. Preparations were made to move clients to Merrill Lynch. The departing employees were directed to keep secret their intention to leave RBC.

In the employment contracts that RBC had with the branch manager and investment advisors, there was no express non-competition or non-solicitation covenant.

Madam Justice Heather Holmes of the B.C. Supreme Court awarded significant damages against the departing branch manager and investment advisors as well as against Merrill Lynch and its regional manager.

The trial judge held that the branch manager and investment advisors failed to give reasonable notice of their departure. In the view of the trial judge, who considered the various competing interests, a reasonable notice period would have been two and a half weeks.

Madam Justice Holmes concluded that there had been a breach of the duty not to compete unfairly, and that the RBC branch manager breached his duty to faithfully perform the duties of branch manager.

The trial judge also held that Merrill Lynch and its regional manager had induced the RBC employees to breach their duty not to compete unfairly.

Decision:

The B.C. Court of Appeal, by a two-to-one majority, substantially reduced the damages awarded at trial.

The branch manager and investment advisors escaped considerable liability given the absence of non-competition and non-solicitation covenants in their employment contracts.

Delivering the judgment of the majority, Madam Justice Mary Southin observed that RBC is a “sophisticated master”, and stated that had RBC “taken proper care of itself”, the branch manager and investment advisors “might well not have entertained the thought of leaving, either because they felt they should observe express terms of a contract, or out of fear of the consequences of not observing such terms”.

In the course of her reasons for judgment, Madam Justice Southin made a number of noteworthy statements. Those statements are as follows:

- “[T]here is no such thing on the part of a servant, upon leaving his master’s employ, as an obligation not to compete ‘unfairly’. Such a broad, open-ended legal duty, whether treated as an implied term of a contract of service or as some obligation outside the contract but imposed by law, would be dependent for its scope of the length of any particular judge’s foot.”
- “[A] client is entitled to know immediately upon his advisor leaving one firm for another where that advisor has gone so that he or she can decide whether to change to the new firm or remain with the old.

Because of that important interest of the client, the advisor should be able, without fear of litigation, to prepare a list of his own book of business from the records of the brokerage house. To hold in the 21st century that an advisor, who usually, by considerable personal diligence, has built up a book of business, must rely on his memory for the full names, addresses, telephone numbers and e-mail addresses of his clients, is not, in my opinion, in the interests of the clients and, therefore, is not in the public interest”

- “The proposition that a servant owes a duty of loyalty to his master is easy to state but its application depends on circumstances.

I know of no authority for the proposition that it is a breach of such obligation, no matter how vital the servant is to the master's business, for the servant to entertain an offer of employment from someone else, including a competitor, or to accept it, even during the continuance of the contract of service. A breach will only occur if the servant departs before the contract of service has expired, either by effluxion of time or by the giving of notice. Nor do I know of any authority for the proposition that a servant is contractually obliged to give his master, by for instance informing him of the terms offered by the new master, an opportunity to retain his services by matching those terms."

Asselstine v. Manufacturers Life Insurance Co.

Facts:

In March 1997, an employee was diagnosed with multiple sclerosis. She took six weeks' sick leave from her job at the employer (the "Employer"). Upon her return to work, she was relieved of all tasks other than sedentary ones.

A few months later, due only to a lack of funding, the Employer gave the employee notice that her position would be terminated.

Some weeks later, the employee secured a job with another employer. She worked in that position until the end of 1997. At that time, her health had deteriorated to the point where she was completely unfit to work.

The Employer had a disability insurance plan that provided long-term disability benefits to employees who qualified. To qualify for long-term disability benefits, an employee had to establish that he or she became totally disabled while employed by the Employer.

The Employer contracted with the Manufacturers Life Insurance Company ("Manulife") to administer the plan. The decision as to whether the employee's claim would be accepted or rejected rested with Manulife.

At the beginning of 1998, the Employer wrote to Manulife in an effort to assist the employee initiate a claim for long-term disability benefits. Subsequently, Manulife was presented with conflicting medical reports regarding the employee's ability to work while employed by the Employer.

Halfway through 1998, the Manulife adjudicator rejected the employee's claim. The adjudicator was of the view that the employee did not qualify for the benefits sought because she was not totally disabled prior to the end of her employment with the Employer.

The employee twice appealed the rejection of her claim. She provided a further medical report confirming she did not have the ability to work after she was diagnosed with multiple sclerosis. Nonetheless, the adjudicator remained of the view that the employee did not qualify for the benefits sought.

The employee commenced legal action against the Employer and Manulife. She alleged bad faith. She claimed specific performance² of the insurance contract or damages for breach of contract, as well as aggravated and punitive damages.

Madam Justice Nancy Morrison of the B.C. Supreme Court found that there had been a clear breach of good faith in the adjudication and rejection of the employee's claim. There was no explanation as to why the adjudicator preferred the medical report detrimental to the employee's claim. The trial judge awarded, among other things, \$35,000 in aggravated damages and \$150,000 in punitive damages against the defendants.

The defendants appealed the trial judge's decision. The focus of the appeal was the punitive damages award.

Decision:

The B.C. Court of Appeal, by a two-to-one majority, set aside the judgment against Manulife, ruling there was "no legal basis for the judgment against Manulife".

Notwithstanding the foregoing, the majority – composed of Mr. Justice Ian Donald and Madam Justice Carol Huddart – declined to disturb the punitive damages award against the Employer.

Mr. Justice Donald and Madam Justice Huddart did not accept the Employer's argument that it "simply facilitated the development of what was a self-funded plan for its employees, taking no part in its administration which was contracted to Manulife".

The majority stated the following:

"Because of the way the defendants pleaded and conducted their defences we can find no meaningful separation dividing the conduct of principal and agent. Manulife adjudicated the claim for the [Employer] and they treated the actions of one as that of the other. It is as though an in-house administrator managed the claim. In that case it would make no sense for the [Employer] to say it is immune from punitive damages for the conduct of an employee acting in the course and scope of her employment.

The defendants filed joint pleadings and engaged the same solicitor and counsel throughout the action

We are told that at trial neither defendant advanced a position which would distinguish them as to their respective liabilities"

In response to the argument that the punitive damages award was not justified, Mr. Justice Donald and Madam Justice Huddart noted that the trial judge was:

- "moved by the indifference of the defendants to the predicament of the plaintiff"; and

² Specific performance is a remedy requiring performance of a contract according to the agreed-upon terms.

- “concerned that disability insurers understand the law will not countenance bad faith administration of their policies”.

While Mr. Justice Donald and Madam Justice Huddart described the punitive damages award as “substantial” and “on the high side” (particularly in light of the fact there was “no evidence of any gain to either defendant”), they declined to disturb the punitive damages award. The majority gave “consideration ... to the vulnerability of the plaintiff and the harm she would have suffered if she had not had recourse to the court for redress”. In the words of the majority, it could not be said that the punitive damages award “crosse[d] the line”.

Macaraeg v. E Care Contact Centers Ltd.

Facts:

Subsequent to the termination of her employment, an employee brought a wrongful dismissal action against her former employer. She was seeking damages in lieu of reasonable notice but, more importantly, payment for overtime hours worked during the course of her employment. The employment contract in question was silent on the matter of the employee’s entitlement to overtime pay.

The employer objected to the claim for overtime pay. It argued that the law in B.C. was well-established. According to the employer, the courts had no jurisdiction to hear claims for overtime pay based solely on an employee’s statutory rights under the *Employment Standards Act*. The employer took the position that the Director of Employment Standards had exclusive jurisdiction under the legislation to deal with claims for overtime pay.

Decision:

Madam Justice Catherine Wedge of the B.C. Supreme Court disagreed with the employer. She declined to follow earlier case law favouring the position taken by the employer.

After extensively reviewing the law, the judge concluded that “an employee may ... bring a civil action to pursue his or her statutory employment rights”.

Madam Justice Wedge emphasized that the *Employment Standards Act* must be read broadly as “benefits-conferring” legislation. The purpose of the legislation, as described by the judge, is “to ensure that employers provide their employees with the minimum statutory employment rights required by the legislation”.

The judge held that the minimum requirements of the *Employment Standards Act* – including the right to overtime pay – form implied terms of employment contracts. In the view of the judge, “the effect of a minimum benefit conferred by employment standards legislation is to introduce a further contractual term into the contract of employment as effectively as if it had been included by agreement of the parties”.

Madam Justice Wedge noted that the “current provisions” of the *Employment Standards Act* “read as a whole, do not grant exclusive jurisdiction to the Director of Employment Standards to



decide claims for benefits conferred by the [legislation]”. According to the judge, the *Employment Standards Act* “does not expressly or impliedly prohibit an employee from commencing civil proceedings to enforce his or her statutory rights”.

Conclusion

The decisions summarized in this newsletter were handpicked. In our view, they are decisions of consequence in the area of employment and labour law. Moreover, they have educational value for and are instructive to employers and employees alike.

Please do not hesitate to contact any lawyer at our firm if you have questions regarding the content of this newsletter, or if you wish to have information on any employment or labour law issue.

Lawyer contact information can be obtained by telephoning us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this newsletter. 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 newsletter. *