CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY LAW BULLETIN NO. 364

APRIL 29, 2015

EDITOR: TERRANCE S. CARTER

EMPLOYER LIABLE FOR DISMISSAL AND ONTARIO *HUMAN RIGHTS CODE* DAMAGES

By Barry W. Kwasniewski*

A. INTRODUCTION

Bray v Canadian College of Massage and Hydrotherapy ("*Bray*"),[1] a recent decision from the Ontario Superior Court of Justice (Small Claims Court), illustrates what can go wrong if an employer attempts to unilaterally impose workplace related changes on an employee after that employee returns to work following a leave of absence, such as a pregnancy or parental leave. Additionally, it underscores that employers cannot treat employees differently based on grounds protected by the Ontario *Human Rights Code* (the "Code").[2] In his decision dated January 31, 2015, Deputy Judge Winny broadly canvassed the law on constructive dismissal, damages in lieu of notice, and discrimination, as well as aggravated and punitive damages. Deputy Judge Winny consistently found in favour of the plaintiff. Although the plaintiff had limited her claim to $25,000, because it was brought in Small Claims Court, Deputy Judge Winny assessed total damages for reasonable notice, discrimination, and punitive damages at $42,700. He therefore awarded the plaintiff $25,000 plus interest. Although *Bray* was decided in Small Claims Court, the decision has important lessons for employers in Ontario, including charities and not-for-profits, which will be reviewed in this *Charity Law Bulletin.*

B. FACTS

Kelly Bray, the plaintiff, is a registered massage therapist who was employed by the Canadian College of Massage and Hydrotherapy (the "College") on a part-time basis since 2004. Ms. Bray worked an

* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters' Ottawa office and would like to thank Anna M. Du Vent, B.A., M.A., J.D., Student-At-Law, for her assistance in preparing this *Bulletin.*
[1] 2015 CanLII 3452 (ON SCSM).
[2] RSO 1990, c H 19.

average of 25 hours a week teaching classes, supervising clinics, and supervising outreach programs.[3] In October 2012, she went on maternity leave[4] for one year and was scheduled to return in October 2013.

During the spring and summer 2013, Ms. Bray was omitted from the distribution list concerning scheduling for the September 2013 term. On July 10, 2013, she received a draft schedule and subsequently emailed the College's Director of Education to enquire about whether she would be leading treatments when she returned as she had done before her leave. The Director's response included the following statement:

> Let's see how this term goes and see if you find it ok with even being in 4 classes and having to be a mother at the same time. It will be a big adjustment.[5]

After being informed that she would not be leading treatments and receiving the above email, Ms. Bray filed a complaint with the Ontario Ministry of Labour. In November 2013, the Ministry of Labour asked Ms. Bray to put in writing a summary of the July events. Deputy Judge Winny inferred that the Ministry of Labour informed the College of this complaint shortly thereafter.

Ms. Bray returned to work as planned in October 2013. Because she no longer had a lead teaching position, Ms. Bray's schedule was reduced to 19 hours a week and her gross weekly pay was reduced by approximately one-third. Ms. Bray was then informed, in an email dated December 16, 2013, that she would not be scheduled for any classes, clinics, or outreach for the January term. She was told that "you are not being removed, at this time we simply do not require your services for this upcoming term."[6] Ms. Bray subsequently withdrew her complaint to the Ministry of Labour and commenced litigation.

C. DECISIONS AT TRIAL

Deputy Judge Winny found in favour of the plaintiff on the following issues: constructive dismissal, reasonable notice, damages for breaches of the Code, and punitive damages. He dismissed the plaintiff's claims for damages for reprisal and aggravated damages.

[3] *Supra* note 1 at paras 4-5.
[4] Sections 46, 47 and 48 of the Ontario *Employment Standards Act, 2000* include job-protected pregnancy and parental leave of up to 52 weeks.
[5] *Ibid* at para 10.
[6] *Ibid* at para 20.

1. Constructive Dismissal

Deputy Judge Winny found that the College's letter on December 16, 2013 resulted in constructive dismissal of the plaintiff stemming from a unilateral reduction in hours, responsibilities, and income. In this regard, he stated that "it is well-established that at common law, an employer has no inherent right to lay off an employee, even temporarily."[7] He further concluded that "it is difficult to imagine a more fundamental term of employment than the payment of remuneration,"[8] that the plaintiff was indefinitely dismissed, and, consequently, that even if any alleged misconduct was true, "the indefinite layoff or suspension was not a proportionate response to it."[9]

2. Reasonable Notice Damages

The College contended that Ms. Bray was limited to eight weeks notice under the *Employment Standards Act, 2000* ("ESA")[10] However, Deputy Judge Winny held that the College did not sufficiently advise or instruct Ms. Bray to read its Employee Policy Handbook and, even if it had, the termination provisions in the Handbook were not "sufficiently clear to exclude the common law requirement for reasonable notice and limit the employer's responsibility to the statutory minimums under the *Employment Standards Act*."[11] Considering that Ms. Bray was a nine-year employee with supervisory responsibilities and that there were limited teaching positions available, Deputy Judge Winny concluded that eight months was an appropriate notice period. This would result in $26,000 in reasonable notice damages. Taking into account other employment income earned by Ms. Bray during the notice period reasonable notice damages were reduced to $17,700.

3. Discrimination Contrary to the Ontario *Human Rights Code*

Ms. Bray claimed that she was discriminated against based on the grounds of sex and family status, which is prohibited under s. 5(1) of the Code. Additionally, s. 53(1) of the ESA states that:

> Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.

[7] *Ibid* at para 23.
[8] *Ibid* at para 27.
[9] *Ibid* at para 28.
[10] SO 2000, c 41.
[11] *Supra* note 1 at para 38.

S. 46.1(1) of the Code authorizes a civil court finding an infringement of a Code-protected right to make

> An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

This is available if the complainant can prove (i) that he/she is a member of a group protected by the Code, (ii) that he/she was subjected to adverse treatment, and (iii) that protected characteristic was "a factor" in the adverse treatment."[12] Deputy Judge Winny found that Ms. Bray was able to prove each of these factors. In assessing the appropriate amount of monetary damages several cases were reviewed, including the recent decision in *Partridge v Botony Dental Corporation* ("*Partridge*"), in which the plaintiff's employment was also terminated shortly after she returned from maternity/parental leave.[13] In *Partridge*, the employer was found liable for discrimination based on family status and damages for injury to feelings, dignity and self-respect were assessed at $20,000. The court ruled that the same amount should be awarded to Ms. Bray.

4. Aggravated Damages

In part because there was no medical evidence, Deputy Judge Winny found that Ms. Bray was unable to prove her claim for aggravated damages. He also considered the fact that "courts must be careful not to make damages awards which overlap in a manner which results in over-compensation."[14]

5. Punitive Damages

Ms. Bray was awarded punitive damages in the amount of $5,000. The court concluded that the College acted in bad faith towards Bray in failing to disclose or properly investigate a complaint it had received about her. According to a College witness, this complaint led to the decision to schedule no work hours starting in January, 2014. The College maintained that it took this measure as a disciplinary approach in response to that complaint. However, because the College did not disclose the complaint to Bray or give her a chance to respond to it, the Court found this violated

[12] *Peel Law Association v Pieters* (2013), 116 OR (3d) 81 (CA) at paras 54-61.
[13] [2015] OJ No 266 (SCJ). For a more detailed discussion of this case see "Ontario Court of Applies 'Family Status' Test for Discrimination" in *Charity Law Update* (March 2015), online: <http://www.carters.ca/pub/update/charity/15/mar26.pdf>.
[14] *Supra* note 1 at para 70.

the duty of good faith in the performance of a contract, as recently articulated by the Supreme Court of Canada in *Bhasin v Hrynew*.[15] In the result, this breach was considered sufficient to support a punitive damages award.

D. CONCLUSION

The *Bray* decision underlines the legal risks that employers face when employees on job-protected ESA leaves of absence return to work. The decision also highlights that discriminatory conduct against such employees contrary to the *Code* may result in increased damage awards in civil claims. With respect to employment contracts, *Bray* underscores the importance of including clear termination provisions if employers want to contractually limit liability. As noted in the decision, unless the employer can prove that the policy regarding termination rights was in fact communicated to the employee, they will have no legal effect. All employers, including charities and not-for-profits, must be aware of their legal rights and obligations when employees return after a leave of absence.