Welcome to the inaugural issue of the *L & E Newsletter* following the founding of Fitzgibbon Workplace Law on August 1, 2017. The support and encouragement I have received from clients and non-clients alike as I embarked on this venture has been overwhelming and I sincerely appreciate it. People seem truly interested in an approach to legal and HR issues that is more personal and collaborative and I'm bolstered by that.

I continue to teach at the University of Toronto, as I have for the past 20 years. This year, I am teaching the Employment Law and Labour law classes as well as a seminar entitled *Regulation of Workplace Discrimination, Harassment, and Violence*. I believe that, as professionals (whether a lawyer, HR practitioner, manager or business leader) we are always learning and owe a duty to ourselves, our employers and clients to take responsibility for our development by, among other things, remaining current in our field of practice. This is not easy given the "fires" we are constantly dealing with and the sheer volume of information out there (to say nothing of wanting to have some sort of personal time!). For my part, I can commit to provide my clients with regular, substantive, updates in the law.

There are no shortage of developments in this area and I try to cover as many of them as I can. My aim is that you will refer to these in your work. I also provide regular updates on the firms Journal page and Twitter account.

With that said, I do hope you find some value in this newsletter and I would be pleased to hear your feedback, and any suggestions for future articles.

Mike

In This Edition

Rushing to Judgment Proves Costly in a Just Cause Termination

Another day another employment case where the Court awards exceptional damages (in this case aggravated damages). The case involved an employer who terminated an employee, ostensibly for just cause following an investigation. The employer withdrew the allegation of just cause on the opening day of trial (never a good strategy). The case is **Lalonde v Sena Solid Waste Holdings Inc**, 2017 ABQB 374 (CanLII) and provides an excellent reminder of the costly consequences associated with alleging just cause for termination when the evidence is sparse or unconvincing.

> Alleging just cause should only occur after having carried out a timely, transparent, thorough and objectively defensible investigation. To do otherwise comes at a price.

In this case the plaintiff was a 62 year old Millwright with approximately 4 years service. Of note is that shortly after his dismissal the plaintiff obtained employment earning close to the hourly wage he was earning while working for the defendant. According to the court, the overall quality of the new employment was lower and he was required to drive long distances to different job sites and perform work that was more physically challenging.

The employer abandoned its allegation of just cause at the trial and, as such, the court turned to consider the issue of reasonable notice of termination which it determined to be in the range of between 4 and 8 months. The court held that 6 months was appropriate.

The court then turned its attention to the damages principles in employment law as set out in the relatively new (and now leading) case of **Paquette v TeraGo Networks Inc.**, 2016 ONCA 618 (CanLII) where the Court of Appeal stated:

> The basic principle in awarding damages for wrongful dismissal is that the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to give proper notice. The damages award should place the employee in the same financial position he or she would have been in had such notice been given… In other words, in determining damages for wrongful dismissal, the court will typically include all of the compensation and benefits that the employee would have earned during the notice period.…
>
> Damages for wrongful dismissal may include an amount for a bonus the employee would have received had he continued in his employment during the notice period, or damages for the lost opportunity to earn a bonus. This is generally the case where the bonus is an integral part of the employee's compensation package… This can be the case even where a bonus is described as "discretionary".… [References Omitted]

I set this quote out at length because it encapsulates the applicable legal principles succinctly and, in my view, nicely and clarifies some misconceptions that some employers have with respect to bonus payments

and the default position of courts to include them in damages. The court awarded a bonus component in *Lalonde* through the reasonable notice period despite the fact that the bonus program included the following:

> "employees who are released without cause will be compensated on a pro-rated basis under the Short Term Initiative and under the Long Term Initiative. Any pro-rated payments will be based on the number of months worked in the calendar year with one day worked in a month being considered working in that month."

The court then considered whether to award aggravated damages (also called *moral damages*) and punitive damages. The leading case on these issues comes from the Supreme Court of Canada in **Keays v Honda Canada Inc,** 2008 SCC 39 (CanLII).

In short, the court can award "damages resulting from the manner of dismissal …. where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive." It is the *manner* of dismissal, rather than the mere *fact* of dismissal that can result in damages.

In *Lalonde* the court considered the fact that the employer had made up its mind to terminate Lalonde for just cause without consideration of his explanation or request for further information. The Court put it this way:

> An internal memo from the Maintenance Manager …. to the HR Manager… ,shows a decision had been made to terminate the Plaintiff; this despite not having any response from the Plaintiff as to the alleged breaches of conduct. The Defendant ignored a letter from an employee … which supported the Plaintiff's contention that he had done nothing wrong in relation to the alleged lack of supervision of a contract employee. The evidence supports the conclusion that *the internal investigation was essentially a sham*. [emphasis added]

The decision was a *fait accompli* and the investigation was simply window dressing. Furthermore, the employer made and maintained its allegation that Lalonde had been terminated for just cause until the first day of trial. Among other things, this resulted in a delay of Lalonde's *Employment Insurance Act* benefits.

The Court concluded that:

> I am satisfied that the Defendant's conduct during the course of dismissal was unfair, breached the requirement of good faith and the expectation that both parties to the contract had that the employer would act in good faith in the manner of dismissal.
>
> The Plaintiff has proven that the manner of dismissal caused mental distress, particularly by the Defendant's actions in attacking the Plaintiff's reputation at the time of dismissal and representing that there was sufficient cause for dismissal for an extended period of time.

In the circumstances, and following a review of the case law, the court awarded Lalonde $75,000 as aggravated damages. The court did so without the usual requirement of the plaintiff providing expert medical evidence supporting mental distress flowing from the proven conduct of the employer. It refused to award

punitive damages because, although the employers' "actions were clearly insensitive, inappropriate and caused mental distress for the Plaintiff" they were not malicious.

Even more recently, an Adjudicator reminds us of the dangers that flow out of a "sham" investigation. The case is *Thomas v. Shamattawa First Nation* [2017] C.L.A.D. No. 203 where the employee had been employed as a Building Healthy Community Coordinator by Shamattawa First Nation. She was terminated on July 24, 2015 for just cause after 20 years of service. At the time of her termination she was 58 years of age. The termination letter provided:

> On July 8th, 2015 you verbally and physically assaulted a coworker in your department. Prior to this incident there were several complaints made against you and your behavior towards other employees, which resulted in the resignation of those employees. The seriousness of these cases cannot be left unresolved, we feel you do not wish to behave with the professionalism mandated by Band policy. Moreover, the last violation is grounds for immediate termination.
>
> Bullying in the workplace can pose serious health and safety issues. Bullying can affect an employee's mental and physical wellness as well as the mental physical wellness of a workgroup, and as a mental health worker you should have known that this behavior is acceptable.
>
> The following are reasons of your termination:
>
> 1. Physical and verbal assault on co-worker
>
> 2. Bullying/intimidation towards another employees
>
> 3. Disobedient towards leadership/Employer
>
> 4. Refusal to carry out lawful and reasonable instructions that are consistent to your employment, which is an action of refusal to work when advised by Leadership/Employer
>
> We consider that your actions constitute serious misconduct warrantying summary dismissal.
>
> You will be given your last payments and your final documentation that separates yourself from Shamattawa First Nation as an employee.

The problem for the employer was that the "investigation", such as it was, was found to be a "sham". The Adjudicator put it this way:

> …. no one in a position of authority took any steps whatever to investigate the matter further by interviewing the participants, specifically the alleged perpetrator. To the contrary, she was deliberately and systematically shunned and excluded, as was her workplace supervisor. I find that the investigation was a sham, plain and simple, so that no genuine effort was made to get to the bottom of what had actually happened, and as to how seriously it ought to be treated.

Further, in the termination letter there were "no details, no dates, and not even a whiff of a suggestion that any investigation has been conducted". The employer was unwilling to hear what the plaintiff had to say in reply to the allegations against her, it acted precipitously and hastily. The Adjudicator awarded the employee 40 weeks pay for the unjust dismissal, $10,000 as punitive damages for the embarrassment and suffering which

she sustained due to the manner of the handling of the dismissal and the high-handed behaviour of the employer and $9,000 in legal fees.

These cases provide a clear reminder that just cause for termination is tough to prove and should only be alleged in the clearest of cases (at least where there is evidence to objectively support the finding in the individual circumstances). Further, where it becomes clear that just cause for termination is unlikely to succeed, it is better to "eat crow while it is young and tender" rather than pursue the defence until the steps of the courthouse and then withdraw it. The damage flowing from this approach will not be lost on the court as these cases and many others demonstrate.

Giving References - What you Need to Know

There is a lot of misinformation out there about giving references. I recently discussed this with my employment law class at the University of Toronto and with a client, so thought this was a good time to review the "state of the law" on this topic. The issue arises where the former employer receives a call from a prospective employer (or their agent) looking for a reference with respect to a prospective employee.

The most recent word on this topic comes from **Kanak v Riggin**, 2017 CanLII 30156 (ON SC) a case in which the plaintiff "took issue with her former manager … about what he said during a job reference." She sued him for defamation and, after a 5 day trial, her action was dismissed in its entirety.

> Caution is required when giving references, but a blanket "no reference policy" may hamper the job search efforts of good performers without a principled justification.

In this case, the plaintiff worked for Atomic Energy of Canada Limited ("AECL") in the position of Senior Cost Control Analyst. The defendant had hired her. She reported to a supervisor who in turn reported to the defendant. She was, by all accounts, a good employee, receiving salary increases, positive performance reviews and a prestigious assignment. When AECL's assets were sold in 2011, the plaintiff and some other employees were laid off. In response to a job ad, the plaintiff applied to work at Bruce Power. She was unemployed at the time. Bruce Power extended a conditional offer of employment to her. The condition that had to be satisfied was a positive reference check.

All references came back positive. As a result of one of the references being out of country, Bruce Power asked for the name of an alternate reference. The plaintiff gave Robert Keeler. He was contacted by someone in HR at Bruce Power and provided a positive reference. He indicated that the defendant had more experience supervising the plaintiff. As a result, the HR employee contacted the defendant.

Bruce Power withdrew their conditional offer of employment. The plaintiff was told that "its revocation of the conditional offer of employment was based on the negative employment reference it obtained from Mr. Riggin."

Defamation Generally

The law of defamation was discussed recently in an employment context in **Papp v. Stokes et al.**, 2017 ONSC 2357 (CanLII). The Court agreed that a plaintiff in a defamation action is required to prove three (3) things:

1. that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

2. that the words in fact referred to the plaintiff; and

3. that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

Once the plaintiff proves these things, the onus shifts to the defendant to establish a defence to the claim. For our purpose, and for purposes of employment references, we will look at the defence of *qualified privilege*.

Qualified privilege is available as a defence against a claim of defamation when the defendant has an "interest or a duty – legal, social or moral – to communicate the defamatory material to the person to whom it is made and the recipient of the communication has a corresponding interest or duty to receive the communication" (**Ramirez v. Gale**, 2017 YKSC 29 (CanLII)).

This defence is not *absolute* (hence the word *qualified*) in that it can be defeated if the plaintiff can show that the statement was made with malice. In **Korach v. Moore** 1991 CanLII 7367 (ON CA) the Court of Appeal discussed malice as follows:

> Evidence of malice may be extrinsic or intrinsic. Extrinsic evidence is evidence of surrounding circumstances. Intrinsic evidence is the wording of the document itself. The wording may be so violent, outrageous or disproportionate to the facts that it furnishes strong evidence of malice.
>
> Extrinsic evidence that the defendant made the defamatory statements knowing them to be untrue will ordinarily be conclusive evidence that the defendant lacked an honest belief in the truth of what he wrote. But the evidence need not go that far. If the defendant was reckless in making the statements, that will be sufficient. "Recklessness" in this branch of the law means indifference to the truth or falsity of what was said.

The court noted in *Kanak*:

> … if the plaintiff proves that the dominant motive for publishing the defamatory expression is actual or express malice. Actual or express malice includes:
>
> a) Spite or ill will;
>
> b) Any indirect motive or ulterior purpose which conflicts with the occasion;
>
> c) Speaking dishonestly, or in knowing or reckless disregard for the truth.

In the circumstances of *Kanak*, malice was not proven and the case was dismissed. The same result followed in *Papp* and in the earlier case of **Miller v. Bank of Nova Scotia**, 2002 CanLII 22030 (ON SC).

The Point

While one cannot stop a disgruntled former employee from bringing a lawsuit in circumstances where he or she is denied employment following a negative reference by the former employer, the defence of qualified privilege in the context of a reference check is one that has some legal history as noted above, though each case will have to be assessed on its own facts. Each company needs to determine how it will respond to reference requests, and what policy they will adopt, however, a blanket policy of "we don't give references beyond the name, rank, serial number" variety because of a fear of being successfully sued for defamation is, *in the vast majority of cases*, a misplaced fear and may well hamper job search and lump the "good performer" in with the bad. There are, of course, exceptions, but as these cases show, they should be rare and can be managed.

Theft in Retail - Not Automatic Grounds for Just Cause Termination… But…

> Proven theft is just cause for some form of discipline, but termination is not automatic. Employers must still engage in a "contextual" analysis before deciding on the appropriate disciplinary response.

An Alberta arbitrator in **United Food and Commercial Workers, Local 401 v Sobey's West Inc. (Safeway Operations)**, 2017 CanLII 61767 (AB GAA) recently reviewed the law with respect to whether admitted theft by a long service employee was sufficient just cause to justify his summary termination. The case provides a detailed analysis of the law with respect to theft in the retail sector (specifically, in the retail grocery sector).

The employer, Sobey's West Inc. had an Employee Honesty and Integrity policy that set out a number of offences that it considered to constitute theft including not paying for merchandise, consuming or "grazing" unpaid for product, and under-ringing merchandise. The policy provided "if an employee commits any acts of theft or dishonesty termination of employment will result."

A 59 year employee with 42 years service was terminated when he was observed by a department manager making and drinking tea at the Starbucks kiosk at the Store on a few occasions without paying for it. When interviewed by the employer, the employee "admitted to making and drinking tea on several occasions without paying for it. He also admitted to taking and eating a Rice Krispies marshmallow snack from the Starbucks kiosk on a few occasions." He was suspended and then terminated.

His union filed a grievance and the matter proceeded to arbitration. The union agreed that the employer had just cause to discipline the employee but argued that the penalty of termination was too severe and ought to be reduced to a significant suspension.

The employee acknowledged being aware that:

- he would be terminated for theft of product in accordance with the Employee Purchases and Honesty and Integrity Policies that employees;
- if he committed an act of theft or dishonesty, regardless of the value of the product stolen, then he would be fired;
- Safeway was vulnerable to theft because employees work alone and can act unethically without getting caught;
- Safeway is particularly vulnerable to theft by employees who work on the night crew since there is no management on duty for that shift;
- there are a lot of desirable products that an employee can easily consume or conceal without paying for;
- employees work in a position of trust that is essential to the working relationship with Safeway;
- he asked to be placed on the night crew and that his position was one of increased trust;
- the Employer needs a strong deterrent for employee theft and he understood that.

While this case arises in a unionized environment, it is also instructive to non-unionized employers as a result of the leading case of **McKinley v. BC Tel**, [2001] 2 SCR 161 where the Supreme Court of Canada introduced the contextual analysis into the just cause assessment in the *non-unionized workplace*.

Analysis of Theft in Retail

Retail, and specifically retail grocery, is "uniquely vulnerable to employee dishonesty." The arbitrator reviewed a number of cases, and summarized the principles as follows:

> From the foregoing, I accept that a high standard of conduct is expected of employees in the retail grocery industry due to the vulnerability of employers in that industry to employee misconduct. The statistical information about shrink demonstrates that seemingly minor thefts fit into a larger pattern of theft (both internal and external) at Safeway and the industry as a whole. For this reason, Safeway takes incidences of employee theft seriously. Ordinarily, acts of employee misconduct such as theft or grazing will attract termination as a penalty. However, termination for such dishonest conduct is not automatic in all circumstances. Under Section 142 (2) of the Code, an arbitrator must consider whether it is appropriate to substitute a lesser penalty for termination if that is requested. In doing so, an arbitrator must examine the facts and circumstances of each case and the context of the dishonest conduct in determining whether an employee's dismissal is justified: *McKinley v. BC Tel, supra*. In applying that contextual approach when reviewing a dismissal for theft in the retail grocery industry, an arbitrator should be cognizant of the vulnerability of employers in that industry given that there is a greater opportunity for employee theft since employees: are lightly supervised; have access to desirable products; handle products that are easily consumed and concealed; and deal with a great volume of product which makes it difficult to detect theft.

Again, this approach has been endorsed by the Supreme Court of Canada and is widely applied in the non-union workplace (save that reinstatement is not an option (in most cases) in the non-unionized employment relationship). Except in rare circumstances (such as where the parties have agreed to a specific penalty for a particular offence in their collective agreement), termination is not automatic, no matter how serious the proven misconduct.

Factors Considered

Among other factors to consider in deciding on the "appropriate penalty" where just cause is established are the following:

- How serious is the immediate offence of the employee which precipitated the discharge?
- Was the employee's conduct premeditated and repetitive or a momentary and emotional aberration?
- Does the employee have a long record of relative discipline-free service with the Employer?
- Has the Employer attempted earlier and more moderate forms of corrective discipline of the employee?
- Does the discharge of the employee accord with the consistent policies of the employer, or does it appear to single out the employee for arbitrary and harsh treatment?
- The relatively trivial nature of the harm done
- The frank acknowledgement of his misconduct by the Grievor
- The Grievor's future prospects for likely good behaviour
- The economic impact of discharge in view of the Grievor's age, personal circumstances, etc.

The arbitrator considered, among other things, the employees' age and his 42 years of service. He accepted the following comment in *Canada Safeway Ltd. v. United Food and Commercial Workers, Local 401, (Ashmeade Grievance):*

> The only compelling reason to mitigate the penalty in this case is the grievor's very long service with the employer. However, as the cases in this area clearly point out, long service alone is an insufficient basis to reinstate. The overriding concern in cases where employees have intentionally deceived the employer by accepting payment for unworked hours is the harm done to the bond of trust that seals the employment relationship.That seal has been broken and, in my view, is incapable of repair. The grievors must suffer the harsh consequences for their deceit. There is unfortunately no room to mitigate the termination penalty, even though both [grievors] have given their entire careers to this employer.

While long-service is a consideration, long-service doesn't give an employee a "free pass". There are many cases in the retail grocery sector where this line of reasoning is accepted, and the arbitrator references a number of these.

In the circumstances, while acknowledging that this was a "sad case" the arbitrator nonetheless upheld the discharge and dismissed the grievance.

Interestingly, another arbitrator even more recently considered whether theft of a chocolate bar by a selector in a grocery warehouse was just cause for termination. The case is **Metro Ontario Inc. v Unifor Local 414**, 2017 CanLII 66049 (ON LA). The arbitrator made the following observations:

- Arbitrators have generally accepted that it is legitimate for an employer, in principle, to impose a harsh penalty on an employee so as to deter others from committing a similar offence. This is particularly so in the grocery sector where employers are "worried that any condonation of the theft of product by employees, even where the stolen product was of minimal value, might send the message to the workforce as a whole that this offence was not particularly serious, with the result that shrinkage due to theft, already a significant problem in this sector, would increase."

- Where, before the grievor has committed the offence, the employer has left employees in no doubt as to the discipline they should expect, arbitrators are even more concerned about the message they would be sending if minor discipline was imposed.

- The "momentary aberration" factor (mentioned above) should not be given too much weight in circumstances where the employer has published its policies on employee theft in order to impress on employees the gravity of the offence of product theft and the consequences.

- Where an arbitrator concludes that discharge was just and reasonable, it would not be appropriate to modify the disciplinary penalty on the basis of "leniency" or "compassion".

The moral of the story is that while proven theft is just cause for the imposition of some form of discipline, termination is not automatic. It is important to go through the contextual analysis in order to determine whether, in all of the circumstances, termination is the appropriate penalty or whether a lesser penalty should be imposed.

Employment Contracts - You Win Some You Lose Some

A fairly recent case from the Ontario Superior Court of Justice provides some needed confirmation that, when properly drafted, courts will indeed enforce a termination contract in a written contract of employment. The case is **Farah v EODC Inc.**, 2017 ONSC 3948 (CanLII). The employee signed a series of employment contracts each containing a termination clause that sought to displace the common law presumption of reasonable notice of termination.

In the Spring of 2015, EODC asked each of its employees, including Mr. Farah, to sign an updated employment contract in return for a "cost-of-living increase of 2 percent". According to the Court:

> [the employment contract] was dated June 1, 2015, but was made effective as of September 2, 2013. Both parties signed the agreement. The signature of Philip Lynch, Managing Director of EODC, is dated June 30, 2015. The Applicant's signature is dated July 8, 2015.

The contract contained the following clause:

> At any time, following the conclusion of the Probationary Period, the Employer may terminate the Employee without just cause simply upon providing him/her with the entitlements prescribed in the *Employment Standards Act, 2000* ("the Act") or any amendments thereto. The Employee hereby acknowledges that he/she has had the opportunity to review the relevant portions of the Act and/or to consult with legal counsel about their impact on his/her current entitlements upon termination of his/her employment.

It is natural (these days) to get the impression that courts will not enforce termination clauses in employment contracts. The *Farah* case (and others) show that courts will honour the agreement of the parties where it is clear and otherwise lawful.

On September 1, 2016, Mr. Farah, along with a number of other employees, was terminated, however, later that afternoon he was contacted and told that the notices had been "issued erroneously and that he was to report back to work the following morning (Friday, September 2, 2016)" which he did and continued to work until November 23, 2016, when he was again terminated. The company offered to pay him 6 weeks' termination pay and 6.42 weeks of severance pay, plus an additional one week's pay in consideration of the Applicant's execution of a full and final release.

He rejected the offer, and brought an application to the court for wrongful dismissal. He argued, in part, that the termination provision in the employment contract was unenforceable as it was ambiguous and therefore could not serve to displace the common law presumption of reasonable notice and, further, that the clause was unenforceable for lack of consideration.

Specifically, the applicant argued that the words "with the entitlements prescribed in the *Employment Standards Act, 2000*" were ambiguous and void. It also argued that the employer failed to define Probationary Period and, thus, was evidence of a further ambiguity.

Although the Court agreed that the term "Probationary Period" was undefined in the most recent contract, it nonetheless found that it was unambiguous in the context of the entire employment relationship which included an earlier contract that defined Probationary Period.

Following a review of the case law, the court considered whether "entitlements prescribed in the *Employment Standards Act, 2000*" was ambiguous. The Court found that it was not, and stated:

> .... the Court finds that the interpretation of the Termination Clause and its intention to provide the Applicant "with the entitlements prescribed in the *Employment Standards Act, 2000*" to be clear and unambiguous. Accordingly, the contractual term rebuts the common law presumption and prevails.

With respect to the "consideration" argument, the Court found that the 2% wage increase provided to the applicant was sufficient consideration in the circumstances. Specifically, the company's evidence was that the cost-of-living increase was provided in exchange for signing the contract (including the termination clause) and that, had the applicant not signed the agreement, he would not have received any increase. The company gave evidence to the effect that one other employee who refused to sign was not paid the increase.

The court agreed that this 2% wage increase was sufficient consideration for the contract.

However, and even more recent case went the other way and the Court in Nogueira v Second Cup, 2017 ONSC 6315 (CanLII) found that the following termination clause was not enforceable to displace the common law presumption of reasonable notice:

> If the Second Cup terminates your employment, it will comply with its obligations under the employment standards legislation in the province in which you work (the 'Employment Standards Act').

In finding that this clause was unenforceable, the court referred to *Farrah* discussed above and distinguished that case and others. The Court stated:

> …. in *Farah v. EODC Inc.*, 2017 ONSC 3948 (CanLII), the contract provided that, "Upon termination, the Applicant would only be entitled to the statutory entitlements prescribed under the *Employment Standards Act*"
>
> No such explanation or warning sign appears in clause 13 of the Employment Agreement here. *Using the barest possible language, it says nothing more than that the employer will obey the statute*. The new employee being asked to sign this contract could be forgiven for assuming that the clause is there to reassure her that none of her rights are being curtailed, when in fact the very opposite is true.

The fact that the employer was responsible for drafting the employment agreement and, as such, any ambiguity in the language was to be interpreted against the employer (*contra proferentem*).

So, when it comes to termination clauses, you win some and you lose some, but the grounds of attack continue to develop. It is a troubling trend.

Lessons for Employers

There are many cases over the past few years where courts have taken highly technical interpretations of termination clauses in employment contracts and found them to be unenforceable. Where that occurs they read in the common law requirement that the employer may only terminate the employee with reasonable notice or pay in lieu of such notice at common law. It is difficult to reconcile the cases in this area, to the point where some have argued that the courts have adopted a "palm tree justice" approach to the interpretation of employment contracts that is entirely discretionary and not tied to precedent.

The *Farah* case provides some balance and confirmation that the court will enforce a termination clause in an employment contract where it *clearly* and *unambiguously* rebuts the common law presumption of reasonable notice. In this case, the clause was found to do so. That said, there are a few conclusions reached in the case (particularly as relates to the consideration) that are troubling, but, in the end, the clause was enforced.

Secret Recordings at Work Found to Be Misconduct

The Manitoba Court of Queen's Bench in **Hart v. Parrish & Heimbecker Limited**, 2017 MBQB 68 (CanLII) considered whether an employee's surreptitious recordings of meetings with management and others in the workplace constituted misconduct. The facts of the case are somewhat complex, however, in short, an employee was terminated for just cause (really after-acquired just cause) following numerous complaints by co-workers over several years regarding his dealings with them. Following a complaint, the employee began recording "the meetings by placing his cell phone on the table in the record mode and did not advise the parties that they were being recorded."

After a further complaint, the employer decided to "part company". The employer presented the employee with a severance package "to give him a chance to retire and save face." Negotiations ensued but the employer took the position "that there was just cause for termination of the plaintiff's employment". The employer relied not only on the conduct of the employee and four (4) complaints filed against him by other employees over a number of years, culminating in a complaint dated January 28, 2014, but also on information that the employer only became aware of after the termination, namely the surreptitious recording of meetings with senior management "which commenced with a recording on October 16, 2013 and ended with a final meeting the plaintiff had with [one of the principals of the plaintiff] on March 4, 2014."

Both plaintiff and defendant relied upon the contextual approach in **McKinley v. BC Tel**, 2001 SCC 38 (CanLII) which required the Court to determine:

1. whether the evidence established the employee's misconduct on a balance of probabilities; and
2. if so, whether the nature and degree of the misconduct warranted dismissal.

Following a review of the evidence the court concluded that, on balance of probabilities, the inappropriate conduct outlined in the complaints occurred.

The court also discussed the surreptitious recordings that the employee had made using his company supplied cellular phone of "confidential meetings with senior management". The court stated:

> The plaintiff's inappropriate use of his cell phone in secretly recording meetings with his superiors does amount to a breach of his confidentiality and privacy obligations to the defendant. The plaintiff admitted on examination for discovery that he knew a breach of the confidentiality obligations could result in termination…
>
> The misuse of his cell phone was also a breach of his personal code of conduct that he prepared as a result of his meetings with Stone Ridge Consulting. In conducting the contextual analysis and assessing the severity of the misconduct, the plaintiff did not disclose the recordings to third parties outside of the defendant other than to his legal counsel and for the purpose of these proceedings.
>
> This evidence was considered by me as a factor in determining whether the defendant had just cause for dismissal. However, it is unnecessary for me to decide whether the plaintiff's use of his

It has never been easier for employees to make surreptitious audio recordings at work. It is a challenging issue for employers and supervisors as it strikes at the trust that rests at the foundation of the relationship.

cell phone amounts to just cause for dismissal in this case. The plaintiff's misconduct, as noted above, was relied upon by the defendant at the time of dismissal, and in my view, that provides just cause for dismissal in the circumstances of this case. [Emphasis added]

These paragraphs are not a model of clarity, but they suggest that surreptitious recordings of meetings with management *could* be just cause (i.e. conduct that is inconsistent with the employment relationship). Whether that conduct would support a termination must be determined under the *McKinley* contextual approach.

A separate issue relates to the admissibility of surreptitious audio recordings at a hearing. In *Hart*, the employer agreed that the recordings could be entered in evidence and that submissions would be made regarding the weight and relevance of the information contained in the recordings.

In a unionized context, because of the ongoing relationship, different considerations may well apply though it is useful to look at these cases. In *British Columbia Government and Service Employees' Union v. BC Public Service Agency (Admissibility of Surreptitious Recording Grievance)*, [2016] B.C.C.A.A.A. No. 129, an arbitrator summarized the matter as follows:

> …. the prevailing opinion is that the evidentiary probative value of surreptitious recordings of workplace conversations is outweighed by the possible deleterious and chilling effect admissibility of such recordings will have on workplace cooperation, collaboration, open settlement discussion and frank exchange in problem solving. Countenancing surreptitious recordings to gather evidence for future conflict adjudication does not encourage trust in workplace relationships; foster objectives of cooperative participation in resolution of workplace issues; or promote conditions favorable for the orderly, constructive settlement of disputes. To the contrary, it can create a climate of apprehension, antagonism and distrust. It can spawn a climate of speaking to the record, not the problem or possible resolutions, by persons fearful they are being surreptitiously recorded. Persons making surreptitious recordings might engage in behaviour seeking to induce others to make culpable statements.

This line of reasoning and the damage that admitting such recordings into evidence would cause to the relationship has found support in labour arbitration cases in Ontario. For example, in *Greater Niagara General Hospital and Ontario Public Service Employees Union, Local 215* (1989) 5 LAC (4th) 292, an arbitration board dealt with whether tape recorded evidence from a disciplinary meeting was admissible. In ruling that the tapes were not admissible, the arbitrator stated:

> I am compelled to exercise my discretion when the admission of evidence would serve to destroy or deteriorate the longer term relationship between the parties or, more importantly, supply a

> measure of jurisprudence that would cause the parties of other relationships to frisk each other before a meeting would commence.

The British Columbia Labour Relations Board in *Michael Miletich and Hotel Restaurant and Culinary Employees and Bartenders' Union, Local 40 and North Mount Services (1975) Ltd.* (unreported, B.C.L.R.B. No. 398/84) put it this way:

> ...it is our opinion that to allow the production of these tapes would be to interfere with, rather than to promote, proper relations between a union and its bargaining unit members. ... it is our opinion that there is a large possibility that if tapes are entered into evidence in the future, that, at any time parties are in dispute there is a possibility that conversations would be taped only to be brought up later in sensitive moments, effectively destroying any opportunity for settlement. The majority of this Panel is concerned that to allow the tapes into evidence would be to encourage parties in every dispute, to distrust each other, to disrupt their desire for resolution and to prolong proceedings at the Labour Relations Board by interminable delays due to the necessity to adjudicate each and every application for admission of taped conversations into evidence.

While it is not settled that surreptitious recording by an employee of management is just cause, there is a principled basis for arguing that this type of conduct is inconsistent with the employment relationship and deserving of some discipline. The appropriate penalty will have to be decided within the contextual approach in *McKinley* having regard to the circumstances of the particular case.

Employee, Independent Contractor or Dependent Contractor

Companies continue to set up work relationships in a variety of ways. The two (2) most common are:

1. Employment
2. Independent contractor

Over time, the courts have found a third category of relationship called either “dependent” contractor or the “intermediate category”.

The Ontario Divisional Court considered the issue in a decision released on October 4, 2017 called **Fisher v. 6007325 Canada Inc.**, 2017 ONSC 5943 (CanLII). This was an appeal of the trial judgment that can be found at **2016 ONSC 4768 (CanLII)**.

The plaintiff sued for wrongful dismissal. The employer’s primary defence was that the plaintiff was an independent contractor, not an employee or dependent contractor, and therefore was not entitled to damages on account of reasonable notice.

The trial judge agreed that the plaintiff was an independent contractor. The Divisional Court found this conclusion to be reasonable.

The trial judge summarized the analytical approach to be taken in these case as follows:

> In **McKee v. Reid's Heritage Homes Ltd.** 2009 ONCA 916 (CanLII), the Court of Appeal described the methodology or analytical approach to the determination of the worker relationship. The first step is to determine whether or not the worker is an employee or a contractor in accordance with the established methodology and criteria for differentiating an employee from an independent contractor. The analysis of the classification of the relationship ends if the worker is determined to be an employee. However, if the worker is determined to be a contractor, the second step of the analysis is to determine whether he or she is a dependent or an independent contractor.

The classification of the relationship as employee or independent contractor requires that we consider, among other things:

1. the intentions of the parties;
2. how the parties themselves regarded the relationships;
3. the behaviour of the parties toward each other; and
4. the manner of conducting their business with one another.

The Supreme Court of Canada in **671122 Ontario Ltd. v. Sagaz Industries Canada Inc.** [2001] 2 S.C.R. 983 put it this way:

A two-step analysis is required to determine whether a worker is an independent or dependent contractor. The reality of the working relationship, not what it is called by the parties or the terms of their contract will determine the outcome.

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

If in the first step of the analysis it is determined that the worker is a contractor, then it is necessary to go further and figure out whether the worker is a *dependent* or *independent* contractor. To do this, according to the Ontario Court of Appeal in *McKee* we look at, among other things:

1. the extent to which the worker was economically dependent on the particular working relationship;
2. the permanency of the working relationship;

3. the exclusivity or high level of exclusivity of the worker's relationship with the enterprise.

The more permanent and exclusive the relationship, the more the determination is skewed towards the dependent contractor end of the scale. The Court commented in *Fisher* as follows:

> The extent to which, over the history of the relationship, the worker worked exclusively or near-exclusively or was required to devote his or her time and attention to the other contracting party's business is an important factor in determining whether the worker is a dependent or independent contractor: the greater the level of exclusivity over the course of the relationship, the greater the likelihood that the worker will be classified as a dependent contractor.

Also, it is important to understand that neither "what" the parties chose to call their relationship or the fact that the worker incorporated is determinative of the classification. While a factor, it will not, without more, decide the matter. The conduct of the parties and how they actually worked together will determine what the relationship is.

In *Fisher*, following a review of the case law and dealings of the parties, the Court held that the relationship was one of independent contractor. Specifically, the trial judge held (and the Divisional Court agreed) that the following factors were relevant:

1. there was no contractual obligation of exclusivity;

2. the Fisher's economic dependency was self- induced; and

3. there was no permanency in the relationship.

It is important for employers to monitor these so-called independent contractor relationships closely. They evolve and there is considerable risk in misclassifying the relationship. While it might be attractive for individuals and businesses to enter into these arrangements there are some significant consequences associated with "getting it wrong". The *Fisher* test upholds the classification, but there are many that do not (for example **Keenan v. Canac Kitchens Ltd.**, 2016 ONCA 79 (CanLII) where the Court of Appeal concluded that the relationship was misclassified, the plaintiffs were found to be dependent contractors and were entitled to 26 months reasonable notice of termination.

Probationary Periods - What Are They and Why Should You Care?

Many employers in Ontario incorrectly believe that "all non-union employees are subject to a 3 month probationary period". The reason for this misplaced belief stems from a misreading/misunderstanding of the *Employment Standards Act, 2000* ("ESA") which provides that only employees with 3 months or more of service are entitled to notice of termination or termination pay under the ESA. This does not establish a probationary period.

What is a probationary period, why does it matter and what is required to establish one? A probationary period is, essentially, a period of monitoring, evaluation and assessment by the employer to determine if an employee is suitable for continued employment.

The main reason that establishing an enforceable probationary period is important is because, where it is done properly, it will displace the common law presumption that an employee employed for an indefinite duration may only be terminated for just cause or on reasonable notice of termination or pay in lieu of such notice.

A case in point was the recent decision of the Ontario Court of Appeal in **Nagribianko v. Select Wine Merchants Ltd.**, 2017 ONCA 540 (CanLII). In this case, it was argued that the plaintiff was terminated shortly before he completed his 6 month probationary period. The employer, Select Wine Merchants Ltd. ("Select") agreed that it did not have just cause for terminating Mr. Nagribianko's employment but argued that, as a probationary employee, it was entitled to terminate his employment where, in good faith, it determined that he was unsuitable for employment. It argued that a key customer of Select refused to deal with him.

The employment contract between Select and the plaintiff provided, simply, "Probation…… Six months".

The trial judge found that this was not sufficient to establish a probationary period of employment. As such, the employer could only terminate the employee for just cause (which was not the case) or on reasonable notice at common law. The trial judge determined that the appropriate period of reasonable notice in the circumstances was 4 months salary and benefits.

The employer appealed to the Divisional Court who **allowed the appeal** and reversed the decision of the trial judge. The employee appealed to the Court of Appeal. In dismissing the appeal, the Court held that:

> The status of a probationary employee has acquired a clear meaning at common law. Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability: **Mison v. Bank of Nova Scotia** (1994), 1994 CanLII 7383 (ON SC), 6 C.C.E.L. (2d) 146 (Ont. Ct. (Gen. Div.)), at para. 43.

As such, unlike when terminating an "indefinite term" employee who can only be terminated for just cause (or on reasonable notice at common law), a probationary employee may be terminated for unsuitability which determination is made in good faith.

Furthermore, as noted by the Divisional Court, "probationary employment, on its face and by its nature, is inconsistent with any inducement or promise of long-term employment."

The Court of Appeal observed that, in this case, because the probationary period was 6 months and the parties could not contract out of the ESA minimum requirements, the plaintiff was entitled to receive 1 weeks termination pay under the ESA which, it would seem, he received.

The case is another reminder that it is important that where the employer wants to set up a probationary period, it do so expressly, in writing. Further, the case is a good reminder that the meaning of probation has "acquired a clear meaning at common law" and that the standard when terminating a probationary employee

is unsuitability measured on a good faith basis after the "probationary employee was given a fair and reasonable opportunity to demonstrate their suitability."

Can You Delay a Representation Vote?

A Union delivers to the employer and files with the Ontario Labour Relations Board ("OLRB") an application for certification. The employer must file a response and list of employees two (2) days after receiving the application. The OLRB will review the material and if it determines that 40% or more of the employees in the union's proposed bargaining unit have indicated an intention to join the union (usually through signed membership cards), then the OLRB will order that a Ministry supervised, secret ballot representation vote be held, *generally*, on the fifth day (excluding weekends, holidays or days on which the OLRB is closed) following the filing of the application.

Timely votes were one of the more significant changes brought into the *Labour Relations Act, 1995* ("LRA"). In the old days, votes could, through a variety of means, be delayed for weeks if not months. When they finally took place, the feeling was that the results of the vote were not reflective of the true intentions of the employees at the time they filed their application for certification because the employer would exert pressure on them (direct and covert) to get them to change their vote.

Quick votes got the "ballots in the box" and was seen as a way of ensuring that the true intentions of the employees were reflected in the results of the vote. A good discussion of the issue can be found in **Toronto (City)**, 1996 CanLII 11115 (ON LRB).

Many believe that a representation vote must take place on the fifth day after the application was received. The OLRB, through its many decisions gives the impression that there is no way of moving or delaying a vote. That's understandable because in the vast majority of cases, the vote is simply schedule in the usual way once the threshold of 40% support is demonstrated.

However, like all rules, there are exceptions and every so often a case comes along that requires the OLRB to consider, among other things, the fairness of the rule. Such was the case in **Parkview Transit Inc.**, 2017 CanLII 49124 (ON LRB) decided on July 24, 2017.

The employer was a school bus company. The union filed an application for certification. The OLRB determined that the union had submitted evidence that not less than 40% of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time the application was made. The vote, in normal circumstances, would be scheduled on July 26, 2017, the fifth day following the filing of the application.

The employer advanced a couple of preliminary arguments including that the "the vast majority" of the employees in the bargaining unit were the subject of a seasonal layoff and would not be returning to work until the commencement of the new school year on September 5, 2017. Vice-Chair Patrick Kelly commented that the five day rule for votes was not written in stone and that the legislation provided the OLRB with some discretion through the words "unless the Board directs otherwise…".

After considering an earlier case called **Blaisdale Montessori School**, 2014 CanLII 50091 (ON LRB), the OLRB delayed the vote stating that the absence of employees during the summer was entirely predictable and, as such, it delayed the vote until the start of the school year when the drivers would be back in the workplace.

This is a sensible, fair and balanced result. While rules serve a purpose, it is important to recognize that there are exceptions and to advance those arguments when the circumstances warrant, as in the *Parkview Transit* case.

Articles that Interested Me and that May Be Of Interest to You Too

My work as a lawyer, teacher at the University of Toronto and work as a mediator in workplace issues, requires that I stay current, including about negotiation tactics and strategies. I follow the **Program on Negotiation Blog** of the Harvard Law School which is not confined to alternative dispute resolution and negotiation.

I read an article on **Price Negotiation 101** which I found enlightening. Price negotiation applies to such workplace issues as salary increases (see the *Program on Negotiation Blog* **How to Negotiate Salary: 3 Winning Strategies**) as well as positioning severance offers.

Where there is an ongoing relationship as in the case of salary negotiations or where the relationship has ended but there is a risk of litigation as in a severance negotiation, it is generally preferable to position the first offer (anchor) in a way that is reasonable, but not offensive. The article seems to support this view and provide some guidance about how to position that first offer.

The next article is entitled **Managing Difficult Employees: Listening to Learn.** Performance management is critically important to business success. Not only does it serve to assist the poor performer but it ensures that the "superstar" performer is not only identified but that steps can be taken to retain the employee. Although there are a number of suggestions in the article to assist supervisors and managers deal with this challenging employee relations issue, the one I found most relevant (as it is in other areas) is instituting accountability. As the author notes:

> When employees understand they will be held accountable for their choices, they are less likely to engage in disruptive behavior. And if they do, the consequences of continuing to engage in that behavior will be more clear-cut, both to you and to the employee.

Clear, direct and positive communication is critical to performance management success. While not every employee can be turned around, many can with patience, caring and the right approach.

A private member's bill was tabled by an Ontario liberal MPP on October 4, 2017 which, if passed, would expand the protected grounds of discrimination under the Ontario *Human Rights Code* to include to include immigration status, genetic characteristics, police records and social condition. You can read **Bill 164, Human Rights Code Amendment Act, 2017**. The Bill was carried at Second Reading and was referred to

the Standing Committee on Regulations and Private Bills on October 26, 2017. The Ontario Human Rights Commission Supports Bill 164 and their **letter to Minister Naqvi** and **Release** set out their position.

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