



LABOUR + EMPLOYMENT LUNCH N'LEARN: YEAR IN REVIEW – HINDSIGHT IS 2021

Presented By:

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TOPICS

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| 1 | Brief update on vaccination policies |
| 2 | Offer of Re-Employment/Mitigation |
| 3 | Constructive Dismissal |
| 4 | Reasonable Notice/Damages |
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■ YEAR IN REVIEW – A SNAPSHOT



25 reported wrongful dismissal cases in British Columbia Courts since December 1, 2020



5 appellate court decisions



0 (No) cases involving just cause as a defence



IMPLICATIONS OF COVID

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Frustrated by Covid?

Verigen v. Ensemble Travel Ltd., 2021 BCSC 1934

BACKGROUND

- ER is a travel company. Pandemic resulted in complete loss of business.
- EE is 58 years old. She had been employed for 14 months. She was laid off at the outset of pandemic.
- EE agreed to the layoff, on the understanding that it would be temporary (not exceeding 13 weeks). Layoff persisted and in August, 2020, ER advised her that her job had been eliminated. EE sued.

DEFENCES

1. Relationship had been frustrated by the pandemic;
2. Policy Manual limited her to statutory minimums;
3. Damages should be assessed with reference to the salary reductions implemented concurrent with pandemic.

IMPLICATIONS OF COVID

Frustration of Contract

“ The doctrine applies "when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract'"...

Court rejects defence:

... Although much of the consumer demand ... has abated, at least for the time being, not all of it has, and then not permanently...

... the collapse in the travel market goes to ETL's "ability to perform", rather than "the nature of the obligation itself."



Frustration of Contract



Statutory Minimums

- Handbook included an express provision limiting her to 2 weeks' notice. Court rejected the application of the handbook because it was not given to her until she had worked for 3 months (lack of consideration)



Damages

- For EE's not laid off, all salaries were reduced by 20%. Court held that reduction did not apply because they were implemented after she had been laid off. A finding that runs contrary to the general rule that damages are to be assessed prospectively.
- Reasonable notice assessed at 5 months!!!

More Covid Cases



***Andrews v. Allnorth Consultants Limited*, 2021 BCSC 1246**

- 61 year old EE laid off due to pandemic. He agreed to the layoff. Shortly after, took another job while awaiting recall. In September 2020, ER applied for a variance to extend layoffs beyond 13 weeks. EE did not agree to the extension and sued. This occurred before his layoff was actually extended.
- Court held that by purporting to extend the layoff, E was justified in regarding himself dismissed. Damages assessed on the basis of 14 months' notice.

***Hogan v. 1187938 B.C. Ltd.*, 2021 BCSC 1021**

- 53 year old EE with 22 years' service laid off with the pandemic. He sued and in April 2021, ER offered to recall him with full back pay to a slightly different position. He refused the offer.
- Court held that the lay off was a dismissal, and damages based on 22 months' notice. Court also held that the offer to re-employ was a litigation tactic and not a *bona fide* offer: "...the plaintiff should not be required to compromise his legal claim as part of his duty to mitigate".



A BLURB ON CERB

Hogan v. 1187938 B.C. Ltd., 2021 BCSC 1021

- The plaintiff received \$14,000 in CERB payments in 2020.
- But for his dismissal, the plaintiff would not have received the benefits.
- The CERB payments are not private insurance, and neither the employer nor the employee contributed to them. As a result, they are not delayed compensation or part of the plaintiff's earnings. There is no evidence that the plaintiff will have to repay the CERB.
- *“As a result, I see no basis to depart from the general rule that contract damages should place the plaintiff in the economic position he would have been in had the defendant performed the contract.”*
- ER liability reduced by \$14,000



Iriotakis v. Peninsula Employment Services Ltd., 2021 ONSC 998

- Plaintiff terminated after 28 months as Business Development Manager with base salary of \$60,000 increased by commission to \$145,000.
- Employer argued that CERB received by plaintiff (\$2,000 per month) should be accounted for when calculating the appropriate notice period and damages.
- **Court distinguished CERB from Employment Insurance benefits:** *“CERB cannot be considered in precisely the same light as Employment Insurance benefits when it comes to calculating damages for wrongful dismissal. CERB was an ad hoc programme and neither employer nor employee can be said to have paid into the program or “earned” an entitlement over time beyond their general status as taxpayers of Canada.”*
- **Court found that it would not be equitable to offset CERB from plaintiff’s entitlement to damages.**





OFFER OF RE-EMPLOYMENT/MITIGATION

Preuss v. Dr. P. Safari-Pour Inc., 2021 BCSC 973

- 63 years old EE dismissed as dental office manager/receptionist after 37 years. Office closed in March 2020, per public health orders, but EE continued working until June, at which time she was advised of her dismissal and given 6 months' pay.
- Upon being sued, ER offered to re-employ her in the same capacity. She refused, regarding the offer as a litigation tactic.
- Court found that the EE's decision was reasonable. She had been abruptly dismissed in a manner that was dispassionate:

(She was) shocked by her dismissal and felt betrayed. She was embarrassed, humiliated She no longer trusted Dr. Safari-Pour and the relationship between them was frayed. A return to her previous employment would ... have resulted in an acrimonious and unhealthy relationship.



Wong v. Polynova Industries Inc., 2021 BCSC 603

- 70-year-old EE dismissed after 15 years' service. In this case, EE left work in March 2020 on the basis that he did not feel well. He did not return or maintain any communication with the ER. On June 1, 2020, he purported to report for duty. He was told that he had no job and was deemed to have quit (abandoned employment). Acrimony ensued, and one month later, ER agreed to re-employ him, with full back pay to June 1, 2020.

- **Court held that EE was justified in not returning to work:**

... the parties became entrenched in their positions, and their communication took on an adversarial tone. There was fundamental disagreement about which party had terminated the employment relationship.





CONSTRUCTIVE DISMISSAL

CONSTRUCTIVE DISMISSAL

McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home)

- Ontario Court of Appeal upheld damages award **in excess of \$1.2 million** for a constructively dismissed employee. One of the highest damages award on record in a Canadian wrongful dismissal case.
- Plaintiff, Grant McGuinty, was a third-generation owner of McGuinty Funeral Home in North Bay, Ontario.
- Plaintiff entered into a share purchase agreement to sell his entire interest in the family-run business.
- As a term of the purchase agreement, plaintiff entered into a Transitional Consulting Services Agreement, by which he would continue to be employed by the funeral home as general manager and consultant for 10 years at an annual salary of \$100,000 including commission, company vehicle, and golf membership.



CONSTRUCTIVE DISMISSAL

Test for Constructive Dismissal

Two Elements:

1) a single unilateral act that breaches an essential term of the contract

OR

2) a series of acts that, taken together, show that the employer no longer intended to be bound by the contract

AND

2) The employee did not consent to or **acquiesce** in the change to an essential term of the employment contract

McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home)

- **Employer's series of acts showed it no longer intended to be bound by the employment contract.**
- Employer forced plaintiff to track time and verify it with a subordinate third party employee.
- Employer attempted to remove vehicle privileges and not pay commission.
- Employer changed locks without notice despite plaintiff being general manager.
- Plaintiff went on leave for medical reasons related to the employer's conduct and refused to step down from general manager position.
- Employer threatened to cease plaintiff's benefits coverage.

CONSTRUCTIVE DISMISSAL

McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home)



- **Issue on Appeal:** Did plaintiff condone the conduct of the employer barring a claim for constructive dismissal?



- **NO!** Evidence supported finding of repudiation of contract by employer.



- Ontario Court of Appeal upheld that a reasonable person would have concluded that the employer's conduct demonstrated an intention to no longer be bound by the employment contract, and that the employee did not condone the employer's actions.



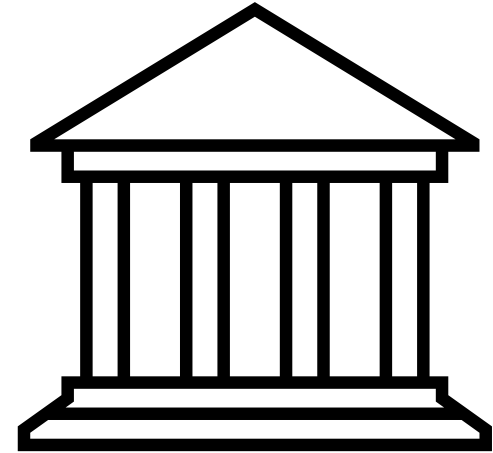
- Plaintiff was constructively dismissed and awarded damages for the remaining nine years of his fixed-term contract **totaling over \$1.2 million!**

Costello v. ITB Marine Group Ltd., 2021 BCCA 154

- EE worked as an office manager in North Vancouver for 34 years. In October 2018, ER closed its North Vancouver office. EE was transferred to Burnaby office, located on a floating barge. She suffered from motion sickness, and was moved into a temporary trailer. The trailer was unsafe (black mould and unsafe stairs). EE complained and was allowed to work from home.
- In January 2019, EE write to ER and asked for a “settlement”. Without any response from ER, her lawyer wrote the next day and contended a constructive dismissal alleging that:
 1. Stripped of all or most of her job duties,
 2. Had been moved into an unsafe working environment, and
 3. Had been subjected to degrading treatment.
 - Trial Court dismissed claim and awarded costs to ER.

CONSTRUCTIVE DISMISSAL

- At CA, the issue was whether the EE had acted “prematurely or precipitously” and it was determined that she had done so:
- ER had changed EE’s duties but she still had plenty of work to perform (within her skill set);
- ER had no right to require EE to work in an unsafe environment, but this was addressed in a reasonable and timely way;
- No evidence that EE had been degraded (voices were not raised, foul language was not used). Any animosity came from EE who was seeking to orchestrate a settlement package.





REASONABLE NOTICE / DAMAGES

REASONABLE NOTICE

- 41 year old store manager; 9.5 years' service. EE claims 16-18 months; ER argues for 9-12 months. Court decides ...
- 36 year old chef; 23 months' service. EE claims 9 months; ER argues for 6 months. Court decides ...
- 64 year old salesperson; 23 years' service. EE claims 24 months; ER argues for 18-20 months. Court decides ...
- 69 year old dispatcher; 13.5 years' service. EE claims 18 months; ER argues for 10 months. Court decides ...
- 63 year old office manager; 37 years' service. EE claims 24 months; ER argues for 12 months. Court decides ...
- 53 year old tire salesman; 26.5 years service. EE claims 24 months; ER argues for 12-16. Court decides
- 53 year old tire salesman; 31 years service. EE claims 24 months; ER argues for 12-16. Court decides
- 43 year old Engineering Manager; 2.5 months service. EE claims 12 months; ER argues for 3. Court decides

REASONABLE NOTICE

- 41 year old store manager; 9.5 years' service. EE claims 16-18 months; ER argues for 9-12 months. Court decides **10 months!**
- 36 year old chef; 23 months' service. EE claims 9 months; ER argues for 6 months. Court decides **7 months!**
- 64 year old salesperson; 23 years' service. EE claims 24 months; ER argues for 18-20 months. Court decides **22 months!**
- 69 year old dispatcher; 13.5 years' service. EE claims 18 months; ER argues for 10 months. Court decides **18 months!**
- 63 year old office manager; 37 years' service. EE claims 24 months; ER argues for 12 months. Court decides **20 months!**
- 53 year old tire salesman; 26.5 years service. EE claims 24 months; ER argues for 12-16. Court decides **20 months!**
- 53 year old tire salesman; 31 years service. EE claims 24 months; ER argues for 12-16. Court decides **18 months!**
- 43 year old Engineering Manager; 2.5 months service. EE claims 12 months; ER argues for 3. Court decides **6 months!**

Bonus Case:

Ojanen v. Acumen Law Corporation, 2021 BCCA 189

- Case involved a law firm and an articulated student who was dismissed approximately 4 months into her articling year.
- At trial ER ordered to pay \$18,934.00 in lieu of notice + aggravated damages of \$50,000.
- ER appealed.
- ER not only lost on the appeal, it lost big on the cross appeal. In addition to the amounts previously ordered, EE was entitled to \$100,000 for loss of opportunity and \$25,000 in punitive damages.



Q&A

HOUSEKEEPING



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THANK YOU

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