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• NAPPING WHILE WORKING IS NOT NECESSARILY CAUSE FOR TERMINATION, OLRB CLARIFIES •

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The OLRB has found in *Zhang v Crystal Claire Cosmetics Inc.*, [2015] O.E.S.A.D. No. 649, that an employee, despite being caught napping while on duty on several occasions, was entitled to termination pay pursuant to the *Employment Standards Act, 2000* (the ESA) upon termination of his employment with Crystal Claire Cosmetics Inc. (Crystal Claire).

BACKGROUND

The employee, Chong Jun Zhang, was employed for just under five years as a powder compounder in the pre-weigh section of Crystal Claire's manufacturing facility at the time his employment was terminated in March 2014, after he was caught sleeping while on duty.

The nap that triggered Crystal Claire's decision to terminate Mr. Zhang's employment, according to the employer, was not the first time he had been found sleeping on the job, according to a senior manager at the Company who claimed that he had found Mr. Zhang "dozing off" or sleeping in secluded areas of the workplace on more than one occasion. Other employees also confirmed they had seen him sleeping at work (in one case, the employee claimed that she even had the opportunity take pictures of him sleeping). However, Mr. Zhang was never formally disciplined prior to the incident that led to the termination of his employment. Crystal Claire did, at one

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point, relocate him in order to better "monitor" him, but he was never informed of the reason he was relocated.

Following his dismissal, Mr. Zhang filed a complaint with the Ministry of Labour and the Employment Standards Officer (the **Officer**) who reviewed the complaint found in favour of Crystal Claire. Mr. Zhang then made an application for a review of the Officer's decision by the Ontario Labour Relations Board (the **OLRB**).

OLRB DECISION

The OLRB agreed with Crystal Claire's decision to terminate Mr. Zhang, stating that Crystal Claire "could not be expected to continue his employment in the circumstances". However, the issue to be decided was whether or not Mr. Zhang was entitled to statutory termination pay.

Under the ESA, all employees are entitled to notice of termination or payment in lieu of notice, unless (among other things), the employee "has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer".

When assessing the circumstances of an employee's termination in the context of an ESA claim for termination pay, according to the OLRB, the threshold is stricter (in some cases) than the threshold to be met in a civil claim for wrongful dismissal. Under the ESA, the question is not whether the misconduct amounts to just and sufficient cause for terminating the employee's employment, but rather, it is necessary for the employer to establish that (1) the employee's misconduct or neglect of duty was wilful (as opposed to reckless or accidental); and (2) the employer did not condone the conduct.

In the circumstances, while the OLRB clearly expressed its view that Mr. Zhang's conduct was inappropriate, the OLRB was not convinced that Mr. Zhang's sleeping was not accidental. In other words, the employer failed to show that he fell asleep "con-

sciously and deliberately" (i.e., that the behaviour was "wilful"). Accordingly, Mr. Zhang was entitled to termination pay under the ESA.

Further, despite many prior instances of sleeping, Mr. Zhang had never been provided with any formal verbal warning or written warning that his employment would be at risk if he engaged in further sleeping on the job. Thus, the employer failed to prove that it had not condoned the behaviour leading up to the termination of his employment.

OUR VIEWS

This decision is a good reminder that in order to terminate an employee's employment without providing termination pay (and severance pay, if applicable) under the ESA, misconduct is not enough. An employer must also be able to show that the misconduct was intentional.

In its decision, the OLRB also highlighted the importance of having clearly articulated policies in place for addressing employee misconduct and following the procedures outlined in those policies when imposing discipline. In addition, employers must clearly communicate policies to employees such that employees understand that, if they engage in certain conduct, their employment will be at risk. This is especially important in cases where the employer wants to apply a "zero-tolerance" policy to a particular behaviour in the workplace (sleeping on the job, for instance). Prior to taking steps to terminate an employee's employment for misconduct, employers should ask themselves whether it is abundantly clear to the employee that the consequence of their behaviour will be termination without further notice or payment.

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• SOMETIMES, PULLING THE PLUG ON A COMPLAINT GIVES LIFE TO AN EMPLOYER •

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In the recent decision of *Drummond v. Community Living Ajax Pickering Whitby*, [2015] O.H.R.T.D. No. 668, the Human Rights Tribunal of Ontario (the Tribunal) came down on an applicant for withdrawing her complaint on the proverbial courtroom steps.

AD (the Applicant) alleged discrimination with respect to employment because of disability and reprisal contrary to the *Human Rights Code* (the Code). On the morning of the first scheduled day hearing, the Applicant's counsel informed the Tribunal and the other parties that she had instructions to withdraw the Applicant's application. Pursuant to the Tribunal's Rules of Procedure, once an application and response have been filed, an application may be withdrawn only with the permission and upon the terms of the Tribunal.

In light the withdrawn application, the employer submitted that this was a case that "cried out" for an award of costs. By way of background, the Tribunal does not have jurisdiction to award costs. Notwithstanding the Tribunal's lack of jurisdiction in this regard, the employer pursued such request and highlighted the fact that the Applicant had displayed similar behaviour in a grievance arbitration proceeding, where she withdrew her grievance after the arbitrator had ordered her to disclose her medical records.

While the Tribunal did not award costs in favour of the employer, it did indicate that the Applicant's conduct in the matter was worthy of some sanction. The Tribunal noted that the Applicant did not appreciate the significant impact that her last-minute decision to withdraw had not only on the respondent employer but also on the Tribunal. The Tribunal held that the Applicant had put the employer and its employees through considerable expenses and inconvenience, which could not pass without repercussion.

In this instance, the Tribunal declared that the Applicant was prohibited from filing any future application against the respondent employer and its current and former officers, officials, employees or agents in any way arising out or relating to the allegations raised in the application or, where the application relates to the employment context, arising out of or in any way relating to the applicant's employment or cessation of employment with the respondent. The Tribunal went further and stated that the request to withdraw the application to avoid a decision finding that the allegations raised in the application were unsubstantiated was "tantamount to a failure to present evidence to prove the Applicant's allegations, and warrants a declaration that the allegations raised therein are unsubstantiated."

A part of the employer's response was a request to have the Applicant declared a vexatious litigant. In making its submission, the employer pointed to the Applicant's similar conduct in a grievance arbitration, as well as a previous application that had been filed by the Applicant with a previous employer. Notwithstanding the Applicant's past, the Tribunal held that the circumstances in this application did not meet the "high threshold" required to make a vexatious litigant declaration.

OUR THOUGHTS

This decision, while employer friendly, confirms the high threshold for successfully arguing that an individual is a vexatious litigant. Additionally, it is a reminder to employers that the Tribunal cannot award costs. For now, sanctions against last minute withdrawal of complaints such as declarations and prohibitions will have to suffice.

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• IN FRENCH, PLEASE! •

Marie-Lou Gauthier, Associate, Stikeman Elliott LLP, Montreal

On April 27th of this year, a group of leading retailers, including Best Buy, Costco and Wal-Mart, won their case before the Quebec Court of Appeal, which confirmed that the display of their English trademarks on storefront signage of the locations they operate in Quebec is in compliance with the *Charter of the French Language* (Charter).[1]

The Court of Appeal upheld the judgment rendered by the Superior Court of Quebec in April 2014 in which Justice Michel Yergeau found that pursuant to Section 25(4) of the Regulation respecting the language of commerce and business (Regulation), the display of a trademark in a language other than French is permitted on public signs and in commercial advertising, especially on storefront signage, as long as a French version of the trademark has not been registered.

This judgment was rendered following a joint hearing in October 2012 in connection with a motion for declaratory judgment filed by Best Buy, Costco, Gap, Old Navy, Guess?, Wal-Mart, Toys 'R' Us and Curves was heard before the Superior Court of Quebec, after these retailers received formal notices from the Office québécois de la langue française (the Office), demanding that they modify their signage at the risk of having their francization certificate suspended. The formal notices were set in the context of a campaign initiated by the Office with regards to the use of trademarks in a language other than French on public signs and in commercial advertising.

However, the victory of these retailers appears to be only temporary given that the Quebec Council of Ministers approved on June 17, 2015 a draft legislation submitted by the Minister for the Protection and Promotion of the French language, Hélène David, which aims to alter the Regulation in order to force companies to add a French generic term to the English trademarks they display at their Quebec locations. The purpose of the amendment is not to impose the translation of the trademark, but rather to add a descriptive or generic French title to the trademark in a language other than French.

The new Regulation will be published in the Official Gazette in the Fall, following its approval by the Council of Ministers. The Council will then have 45 days to submit comments. The entry into force of the new Regulation is expected in early 2016. The new Regulation provides for transitional measures so that companies may be granted a compliance period.

Following this announcement, the Attorney General of Quebec, Stéphanie Vallée, confirmed that the Government of Quebec would not appeal the decision of the Court of Appeal rendered on April 27th of this year.

DOING BUSINESS IN QUEBEC

In Quebec, the Charter requires employers to draft written communications to their staff, offers of employment or promotion as well as collective agreements in the official language of the province, which is French (Sections 41 and 43).

Furthermore, the Charter prohibits an employer from dismissing, laying off, demoting or transferring a member of his staff for the sole reason that he is exclusively French-speaking or that he has insufficient knowledge of a particular language other than French (Section 45).

Similarly, an employer is prohibited from requiring the knowledge or a specific level of knowledge of a language other than French in order to obtain an employment or office, unless the nature of the duties requires such knowledge (Section 46 of the Charter).

The Charter also provides that the francization program is intended to generalize the use of French at all levels of the business through (1) the knowledge of the official language on the part of management, the members of the professional orders and the other members of the personnel; (2) an increase, where necessary, at all levels of the business, including the Board of directors, in the number of persons having a good knowledge of the French language so as to generalize its use; (3) the use of French as the language of work and as the language of internal communications; (4) the use of French in the working documents of the business, especially in manuals and catalogues; (5) the use of French in communications with the civil administration, clients, suppliers and the public amongst others; (6) the use of French terminology; (7) the use of French in public signs and posters and commercial advertising; (8) appropriate French policies for hiring, promotion and transfer; (9) the use of French in information technologies (Section 141).

Companies which employ 50 persons or more for a period of six months must register with the Office and shall perform an analysis of their linguistic situation. On the basis of this analysis, the Office will either issue a francization certificate or order the adoption a francization program in order to generalize the use of French at all levels of the company. In the latter case, the company shall implement the francization program within a specific delay in order to obtain a francization certificate (Sections 139, 140 and 145 of the Charter).

Once they obtain a francization certificate, companies must ensure that the use of French remains generalized at all levels and must complete a triennial report on the progression of the use of French in their activities (Section 146 of the Charter).

Businesses employing 100 or more persons must also form a francization committee composed of six or more persons (Section 136 of the Charter).

Failure to comply with requirements and obligations under the Charter is an offense and can result in criminal penalties, including a fine of up to $20,000 in the case of a legal person, which is doubled for subsequent offences (Section 205 of the Charter).

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[1] *Magasins Best Buy ltée c. Québec (Procureur général)*, [2014] Q.J. No. 2058, 2014 QCCS 1427, aff'd [2015] J.Q. no 3368, 2015 QCCA 747.

• ANOTHER ONTARIO TERMINATION CLAUSE DECISION IN FAVOUR OF EMPLOYEES •

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The Ontario Divisional Court recently affirmed the lower court's decision in the case of *Miller v. A.B.M. Canada Inc.*,[1] an important case with respect to the interpretation of termination provisions in employment contracts.

In *Miller,* the employee signed an employment agreement with the following termination clause:

> Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation.

The termination provision did not expressly state that benefits would be continued during the statutory notice period under the *Employment Standards Act, 2000* (the "ESA"). As a result, the court found that the termination provision contravened the ESA. In upholding the lower court's decision that the termination provision was void and common law notice should instead be substituted, the Divisional Court made the following findings.

First, the court stated that the employment agreement in question distinguished salary, pensions and car allowance under the heading of 'remuneration', but that the termination provision specifically just referenced salary. As a result, it was clear that just salary was to be provided on termination.

Second, the court found that the employment agreement's silence on providing benefits during the notice period did not lead to a presumption that benefits would be provided. At best, the court found that there was an ambiguity in the agreement with respect to the question of whether benefits would be continued, and ambiguities should be interpreted against the drafter (in this case, the employer).

This case confirms the law set out in earlier decisions such as *Wright v. Young* and *Rubicam Group of Companies and Stevens v. Sifton Properties Ltd.* In short, in order to ensure that the termination provision in an employment agreement is not set aside, it must be carefully drafted and it must not appear to undercut the minimum provisions of the ESA. If the termination provision does not expressly state that benefits will continue during the ESA notice period, then the employer risks having the termination provision set aside.

For employers who have not had the termination provisions in their employment agreement templates reviewed recently, now would be a good time to ensure that they are in order and to consider updating them if they are not.

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[1] *Miller v. A.B.M. Canada Inc*., [2015] O.J. No. 2439, 2015 ONSC 1566, aff'g [2014] O.J. No. 3221, 2014 ONSC 4062.