

Current Cases of Interest

By Monica Ciriello, Ontario, 2015

City of Calgary Is Granted Injunction Against Uber Drivers.

Calgary (City) v. Trevor Arthur John Gold et al., 2015 (AB QB) E-File No.: CVQ15GOLDTREV

The City of Calgary ("City") sought an interim injunction prohibiting drivers ("Respondents") from providing rides under the Uber "app" as it is a breach of the City's *Livery Transport Bylaw ("Bylaw").*

HELD: Injunction against the Respondents is granted.

DISCUSSION: The City brought forward an interim injunction under section 554 of the *Municipal Government Act ("Act").* The Court indicated that it is often better to wait for a full trial before granting an injunction, as "injunctions before trial are often said to be extraordinary remedies to be granted only when equitable principles have been satisfied." The Court examined whether the Respondents had breached the *Bylaw.* The City presented satisfactory evidence to the Court that documented the Respondents charged a fee to carry passengers and therefore breached the *Bylaw.* Based on evidence presented by the City, the Court was able to infer that there was a continuous contravention of the *Bylaw* by the Respondents and the Respondents "were likely aware, or should have been aware, of the City's position." The Court did not require the City to show that each Respondent continuously breached the *Bylaw*, as that would "present a practically insurmountable hurdle for any application in this type of situation under section 554 of the *Municipal Government Act*."

The Respondents argued that because Calgary City Council had requested Administration to propose a *Bylaw* change to accommodate rides under an "app", the Court should deny the interim injunction. The Court dismissed this argument, stating that "there is a legally binding bylaw that precludes what the respondents, on the evidence, have been doing. It is being contravened deliberately and continuously. The respondents do not get to choose which bylaws are out of date and can be ignored." The Court concluded that, "absent an injunction, the usual sanctions available to the City by way of retrospective penalties will not avail in curtailing the activity of which it complains." The Court granted an interim injunction against the Respondents, which extended to all other persons who operate as an Uber driver in the City.

Update - provided in consultation with the City of Calgary Prosecutor, Colleen Sinclair:

Following the interim injunction, Uber voluntarily shut down their app in the City, thereby eliminating the need to pursue a permanent injunction. The injunction is still in place today without challenge. It is impossible for any of the drivers to breach the injunction as the app remains shut down. Prior to the successful interim injunction, City Council had instructed Administration to propose options to amend the *Bylaw* to allow a Transportation Network Company ("TNC") like Uber to operate. The *Bylaw* amendments will be proposed to City Council on February 22, 2016.

Employer Must Accommodate To The Point Of Undue Hardship.

Chatham-Kent (Municipality) v. CUPE, 2016 CanLII 76 (ON LA) http://canlii.ca/t/gms6r

Rob Bossence ("Grievor") filed a grievance claiming the Municipality of Chatham-Kent ("Employer") failed to accommodate his disability. The Grievor had a seizure and as a result his driving licence was medically suspended. When the Grievor returned to work, he performed all duties except driving. A month after returning to work his hourly rate was reduced to the Labourer rate.

HELD: Grievance is allowed.

DISCUSSION: The Employer relied on Minutes of Settlement from 2008 which indicated that:

Any member of the bargaining unit employed in a classification which requires a driving license and whose license is suspended for any reason shall be placed in the position of labourer subject to availability of work in the position and subject to the individual's ability to otherwise meet the skills and qualifications of the labourer position. The parties agree that, where applicable, such placement meets the requirements of the *Human Rights Code* to accommodate to the point of undue hardship.

The Union argued that the Minutes of Settlement were "either inapplicable to the present situation or unlawful for being in violation of the *Human Rights Code*". The Union stated that the course of action taken by the Employer lacked an individualized approach that the Grievor was entitled to by law: the Ontario Human Rights Commission *Policy and Guidelines on Disability and the Duty to Accommodate* provide that "each person's needs are unique and must be considered afresh when an accommodation request is made."

The Arbitrator found that the Minutes of Settlement are not in compliance with the *Human Rights Code.* The Grievor was entitled to an accommodation, to the point of undue hardship on the Employer, not a blanket application of the Minutes of Settlement.

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Application v. Action: Choosing the Appropriate Route.

Halifax Regional Municipality v. Zurich Insurance Company Ltd., 2015 NSSC 373 (CanLII) http://canlii.ca/t/gmpxl

Halifax Regional Municipality ("Applicant") sought a declaration of indemnity from the Court pursuant to an insurance policy with the Zurich Insurance Company Ltd. ("Respondent"). The Respondents argued that what took place was not "sudden and accidental" and therefore does not fall within the scope of the insurance policy. The Respondent subsequently made this motion to convert the proceeding into an action.
HELD: The Respondent's motion is dismissed.
DISCUSSION: The Court first examined the analysis that must be applied on a motion to convert as discussed in *Jeffrie v. Hendriksen*, 2011 NSSC 292 (CanLII):

> 13. Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:
> a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);
> b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);
> c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

The Respondent argued that "justice can only be done if they have the right to examination and cross-examination and to have witnesses appear to have their conduct and testimony assessed by a judge." The Applicant argued that an application is a speedier and more cost effective option for determining the definition of a contractual term: sudden and accidental. The Court agreed with the applicant that this was a case of interpreting the contractual term. The Court held that "at this juncture, the application route is most appropriate and the presumptive one in accordance with Civil Procedure Rules."

Applicant Did Not Present Any Exceptional Circumstances of Sensitivity Necessitating Anonymity.

Budwal v. Brampton (City), 2016 HRTO 46 (CanLII) http://canlii.ca/t/gmw41

Budwal, the applicant ("Applicant") in a Human Rights Tribunal ("Tribunal") process sought an interim decision seeking anonymity.
HELD: The Applicant's request for anonymity was denied.
DISCUSSION: To obtain an anonymity request, the Applicant had to establish that an exceptional circumstance existed that warranted anonymity. The Tribunal assessed the Applicant's argument in light of *Visic v. Elia Associates Professional Corporation*, 2011 HRTO 1230 (CanLII). In *Visic* the Tribunal held: Although a publication ban is a discretionary remedy, it is an extraordinary measure that is used to ensure fairness of the hearing process and/or protect significant privacy interests. The importance of an open human rights process is expressed in the Tribunal's Rules of Procedure, which state that the Tribunal is committed to "a fair, open and accessible process". This is also reflected in Rule 3, which provides that the "Tribunal's hearings are open to the public", except when appropriate to protect the confidentiality of personal or sensitive information.
The Applicant argued that his application contained private information regarding the nature of his disability that may affect his future employment. The Tribunal agreed with the City of Brampton's position that the Applicant did not meet the threshold of exceptional circumstance, therefore anonymity was not warranted. Relying on *Visic* the Tribunal ultimately held that most Tribunal applications contain "personal information about an applicant's disability, or the basis for the perceived disability."

City Employee Was Constructively Dismissed When Her Employment Was Substantially Changed.

Maasland v. City of Toronto, 2015 ONSC 7598 (CanLII) http://canlii.ca/t/gmnv3

The plaintiff, Maasland ("Plaintiff") was an employee at the City of Toronto ("City") since 1989. The City reorganized the structure and responsibilities of various traffic units where the Plaintiff worked. The Plaintiff was moved to a new unit, at the same wage and in the same location. However, the essential terms of her employment were changed. The Plaintiff stopped attending work; using up her vacation and leave time. The City advised that the Plaintiff must return to work or her employment would be terminated for cause. The Plaintiff was ultimately terminated and brought forward a claim for constructive dismissal.
HELD: The Plaintiff was constructively dismissed and is entitled to salary in lieu of notice.
DISCUSSION: The Court examined the test for constructive dismissal; "at the time the alleged breach of the employment contract occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of her employment were being substantially changed" *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 (CanLII), [2015] 1 S.C.R. 500. When examining the plaintiff's role change, the Court found that the plaintiff's situation was analogous to *Corker v. University of British Columbia*, 1990, Carswell B.C. 726 BCSC, where the Court held that constructive dismissal occurred:
Where an employee who had been hired to provide counselling services at a university was unilaterally transferred into a position where she was to be responsible for cataloguing reference materials (her counselling clients were transferred to others). Despite the fact that her title and salary remained the same, the court concluded that she had been constructively dismissed. The employer was not entitled to alter her duties unilaterally in the manner in which it had done because she was hired to provide counselling services and not clerical services.
The City argued that an organization may internally reorganize its structure and it may require an employee to transfer or be re-assigned. The Court found that "the City is not to be faulted for seeking greater efficiencies in the way that it delivers services to the people of Toronto, a reasonable person observing the changes in the plaintiff's terms of employment would, in my opinion, conclude that her role would change substantially."
In summary, the Court concluded that the plaintiff was constructively dismissed the day the reorganization took effect. ML