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In This Issue

George Waggott reviews how the alleged unfair labour practices of a national company could have consequences beyond the provincial borders where the allegations arose.

Karen Carteri discusses a recent Labour Relations Board decision on replacement worker usage during an essential services strike. David McInnes provides a summary on a recent Supreme Court of Canada decision regarding restrictive covenants in employment contracts, and Joan Young examines an Ontario case which found an employer's breach of an implied term of the employment contract so egregious seven months pay was awarded as damages.

Finally, David Dahlgren and Claire Ellett review issues surrounding mitigating damages when employees are terminated or constructively dismissed.

Alleged Unfair Labour Practice in Quebec May Have Consequences in Other Provinces

George Waggott

The ongoing efforts by various groups to unionize employees at Wal-Mart stores in Canada have received substantial media publicity. As part of the ongoing claim, the Wal-Mart store in Jonquiere, Quebec was closed not long after the location was certified. In a decision which expands the potential scope of employer liability for alleged unfair labour practices across the country, the Saskatchewan Labour Relations Board recently ruled that the closure by Wal-Mart Canada of the Jonquiere store can be reviewed under Saskatchewan law for potential intimidation of employees where the affected union is organizing in that province. In other words, a decision taken in Quebec may be reviewed for its potential impact as a form of intimidation on conduct by employees in that province.

Wal-Mart closed the Jonquiere store in April 7, 2005 after the Quebec Labour Relations Board certified the United Food and Commercial Workers Union ("UFCW") to represent employees at the store. The position of Wal-Mart, which was subsequently reviewed and validated, was that the closing was due to lack of business.

In its recent Saskatchewan Board application, the UFCW argued that the Wal-Mart threats of the Jonquiere closure and subsequent closure after it was unionized were intended to not only intimidate employees in Jonquiere, but also employees at any of its stores across Canada who were attempting to organize. This included employees in Saskatchewan, some of whom were subject to a pending application for certification at the time the Jonquiere store was closed.

Wal-Mart sought to have the union's application dismissed for a variety of reasons, including that it did not relate to events that had occurred in Saskatchewan.

In dismissing the preliminary objection of Wal-Mart, the Saskatchewan Board held the fact that the allegations related to matters occurring outside the geographic confines of Saskatchewan did not automatically mean that there could not have been a violation of

applicable provincial legislation. Instead, the union had put forward an arguable case which would need to be determined on its merits.

Wal-Mart has indicated that it intends to challenge this decision in the courts. If this line of reasoning prevails, the fact that a particular national employer develops a "record" of unfair labour practice findings in one province might mean that unions may attempt to bootstrap such a finding across the country. As we move to more challenging economic times and the traditional support of unions is eroding, this argument may see increased prominence.

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Replacement Workers Not Strictly Prohibited During Essential Services Strike

Karen Carteri

An employer is not entitled to use the services of replacement workers to perform bargaining unit work during a strike, pursuant to section 68(1) of the *Labour Relations Code* (the "Code").

By definition, replacement workers include any workers that have been hired by the employer after notice to bargain has been given. This restriction prevents employers from flooding their workforce with new hires, typically outside of the bargaining unit, to pick up the workload during the strike. However, section 68(1) of the Code does not distinguish between new hires within the bargaining unit and new hires outside the bargaining unit. Therefore, arguably, replacement workers include employees hired into the bargaining unit after notice to bargain.

By definition, replacement workers include any workers that have been hired by the employer after notice to bargain has been given. This restriction prevents employers from flooding their workforce with new hires.

When a strike threatens essential services in British Columbia, section 72 of the Code provides that the Minister of Labour may direct the Labour Relations Board to make an order designating the level of essential services for the purpose of eliminating an immediate and serious danger to the health, safety or welfare of the residents of British Columbia as a result of the strike.

The Ambulance Paramedics of British Columbia, CUPE Local 873, have been on strike against their employer, the Emergency and Health Services Commission, since April 1, 2009. The parties are subject to an essential services order from the Board and one of the main effects of the essential services order is that the union members are required to perform essential service levels of work during the strike.

What if the employer needs to use the services of the union members hired after notice to bargain in order to maintain designated essential service levels? What if resignations and attrition during the course of an extended strike require the employer to hire new employees to fill vacancies in order to maintain essential service levels? Since section 68(1) prohibits employers from scheduling workers hired after notice to bargain, how can essential services be maintained in such situations?

Shortly after replacement worker legislation was introduced in British Columbia in the early 1990s, in a case known as *Chantelle Management Ltd.*, the Labour Relations Board established that there needs to be a balance between section 68 and section 72 of the Code. Up until April 1, 2009, it was generally understood that the section 68 restrictions on use of replacement workers and rights to refuse to work could be restricted as required in order to maintain essential services.

On April 1, 2009, the Board decided in *Compass Group Canada (Health Services) Ltd.* that it could not order managers who were hired after notice to bargain to perform work during an essential service strike, on the premise that the Board could not order a contravention of section 68 of the Code. This decision appeared to reverse the precedent set in *Chantelle Management*, hampering the Board's flexibility to restrict the

application of section 68 in the interest of maintaining essential service levels for the citizens of British Columbia.

In the paramedics strike, the union relied on *Compass Group* as the basis for an application to the Board for a determination that the Emergency and Health Services Commission was acting in contravention of section 68 of the Code by scheduling paramedics who were hired after notice to bargain. Their employer opposed the application on various grounds, including an argument that *Compass Group* was wrongly decided and should not be followed.

The Board dismissed the union's application in *Emergency Health Services Commission and Ambulance Paramedics of British Columbia, CUPE Local 873*. The Board found that *Compass Group* was wrongly decided, largely because the facts in *Compass Group* did not provide the Board with a context where essential services would be threatened if post-notice hires could not be utilized. The Board concluded that an essential services order displaces section 68(1) of the Code: once there is an order designating essential services, section 68 no longer applies.

Managers hired after notice to bargain must work the 60-hour week found in a standard essential service order, and all union members can be scheduled to work in accordance with the essential services order, regardless of whether they were hired after notice to bargain.

The Board stated that under an essential services order, "all bargaining unit employees may be used to provide essential services, whether they were hired before or after notice to bargain was issued, and all management and excluded personnel must be used to the best extent possible," even if hired after notice to bargain.

As such, managers hired after notice to bargain must work the 60-hour week found in a standard essential service order, and all union members can be scheduled to work in accordance with the essential services order, regardless of whether they were hired after notice to bargain. Any question of who must work (and who is or is not essential) in order to meet essential service levels is to be addressed by the Board pursuant to its broad jurisdiction under section 72.

Although this has likely settled the matter, an application for reconsideration of the *Compass Group* decision has been filed.

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Employee Restriction Provisions Revisited

N. David McInnes

The purpose of including restrictive covenants in employment contracts is usually to prevent an employee from competing or soliciting business from their original employer for a period of time after they have left the original employer. The law is generally concerned with the *reasonableness* of these clauses in employment contracts. What constitutes reasonableness depends on the activity, time and geographical area that the employee is prohibited from engaging in. This concern was echoed in the decision of *Shafron* v. *KRG,* which the Supreme Court of Canada released earlier in 2009. In this decision, the SCC explained that a restrictive covenant, whether it be a "non-solicitation clause" or a "non-competition clause," is unenforceable at law unless it is shown to be reasonable. However, what happens if the clause is unclear? How is reasonableness of the clause then determined? *Shafron* v. *KRG* addressed the question of how a restrictive covenant is treated in the event it is found to be ambiguous.

Case Summary

Morley Shafron sold his insurance agency to KRG in 1987. Shafron was employed by KRG from 1987 to 2001 by a series of employment contracts that contained a restrictive covenant in which, for three years after leaving KRG, he would not be employed by another insurance brokerage in the "Metropolitan City of Vancouver." After leaving KRG, Shafron began working for another insurance brokerage in

Richmond, starting in January 2001. Shortly thereafter, KRG initiated an action to enforce the non-competition clause.

At trial, the judge found the term "Metropolitan City of Vancouver" to have no legal definition. Accordingly, he dismissed the claim by KRG to enforce the restrictive covenant as the geographical area it covered was not clear nor certain. However, the B.C. Court of Appeal overturned the trial judge's decision even though it also found the term "Metropolitan City of Vancouver" to be ambiguous. The Court found the parties intended to prevent Shafron from being employed in an area "beyond the City." In doing so, the Court applied *notional severance*, a legal tool used to "read down" provisions in contracts, to resolve the ambiguity of the term "Metropolitan City of Vancouver." As such, it substituted the phrase "City of Vancouver, the University of British Columbia endowment lands, Richmond, and Burnaby" and found the restrictive covenant to be enforceable.

The SCC disagreed with the Court of Appeal and restored the decision of the trial judge. In doing so, the Court explained that in making a determination of the reasonableness of the restrictive covenant, it must first be unambiguous as to its meaning.

The SCC disagreed with the Court of Appeal and restored the decision of the trial judge. In doing so, the Court explained that in making a determination of the reasonableness of the restrictive covenant, it must first be unambiguous as to its meaning. The Court stated the meaning of "Metropolitan City of Vancouver" was not clear. The Court ruled the legal tool of *notional severance* should never be applied to restrictive covenants in employment contracts for two reasons. First, it invites courts to rewrite restrictive covenants in their own view of what constitutes reasonableness. Second, it increases the power imbalance between employers and employees typically assumed under restrictive covenants. As for the doctrine of *blue-pencil severance*, the Court explained that it can be applied to restrictive covenants in employment contracts, but only in rarest cases where the term is trivial and clearly severable. The Court found that was not the case with removing the term "Metropolitan" from the covenant in Shafron's employment contract.

Moving Forward

This decision serves as a reminder to employers that they should not rely on the courts to rewrite restrictive covenants that are overly broad or not precise. In addition, employers should ensure that any restrictive covenant in an employment contract is specific to their needs and also the particular employee who is subject to such a clause. In the wake of *KRG*, restrictive covenants in employment contracts are likely to be scrutinized more rigorously than similar clauses found in other types of contracts.

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*Ed.: In the preparation of this article, David wishes to recognize the assistance of **Ben Tarnow**, articling student, Vancouver.*

Employer Pays a Big Price for Spying on Employee

Joan M. Young*

Violating an employee's privacy is a breach of the implied terms of an employment contract according to an Ontario Judge. The result was a damages award payable to the employee by her former employer and a strong rebuke from the court.

In *Colwell* v. *Cornerstone Properties Inc. and Krauel,* a former commercial manager sued her employer for constructive dismissal after she learned that her immediate boss, Mr. Krauel, had surreptitiously installed a surveillance camera in the ceiling above her desk nine months beforehand. When the employee learned of the camera, she had it removed and eventually was so distressed that she had to seek medical assistance and began taking sedative drugs.

Her boss tried to defend his bizarre behaviour by explaining that he had installed it to try and assist the company in detecting theft by the maintenance staff, that he had no intention of spying on her, and that although he understood

* denotes law corporation

that the employee was upset, he had a full right to install such a camera. The employee disagreed with the explanations noting before she learned of the camera she was not aware of any thefts which had occurred from her office, she was not told about the camera even though she was responsible for the maintenance staff at the company, and there were no valuables kept in her office.

The employee tried to resolve the issue by going over her boss's head to the president of Cornerstone seeking a letter of recommendation and a severance payment. However, the company did not provide her with what she asked. She sought legal advice and eventually quit, alleging that the invasion of her privacy was a fundamental breach of her employment contract amounting to constructive dismissal. And she sued.

In the end, the Ontario Court of Justice sided with the employee and held that the employer's conduct was indeed a breach of the implied terms of the contract of employment. Although the judge recognized Ontario does not have privacy legislation protecting employees, and Canadian employment standards legislation has not yet gone very far in protecting employee's rights to privacy in the workplace, this was an emerging and evolving area of law. The court considered the case law developed around surveillance in unionized workplaces and agreed in principle that the employer must have a "reasonable apprehension of abuse by an employee to justify the introduction of a [surveillance] device" into the workplace. In this case, there were no reasonable explanations for the surveillance. Applying the Supreme Court of Canada's concepts of "good faith" and "fair dealing" from the *Wallace* v. *United Grain Growers* decision, the court found that the "cost to human dignity caused by the surveillance, coupled with the unbelievable explanation subsequently provided, left the [employee] in a position of being unable to rely upon the honesty and trustworthiness of her immediate supervisor, and amounted to more than merely 'bad faith' and 'unfair dealing.'" The judge held that the employee was more than justified in quitting her job and not returning to work. The judge implied a term into the employment contract that each party would treat the other fairly and in good faith, and that the actions of the employer had clearly violated those terms. The employee was awarded seven months of pay as damages.

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The Extent of Mitigating Damages: Terminated and Constructively Dismissed Employees Obliged to Return to Work with the Same Employer

David Dahlgren

Claire E. Ellett

The courts are starting to recognize that it is unreasonable for an employee to simply walk away from gainful employment on the pretext of constructive or wrongful dismissal and seek damages for the employer's failure to provide reasonable notice.

Employers must be aware that if an employee suggests that they have been constructively dismissed or wrongfully dismissed, it is possible to significantly increase the employee's risk and simultaneously ease the employer's burden in proving that the employee failed to mitigate. If at all possible, the employer should:

- immediately disagree that there has been constructive or wrongful dismissal;
- subject to financial constraints, offer the employee a similar employment position with a comparable rate of pay;

- ensure that there is no hostility with the employee and that the matter is conducted professionally and courteously;
- ensure that any transition into a new position is handled without any embarrassment to the employee; and
- offer the employee an opportunity to secure alternative employment, such as time off, in order for the employee to attend interviews or job fairs.

It has been held in numerous instances that an employee has an obligation to mitigate his or her damages where the employer is willing to allow the employee to continue working in some capacity during the notice period.

In the recent Supreme Court of Canada decision *Evans* v. *Teamsters Local Union No. 31*, the majority of the court, in reasons delivered by Bastarache J., held that the same principles with respect to mitigation should apply to employees who are constructively dismissed or wrongfully dismissed:

> In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself.

In *Evans,* the employee was a long-time business agent with the respondent union. The employee was sent a termination letter and encouraged to "commence discussions" with respect to appropriate severance in lieu of notice. Evans subsequently received a letter from his employer asking him to return to his employment to serve out the balance of his notice period of 24 months. In the lower courts, the trial judge held that Evans was wrongfully dismissed, however, the British Columbia Court of Appeal set aside the trial judge's award and held that Evans had not acted reasonably with respect to the job offer. By refusing to accept the job, even on a temporary basis, Evans failed to mitigate his damages.

The Supreme Court of Canada agreed with the Court of Appeal and upheld the decision.

In wrongful and constructive dismissal cases, if the employer seeks to rely on any failure by the employee to mitigate their damages, the employer bears the onus of demonstrating that alternative work is available and that the employee failed to make reasonable efforts to find new employment. Therefore, when an employer offers an employee a different position with the same salary, similar working conditions and where the personal relationships are not acrimonious, it is very likely that a court will find that a reasonable person would accept the employment position as a temporary measure to mitigate their damages.

The court in *Loehle* v. *Purolator Courier Ltd.* followed the decision in *Evans* and held that:

> … the standard is an objective one; that is whether a reasonable person would have accepted the position offered by the employer.

The British Columbia Court of Appeal had earlier concluded in *Cox* v. *Robertson* that additional factors, such as the history of the relationship, whether the employee commenced litigation and the timing of the offer of re-employment were crucial factors that would be taken into the objective assessment of reasonableness.

Furthermore, the Court in *Farquhar* v. *Butler Brothers Supplies Ltd.* (1988) noted that an employee will "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation."

In the recent case of *Davies* v. *Fraser Collection Services Limited*, Madam Justice Humphries held that:

> On the evidence before me, I am satisfied that there were no conditions arising out of factors such as humiliation, embarrassment, or hostility in the work-place that would render the return to work unreasonable, despite Mr. Davies' statement to the contrary.

The circumstances of the termination of an employee's contract are generally less personal when an employee has been constructively dismissed in comparison with employees who have been wrongfully dismissed. In constructive dismissal cases, it is usually not directly about the individual.

As held by the Court in *Loehle*:

> Mr. Loehle was a valued employee of Purolator. His job performance had never been in question. The company wanted him to stay and, but for the negli-

gence of management, Mr. Loehle would have continued as an employee in a higher position. The offer of employment to a demoted position was an obvious attempt to retain Mr. Loehle as an employee and, at the same time, relieve the company from liability for its negligence. As well, the salary would have remained at the higher level.

In conclusion, if there is no bad faith in the termination, the Court will consider any other reasons and the context of the termination. The current case law establishes that as long as there are no barriers to re-employment, then requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice and not to penalize the employer for the dismissal itself.

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Wrongful Dismissal Case Law Update

Name	Position	Salary (Dollars)	Age	Service (Years)	Notice (Months)	Comments
Langan v. *Kootenay Region Metis Assoc.* 2008 BCSC 1169	Chief Administrative Officer	58,496	46	9	15	lack of comparable employment significant factor in awarded 15 months, with present earnings deducted
Daoust-Savoie v. *South Okanagan Montessori* 2008 BCSC 1181	Teacher/Principal	40,000		3	6	employee also succeeded in claiming unpaid wages and other amounts owed
Fisher v. *Lakeland Mills* 2008 BCSC 129	Switchboard Operator/ Receptionist	–	65	18	10	
Bru v. *AGM Enterprises Inc.* 2008 BCSC 1680	Deli Clerk	12/hour	59	1.5	3	$5,000 *Wallace* damages and $12,000 non-pecuniary damages also awarded
Hart v. EM *Plastic & Electric* 2008 BCSC 228	Customer Service Manager – West Coast	50,000	58	25	15	employee failed to mitigate (turned down two offers and began new career) so no damages actually awarded
Tucker v. *Weyerhauser* 2008 BCSC 349	Forestry Supervisor Level 3	82,000	45	15	16	fact that employee took only part-time work was not a failure to mitigate
Lewis v. *Lehigh* 2008 BCSC 542	Cement Plant Engineer/ Manager	116,000	59	26	22	
Toivanen v. *PMC-Sierra Ltd.* 2008 BCSC 682	Leader, Product Validation Engineer	135,536	34	8.6	11	not a failure to mitigate by declining employer's offer of job with 50% of former salary and demotion
Saalfeld v. *Absolute Software Corp.* 2008 BCSC 760	Territory Manager Software Sales	60,000 + bonus	35	0.75	5	also awarded lost stock options, commission, and benefits
Davies v. *Fraser Collection Services Ltd.* 2008 BCSC 942	Debt Collector	50,400	63	5	6.5	notice period in contract of 6.5 months reduced to two because he did not return to work when recalled – failure to mitigate
Kalsi v. *Greater Vancouver Associate Stores Ltd.* 2009 BCSC 287	Mechanic	40,000	36	16	16	damages for false imprisonment, but no *Wallace* damages

News

Howard Levitt

Canadian Legal Lexpert Directory 2009 Recognizes 13 Lang Michener Leading Practitioners

We are pleased to announce that **Howard Levitt** was one of 13 of our lawyers recognized as leading practitioners in the *Canadian Legal Lexpert Directory* 2009. This designation highlights our expertise in a broad spectrum of practice areas, as well as our strength of national coverage. Howard was recognized as an expert in Employment Law.

Joan M. Young

Joan M. Young Joins Lang Michener

We are pleased to announce that Joan Young has joined the Vancouver office of Lang Michener. Joan joins the firm as associate counsel with a practice focused on employment law, civil and commercial litigation and public law.

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