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CHARITY & NFP LAW BULLETIN NO. 487

FEBRUARY 25, 2021

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ASSISTANT EDITORS: NANCY E. CLARIDGE,
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NURSE SUSPENDED FOR SIX YEARS NOT CONSTRUCTIVELY DISMISSED, SAYS OLRB

By Barry W. Kwasniewski*

A. INTRODUCTION

WAITING SIX YEARS while on unpaid leave from work is too long to claim constructive dismissal, according to the Ontario Labour Relations Board ("OLRB"). In *Basdaye Kissoon v Victorian Order of Nurses (VON)*,[1] the applicant employee alleged constructive dismissal and reprisal against her employer, neither of which were found by the OLRB in its December 7, 2020 decision. The case offers a summary of the principles of constructive dismissal, which is important for employers, including charities and not-for-profits, to know. In a common law civil action, constructive dismissal can result in expensive termination payments in lieu of reasonable notice if employers unilaterally change the terms of the employment contract, resulting in a potential wrongful termination claim by an employee.[2] This *Bulletin* summarizes the facts of the case and the legal analysis applied by the OLRB.

B. BACKGROUND AND OVERVIEW

MS. BASDAYE KISSOON began working for the Victorian Order of Nurses ("VON") as a Registered Practical Nurse (RPN) on April 22, 2003.[3] Nearly eight years later, on June 21, 2011, Ms. Kissoon was placed on sick leave, which she testified was involuntary, and was paid accrued sick leave until the end of December of 2011.[4] VON then placed Ms. Kissoon on a leave of absence without pay, except vacation

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[1] 2020 CanLII 100607 (ON LRB) [*VON*].
[2] *Employment Standards Act, 2000*, SO 2000, c 41 s 74.
[3] *VON*, *supra* note 1 at paras 6–7.
[4] *Ibid* at para 6.

pay pursuant to an Employment Standards Office ("ESO") decision of May 8, 2013.[5] VON also filed a complaint with the College of Nurses of Ontario ("CNO"), which suspended Ms. Kissoon's nursing licence in August 2011.

Ms. Kissoon testified to the OLRB that she learned the CNO would not reinstate her nursing licence in August 2018, following a hearing. She further testified that she emailed a Memorandum of Understanding ("MOU") to VON asking for a letter of reference for the reinstatement of her nursing licence.[6] She apparently resigned from VON by sending another email on October 1, 2018, according to her testimony, not having received a reply from VON to her request, although her email did not expressly state that she was resigning.[7] A VON representative emailed Ms. Kissoon back on the same date, October 1, 2018, noting her absence from the workplace and licence suspension: "Please be advised that unless you are able to provide proof of a valid and active license to practice within 30 days your employment with VON will be terminated. You must provide proof from the College of Nurses of Ontario by no later than October 31, 2018."[8]

In cross examination, Ms. Kissoon gave different accounts as to how and when VON apparently terminated her employment. She testified that the October 1st email from VON was too late because her employment terminated in June 2011 when she was forced to leave, and that she had already resigned.[9] When she next wrote back to the VON representative in July of 2019, she stated that her "resignation is final."[10]

Ms. Kissoon asserted constructive dismissal and reprisal. She suffered reprisals because she was attempting to assert her rights under the *Employment Standards Act, 2000* ("*ESA*"), she said, and claimed the lack of response by VON to her MOU was also a reprisal. Because she could not return to work as her

[5] *Ibid.*
[6] *VON*, *supra* note 1 at para 9.
[7] *Ibid* at para 10.
[8] *Ibid* at para 11.
[9] *Ibid* at para 12.
[10] *Ibid* at para 13.

licence was suspended and "VON abandoned her," the situation amounted to a constructive dismissal, she argued.[11]

VON contended that Ms. Kissoon's remaining on leave despite a suspended licence, which was a condition of her employment, demonstrated neither a reprisal nor a constructive dismissal.[12] Based on another OLRB decision, *Home Depot Canada*,[13] VON argued that Ms. Kissoon did not resign in a reasonable period of time, waiting either seven or eight years, depending on whether the October 1, 2018 or July 11, 2019 emails count as a resignation. In effect, Ms. Kissoon "condoned her inactive status," according to VON.[14] Their October 1, 2018 response was not a termination letter, VON argued.[15] As for reprisals, VON asserted there was no evidence to support that claim, and their refusal to reinstate Ms. Kissoon was due to her suspended licence.[16]

C. ANALYSIS

THE OLRB FOUND that Ms. Kissoon was not constructively dismissed. The first issue considered in its analysis was whether VON actually terminated Ms. Kissoon's employment in the October 2018 letter. If that were the case, then Ms. Kissoon would be entitled to termination and severance pay under the *ESA*.[17] However, as VON took no action after sending the letter, and Ms. Kissoon did not seem to interpret it as a termination — writing almost 18 months later to state that her resignation was final — the OLRB found that VON did not terminate her employment. Instead, Ms. Kissoon resigned as of July 11, 2019, the OLRB ruled.[18]

Although the *ESA* does not define "constructive dismissal," which is a common law concept, the OLRB referred to another of its decisions, *Martindale Animal Clinic*:[19]

[11] *Ibid* at para 14.
[12] *Ibid* at para 19.
[13] (2014) CanLII 39381 (ON LRB).
[14] *VON, supra* note 1 at para 19.
[15] *Ibid.*
[16] *Ibid* at para 22.
[17] *Ibid* at para 24.
[18] *Ibid* at para 25.
[19] 2016 CanLII 7070.

> For the purposes of the Act, a constructive dismissal occurs when an employer makes a fundamental change to an employment contract that is substantial and is adverse to the employee. Often, the change to a term of an employment contract can be identified and measured: an employee's wages are reduced, her job duties are changed, or her workplace is relocated.

The leading case on constructive dismissal in the Supreme Court of Canada, *Potter v New Brunswick Legal Aid Services Commission*,[20] established the following principles:

- The onus lies with the employee to establish that he or she was constructively dismissed;
- There are two branches to the test for constructive dismissal;
    1. The first branch of the test for constructive dismissal has two steps:
        i. The employer's unilateral change must be found to constitute a breach of the employment contract and,
        ii. If it does constitute a breach it must be found to substantially alter an essential term of the contract (para 34)
        - Typically the breach involves changes to the employee's compensation, work assignments or place of work that are unilateral and substantial (para 32)
        - In making this determination the court (or tribunal) will ask whether "at the time the [breach] occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed" (para 39)
        - Such a breach has also been referred to as a "fundamental breach" or a "substantial breach" (para 35)
        - If an express or implied term of the contract gives the employer the authority to make the change, or if the employee consents or acquiesces in it, the change is not a unilateral act and therefore will not constitute a breach (para 37)
    2. The second branch of the test for constructive dismissals seeks to determine whether the employer has engaged in conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. (para 42)
        - The focus in the second branch is on whether the employer pursued a course of conduct that "evinces an intention no longer to be bound by the contract" (para 42)

Based on the facts, the OLRB did not find that VON "unilaterally changed the conditions of Ms. Kissoon's employment."[21] Her licence remained suspended as of the date of hearing, and that licence was a requirement of her position, without which she was unable to practice nursing. This was the reason VON could not reinstate her, and it was not their decision, but that of the CNO, the OLRB noted.[22] Accordingly, there was no basis that "would lead a reasonable person to conclude that the employer no longer intended

[20] 2015 SCC 10, [2015] 1 SCR 500. Paragraphs noted in citation.
[21] *VON, supra* note 1 at para 32.
[22] *Ibid.*

to be bound by the terms of the [employment] contract."[23] There was no obligation under the *ESA* for VON to return Ms. Kissoon to work in some other capacity.[24]

Furthermore, Ms. Kissoon "did not resign her employment within a reasonable period of time as is required under the *ESA*," the OLRB decided.[25] Section 56 and section 63 of the *ESA*, dealing with termination and severance of employment, respectively, both state that an employee is to resign in response to a constructive dismissal "within a reasonable period".[26] Considering the time only after the May 2013 ESO decision, if VON had unilaterally changed the conditions of employment, the passage of more than six years until July 2019 for the employee to resign and claim constructive dismissal "is not reasonable," according to the OLRB. Ms. Kissoon would have been constructively dismissed long before she actually resigned.[27]

Under section 74 of the *ESA*, the onus is on the employer to prove that they did not commit reprisal against an employee. In this case, the OLRB found that the employer met that burden of proof. There was no evidence that VON "did anything to interfere or block Ms. Kissoon's communications with her former colleagues," as alleged, the OLRB stated.[28] VON's response that they could not employ Ms. Kissoon in "some kind of Criminal Justice capacity," as she had in the meantime earned a Criminal Justice degree during the years of her suspension, did not constitute reprisal because there is "no suggestion that VON in fact has such jobs."[29] For the same reason, the lack of response to Ms. Kissoon's MOU was not a reprisal, according to the OLRB.[30]

D. CONCLUSION

ALTHOUGH THE EMPLOYEE was unsuccessful in this case, it is always prudent for employers to consider the possibility of a constructive dismissal claim in situations that affect the terms of an employment contract. Preparing for the risk that an employee may claim wrongful termination can later provide a

[23] *Ibid*.
[24] *Ibid* at para 33.
[25] *Ibid* at para 34.
[26] *ESA*, *supra* note 2, ss 56(b), 63(b).
[27] *Ibid*.
[28] *Ibid* at para 37.
[29] *Ibid* at para 38.
[30] *Ibid*.

defence if such claims are brought either before a tribunal or in court. Reprisal can be a serious allegation and employment legislation in Ontario places the burden on employers to refute such claims.[31] In this case, Ms. Kissoon's allegations did not amount to a persuasive argument and the OLRB dispensed with the claims based on a lack of evidence that VON acted in any way that might constitute reprisal. In any case, employers should be careful to avoid any action or even the appearance of an action that may seem to be a retaliation in response to employees seeking to pursue their rights under the *ESA.*

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[31] *ESA*, *supra* note 2.