

Boughton Employment and Labour Line

Spring/Summer 2010

In this Issue:

Human Rights
Litigation - Who Pays
the Legal Fees?

Update on Dams
Ford:
Letting an
Apprentice Go

Union Organizing -
Is it Still Alive?

Arm Wrestling
over Independent
Contractors v.
Employees

Upcoming Events
and News



Explosion in Human Rights Litigation Begs the Question: Who Pays the Legal Fees?

BC v. BCGSEU, [1999] 3 S.C.R. 3 ("Meiorin"); Senyk v. WFG Agency Network (No. 2), 2008 BCHRT 376 ("Senyk"); Canada v. Mowat, 2008 FC 118, rev'd in 2009 FCA 309 ("Mowat")

There is no doubt that there has been an explosion of human rights litigation following the Supreme Court of Canada's 1999 *Meiorin* decision. It has come to the point that the SCC will be considering the authority to award legal fees to complainants. In *Meiorin*, the SCC fundamentally altered the way in which human rights complaints were adjudicated by reformulating the duty to accommodate ("DTA"). The employer had to demonstrate that the standard imposed was reasonably necessary and that it was impossible to accommodate without imposing undue hardship on the employer. Despite the direction of the SCC that a "common sense" and practical approach must be taken, many Human Rights Tribunals following the *Meiorin* decision seem to have ignored or minimized that direction.

Our BC Human Rights Tribunal regularly makes substantial monetary awards in favour of complainants even where there has only been a finding that the employer did not follow procedural aspects of the DTA. But perhaps the most troubling expansion of remedies is the Tribunal's award of legal fees to complainants.

In *Senyk* the Tribunal issued a cease and desist order, awarded \$35,000 for injury to dignity, hurt feelings and self respect, and \$10,000 for expenses.

It also ordered the employer to pay all of Senyk's reasonable legal fees and expenses. While the amount

of those fees was not noted in the award such fees could be very costly especially in a case involving expert medical evidence and unique issues of law.

The Tribunal in *Senyk* followed the Canadian Human Rights Tribunal decision in *Mowat*, which had held it had the authority to award legal fees. However, the Federal Court of Appeal overturned the *Mowat* decision, finding the Tribunal had no authority to make an award of legal fees under the *Canadian Human Rights Act*. As a consequence the law in BC is unclear on this issue.

In April 2010 the Supreme Court of Canada granted leave to appeal the Federal Court of Appeal decision in *Mowat*. Accordingly, the recovery of legal costs will now be decided by Canada's highest court.

Employers may act in good faith and without intent to breach the substantive provisions of the Code but still be found liable for not following the procedural aspects of the DTA. If the SCC overturns the *Mowat* decision and finds that Human Rights Tribunals do have the authority to award legal fees to successful complainants, then employers, especially small and medium-sized employers that provide the bulk of jobs in BC, will be subject to potentially crippling cost awards in addition to other damages which may in many cases far exceed the costs of wrongful dismissal and other court actions. We will keep you posted.



Michael J. Weiler
Practice Group Leader
Direct Line: 604.647.5521
Email: mweiler@boughton.ca

Update on Dams Ford BCCA: When Letting an Apprentice Go - Say What You Mean and Mean What You Say

Marchen v. Dams Ford Lincoln Sales Ltd., 2010 BCCA 29 partially rev'g 2009 BCSC 400 ("Marchen")

In our previous newsletter we reported on the BC Supreme Court decision of *Marchen*. Since then the BC Court of Appeal has come down with its decision, which varies the award and remits one aspect of damages back to trial.

As you may recall, in *Marchen* the dismissed employee started a four year apprentice contract subject to the availability of work. Despite previous statements, at trial the employer took the position that the reason for dismissal was down-sizing. The trial judge determined that the employee had been fired because of the employer's unfounded suspicion that he was involved in criminal activity.

It was all bad news for the employer at the BC Supreme Court. In addition to \$18,151 for lost wages until the end of the four year contract, the plaintiff recovered:

- Moving expenses of \$2,036;
- Damages for consequential loss to his apprentice training and status amounting to \$25,000;
- Punitive damages of \$100,000; and
- Special costs because of the defendant's attempt to mislead the court as to the true reasons for termination.

The BC Court of Appeal overturned the most stinging aspect: the punitive damages award. They also found that the employment contract was not a fixed term contract, because it contained a number of variables and therefore could be terminated with reasonable notice. The \$25,000 for consequential loss of status and training was upheld. Finally, the special costs award was upheld, which means that the defendant is on the hook for a high percentage of the winner's actual legal fees in addition to their own. The case was sent back to trial level to assess the damages in lieu of reasonable notice, but nothing has been filed to date. It has likely been settled by counsel concluding what was undoubtedly an expensive battle.

Practice Point: Punitive damages and special costs can be just as hard on your wallet and reputation as the main damages at issue.



Anne Muter

Associate

Direct Line: 604.605.5634

Email: amuter@boughton.ca

Union Organizing - Is It Still Alive?

In 2001 the newly elected Liberal government introduced two significant changes to the *Labour Relations Code*. First, employer free speech was broadened to allow employers to communicate more openly with their employees. Second, a secret ballot vote was required in all but the most exceptional cases. Prior to that time, unions were able to certify an employer automatically without a vote by simply signing up 55% of the employees. The impact of these two changes has been fairly significant. Union organizing and density, especially in the private sector, has been greatly diminished. Nevertheless, employers should not be lulled into a sense of security that a union will not show up on their doorstep. We have recently seen an increase in union organizing which should cause all employers, especially small and medium-sized businesses, to pause and reflect.

Elizabeth Reid and I recently assisted two employers in union certification applications. In both cases we were able to successfully assist our clients to implement communication and other strategies that, within the legal confines of the *Code*, effectively re-established the relationship between the employer and the employees. In both cases the certification application was defeated - in one case the employees voted 100% against the union.

The additional costs of running a unionized operation are significant. If a union certification application is filed an employer has very little time to respond as the *Code* requires that the certification hearing and vote take place within 10 days of the application being filed. Once an application is filed it requires significant commitment and teamwork by management and counsel to implement a strategy that is responsive to the union certification application but at the same time is legally permissible under the *Code*. Although most

cases will be determined by a secret ballot vote of employees, the Labour Relations Board will order automatic remedial certification without a vote if employers commit egregious unfair labour practices. Once a union is certified, the employer can no longer deal directly with the employees but must recognize the union as the exclusive bargaining agent.

This introduction of a third party into the relationship can not only be expensive in terms of the costs associated with collective bargaining, the administration of a collective agreement and the potential for a strike, but also often creates a divisive "us vs. them" culture within the workplace.

We recommend that employers consider what, if any, changes need to be made to their workplace to minimize the chance that a union will obtain a certification before such an application is made. Taking such an audit of your business also serves a very practical purpose - running an efficient business requires a motivated workforce that operates as a team. That is the best antidote to a union organizing campaign. If an application is filed, management needs to quickly mobilize to respond in an effective and legal way in the hopes of winning that all important certification vote.



Michael J. Weiler

Practice Group Leader

Direct Line: 604.647.5521

Email: mweiler@boughton.ca

Arm Wrestling over Independent Contractors v. Employees

Wiebe Door Services Ltd. v. M.N.R., 87 D.T.C. 5025 (FCA) (“*Wiebe Door*”); *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87 (“*Winnipeg Ballet*”); *Re Trigg*, BC EST#D040/03 (“*Re Trigg*”); *McKee v. Reid’s Heritage Homes Ltd.*, 2009 ONCA 916 (“*McKee*”)

From a Tax Lawyer’s Perspective:

One of the most litigated topics in the Tax Court of Canada is the issue of whether a worker is an employee or an independent contractor. Does the intention of the parties matter? Shouldn’t it? With other tax issues, the courts feel comfortable respecting the nature of contractual agreements between individuals who act on an arm’s length basis. Why not the same deference for agreements governing working relationships?

The *Wiebe Door* test which the courts have been implementing looks at (1) who has control over the work; (2) ownership of tools; (3) chance of profit; and (4) risk of loss. What about the contract? In *Wiebe Door* the court commented that the contractual arrangement between the parties would not be determinative of the relationship.

However, later cases have held the *Wiebe Door* test to be mere “factors to be considered” in determining the “essence” of the relationship, even going so far as to look for clues of the parties’ intention in the absence of a written agreement. Where does that leave us?

In later cases mutually stated intentions or written agreements have been considered a “helpful tool”. Other cases have said mutual intent was not necessarily determinative but entitled to “considerable weight”.

A gaggle of Royal Winnipeg ballerinas know that the first judge in their case concluded it was completely unnecessary to take into account the intention of the parties. The Court of Appeal was softer on the approach saying the terms of the contract should be given weight, but if they do not reflect the legal relationship, the stated intention will be “disregarded”.

This confusion didn’t stop in Winnipeg. A later case called the intent of the parties a mere “tie-breaker” if things were close after the *Wiebe Door* test. One judge said that trial judges who ignore intention stand a “very good chance” of being overruled in the Court of Appeal. Nowadays courts are calling the intent of the parties a significant and sometimes determinative factor. This could lead to vigorous debate if the judges of the Tax Court and Federal Court of Appeal were to find themselves on a retreat in Whistler enjoying some après ski beers. - *Written by Jeff Glasner*



From an Employment & Labour Lawyer’s Perspective:

Things would only get more interesting if we invited some folks from the Employment Standards Branch and a few judges in wrongful dismissal cases to those après ski beers, since the independent contractor v. employee determination is relevant in those forums as well. A significant pitfall is that the test for determining whether someone is an independent contractor or an employee can change depending on the forum. Not surprisingly, the test for employment standards purposes is heavily weighted towards finding persons to be employees so that they will receive the minimum working conditions guaranteed by the *Employment Standards Act* (“ESA”). Cases such as *Re Trigg*, have confirmed that the already broad definition of employee in the ESA is to be broadly interpreted and that common law tests of employment, such as those in *Wiebe Door* and *Winnipeg Ballet*, are subordinate to the statutory definition. To further complicate matters, in the wrongful dismissal context, a third possibility arises: that of “dependent” contractor. The recent case from the Ontario Court of Appeal, *McKee*, reminds us that there are some working relationships which are so closely intertwined that even if the worker is not an employee, a term of reasonable notice may still be implied into the contractual relationship. - *Written by Elizabeth A. Reid*

Practice Point: The more factors you can line up, the better; the control, the ownership of tools, the chance of profit, the risk of loss, the contract, and the mutual intent. Get them all in your favour and you won’t need to worry about what side the judge’s coin lands on.

About our Guest Author:

Jeff Glasner is a Tax Associate with Boughton Law Corporation. His practice focuses on representing taxpayers in their disputes with the Canada Revenue Agency and the British Columbia Ministry of Small Business and Revenue.



Jeff Glasner
Tax Associate
Direct Line: 604.647.5527
Email: jglasner@boughton.ca



Elizabeth A. Reid
Associate
Direct Line: 604.647.4173
Email: ereid@boughton.ca

Upcoming Events



September 22, 2010: Top 10 Ways to Stay Out of Court for Wrongful Dismissal

Please contact Dari Gilham, Legal Assistant to the Employment and Labour Practice Group, if you are interested in attending at 604.647.4141 or email: dgilham@boughton.ca.

News

On March 5, 2010, Elizabeth Reid presented on cross border employment issues at a Doing Business in Canada seminar, held in Seattle, WA.

The Employment and Labour Group hosted “The Dangers of Being Wrong about Human Rights” seminar at Boughton on March 25, 2010.

Boughton hosted its 5th Annual Young Professionals’ Casino Night on April 15, 2010: more than 85 young professionals attended.

What We Do

- Represent clients at all levels of court, at the British Columbia and Canadian Human Rights Tribunals, the BC Labour Relations Board and other employment or labour related hearings
- Advise and represent clients faced with wrongful dismissal suits, human rights complaints, union certification, collective bargaining, grievance meetings and arbitrations
- Draft executive and other employment contracts and advise on preparing severance packages
- Presentations to clients on topics such as work-place bullying, avoiding costly human rights cases, and fundamentals of employment law
- Protect clients’ confidential information and business interests throughout the employment relationship

Don't Miss Out

If you would like to ensure you receive this newsletter on a regular basis, please contact Dari Gilham, Legal Assistant to the Employment and Labour Group, phone 604.647.4141 or email at dgilham@boughton.ca.