

Boughton Employment and Labour Line Winter 2009/2010

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Human Rights: Reasonable Offers Can Bring Big Rewards

Employers can gain advantage by making reasonable offers in human rights complaints.

Temporary Lay-Offs: Employers Beware

Employers should be cautious of temporary layoffs in the absence of an express contractual right to do so.

Honesty goes a long way...

In one of a series of recent decisions, our BC Supreme Court awarded an apprentice \$100,000 in punitive damages plus special costs when his employer lied to him about the reason for his dismissal.

Wal-Mart's Closure of a Unionized Store was not an Unfair Labour Practice

While Wal-Mart avoided unionization, it remains exposed to unfair labour complaints.



Welcome!

Welcome to the inaugural edition of the Boughton Employment and Labour Line.

Our goal is to provide practical and cost effective advice to our clients. In this newsletter you will find current information and useful tips to help you manage your employment and labour relationships. We will discuss current cases and issues facing employers ranging from multi-national corporations to neighbourhood variety stores. We want to help you deal with the present, plan for the future, and above all reduce your risk of costly litigation.

In this first edition, we would also like to take the opportunity to introduce you to the members of our team. I am the head of the Employment and Labour Group. I have over thirty years of experience in helping clients with their labour, employment and human rights matters. Paul Miller is the other senior member of our team. Paul practices employment law and civil litigation and is well known for his expertise in executive employment contracts, fiduciary duties and human rights law. Elizabeth Reid joined the group in July of this year and dedicates her

practice solely to employment, labour and human rights issues. She draws on her strong business law background and her experience as a law clerk at the BC Court of Appeal. Anne Muter practices in the areas of employment and labour law and also has experience in general corporate and commercial litigation. Anne articulated with Boughton and has recently joined our group as an associate.

The articles in this edition reflect the development of the law in our Group's various practice areas. The Boughton Employment and Labour Line will be published in the Spring, Fall and Winter.

So welcome to Boughton - where we continue to build on relationships. We invite your comments on any aspect of the newsletter. For advice on any topic, please feel free to contact any of the members of our Group.



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Human Rights: Reasonable Offers Can Bring Big Rewards

Carter v. Travelex Canada Limited, 2009 BCCA 180

This decision gives employers a new tool to minimize the cost associated with human rights complaints.

In *Carter*, Ms. Carter claimed that Travelex had discriminated against her because of her chronic depression. She asked the Tribunal to declare that Travelex had discriminated against her and to pay her lost salary as well as compensation for injury to dignity, feelings, and self-respect. Travelex denied the allegations, but nonetheless made a formal settlement offer of \$12,500.

Ms. Carter countered by asking Travelex to pay her \$10,000 and admit that it had discriminated against her. Travelex refused her offer and successfully applied to the Tribunal for the complaint to be dismissed. The Court of Appeal confirmed that the Tribunal had the discretion to dismiss a complaint under s. 27 of the Human Rights Code if the employer had made a reasonable settlement offer. By making an offer which Ms. Carter should have accepted, Travelex was able to avoid the management and legal expenses associated with a hearing.

An interesting question is whether Travelex ever had to pay the \$12,500 specified in the offer. The decision-makers didn't discuss this in detail, but each noted that Travelex had left the offer open. Employers should be able to rely on this case to avoid the cost of a full hearing by making a reasonable settlement offer.

Practice Point: The lesson learned here is that the Human Rights Tribunal expects complainants to accept reasonable offers and may punish them for not doing so.



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Don't Miss Out

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

Temporary Lay-Offs - Employers Beware

Bessie v. Dr. A.S. Machner Inc., 2009 BCSC 1316

The recent decision in *Bessie* has changed the rules for employers who want to rely on the temporary lay-off provisions in the *Employment Standards Act*. In that case, Dr. Machner took over a dental practice employing two full time receptionists. Financial considerations required him to reduce expenses. He approached the two receptionists with a proposal that they both work reduced hours until business improved. One receptionist agreed and the other did not.



Dr. Machner spoke to a representative at the Employment Standards Branch and also searched its website. As a result of the information he received, he understood that he could temporarily lay-off an employee without compensation for up to 13 weeks in a 20 week consecutive period. Relying on this information, Dr. Machner then advised the receptionist who had not agreed to a reduced work week that she would be laid off for 12 weeks and six days. The receptionist sued for wrongful dismissal.

The trial judge held that the imposition of a temporary lay-off constitutes, in the absence of a contractual provision permitting the same, a fundamental breach of contract. Dr. Machner breached an essential term of the contract of employment as the continued attendance of an employee at the place of work, for pay, is central to the employer-employee relationship.

Interestingly, the trial judge limited the damages payable during the lay-off period finding that the receptionist failed to mitigate her damages by not returning to work after the lay-off period had expired.

Practice Point: The lesson for employers is that absent consent from an employee, an employer cannot temporarily lay-off an employee unless there is an express provision permitting a lay-off in the employment agreement or one can be implied such as in the logging industry where it is well-known that logging does not occur during "break-up".



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Honesty goes a long way...

Obeng v. Canada Safeway Limited, 2009 BCSC 8; *vanWoerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73; *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2009 BCSC 400; *McKinley v. B.C. Tel*, 2001 SCC 38

In the leading case of *McKinley v. B.C. Tel* the SCC diminished the scope of when dishonesty forms the basis of just cause for dismissal. However, the B.C. courts are paying attention to honesty and forthrightness between employers and employees, especially when things go sideways. The duty of good faith is fundamental to the maintenance of the employment relationship. Here are three wrongful dismissal cases where honesty would have gone a long way for both parties.

In *Obeng*, Mr. Obeng had worked for Safeway for 7 years. At the time of his dismissal he was an assistant manager. Safeway claimed that Mr. Obeng had been dismissed for cause because he stole groceries and was dishonest during the investigation. The court said there was not enough evidence to find that Mr. Obeng had taken groceries from the store without paying. However, it went on to consider Mr. Obeng's behaviour during Safeway's internal investigation. He was questioned on multiple occasions about the evidence given by the other employees. While he denied their allegations, he did not provide any alternate explanation. At trial he explained that the reason he had groceries in a basket was because he was gathering misplaced goods to be re-shelved. The court found that "by failing to respond in a complete and truthful manner, Mr. Obeng breached the implied duty of honesty and faithfulness owed by him to Safeway" (para 31). The court turned to *McKinley v. B.C. Tel* and the test of whether the dishonesty led to a breakdown of the employment relationship. Mr. Obeng's case was dismissed. Despite having failed to prove the theft, Safeway was able to justify dismissing Mr. Obeng because his dishonesty led to a breakdown in the employment relationship.

This was in many ways very similar to the *van Woerkens* case; however, there the dishonesty during the investigation was one of two elements justifying the dismissal. Mr. van Woerkens was a 22 year senior employee of Marriott Hotels who was fired as a result of the fall out from the company's Christmas party. The court found that the plaintiff had sexually harassed his subordinate and then denied the allegation and was

thus dishonest. The plaintiff also tailored his evidence at trial after he had seen statements from other witnesses. The court held that the employer had justified the dismissal, stating "Mr. van Woerkens' serious sexual harassment of M combined with his dishonesty during the investigation breached the faith essential to the working relationship between Marriott and the plaintiff, and was fundamentally inconsistent with the continuation of the employment relationship" (para 197).

It's not just employees who have to be honest. In *Marchen*, the court held that employers also have an obligation to be honest. On the day Mr. Marchen's employment as an apprentice auto mechanic was terminated, he was called into a meeting, told his services were no longer required and provided 2 weeks severance and a Record of Employment indicating dismissal. When he asked why he was being terminated, he was told it was not up for discussion. The employer was aware that Marchen's brother was a thief, and was wanted for possession of stolen property in violation of his parole. There was evidence that the employer told Marchen's father and Services Canada that Mr. Marchen had been fired for his involvement in criminal activity. At trial the employer said that the termination was due to downsizing. The court found that while the shop was ultimately downsized, the downsizing was not the reason for the termination. The termination was motivated by unfounded suspicion that Mr. Marchen, like his brother, had been involved in criminal activity. The court awarded significant damages. In addition to \$18,151 for wrongful termination, the plaintiff recovered moving expenses (\$2,036), consequential loss to his training and status (\$25,000), punitive damages of \$100,000 and special costs. The court's award of punitive damages was based on the finding that the Defendant's attempt to justify the dismissal on the basis of downsizing was intended to deliberately mislead the court, was reprehensible and breached its obligation to act in good faith to the Plaintiff. This decision is currently under appeal.

Practice Point: Whether it is an investigation into misbehaviour or discussions after termination, both employers and employees have a duty of good faith that, not surprisingly, includes simply being honest.

"By failing to respond in a complete and truthful manner, Mr. Obeng breached the implied duty of honesty and faithfulness owed by him to Safeway"



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Wal-Mart's Closure of a Unionized Store was not an Unfair Labour Practice

Plourde v. Wal-Mart Canada Corp., 2009 SCC 54; Desbiens v. Wal-Mart Canada Corp., 2009 SCC 55; Hunt Manufacturing Ltd., BCLRB No. B270/93

Running a profitable business in a unionized environment is difficult. As Wal-Mart recently found, even going out of business is costly and problematic. Although Wal-Mart was successful at the Supreme Court of Canada ("SCC") in defending its store closing, it remains exposed to other unfair labour practice complaints as a result of the closure.

In August 2004 a union was certified for the Jonquière store. It was the first Wal-Mart store to be unionized in North America. After several unsuccessful bargaining sessions, the Quebec Minister of Labour appointed an arbitrator. On the same day, Wal-Mart informed the employees of its decision to close the store.

Two employees filed complaints under certain sections of the *Quebec Labour Code* ("Code") seeking reinstatement and claiming they lost their employment because of the unionization of the establishment. The legal issue was narrow and was based on the particular wording of the *Code* - namely whether the reverse onus provisions of the *Code* applied, requiring the employer to establish that it did not discriminate against the workers for anti-union reasons. The SCC found that these provisions did not apply to the complaints. Therefore, Wal-Mart did not have to justify its motives for the closure because the remedies sought by the individuals presupposed an ongoing business. A permanent workplace closure, regardless of the motives, was a complete answer.

The SCC noted, however, that the decision was limited and did not stand for "the more sweeping proposition that closure wipes the employer's record clean and immunizes it from any financial consequences for associated unfair labour practices." Wal-Mart might well have violated other provisions of the *Code* and have committed an unfair labour practice if it had been found that the closure itself was aimed at hindering the union or the employees from exercising their rights under the *Code*. There was a very strong dissent authored by Madam Justice Abella who stated that denying the employees procedural rights and a remedy represented a "marked and arbitrary departure from the philosophical underpinnings, objectives and general scope of the *Labour Code*."

Unionized employers in British Columbia have always

been susceptible to claims of unfair labour practice resulting from closures. In *Hunt Manufacturing Ltd.*, for example, the employer closed the unionized part of the plant and moved to Alberta after signing the first collective agreement. The B.C. Labour Relations Board found that the decision was motivated in part by anti-union animus although there were very good business reasons for the closure. It ordered the employer to cease and desist the activity, reimburse the union for organizational representational expenses thrown away, reinstate employees affected with back pay and if reinstatement was not possible to pay them until they secured comparable employment. While the remedy may have seemed unusual the principles remain the same - in a unionized environment going out of business can be expensive and problematic.

Practice Point: While union certifications have been on the decline since 2001, non-union employers should continue to be vigilant to ensure that their workplace does not attract union organizing drives. They should also be prepared to move quickly should a union commence an organizing drive.



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Employment and Labour Group Upcoming Breakfast Seminar

"The Danger of Being Wrong About Human Rights"

March 25, 2010

8:00 am - 10:00 am

Suite 700 - 595 Burrard Street

Vancouver, BC

*Register early. Space is limited.

Please RSVP to Dari Gilham by phone at 604.647.4141 or by email at dgilham@boughton.ca

What We Do

- *Represent clients at all levels of court, at the British Columbia and Canadian Human Rights Tribunals, the B.C. 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*