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## **Employment Law – A Brief Update**

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# Employment Law – A Brief Update

## Topics:

1. The challenge of the older worker
2. Termination and the duty to mitigate
3. Wallace damages – a recent case



# 1. The Challenge of the Older Worker

- 12/12/06 – end to mandatory retirement at age 65 in Ontario (*Human Rights Code* amended)
- Consequence: new challenges for employers in dealing with employee performance, succession planning, etc. in regard to older workers

# 1. The Challenge of the Older Worker

*Fisher v. Lakeland Mills Ltd. (BCCA)(2008)*

- 65 yr old clerical employee with limited computer skills became upset when topic of retirement raised
- company president assured her she could stay as long as she wished

# 1. The Challenge of the Older Worker

## *Fisher v. Lakeland Mills Ltd. (cont'd)*

- e'ee given training for new back-up duties but found it difficult and uncomfortable
- supervisor suggested company “*could muddle along*” if e'ee intended to retire soon but otherwise would need to hire back-up who also would have to “*pick up*” some of e'ee's duties

# 1. The Challenge of the Older Worker

## *Fisher v. Lakeland Mills Ltd. (cont'd)*

- e'ee felt she had no choice – i.e. either learn new duties or company would hire new e'ee who would take away some of her duties
- e'ee complained to president stating she felt she was being forced to retire because unable to learn new duties; president “*did nothing to disabuse [her] of her perception*”

# 1. The Challenge of the Older Worker

## *Fisher v. Lakeland Mills Ltd. (cont'd)*

- e'ee sued for constructive dismissal
- court: the process began innocently with suggested reorganization of staff but progressed to point where significant change to e'ee's employment occurred - addition of new duties and deletion of others would constitute "*fundamental change*"
- e'ee entitled to 10 mos.' notice

## 2. Termination and the Duty to Mitigate

- terminated e'ees have duty to mitigate their losses arising from termination and e'ers entitled to benefit therefrom
- recent SCC decision indicates that in appropriate circumstances, terminated e'ee may be required to mitigate by returning to work for dismissing employer



## 2. Termination and the Duty to Mitigate

### *Evans v. Teamsters, Local No. 31*

- union business agent with 23 yrs service backed losing candidate in bitter election for president
- new president terminated e'ee without notice or pay but indicated willingness to “*commence discussions*”
- e'ee retained lawyer and claimed 24 mos. notice



## 2. Termination and the Duty to Mitigate

### Evans, cont'd

- union maintained e'ee's pay and benefits while negotiating with lawyer
- no settlement after 5 mos so union asked e'ee to return in order to work balance of 24 mo notice period, failing which e'ee would be terminated "for cause"

## 2. Termination and the Duty to Mitigate

### Evans, cont'd

- e'ee stated he would return only if termination letter rescinded but union refused
- employee sued for wrongful dismissal and union claimed failure to mitigate

## 2. Termination and the Duty to Mitigate

Evans, cont'd

*“In the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer”.*



## 2. Termination and the Duty to Mitigate

### Evans, cont'd

*“...critical element is that... e’ee “not [be] obliged to mitigate by working in...atmosphere of hostility, embarrassment or humiliation...and it is that factor which must be at...forefront of the inquiry into what is reasonable. Thus...it is extremely important that the non-tangible elements...including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements -- be included in the evaluation.”*



### 3. *Wallace* Damages – a recent case

- In *Wallace*, SCC held that e'ee may be compensated by longer notice period if e'er's conduct in the manner of dismissal falls below an acceptable standard
- Examples: e'er fails to be candid, reasonable, honest and forthright with the e'ee or acts in a manner that is unfair or in bad faith by being, for example, untruthful, misleading or unduly insensitive.

### 3. *Wallace Damages* – a recent case

#### *Mulvihill v. Ottawa (City)*

- difficult e'ee:
  - antagonistic relationship with co-workers and supervisors
  - poor performance
  - filed harassment complaint against co-worker
  - etc.

### 3. *Wallace Damages* – a recent case

#### *Mulvihill v. Ottawa (City)*

- e'ee provided medical note on Sept. 20<sup>th</sup> indicating “*unable to work for medical reasons*” until Oct. 17<sup>th</sup>
- meeting with supervisor on Oct. 28<sup>th</sup> was antagonistic and combative
- e'ee remained on sick leave



### 3. *Wallace Damages* – a recent case

#### *Mulvihill v. Ottawa (City)*

- Nov 5<sup>th</sup> – letter to e'ee with results of harassment investigation - i.e. no harassment found
- Nov. 8<sup>th</sup> – e'ee responds with strongly worded letter
- Nov. 16<sup>th</sup> – City sends letter to e'ee (still on sick leave) dismissing her for cause

### 3. *Wallace Damages* – a recent case

#### *Mulvihill v. Ottawa (City)*

- City dropped “*for cause*” allegations at trial
- Trial judge stated that original dismissal for cause “*not warranted*” and awarded “*Wallace damages*” on grounds that although e’ee was difficult, it was “*callous and insensitive*” to dismiss her while on sick leave

### 3. *Wallace* Damages – a recent case

*Mulvihill v. Ottawa (City)*

Court of Appeal:

*“...mere fact that cause...alleged but not...proven does not automatically mean that Wallace damages [are warranted]. So long as...e’er has...reasonable basis on which to believe it can [establish cause]... e’er has... right to take that position without fear that failure to succeed on that point will automatically expose it to a finding of bad faith.”*

### 3. *Wallace* Damages – a recent case

#### *Mulvihill v. Ottawa (City)*

*“The mere fact that [e’ee] was on sick leave...does not necessarily mean the dismissal was conducted in an unfair or bad faith manner. There must be other evidence of bad faith, unfair dealing or "playing hardball", such as cancellation of accommodation for an employee's illness as a reprisal for the employee having made a human rights claim...”*