



Happy New Year! I hope you had a safe and restful holiday and that you are refreshed and recharged for another year of opportunities and growth.

This *Alert* provides a summary and overview of some of the important legal developments from 2017. As with all such “lists” this one is necessarily incomplete and I have had to leave out many important cases. That said, 2017 was a year rich in labour and employment law developments most notably the passage of Bill 148, *Fair Workplaces, Better Jobs Act, 2017* and renewed focus on workplace harassment and sexual harassment.

But there were many other cases and developments of note in 2017, from those dealing with investigations, termination clauses, just cause, workplace violence and harassment, probationary periods and the legalization of recreational marijuana and its impact on the workplace, among others.

I know most firms do a Top 10 list, I did a Top 21, though I certainly could have done a Top 50 had time permitted. I hope you find this *Alert* of some value and, as always, your comments are appreciated as are your suggestions for future topics.

Mike

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Grab Bag of 21 Cases and Developments from 2017 In No Particular Order (and Not All of Them)

Another year, another labour and employment law gift unpacked.... what will 2018 bring? As we look back at 2017 it is clear that it was a year of significant change on many fronts. This article will highlight some important developments and cases from 2017.

1. Ontario Passes Bill 148, *Fair Workplaces, Better Jobs Act, 2017*

After considerable discussion, debate and controversy, the Ontario government held true to its promise to amend the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995* to, among other things, provide protection and entitlements to employees working in so-called precarious employment and sectors. As I discussed on a recent client Webinar *Sweeping Amendments to Ontario Employment Laws Have Passed - Now What?* the amendments brought about by Bill 148 are not confined, in any surgical manner, to those in precarious employment and the impact extends well beyond that group.

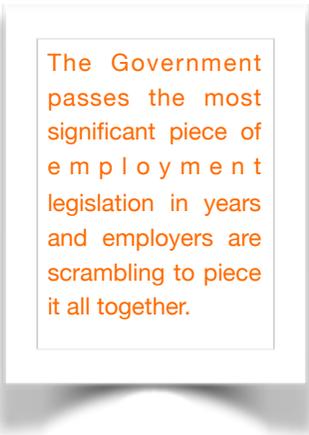
In fact, as we are seeing as I write this, employers, particularly in certain sectors, are implementing cost containment strategies to deal with the impact of Bill 148. In the debates and consultation process leading to the passage of Bill 148, which included a significant increase to the minimum wage, employers were clear that they would have to take action to manage costs. Now that they have done so, they are accused of being, for example, bullies.

Though some of the changes only come into force in April 2018 and later, most are in place now. There is a lot of information online including the amended **Employment Standards Act, 2000** with the Bill 148 changes. The Ministry of Labour has also updated its useful **Guide to the Employment Standards Act, 2000** to reflect the Bill 148 changes as they come into force.

2. Workplace Sexual Harassment

We are seeing almost daily reports of widespread sexual harassment accusations in media, tech, and elsewhere where, it would seem, a culture of sexual harassment and solicitation has, in certain cases, been a dirty little secret and a systemic problem. Bill 132, **An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters** came into force on September 8, 2016 and expanded the definition of workplace harassment to include “sexual harassment”. The Bill also required an employer to have a harassment program in place and set out how complaints of workplace harassment will be investigated and dealt with.

In this climate, one would expect a “zero tolerance” approach to workplace sexual harassment. However, as the recent arbitration case of **Tembec Entreprises Inc. v United Steelworkers, Local 1-2010**, 2017 CanLII 84288 (ON LA) shows, it is important in both the union and non-union workplace to adopt a contextual approach to these matters. There is no “automatic termination” for sexual harassment (absent a provision in a collective agreement that provides for that specific penalty). In this case, a 56 year unionized employee, with 4 years of service and a clean disciplinary record was reinstated to his employment without pay or benefits following a single incident of sexual harassment. Although the union conceded that some sort of discipline was warranted, it argued that termination was excessive. The Arbitrator agreed stating:



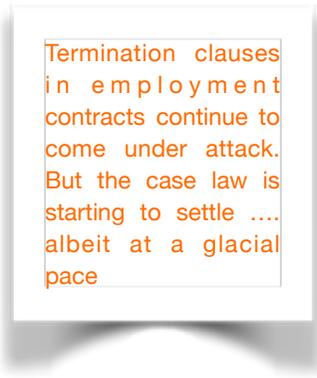
The Government passes the most significant piece of employment legislation in years and employers are scrambling to piece it all together.

I am not satisfied that the employment relationship has been irreparably destroyed by this single incident. I do not regard him as being such a grave threat to female employees that it would be unsafe for the employer to have him on its premises. In my view, a significant unpaid suspension will likely convince the grievor of the high cost of committing any sexual impropriety at the workplace and persuade him to steer clear of any interaction with female colleagues that is not strictly required by his work at the sawmill.

There are, of course, cases going the other way, but it is important to recall that each situation turns on its own facts and that no misconduct automatically leads to termination. The contextual approach to just cause discussed in **McKinley v. BC Tel**, [2001] 2 SCR 161 applies. That said, employers are acting decisively in these cases and taking swift remedial action.

3. Another Year and Still the Termination Clause Debate Continues

The Court of Appeal got back into the employment contract termination clause discussion in **Wood v. Fred Deeley Imports Ltd.**, 2017 ONCA 158 (CanLII). Wood signed a contract containing the following termination provision:



Termination clauses in employment contracts continue to come under attack. But the case law is starting to settle albeit at a glacial pace

[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph.... The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*.

Deeley paid Wood her salary and benefits for 13 weeks of working notice (May 1 to August 4, 2015). Deeley also paid her additional compensation, including a lump sum equivalent to eight weeks' pay. Wood argued that the termination clause was unenforceable because it excluded the Company's statutory obligation to contribute to Wood's benefit plans during the notice period. The Court of Appeal agreed and held that the termination clause sought to contract out of the *ESA* and was unenforceable. The word "pay" did not specifically include salary and benefits but, to the contrary, included only salary.

The fact that Deeley continued Wood's benefits, and in fact provided her with more than the contract required, did not save an unenforceable termination clause. Among other reasons offered in support of this was:

[A]llowing employers to rely on their conduct at the time of termination of employment would also be inconsistent with one of the important considerations governing the interpretation of termination clauses: these clauses should be interpreted in a way that encourages employers to draft agreements to comply with the *ESA*. If employers can always remedy illegal termination clauses by making payments to employees on termination of employment, then employers will have little incentive to draft legal and enforceable termination clauses at the beginning of the employment relationship:

The Court relied on two (2) “well reasoned Superior Court decisions” in **Wright v. Young and Rubicam Group of Cos. (Wunderman)**, 2011 ONSC 4720 (CanLII) and **Stevens v. Sifton Properties Ltd.**, 2012 ONSC 5508 (CanLII).

4. And another Employment Contracts Termination Case (Because there were so many)

Please take some time to make your way through **Cook v. Hatch Ltd.**, 2017 ONSC 47. It’s a well reasoned, thoughtful and balanced decision that injects some common sense into the enforceability of contractual termination clause discussion.

The employment relationship is contractual and the task of the court is to determine the intentions of the parties and to put these into effect. Yet, through judicial activism or otherwise, courts have, in many cases, taken a technical approach that ignores the clear intentions of the parties. *Cook* and some other recent cases pull the pendulum back from where it has swung.

The court was called upon, on a motion for summary judgment, to interpret the following contractual provision:

The Company’s policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

The question was whether this clause was enforceable and served to displace the common law presumption of reasonable notice (**Machtinger v. HOJ Industries Ltd.**, [1992] 1 SCR 986).

Mr. Cook was terminated without just cause and he received eight (8) weeks’ salary as termination pay, 10.58 weeks of severance pay and his health benefits were continued for eight (8) weeks.

The Court made a number of comments:

1. Any attempt to contract out of the minimum employment standards imposed by the legislation, by providing for lesser benefits, was “null and void” (*Machtinger*).
2. Where an employment contract does not meet with the minimum requirements of the applicable legislation, it will be null and void for all purposes. It could not be used as a demonstration of the intention of the parties (*Machtinger*).
3. Any effort to understand the meaning of the contract (the intention of the parties) begins with the words used, not from the subsequent actions of the parties.
4. The employment contract must be considered at the time it is executed. If the termination provision fails to comply with the *Employment Standards Act, 2000* at the outset of the employment relationship, then it will be void and unenforceable. *Potential* violation in the future is sufficient for this purpose. (*Garreton v. Complete Innovations Inc.*, 2016 ONSC 1178).
5. The intention of the parties should be clear from the words (*Wright v. Rubicam Group of Companies*, 2011 ONSC 4720).
6. The effort to understand a termination clause may begin with the words but it does not necessarily end there. If the intentions of the parties can be clearly discerned from the language

used (albeit not perfect) the court should enforce it. (*MacDonald v. ADGA Systems International Ltd.* 1999 CanLII 3044 and *Roden v. Toronto Humane Society* 2005 CanLII 33578 (ON CA)).

7. The rationale behind *Machtinger* is that an employer who drafts a clause that attempts to avoid the minimum statutory notice requirements cannot rely on such a clause to show that the intent of the parties was to provide the minimum statutory notice (*Clarke v. Insight Components (Canada) Inc.* 2008 ONCA 837)
8. The first task in contractual interpretation is to interpret the contract with the view to ascertaining the objective intention of the parties by considering the intentions of the parties. The goal is always and everywhere to determine what was intended on a true *and fair* construction of the contract. If, and only if, a fair construction of the contract leads to the conclusion that such was their intention (i.e. to contract out of the Act), then that attempt to contract out is rendered void by s. 5 (1) of the ESA. (*Oudin v. Centre Francophone de Toronto, Inc.* 2015 ONSC 6494 appeal dismissed 2016 ONCA 514 (CanLII))
9. The Court is to “look for the true intention of the parties, not to disaggregate the words looking for any ambiguity that can be used to set aside the agreement and, on that basis, apply notice as provided for by the common law”. You don’t search out “what is said to be an ambiguity and, on that basis, seek to set aside the common intention of the parties.”

Further “contracts are to be interpreted in their context and I can find no basis to interpret this employment agreement in a way that neither party reasonably expected it would be interpreted when they entered into it. There was no intent to contract out of the ESA in fact; to the contrary, the intent to apply the ESA is manifest.” (*Oudin v. Centre Francophone de Toronto, Inc.*)

10. In *MacDonald v. ADGA Systems International Ltd.* the termination clause did not refer or allude to any legislation. The contract provided that termination could be effected by “...giving not less than one (1) month’s prior written notice” The Court of Appeal held that the clause was enforceable and did not violate the Act. Although it would have been preferable had the parties specifically referenced the legislation, the fact that they did not was not fatal. Their intentions were clear.
11. Including a “this is your complete entitlement clause” or a “limitation clause”, and where the termination clause does not specify “everything” the employee will receive in a manner that complies with the Act, *then* the clause may be unenforceable.

The Court put it this way “it is not necessary for a termination clause to explicitly address the employer’s obligation under the *Employment Standards Act* to provide the employee with benefits during the statutory period. Provided termination clause does not attempt to contract out of the employer’s obligation to provide benefits, the termination clause will be upheld.... Following *Roden v. Toronto Humane Society*, courts in Ontario have continued to uphold termination clauses that do not refer to the issue of benefits.”

12. In *King v. Cannon Design Architecture Inc.* 2015 CarswellOnt 20496 123 the court held that where a “termination clause is silent on benefits and/or severance pay, is not automatically repugnant to, or purport to waive or contract out of any right or obligation under the *Employment Standards Act*.”
13. Termination clauses that limit “what is paid” on termination in a manner that contravenes the *Employment Standards Act, 2000* will be found to be unenforceable. For example, in ***Miller v. A.B.M. Canada Inc.*** 2015 ONSC 1566 the clause limited “what” was paid on termination to salary

which was found to contravene the *Act* and the court found this to be unenforceable. See also **Carpenter v Brains II, Canada Inc.**, 2015 ONSC 6224 aff'd at **2016 ONSC 3614 (CanLII)**.

Applying these principles, the Court in *Cook v Hatch Ltd.* held that the termination clause in issue was more akin to the one in *Roden* and was enforceable according to its terms.

The case provides an excellent review of the principles to be applied in these termination clause interpretation cases and discusses the court's overriding objectives when interpreting the contract, discern the intentions of the parties and put these into effect. Where these are not apparent or where the clause is otherwise unenforceable (for example, as contravening the *Act*) then the court will apply the common law.

The most recent word on termination clauses comes from the Court of Appeal in **Nemeth v. Hatch Ltd.**, 2018 ONCA 7. I've written about this case at **2018 Starts Off with Another Termination Clause Case.**

5. "Discretionary" Bonus Found Not to Be So Discretionary After All

There is considerable misunderstanding about how and when bonuses are to factor into wrongful dismissal damages. Two cases involving Nordstrong Equipment Limited provide recent examples. The cases are **Fulmer v Nordstrong Equipment Limited**, 2017 ONSC 5529 (CanLII) and **Singer v Nordstrong Equipment Limited**, 2017 ONSC 5906 (CanLII).

In *Fulmer*, although the bonus was said to be discretionary, he received a bonus, in varying amounts, in each year of his employment. The evidence was that the employer maintained an "unofficial policy" that a terminated employee would not be provided with any bonus, pro rata or otherwise. The Court disagreed, and was somewhat critical of the employer for trying to rely on post-termination information to "justify its "unofficial policy" of not paying out a bonus to any terminated employee." The Court awarded Fulmer \$20,000 as damages for the 2016 bonus. With respect to a 2017, the court awarded 10 months reasonable notice of termination at common law, but declined to make any 2017 bonus award. The reason was:

Historically, bonuses were earned and calculated at the conclusion of the defendant's fiscal/calendar year, and no doubt granted on the basis of an employee's positive efforts and contributions to Nordstrong East's business. I do not find it to be within the reasonable expectation of the plaintiff (charged with a duty to mitigate his losses) to be able to earn a bonus for the 2017 calendar year while he searched for alternative, comparable employment.

In *Singer*, the Court determined that the period of common law reasonable notice was 17 months. With respect to the bonus, the employer argued that Singer was only "eligible" to receive an annual bonus, but not "entitled". The Court in *Fulmer* and *Singer* relied on **Bain v UBS Securities Canada Inc.**, 2017 ONSC 1472 (CanLII) and in particular the following passage:

Simply because a bonus is awarded in the sole discretion of an employer does not mean that it can be done in an arbitrary or unfair fashion or that the employer can decide that an employee should not get a bonus without following a fair, identifiable process. The employer may adjust the weight given to various factors, given the market conditions and other changeable criteria, but that does not obviate the requirement that the exercise must

How can a discretionary bonus plan be found to be "non-discretionary" and included in the employees' damages on termination? The Court provides some guidance, but actions speak louder than words.

be done in a fair manner. The court must analyze the evidence in a particular case and decide whether the process that was followed was fair and reasonable.

The Court held that *Singer* was entitled to a 2016 bonus payment.

With respect to the 2017 bonus, the judge (the same one who decided *Fulmer*) stated:

As per my comments in *Fulmer v. Nordstrong Equipment Limited* 2017 ONSC 5529 (CanLII), I believe that *Singer's* argument is overreaching. The purpose of reasonable notice is to provide a terminated employee with sufficient time to locate comparable employment. Historically, bonuses were earned and calculated at the conclusion of the defendant's fiscal/calendar year, and no doubt granted on the basis of an employee's positive efforts and contributions to Nordstrong East's business.

It is important to understand that discretionary bonus payments may not be discretionary. Further, when a bonus policy is unwritten the Court will be called upon to come up with a reasonable solution in all of the circumstances.

6. When Does a Work Environment Become Poisoned?

The phrase "poisoned work environment" is banded about in the context of complaints under the *Human Rights Code*, but what exactly is a poisoned work environment?

In short, a workplace may become "poisoned" where discrimination or harassment on a prohibited ground "becomes a part of a person's workplace, becoming a term or condition of employment." One of the earliest cases to discuss the concept of poisoned work environment was *Ghosh v. Domglas Inc.* (No. 2) (1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.), where the Board of Inquiry observed:



"The term 'poisoned work environment' is usually applied in circumstances where the work environment has become toxic because of pervasive discrimination or harassment."

It is now beyond question that the atmosphere in which an employee must work is a condition of his or her employment, and should that atmosphere be oppressive or "poisoned" for a minority group, that circumstance might amount to discrimination on a prohibited basis. Management personnel who know, or ought to know, of that condition but permit it to continue thereby discriminate against the affected employees even if they are not themselves actively engaged in the production of that atmosphere. Where such discrimination is based upon a prohibited ground it is caught by the Code. There is a long line of cases to that effect decided under the previous Ontario Code and this same reasoning has been found applicable in respect of the present Ontario legislation [citations omitted].

A work environment was found to be poisoned in ***Vanderputten v. Seydaco Packaging Corp.***, 2012 HRTO 1977 (CanLII) and, more recently, in ***Crete v. Aqua-Drain Sewer Services Inc.***, 2017 HRTO 354 (CanLII) where the HRTO commented:

The term "poisoned work environment" is usually applied in circumstances where the work environment has become toxic because of pervasive discrimination or harassment, most commonly involving grounds relating to race or sex.

In the *Crete* case, the HRTO reached its conclusion based on, among other things, the following:

1. the applicant's direct manager and supervisor from December 2014 onwards engaged in conduct that the Tribunal found to constitute sexual harassment;
2. there was a power differential between the manager and the complainant;
3. employers have a duty to ensure that workplaces are free of discrimination and harassment contrary to the Code. Pursuant to this duty, employers are obliged to take reasonable steps to address complaints of workplace human rights violations, including sexual harassment and sexual solicitation;
4. the respondent was aware of the alleged sexual harassment and sexual solicitation. The respondent was obligated to take the applicant's concerns seriously and to properly address them. The respondent knew about the alleged harassment and did not act;
5. it is management's responsibility to set the tone for the workplace and to clearly communicate that a sexualised workplace and discriminatory and harassing behaviour are inappropriate and unacceptable.

The Tribunal concluded that "in the face of inaction and ongoing sexualised comments, the harassment became a condition of employment."

In **Crêpe It Up! v. Hamilton**, 2014 ONSC 6721 (CanLII), the Divisional Court adopted the test for finding a poisoned work environment in the human rights context that was articulated by the Ontario Court of Appeal in the context of a wrongful dismissal action in **General Motors of Canada Ltd. v. Johnson**, 2013 ONCA 502 (CanLII):

... There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created.

Moreover, except for particularly egregious, stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated.

The HRTO reviewed the development of the law with respect to poisoned work environment in **George v. 1735475 Ontario Limited**, 2017 HRTO 761 (CanLII) and summarized the test as follows:

As a result, in the human rights context, a poisoned work environment will be found in two circumstances:

1. If there has been a particularly egregious, stand-alone incident, or
2. If there has been serious wrongful behaviour sufficient to create a hostile or intolerable work environment that is persistent or repeated.

In determining whether or not a poisoned work environment exists, relevant factors include: the number of comments or incidents; their nature; their seriousness; and whether taken together, it had become a condition of the applicant's employment that she or he must endure discriminatory conduct and comments

As can be seen, not every case where harassment is found to exist will rise to the level of creating a poisoned work environment. I would commend you to the recent *George* case as it provides a really valuable overview and discussion of the law.

7. Sale of a Business and Intermingling under the *Labour Relations Act, 1995*

The Ontario Labour Relations Board (“OLRB”) considered the sale of a business provisions in the *Labour Relations Act, 1995* in ***ADT Security Services Canada, Inc. v Unifor Local 554***, 2017 CanLII 4481 (ON LRB).

ADT (a unionized company) purchased a Protectron (a non-unionized company) and, although initially operating as distinct companies, over time, intermingled the operations and employees. According to the OLRB:

The Intermingled unit is comprised of twenty (20) individuals who were formerly Protectron employees and twenty-four (24) individuals who were formerly ADT employees.

ADT asked Unifor to consent to a representation vote. Unifor refused and took the position that the Protectron employees fell within Unifor’s bargaining unit, that Unifor represented them and there was no reason for holding a vote.

ADT made an application to the OLRB arguing that there had been a sale of a business within the meaning of the *Act*, that employees had been intermingled and that the OLRB order a representation vote among all employees.

The union argued that the application ought to be dismissed because the employer had failed to make out a *prima facie* of a breach of the *Act*.

The OLRB stated:

From the earliest sale of business cases, the Board has held that the purpose of section 69 is to protect and preserve a union's bargaining rights (and/or collective agreement) where a unionized business is sold: See, for example, *Kerr Progress*, [1975] OLRB Rep 590.

Under section 69(6) of the *Act*, the Board may determine the status of collective agreement and bargaining rights when a sale of business occurs and employees of the vendor and purchaser are intermingled. The Board may order a representation vote under section 69(6) where a sale of business results in the intermingling of the unionized employees of the vendor with other employees of the purchaser.

The Board was not provided with a case that held that it should exercise its discretion under section 69(6) where a non union business was sold to a purchaser with a union.

The OLRB agreed with the union and dismissed the application. In doing so, they stated:

Generally speaking, the *Act* confers bargaining rights on the basis of the expression of the wishes of a majority of employees. The union’s bargaining rights attach to the workplace and not to individual employees, so that employees who join that workplace (in whatever fashion) after bargaining rights are granted are covered by the collective agreement if they fall within its scope. To that extent, the scheme of the *Act* provides that new employees have no “choice” in the matter. Once granted, bargaining rights are subject to termination in accordance with the *Act* and in this way, the *Act* permits employee wishes to be tested.

In this case, the employer urges the Board to exercise its discretion and to apply its labour relations expertise under section 69(6) to direct a representation vote to permit the expression of employee wishes. The employer is asking the Board through section 69(6) to create a new vehicle for allowing employees to express their choice.

The employer seeks to elevate “employee choice” to a right that triggers a vote in a bargaining unit when a sale has occurred and non union employees are affected. The Act provides opportunities for all employees – including ADT’s employees in this case – to choose to terminate their union’s bargaining rights during the statutory open periods at the conclusion of every collective agreement. To direct a vote in this case would subvert the protection of bargaining rights that is the purpose of the sale provisions of the Act and it would, at the same time, disrupt the normal cycle of open periods in which employees may terminate their union’s bargaining rights.

The case stands for the proposition that a representation vote under section 69(6) will not be ordered where a unionized company purchases a non-unionized company. Where a non-union business is purchased by a unionized employer, the employees of that non-union business who fall within the scope clause in the purchaser’s collective agreement are an accretion to the purchaser’s pre-existing bargaining unit. If those employees want to rid themselves of the union, they can make an application during an open period to terminate the union’s bargaining rights as provided in the Act.

8. Giving References - Some Further Clarification

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.

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.

Giving references, even negative ones, is generally permissible, but there are exceptions and a couple of recent cases help identify the boundaries.

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. Riffin.”

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).

9. 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”. In the context of Bill 148 and the amendments relating to the misclassification of relationships (which came into force on November 27, 2017) it is critical that employers immediately consider the various ways that they have work performed.

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:

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.

Another useful analysis of the difference between an independent and dependent contractor can be found in **Glimhagen v GWR Resources Inc.**, 2017 BCSC 761 (CanLII).

10. A Probationary Period Has Meaning

Many employers incorrectly assume that because notice or termination pay is only required under the *Employment Standards Act, 2000* when terminating an employee with 3 months or more of service that, somehow, this implies a “probationary period” into every employment relationship in Ontario. This is wrong. It is important to spell out in the written contract of employment whatever the probationary period is agreed to be.

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.

Probationary periods aren't established by legislation but through clearly drafted written agreements between employer and employee.

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.”

11. While on the Topic of Probationary Periods - Here's a Caution

Lest we think that probationary periods offer a panacea for employers, the Supreme Court of British Columbia case of **Ly v British Columbia (Interior Health Authority)** 2017 BCSC 42 comes along to remind us that relying on a probationary clause in an employment contract to terminate an employee puts some onus on the employer. Although the Court found that Ly's contract contained a valid probationary clause (an important first step), the Court concluded that the employer could not rely on that clause to terminate Ly because the employer failed to manage the performance issues it relied upon to terminate Ly's employment during the probationary period. The employer failed to provide Ly with guidance, direction and support in assessing his suitability for continued employment. It did not, in other words, carry out a good faith assessment of Ly's suitability for permanent employment. The Court determined that Ly was entitled to reasonable notice of termination of three (3) months despite his having only been employed for slightly over 2 months at the time of his termination.

The case highlights the importance of managing the employment relationship, even a probationary one.

12. Supreme Court of Canada Expands the Limits of Workplace Discrimination

The Supreme Court of Canada in **British Columbia Human Rights Tribunal v. Schrenk**, 2017 SCC 62 (CanLII) held that individuals could pursue human rights complaints against individuals whenever that discrimination has a sufficient nexus with the employment context. Specifically, the majority of the Court held that:

The scope of s. 13(1)(b) of the Code is not limited to protecting employees solely from discriminatory harassment by their superiors in the workplace. Rather, its protection extends to all employees who suffer discrimination with a sufficient connection to their employment context. This may include discrimination by their co-workers, even when those co-workers have a different employer.

Determining whether conduct falls under this prohibition requires a contextual approach that looks to the particular facts of each claim to determine whether there is a sufficient nexus between the discrimination and the employment context. If there is such a nexus, then the perpetrator has committed discrimination “regarding employment” and the complainant can seek a remedy against that individual.

Among other factors to consider in deciding if there is a sufficient nexus are:

- (i) whether the respondent was integral to the complainant's workplace;
- (ii) whether the impugned conduct occurred in the complainant's workplace; and
- (iii) whether the complainant's work performance or work environment was negatively affected.

Employers need to understand that, following *Schrenk* that they can be responsible for discrimination or harassment committed by their employees against non-employees where a sufficient connection to the employment exists.

13. Cursory, Rushed or Flawed Investigation Can Only Bring Trouble for Employers

An Adjudicator recently reminded 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 warranting 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.

The Court of Appeal in **Doyle v. Zochem Inc.**, 2017 ONCA 130 (CanLII) also reminds us of the implications on damages of a cursory investigation in the context of a sexual harassment complaint.

14. Even Workplace Violence is Not an Automatic Termination Offence

There are no automatic grounds for terminating for just cause - except where the parties specifically agree otherwise. The contextual approach applies irrespective of the severity of the infraction.

I have written frequently about workplace harassment and violence (in fact, I teach a seminar at the University of Toronto on the subject). What is clear is that, while serious, proven allegations of workplace harassment or violence will not automatically result in a finding that termination is the appropriate penalty. The most recent case is **Toronto Transit Commission v Amalgamated Transit Union, Local 113**, 2017 CanLII 11071 (ON LA).

This was an arbitration award that considered whether a long-service (25 years) employee of the TTC should be reinstated to his employment. The employee was terminated for allegedly uttering death threats against three (3) TTC managers. The alleged threats were made to a co-worker following the grievor's participation in sensitivity training which "was one of the conditions of reinstatement after he had been relieved of duty about six months prior over an incident in which he offered his middle finger to an obstreperous customer, who then photographed it and lodged a complaint about him."

The grievor denied having made the threats and although he was charged criminally with three counts of uttering death threats, he was acquitted after a trial. The grievor denied making the threats and the case turned on the credibility of the grievor and the co-worker to who he allegedly made the threats.

The arbitrator considered the comments of the trial judge at the criminal trial:

So, the accused's evidence, while questionable in certain areas, on the whole of it does raise a reasonable doubt. Mr. Davis steadfastly maintained that he did not make these threats and, as I said, while I do question some of his evidence, I have no reason to reject his denial of making those threats. As I said earlier, this is not a credibility contest. It is not whether or not I prefer Ms. Bethune's evidence over the accused's. The standard is that the Crown has to prove the case beyond a reasonable doubt. It is a very high standard, and in this case, although I have concerns, in all the circumstances I do have a reasonable doubt.

The case before the arbitrator involved a credibility contest. In the end, the arbitrator preferred the evidence of the co-worker over that of the grievor and concluded that the grievor had made the threats on balance of probabilities. The arbitrator considered whether termination was the appropriate penalty and said:

.... workplace violence, especially given its wide definition in the *Occupational Health and Safety Act*, does not automatically warrant the upholding of a discharge. As in all disciplinary cases – aside from those where a specific penalty has been agreed by the parties – the arbitrator must consider all the circumstances, including the nature of the violence, its context, the grievor's seniority and disciplinary history, the impact of the job loss on the grievor, and, above all, the prospects that the employment relationship can be rehabilitated and survive the grievor's reinstatement.

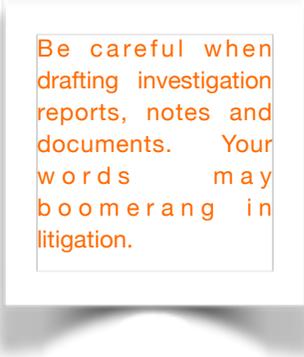
In the circumstances, Arbitrator Slotnick held that termination was the appropriate penalty. In doing so, he considered, among other things, that the grievor "ever acknowledged the threats that I have found he made, and consequently has not apologized for his behaviour", that his disciplinary record was not clear and, most

significantly to the arbitrator, “this incident took place only a day after Mr. Davis had completed sensitivity training, designed to ensure he understood how to deal with anger and to impress upon him the seriousness of workplace violence, including threats.”

Although this case arises in a unionized environment, the analysis applies to non-union workplaces following the Supreme Court of Canada decision in ***McKinley v. BC Tel*** (2001) SCC 38 (CanLII).

15. Workplace Investigation Reports and Documents - Be Really Careful

Workplace investigations arise in many contexts. Often the investigator is a company employee such as a member of the human resources or legal department. Other times, the investigation is conducted by a third party retained by the company for that purpose. An issue sometimes arises about whether the investigation report and other documents (such as notes and witnesses statements) must be produced in the course of litigation of one sort or another.



Be careful when drafting investigation reports, notes and documents. Your words may boomerang in litigation.

This is a really interesting issue and has received considerable attention of late. The most recent word on the subject comes from the Human Rights Tribunal of Ontario in ***De Francesca v. Centric Investigation Services Inc.***, 2017 HRTO 798 (CanLII). The Tribunal set out the basic production obligation:

The basic principle in determining a production request is whether the requested documents are “arguably relevant”. The party seeking production must demonstrate a nexus between the information or document sought and the facts or issues in dispute before the Tribunal. A nexus may be established if the sought-after information goes to prove or disprove a fact or issue in dispute or provides an inferential link to support a theory of the case or line of defence.

The applicant sought to call a third party lawyer who conducted an investigation for the respondent “into a sexual harassment complaint filed by one of the applicant’s colleagues”. The applicant appears to have filed a witness statement in which it was suggested that the investigator would testify in relation to:

.... her qualifications; her involvement in the workplace investigation she conducted for the respondent; the circumstances that led to her being hired; a description and explanation of who was subject to the investigation; what her investigation entailed; a description and explanation of her findings; her knowledge of the applicant’s efforts to restore the relationship with the respondent; and the advice she gave to the applicant with respect to her employment with the respondent.

Production is not without limits and the respondent argued that the applicant could not call the investigator because of solicitor-client privilege. The Tribunal disagreed stating:

I noted that communications relating to a workplace investigation do not become subject to solicitor-client privilege simply because the investigator is also a lawyer. See, for example, ***Howard v. London***, 2015 ONSC 156 (CanLII) at para. 70, and ***Durham Regional Police Association v. Durham Regional Police Services Board***, 2015 CanLII 60920 (ON LA), 2015 CanLII 60920. Although the respondent claimed that it retained [the investigator] both to conduct an investigation and to provide a legal opinion, the respondent filed no evidence to establish that [the investigator] was retained to provide legal advice. Instead, the letter [the investigator] sent to the applicant stated that she was appointed as an independent investigator to conduct an

investigation into allegations of sexual harassment. There is nothing in the documentation filed by the parties that supports the respondent's claim that [the investigator] was also retained to provide legal advice in addition to her investigation of whether certain allegations of harassment had been factually substantiated or not. For this reason, I do not agree that [the investigator's] expected testimony is subject to solicitor-client privilege.

There are different types of privilege that could, possibly, exclude documents from being produced. For example a document will be subject to litigation privilege if its dominant purpose is litigation. Often, the dominant purpose of an investigation is not litigation (see *Durham*) but rather to determine if a complaint has been substantiated. For solicitor-client privilege to apply to a document the following factors must be shown"

- (1) it must have been between a client and solicitor;
- (2) it must be one in which legal advice is sought or offered;
- (3) it must have been intended to be confidential; and
- (4) it must not have had the purpose of furthering unlawful conduct.

The retainer letter with the investigator will be important in deciding whether solicitor-client privilege applies, and careful thought must be put into the entering of the relationship and the role the investigator will play. Importantly, simply because the investigator is a lawyer doesn't assist. Also importantly, the fact that HR conducts the investigation will generally require that the report and all surrounding documents be produced to the employee in the course of litigation.

At the end of the day, the employer should ask itself whether asserting privilege to exclude a report is even necessary or in the employer's interest and, if it is, to set up the privilege as best it can.

16. When Can an Employer Request an Independent Medical Examination?

The Ontario Divisional Court provided some needed guidance about the circumstances in which an employer is entitled to request that the employee participate in an independent medical examination. The case is ***Bottiglia v. Ottawa Catholic School Board***, 2017 ONSC 2517. The employee worked for the Board from 1975 until April 2010 when he went off work on a sick leave. He resigned his employment in 2012 and, in November 2012, commenced an application against the Board alleging that it had discriminated against him by failing to accommodate his disability as required under the *Human Rights Code*. Specifically, he maintained that the Board had required him to attend at an independent medical examination ("IME") before it would allow him to return to work and then "breached the terms upon which he had agreed to do so by providing the examiner with misleading information."

The application before the Human Rights Tribunal of Ontario was dismissed. He sought before the Divisional Court to set aside the decision of the Tribunal. The application required the Divisional Court to consider the scope of an employer's right to request that an employee undergo an IME and the corresponding duties of an employee with respect to that.

The employer in this case had no contractual right to request an IME. The employee argued that, in the absence of such a right, the employer had no right to require an employee to attend at an IME. The Court disagreed. It commented:

In certain circumstances, the procedural aspect of an employee's duty to accommodate will permit, or even require, the employer to ask for a second medical opinion. Without attempting to

define all of those circumstances, they will include the circumstances that the Tribunal reasonably found existed here, where the employer had a reasonable and bona fide reason to question the adequacy and reliability of the information provided by its employee's medical expert.

In the *Bottiglia* case, the employer had a reason to question the medical information provided because, in a span of 5 months, the employees' physician had done an "about-face" with respect to the employees' ability to work.

The employee argued that before the employer could require him to attend at an IME it first had to exhaust less intrusive means for obtaining the information (such as requesting clarification from his physician). The Tribunal and the Divisional Court rejected this. In the circumstances of this case, the employer was not required to seek clarification from the very physician whose reliability they questioned before requiring that the employee attend at an IME.

In terms of providing information to the independent medical examiner, the Court noted:

.... where an employer is justified in requesting an IME, the employer is entitled to provide the examiner with information relevant to the issue of accommodation and to request such information from the examiner.

When providing the examiner with information, it is my view that the employer must be careful not to impair the objectivity of the examiner. Where an employer has provided information to an examiner which might reasonably be expected to impair that examiner's objectivity, it is my further view that an employee is justified in refusing to attend the IME. In such a case, the accommodation process will not have failed as a result of the employee's refusal to attend the IME. Instead, the process will have broken down as a result of the employer's actions in potentially impairing the examiner's objectivity.

The Court dismissed the application.

17. Federal Government Extends Employment Insurance Benefits for Parental and Caregiver Leaves

On June 22, 2017 Bill C-44, *An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures* was given Royal Assent. Effective December 3, 2017 the period during which *Employment Insurance Act* maternity benefits will be payable to a birth mother will be extended to commence 12 weeks before her due date (as opposed to the eight weeks in the previous legislation). Maternity leave EI benefits will remain capped at 15 weeks with a one week waiting period.

In terms of parental leave, the maximum leave is 35 weeks for someone caring for a newborn or newly adopted child. Bill C-44 provides parents taking parental leave with the option of receiving 33% of weekly insurable earnings over a 61 week period or receiving 55% of the weekly insurable earnings over a 35 week period. This is a "one time only" election.

These amendments are to be looked at with the Bill 148 changes to the *Employment Standards Act, 2000* as relates to pregnancy and parental leave.

18. Court Awards Significant Damages for the Tort of Harassment

Much attention has been paid to the Ontario Superior Court case of ***Merrifield v The Attorney General***, 2017 ONSC 1333 (CanLII), but what's all the fuss about? Sure the Court wrote a 175 page decision and awarded a

plaintiff significant damages. Importantly, it unequivocally found that the tort of harassment did, indeed, exist in Ontario. In order to establish this cause of action an employee had to show the following:

1. The conduct of the defendant was “outrageous” meaning “deeply shocking and unacceptable”, “grossly cruel”, “immoral, offensive”;
2. The conduct of the defendant was intended to cause emotional stress or was in reckless disregard for causing the plaintiff emotional stress;
3. The plaintiff suffered serious or extreme emotional distress; and
4. The outrageous conduct was the actual or proximate cause of the emotional distress.



The tort of harassment provides employees with a further monetary hook in Ontario yet again emphasizing that optics are important

The Court concluded on the evidence that:

... the defendants’ conduct toward the plaintiff was outrageous. The defendants had a reckless disregard of causing the plaintiff to suffer emotional distress. His emotional distress was severe. The defendants’ outrageous conduct was the actual and proximate cause of the plaintiff’s emotional distress. The plaintiff has proven the tort of harassment.

The Court awarded the plaintiff \$100,000 in general damages for harassment and intentional infliction of mental suffering.

Employees have always been able to bring claims for intentional infliction of mental suffering which required proof of almost the same criteria as for the tort of harassment. The case is important as it provides employees with another hook on which to pursue their claim arising out of the manner in which they were treated by their employer.

18. How You Treat an Employee During Employment and On the Way Out Matters

The case is **Galea v. Wal-Mart Canada Corp.**, 2017 ONSC 245 (CanLII) where the court awarded Ms. Galea \$250,000 in moral damages and \$500,000 in punitive damages.

In order to be awarded moral damages, there is a requirement that those damages for an employer's breach of good faith and fair dealing be reasonably foreseeable. The Court in *Galea* considered the following factors to summarize when moral damages may be available to a terminated employee:

1. Where an employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed;
2. Conduct that could qualify as an employer's breach of good faith or the failure to deal fairly in the course of a dismissal includes an employer's conduct that is untruthful, misleading or unduly insensitive, and a failure to be candid, reasonable, honest and forthright with the employee;
3. Where it was within the reasonable contemplation of the employer that the manner of dismissal would cause the employee mental distress;
4. The wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings that normally accompany a dismissal; and

5. The grounds for moral damages must be assessed on a case by case basis.

Moral damages relate to foreseeable damages to compensate an employee for injury or harm suffered by an employer's conduct. The claim Ms. Galea was making was that the employer led her to believe through representations that she was on an upward career trajectory, only to pull the rug out from under her and terminating her employment. There were other claims, including with respect to post-termination and litigation conduct that Ms. Galea relied on in support of her claim for moral damages.

One issue that the court had to address was whether medical evidence was required to establish a claim for moral damages. In the *Galea* case, no medical evidence was presented. The law on the point was divided with some cases requiring such evidence and others not requiring it. The Court in *Galea* held that medical evidence is not required in an employment context to found a claim for moral damages.

The Court relied on an earlier case called **Boucher v. Wal-Mart Canada Corp.**, 2014 ONCA 419 where the Court of Appeal upheld a trial judgment awarding the plaintiff \$200,000 in moral damages. The Court in *Galea* tagged on an additional \$50,000 in moral damages as a result of the employer's post-termination conduct including the decision to "stop the continued payment of her base salary and the health and dental coverage to her and her family" and certain matters occurring during the litigation.

The Court also awarded Ms. Galea \$500,000 in punitive damages. These are different from moral damages in that they are not compensatory. They are intended to punish the employer and are only awarded in exceptional cases where for misconduct that is "malicious, oppressive and highhanded" and "offends the courts sense of decency". In deciding whether to award punitive damages, the Court will consider, among other things, ensuring that the award is proportional to the misconduct, the need for deterrence, avoiding double recovery, other damages awarded and whether these show sufficient denunciation and avoiding duplication.

How employees are treated during employment and at the time of termination are factors to be taken into accounts by courts when assessing liability. While these cases are exceptional, and should be, they nonetheless exist and employers should learn from them.

19. Human Rights Tribunals Clarifies the Test for Family Status Discrimination

The HRTO clarified the appropriate test to apply in family status discrimination cases under the *Human Rights Code* in **Ananda v. Humber College Institute of Technology & Advanced Learning** 2017 HRTO 611 (CanLII). Specifically, the employee is required to demonstrate that a rule or requirement had an adverse effect on her or him because of requirements or needs relating to or arising out of the parent-child relationship. The applicant must show more than a negative impact on a family need but must demonstrate that "the negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work." Leading Ontario cases include **Devaney v. ZRV Holdings Limited**, 2012 HRTO 1590 (CanLII) and **Misetich v. Value Village Stores Inc.**, 2016 HRTO 1229 (CanLII).

20. Marijuana and the Workplace

In April 2017, the federal government introduced legislation to **legalize and regulate recreational cannabis** in Canada by July 2018. Bill C-45, **An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts** ("*Cannabis Act*") is making its way through the Parliamentary process. Once the Cannabis Act comes into force, Canadians will be able to access marijuana for recreational use – not just for medicinal purposes.

Anticipating the passage of Bill C-45, the Ontario government introduced Bill 174, **Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017** which was given Royal Assent on December 12, 2017. Not surprisingly, the legalization of the recreational use of marijuana has employers concerned. It is important to note that Under Bill 174 no person is permitted to consume marijuana in a workplace within the meaning of the *Occupational Health and Safety Act*, any public place or in a motorized vehicle. The *OHS Act* defines a workplace “any land, premises, location or thing at, upon, in or near which a worker works.”

That being said, a medical cannabis user may consume cannabis for medical purposes in any of these places subject to any prohibitions or restrictions set out in the regulations or under the *Smoke-Free Ontario Act, 2017*. Medical cannabis users are not be allowed under the legislation to smoke or vape medical cannabis in enclosed workplaces, enclosed public places, motor vehicles and other smoke-free places, with a few exceptions. According to Health Canada, as of March 31, 2017 there were 167,754 people registered to use marijuana for medical purposes. This is up from 53,649 on March 31, 2017.

The issue of impairment is a live one and a challenging one as there are no reliable tests for measuring impairment from marijuana. Employers, in the case of medical marijuana, have a duty to accommodate to the point of undue hardship under the *Human Rights Code*. Health and safety considerations are relevant in this analysis as relates to cannabis in the workplace.

A recent article entitled **Canadian companies fret about hazy rules around legal pot use** outlines some of the employer concerns. The Human Resources Professional Association has also published a helpful pamphlet **Clearing the Haze - The Impacts of Marijuana in the Workplace** as has the Canadian Centre for Occupational Health and Safety in a White paper **Workplace Strategies: Risk of Impairment from Cannabis**.

21. Chronic Stress Claims under the *Workplace Safety and Insurance Act*

Effective January 1, 2018 the *Workplace Safety and Insurance Act* was amended to permit employees to claim benefits for chronic or traumatic mental stress arising out of and in the course of the worker's employment in respect of any accident occurring after January 1, 2018. The Workplace Safety and Insurance Board has published a policy dealing with **chronic mental stress**. Of note is that “mental stress caused by an employer’s management decisions or actions is generally not covered by the WSIB”. Employer’s covered by the *Act* should expect employees to advance these sorts of claims with greater frequency as the landscape develops.

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