

# Overholt Law Seminar 2016



## Recent Trends in Termination and Case Law Update

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# Overview

Three 2015 decisions in BC that are significant for employers:

- ***Roe v British Columbia Ferry Services Ltd.***
  - What conduct will warrant a just cause dismissal?
- ***Fredrickson v Newtech Dental Laboratory Inc.***
  - When has a terminated employee mitigated their damages from their wrongful dismissal?
- ***Hall v Quicksilver Resources Canada Inc.***
  - How is notice affected when a company undergoes a sale?



# Just Cause – *McKinley v BC Tel*

- An employee is entitled to reasonable notice or pay in lieu of notice upon dismissal, unless just cause existed for the termination of their employment
- The test is whether the conduct is “behaviour that, viewed in all the circumstances, is seriously incompatible with the employee’s duties, conduct which goes to the root of the contract, and fundamentally strikes at the employment relationship” – *Adams v Fairmont Hotels & Resorts*

# *Roe v British Columbia Ferry Services Ltd, 2015 BCCA 1*

- A senior employee was caught violating company policy by giving food vouchers to his daughter's volleyball team
- The employee was dismissed for cause
- At trial the judge found the behaviour was relatively minor and did trifling
- The alleged misconduct did not constitute just cause
- The employer appealed

# *Roe v British Columbia Ferry Services Ltd, 2015 BCCA 1*

*“BCF [the Employer] personnel have the responsibility to understand and conduct themselves in accordance with this code, and to report conduct or proposed conduct that is in violation of this code.*

...

***Employees who breach the code may be subject to disciplinary action, up to and including dismissal. If a violation of law is involved, the matter may also be referred to the appropriate law enforcement agency. Any Supervisor or Manager who directs or approves of conduct in violation of this code, or who fails to report a violation of which he or she has knowledge, is also in violation of the code and subject to disciplinary action”***

# *Roe v British Columbia Ferry Services Ltd, 2015 BCCA 1*

- On appeal: it wasn't the dollar value of the vouchers that indicated serious or significant misconduct
- The judge erred by not looking at all the circumstances of the incident before determining the behaviour was "bordering on trifling"
- A new trial was ordered

# ***Roe v British Columbia Ferry Services Ltd, 2015 BCCA 1***

- The significance of the Roe decision is that it highlights the need for clear policies and training in the workplace
- Given that the Court upheld the policy of the Employer, consideration needs to be given to any representations



# Employee Mitigation

- Employees who have been wrongfully dismissed are entitled to notice of their termination or payment in lieu.
- An employee must, however, take steps to mitigate any loss arising from their termination of employment



# ***Fredrickson v Newtech Dental Laboratory Inc., 2015 BCCA 357***



- Employee was dismissed after 8.5 years and launched a claim for damages for wrongful dismissal
- Employer gave her several offers of reemployment, which she declined
- At trial the judge found that the employee failed to mitigate her damages by not accepting these offers
- The employee appealed

# *Fredrickson v Newtech Dental Laboratory Inc., 2015 BCCA 357*

- The Court of Appeal reviewed the law of reemployment offers as set out in *Evans v Teamsters Local Union No. 31*
- The Court in *Fredrickson* made two findings:
  - The return to work offers were “incomplete”
  - There was a breakdown of trust in the working relationship such that it would be unreasonable for the employee to have returned to her old job

# ***Fredrickson v Newtech Dental Laboratory Inc., 2015 BCCA 357***

- It's not enough that an offer of reemployment be similar in character to the original employment contract
- There must be a preservation of trust between the employee and employer in order to maintain the integrity of the employment relationship



# Notice and Length of Service

- An employee dismissed without cause is entitled to notice of their termination
- Absent a contractual or statutory clause, the employee is entitled to reasonable notice
- Reasonable notice is assessed based on the employee's age, length of service, character of employment, and availability of similar employment

# *Hall v Quicksilver Resources Canada Inc., 2015 BCCA 291*

- An employee was dismissed without cause and given pay in lieu of one week's notice
- The employee argued he was entitled to notice based on 24 years of service
- At issue was whether the employee was entitled to notice based on his service with his previous employer

# *Hall v Quicksilver Resources Canada Inc., 2015 BCCA 291*

- The employee began work with Company A in 1989
- Company A was purchased by Company B in 2013, at which point Company A paid the employee \$125,345
- The employee argued this was recognition of his service, not severance pay

# *Hall v Quicksilver Resources Canada Inc., 2015 BCCA 291*

- The Court of Appeal found that the substance of the agreement and the surrounding circumstances indicated the lump sum was in fact a severance payment
- The trial judge erred in giving notice based on continuous employment since 1989. The employee was only entitled to notice from 2013 onward

# *Hall v Quicksilver Resources Canada Inc., 2015 BCCA 291*

- The question of successorship and prior service being considered in determining severance was considered by the Court of Appeal in *Sorel v Tomenson Saunders Whitehead Ltd.*
- This decision demonstrated the importance of defining the terms of employment in the event of a sale or a transfer