

BRIEFING NOTE

Briefing Note: *Deol v. Dreyer Davison LLP*, 2020 BCSC 771

In *Deol v. Dreyer Davison LLP*, 2020 BCSC 771 [*Deol*], the Court confirmed that in circumstances of harassment culminating in constructive dismissal, a plaintiff can pursue a civil claim, as such matters are not within the exclusive jurisdiction of the BC Human Rights Tribunal or WorkSafe BC

Facts

The plaintiff alleged that throughout her employment at the defendant law firm she was subjected to inappropriate conduct by one of the firm's partners, including sexually inappropriate verbal communications and physical contact. She further alleged that when she addressed the conduct with the firm's other partner, her complaints were not taken seriously and that the partner "downplayed the seriousness of the misconduct and advised her to tough it out."

The plaintiff claimed that the harassing behaviour created an intolerable work environment which was made worse by the firm's lack of response. Therefore, the plaintiff claimed that she was entitled to treat her employment contract as repudiated and that she was constructively dismissed as a result of this repudiation. The plaintiff sought damages for breach of contract and aggravated and punitive damages. She further sought an increase in the amount of damages awarded for wrongful dismissal in cases involving sexual harassment, including substantial awards in aggravated and punitive damages.

The defendants sought to strike the plaintiff's claim on the basis that the Supreme Court did not have jurisdiction to consider the issues as the true nature of the plaintiff's claim was not constructive dismissal but rather for damages from the sexual harassment. The defendants said that the correct forum to bring this action was the WCB for tortious or injurious conduct, or the BCHRT for discriminatory conduct.

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Constructive Dismissal:

The defendants' argued that the plaintiff's claim was for damages and compensation directly from the sexual harassment she may have suffered, while the plaintiff argued that the sexual harassment amounted to a repudiation of her employment contract which resulted in a constructive dismissal claim.

The court found that the plaintiff had sufficiently set out an action for constructive dismissal in her notice of civil claim. Further, the instances of sexual harassment and failure to address same would be relevant when considering whether the plaintiff's employer was responsible for creating or perpetuating an intolerable work environment that amounted to a repudiation of the plaintiff's employment contract.

Jurisdiction of the WCB or the BCHRT

The defendants argued that even if the action was properly plead as a claim of constructive dismissal, the claim must fail because it fell within the exclusive jurisdiction of the WCB and/or the BCHRT.

Human Rights Tribunal

The defendants argued that the breach of contract claim was merely a drafting technique. They relied on several cases to show that the plaintiff's claim should have been brought within the jurisdiction of the BCHRT. However, the court found that none of the cases provided by the defendants showed that discriminatory conduct could never be relevant to an action of wrongful dismissal and relied on *Lewis v. WestJet Airlines Ltd.*, 2017 BCSC 2327 (affirmed in *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 [*Lewis*]).

In *Lewis*, the plaintiff brought an action against her employer, WestJet, for breaching its employment contracts. She alleged that WestJet did not comply with an "Anti-Harassment Promise" which was contained in her employment contract. The defendant brought an application to strike the plaintiff's action on the basis that the claim should have been brought before the Canadian Human Rights Tribunal or the applicable provincial workers' compensation board.

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The Court rejected WestJet's argument that the breach of contract claim was brought to disguise the true nature of the claim of discrimination, sexual and other harassments and its failure to comply with its statutory obligations. The court concluded that claims in contract, including constructive dismissal in relation to sexual harassment claims, are claims which can be brought under the common law.

The Court in *Deol* therefore concluded, on the basis of *Lewis*, that the BCHRT did not have exclusive jurisdiction over the claim and that a claim in BC Supreme Court for breach of contract could still be advanced.

Workers' Compensation Board

Workers who suffer physical and mental injuries or illnesses during the course of their employment are required by the *Workers Compensation Act* to bring their claim in front of the WCB. The defendants argue that due to the fact that the plaintiff's claim of workplace and sexual harassment occurred during the course of her employment, she must seek remedies through the workers' compensation scheme.

The court found that the defendants were correct in arguing that the plaintiff's claim for damages for injuries which arose out of her employment was out of the jurisdiction of courts. The defendants were also correct in identifying that the alleged sexual harassment could be considered a claim for a mental disorder which is compensable under the *Workers' Compensation Act*. However, the court found that the defendants' argument that claims of constructive dismissal are within the exclusive jurisdiction of the WCB failed. The court found that the damages for personal injury arising out the harassment itself were within the jurisdiction of the WCB and therefore that section of the claim was struck. Whereas the damages being sought for breach of the employment contract including compensatory damages which arose from the manner in which the plaintiff was dismissed were within the court's jurisdiction.

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Conclusion

As *Deol* reveals, an employee who is subjected to harassment in the workplace to such a degree that it has the effect of repudiating the employment contract (i.e. constructive dismissal) can potentially pursue claims in multiple forums. Although the Courts have previously held that there is no independent tort of harassment, where that harassment amounts to a breach of contract, the Court's findings in *Deol* would support that the employee can pursue a civil claim, in addition to a human rights complaint and potentially a claim for compensation for an occupational injury from WorkSafe BC.

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