e2r Alert!

2023 Round Up

Happy New Year! As we move in to 2024, we've highlighted below some important legal decisions in employment law last year:

Giving Consideration to Oral Agreements

In *Dornan v. New Brunswick (Health), 2023,* a New Brunswick labour adjudicator considered whether oral discussions between Dornan and his former employer, Horizon Health Network, prior to the commencement of his 5-year fixed-term employment as CEO formed an oral contract of employment. Conversely, the employer argued that the written employment agreement that was provided following Dornan's start date (and did not resemble the oral agreement) was enforceable. Dornan was terminated after less than 5 months of employment and the employer relied on the termination clause in the written agreement to limit Dornan's severance to 12 months' pay in lieu of notice. The adjudicator held that the termination provision was not enforceable and that the oral discussions formed the employment contract for a number of reasons, but most significantly, because the discussions encompassed the fundamental terms of a contract – there was an offer made by the employer, acceptance by Dornan, and consideration provided via compensation paid to him.

This decision is a significant reminder that verbal agreements *can* form legally binding employment contracts as well as the importance of fresh consideration to be provided to employee's when an employer changes fundamental terms of their employment.

Notice Periods Beyond 24 Months

In October, the Ontario Court of Appeal upheld reasonable notice periods in excess of 24 months for two long-service and highly specialized employees. The decisions in both *Lynch v. Avaya Canada Corporation, 2023,* and *Midwid v. IBM Canada Ltd, 2023,* highlighted the 'exceptional circumstances' that may warrant common law notice in excess of the conventional 'cap' of 24 months. In *Lynch*, those circumstances included the fact that Lynch's position was unique and specialized and that his skills were largely only relevant to his very specific work experience with Avaya. Furthermore, Lynch specialized in the design of software to control unique hardware manufactured by the former employer, had developed one or two patents per year during his 38+ years of employment, and had been identified as a "key performer" in a recent performance

review. Given the above, the plaintiff's age (64), and the scarcity of comparable employment in Belleville, the employer's appeal was dismissed, and the 30-month award was upheld.

These decisions affirm that specialized and/or difficult-to-transfer skills could warrant a finding of exceptional circumstances for older and long-service employees.

What's on Record?

In British Columbia, the Court of Appeal held that the former employee's surreptitious recordings in the workplace did amount to after-acquired cause for dismissal. In *Shalagin v. Mercer Celgar Limited Partnership, 2023,* the employee was terminated without cause after a decade of employment. He subsequently sued the employer for wrongful dismissal, in addition to filing employment standards and human rights complaints. During tribunal proceedings, Shalagin admitted to having secretly recorded over 100 conversations in the workplace, including meetings with managers and human resources personnel, safety meetings, one-on-one sessions, and conversations with colleagues. Thereafter, the employer asserted that the recordings amounted to after-acquired cause justifying the employee's dismissal and the Court agreed.

In dismissing Shalagin's appeal and determining that there was after-acquired cause, the Court considered the relevant factors and circumstances, including the employee's stated reasons for making the recordings, the length of time during which the recordings occurred, the amount of recordings, the sensitivity of the information captured, and whether the recordings were made in violation of the employer's policies.

What's Ahead

The summaries above – which speak to a number of important concepts, like consideration, oral vs. written employment agreements, common law reasonable notice, privacy concerns, and after-acquired cause - are only a sample of the decisions made in 2023 within the ever-developing world of employment/HR law.

We will continue to pay close attention to critical decisions across Canada as there is no doubt that 2024 will see a myriad of developments – including amendments to the Federal *Canada Labour Code* in February, the future of confidentiality agreements/non-disclosure agreements, and the proposed Bill 149 which would bring about significant changes to employment legislation relating to recruitment and hiring procedures in Ontario.

If you have any questions about these decisions or your agreements, please do not hesitate to contact ClientCare.