I hope you all had a safe and relaxing summer. Labour and employment law developments did not take a holiday, though I do hope you did.

This newsletter contains 15 articles covering a broad range of recent labour and employment law topics and developments.

On September 7, 2018 the *Toronto Star* reported that Ontario lost more than 80,000 jobs last month, "the province's greatest loss of jobs in a Statistics Canada monthly employment survey since the 2009 global recession" and the Chamber of Commerce has suggested that:

> "The Ontario business community has made it clear — Bill 148 has led to a substantial decrease in staff hours and capital investment as well as an increased reliance on automation. This dramatic decline in over 80,000 jobs reflects the work that must be done to build a prosperous and competitive province."

While I'm not ready to wade into the political debate, nor whether these job losses are a consequence of Bill 148 and, if so to what degree, what is clear is that with the Conservatives are in a majority position, and there is a real push by at least some of those who put them in that position for the repeal of the Bill 148 amendments to the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995.* The Ford government has it's hands full with other pressing matters at the moment, and it remains to be seen what they will do and how far they'll go in dealing with Bill 148. Stay tuned.

Have a great rest of the month and I hope you enjoy this Newsletter.

Mike

In this Edition

Overtime Under the *Employment Standards Act, 2000*

Does your company comply with the overtime requirements of the *Employment Standards Act, 2000* (the "ESA" or the "Act")?

The reason I ask the question is because I saw that another class action was started alleging breach of the overtime provisions in the ESA. Specifically:

> On August 20, 2018, a proposed class action for unpaid wages (including overtime) and unlawful deductions was filed against Primary Response Inc. ("Primary Response") and Garda Canada Security Corporation ("Garda"), which purchased Primary Response in January 2018, on behalf of all current and former security guards who worked for Primary Response in the Province of Ontario since August 6, 2016.

You can read the Statement of Claim which is summarized by Goldblatt Partners, counsel in the proposed class action as follows:

> The Statement of Claim filed by the proposed representative Plaintiff alleges, among other things, that Primary Response violated the *Employment Standards Act, 2000* (the "ESA") and its contracts of employment with Class Members by requiring the Class Members to show up for work a minimum of fifteen minutes early, but failing to compensate them for this time, by unlawfully averaging the overtime pay of the Class Members over a two-week pay period despite the fact that its overtime averaging agreement expired and its subsequent application for approval was rejected by the Ministry of Labour, and by making uniform deductions from payroll which did not comply with the ESA.

The Act requires that you pay eligible employees at a rate of 1.5 times their regular rate of pay for all hours worked in excess of 44 hours in a week. Employers and employees can, of course, agree to greater rights or benefits than those in the ESA (for example, paying overtime after 40 hours instead of 44 hours) but they cannot contract out of the ESA.

In terms of the "averaging" issue, the ESA permits an employer to "average" hours for certain purposes. According to the Ministry of Labour in Applications for Excess Weekly Hours of Work or for Averaging Hours of Work for Overtime Pay Purposes:

> An employee's hours of work can be averaged over two or more weeks for the purpose of calculating their entitlements to overtime pay. However, in order to do this, the employer must secure an approval from the Director of Employment Standards, and:
>
> - in the case of a **non-union employee**, the employee and the employer must agree, in writing, that the employees' hours of work will be averaged over a specified number of weeks;
>
> - in the case of **employees represented by a union**, the union and the employer must agree, in writing, that employees' hours of work will be averaged over a specified number of weeks.

While the Statement of Claim only sets out allegations and are unproven, and many hurdles must be jumped over before the class action will be certified under the *Class Proceedings Act, 1992* this case is a reminder of the ticking time bomb that is the overtime obligations under the ESA.

It is always recommended that employers audit their HR practices, policies, documents at least annually which would, of course, include a review of your overtime policies. For example, who is eligible, what is the threshold for overtime pay, written agreements and the status of any approvals from the Director of Employment Standards. Many employers don't conduct this type of review until there's a problem, and prefer to leave any liabilities "under the rug", though liabilities don't disappear, they just continue to accrue and get larger.

New Criminal Record Check Rules Come into Effect on November 1, 2018

Police checks are an important part of the hiring process. Many concerns have been expressed by privacy and human rights advocates regarding the police record check process and the information that can be disclosed and shared through the process.

The disclosure of non-conviction information or "contact with the police" data has been noted as a serious concern. There have been calls for legislation to ensure that universal safeguards and protections are in place.

Nearly three (3) years after its passage, Bill 113, the Police Record Checks Reform Act, 2015 finally comes into force on November 1, 2018. The Act sets out a process governing requests for searches of the Canadian Police Information Centre databases, or other police databases, in connection with screening an individual for certain purposes including for the purposes of determining his or her suitability for employment.

A police force may conduct three (3) types of police record checks:

1. criminal record checks;
2. criminal record and judicial matters checks; and
3. vulnerable sector checks.

A police record check provider will not conduct a police record check in respect of an individual unless the request contains the individual's written consent to the particular type of check.

A police record check provider will disclose the results of a police record check to the individual who is the subject of the request and will not disclose the results to any other person unless the individual provides written consent after receiving the results of a check about himself or herself. Where that happens, the police record check provider may give a copy of the information to the person or organization who requested the check or to another person or organization the individual specifies.

The information that can be disclosed in response to a request depends on the type of police record check being requested. The Act has a helpful Schedule. For example, certain non-conviction information could still be disclosed where there is a vulnerable sector check (i.e. where the person works with the elderly or children).

The Act also provides that the information shall not be used or disclosed except for the purpose for which it was requested, or as authorized by law (i.e. determining a persons' suitability for employment).

Persons or organizations that wilfully contravene certain provisions of the Act would be guilty of an offence and liable to a fine of not more than $5,000.

You should read the Act and ensure that your background check screening process complies with the new rules.

Pregnancy Leave, Constructive Dismissal and the Courts

The Ontario Superior Court of Justice released a decision on June 5, 2018 called *Peternel v. Custom Granite & Marble Ltd.*, 2018 ONSC 3508 (CanLII) that is a must read for any employer.

The employee worked for the Company for about 3 years before commencing a maternity leave. Under the *Employment Standards Act, 2000*, her leave would end on December 15, 2014. In or about October 2014, the Company and employee agreed that she would not return to work until the new year, although no date was set for her first day in January 2015.

There was a meeting between the employer and employee on January 6, 2015 to discuss a return to work. An offer of employment was sent to the employee under which she was to start work at 8:30 am. Except for the start time, the offer was substantially the same as her pre-maternity-leave job as scheduler.

The plaintiff agreed that it was made clear to her in 2011, when she started with the company, that mornings were important in the position of scheduler. According to the Court:

> The previous Scheduler had begun her workday at 7:30 a.m. but the plaintiff told Custom she could not be in the office before 8:30 a.m. because of childcare responsibilities. However, the plaintiff made it known to Custom that she could assume the role of Scheduler as her mother lived with her and provided childcare when needed. Therefore, the plaintiff was available to attend early morning meetings when required and could also handle early morning work-related issues by phone. Custom provided the plaintiff with a cell phone and, after accepting the role of Scheduler, the plaintiff did take work-related phone calls as early as 6:00 a.m.

There was a suggestion that the plaintiff was allowed to come into work anytime before 10 am before taking her maternity leave. It was suggested that this was to permit her to take her two children to the school bus and that, by doing so, the employer accommodated her childcare needs.

The employer disputed this saying, in part, that the plaintiff's mother was available to assist and did so when the plaintiff had to come to work prior to her maternity leave. The employer noted that it had "shown latitude in

her start time because she had suffered two miscarriages while at Custom (May and November 2012) and had told Custom her pregnancy in 2013 was high-risk."

Further, and as happens, the company's business evolved while the plaintiff was on maternity leave which required that she had to be consistently at work by 8:30 a.m. The plaintiff indicated:

> .. she had had a falling out with her mother, who had moved out, and that the plaintiff needed to arrange for outside daycare. The plaintiff told Custom that, while she had full-day daycare for her infant, she had only arranged for after school daycare for her older two children, based on her assumption that she would resume her previous work hours of 10:00 a.m. to 5:00 p.m.

Following the meeting, the plaintiff looked for alternatives, and placed her children on a waiting list for before school care offered by her children's school. Her evidence at trial was that this waiting list was approximately six months.

Throughout her evidence, the plaintiff's principal explanation for her late arrival at work was that she had to take her two children to the morning school bus and that by allowing her to begin her work day at 10:00 a.m., Custom was accommodating her childcare needs.

The plaintiff did not return to work at Custom and, instead, sued alleging that she had been constructively dismissed and that the employer had discriminated against her on the basis of her sex contrary to the *Human Rights Code*.

Discussion of the *Employment Standards Act, 2000*

There was also discussion of the obligations on the employer under the *Employment Standards Act, 2000* with respect to an employee returning to work from a statutory leave, in this case, a maternity leave. Section 53(1) of the *ESA* provides:

> Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.

There is, in the case law, considerable discussion about what the words "if it still exists means". In the *Peternel* case, the position the employee most recently held, broadly speaking, still existed. The Court commented:

> The employer is not obliged to reinstate an employee to the exact pre-maternity leave schedule when there has been a *bona fide* change during the leave. The purpose of the statute "is to preserve the employee's rights as they would have been had a pregnancy or parental leave not been taken but not to freeze their duties in perpetuity". An employee is entitled to return to a position which is "… substantive [sic] and qualitatively the same as the one she held prior to her leave. (see *Kingston Independent Nylon Workers Union v. Page*, 2003 CanLII 40803).

The Court concluded that the employer met its obligation under the ESA to "restore the plaintiff to the position she had held prior to her maternity leave or, alternatively, to a position that was substantively and qualitatively that same as the one she had held prior to her leave".

Discussion of the *Human Rights Code*

The Court reviewed the law with respect to the applicable test to be applied in a case of alleged discrimination on the basis of family status under the *Human Rights Code*. The test has been much litigated and centres on "when" an employee has met the onus of proving a *prima facie* case of discrimination on the basis of family status. In other words, when has the employee presented sufficient evidence to shift the onus to the employer to prove that it has reasonably accommodated the employee to the point of undue hardship. The employee bears the initial onus of proving a *prima facie* case of discrimination on a prohibited ground under the *Human Rights Code*.

The Court discussed the test coming from the Federal Court of Appeal in Johnstone v. Canada (Border Services Agency, 2014 FCA 110 (CanLII) where the plaintiff must establish that:

(i) the child is under her care and supervision;

(ii) that the childcare obligation at issue engages her legal responsibility for that child, as opposed to a personal choice;

(iii) that she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

(iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

Although the employer conceded point #1 of the *Johnstone* test, it argued with respect to point #2 that taking a child to a school bus is a choice. The employer also conceded that if the employee was not able to "obtain daycare, requiring her to attend at work without it would interfere in a manner that is more than trivial with the fulfilment of the plaintiff's childcare obligation" under point #4.

With respect to point #3, the employer argued that the plaintiff failed to show that she made "reasonable efforts". Here the Court turned its attention to the Human Rights Tribunal of Ontario case of Misetich v. Value Village Stores Inc. 2016 HRTO 1229 where the Tribunal rejected the *Johnstone* approach and specifically the obligation on the employe to prove "self-accommodation". The Court in *Peternel* summarized the *Misetich* test as follows:

> In *Misetich*, the Tribunal held that to show family status discrimination in the context of employment, an employee would have to show not only a negative impact on a family need but also 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. For example, a workplace rule may be discriminatory if it puts the employee in the position of having to choose between working and caregiving, or if it negatively impacts the parent/child relationship and the responsibilities that flow from that relationship in a significant way." The Tribunal further stated that assessing the impact of a workplace rule must be done "contextually and may include consideration of other supports available to the applicant".
>
> ***
>
> Recognizing the similarity between "contextual considerations" and inquiries about "self-accommodation", *Misetich* distinguished its approach from the *Johnstone* self-accommodation approach as follows:
>
> > Requiring an applicant to self-accommodate as part of the discrimination test means the applicant bears the onus of finding a solution to the family/work conflict; it is only when he/she cannot that discrimination is established. This is different than considering the extent to which other supports for family-related needs are available in the overall assessment of whether an applicant has met his/her burden of proving discrimination.

In the *Peternel* case, the plaintiff did not allege that "placing her school-aged children in before school daycare would have a negative impact on a family need nor that any alleged negative impact would result in a "real disadvantage to the parent/child relationship" or put her in a position of having to choose between "working and caregiving" if she had to find before school care for her two older children."

The Court also discussed the fact that the accommodation process (if it applied) was one that was joint in that it required cooperation of the employer, employee and, if there is one, trade union. There is a duty to cooperate on the employee and the Court concluded, in the circumstances, that the employee had failed to meet that duty. Specifically the plaintiff provided Custom with very little information about her childcare arrangements and, specifically:

- did not tell Custom that she had not paid for daycare and that without a firm January start date, she would lose all her daycare;
- did not tell Custom how difficult it had been for her to find daycare for her then 13-month old infant;
- did not tell Custom that she had secured temporary before school care through a neighbour, which would bridge the gap until a before school daycare spot opened up at her children's school;
- did not tell Custom (as she alleged at trial) that unless she were permitted to start her workday at 10:00 a.m., even on a short-term basis, the plaintiff would forfeit her daycare spots and would be unable to return to Custom on any terms; and
- did not provide Custom with any details about her efforts to secure before school care.

There is a danger in not sharing reasonable information with the employer in the accommodation process. According to the Court:

> Had the plaintiff provided Custom with information about her daycare situation, and Custom then refused to co-operate in accommodating the plaintiff, she might have been able to establish that the work hours required by Custom constituted adverse treatment on the basis of her family status. However, as the Tribunal concluded

> in *Misetich*, all of that is "theoretical" because the plaintiff did not provide that information to Custom.
>
> ***
>
> By failing to disclose to Custom her true childcare needs, the plaintiff thereby frustrated any efforts that might have been made by Custom to accommodate those needs.

The Court concluded that, whether they applied the *Johnstone* or *Misetich* test for discrimination on the basis of family status, the outcome was the same - the plaintiff failed to prove that the employer's request that she begin her workday at 8:30 a.m. was discriminatory.

Discussion of Constructive Dismissal

The Court reviewed the *two-branch* test of constructive dismissal from the Supreme Court of Canada decision of Potter v. New Brunswick (Legal Aid Services Commission), 2015 SCC 10 summarized by the Ontario Court of Appeal in Brake v. PJ-M2R Restaurant Inc., 2017 ONCA 402 (CanLII) at paras. 64 to 66:

> The test that *Potter* establishes for constructive dismissal consists of two branches. Satisfaction of either branch is sufficient for a finding of constructive dismissal.
>
> The first branch of the *Potter* test has two steps. First, the Court must determine objectively whether a breach has occurred. To do so, the Court must ascertain whether the employer has unilaterally changed the contract. If an express or an implied term gives the employer the authority to make the change or if the employee consents or acquiesces in it, the change is not a unilateral act and will not constitute a breach. To qualify as a breach, the change must also be detrimental to the employee. Second, once it has been objectively established that a breach occurred, the Court must ask whether a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed (*Potter*, at paras. 37 – 39)
>
> The second branch of the *Potter* test necessarily requires a different approach. On this branch, constructive dismissal consists of conduct that, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. (Potter, at para. 42)

The employer, for valid business reasons, could no longer offer the plaintiff the flexibility to arrive at work after 8:30 am. The Court held, based on the evidence, that "the plaintiff's loss of childcare coverage when her mother moved resulted in the plaintiff no longer wishing to resume work at Custom on her previous terms of employment" and that it always remained a term of her employment that she "be able to attend work close to 8:30 a.m., if asked to do so" or to attend at meetings. The Court held that:

> When [the plaintiff] made it clear to Custom that, because of her childcare responsibilities, the plaintiff would never be available for work before 10:00 a.m., it was the plaintiff who was attempting to impose a unilateral change to the terms of her employment contract by changing her daily start time.

The Court concluded that the plaintiff had not been wrongfully or constructively dismissed.

In the circumstances, the Court dismissed all of the plaintiff's claims with costs. This was an 8 day trial and the parties were unable to agree on the costs payable by the plaintiff to defendant. The Court considered written submissions and awarded costs "to the defendant in the total amount of $54,108.36 is a fair and reasonable amount to be paid by the plaintiff." You can read the courts Costs Decision at 2018 ONSC 4881.

This is a well reasoned, thorough and concise review of the law with respect to family status discrimination and accommodation, the *prima facie* test and the duty to cooperate and is a must read.

Recovery of Real Estate and Moving Expenses in a Wrongful Dismissal Case

The Ontario Court reviewed the issue of mitigation and what sorts of mitigation expenses are recoverable in a wrongful dismissal case. The case is Robinson v. H. J. Heinz Company of Canada LP, 2018 ONSC 3424 where the plaintiff was found to have been constructively dismissed and was entitled to damages on account of reasonable notice which the parties had agreed was 15 months in the circumstances, inclusive of any statutory termination and severance pay under the *Employment Standards Act, 2000* ("ESA").

The parties also agreed that the plaintiff was entitled to termination pay and severance pay under the ESA based on her length of service. In the circumstances, Ms. Robinson was entitled to 9 weeks termination pay and 15.8 weeks of severance pay under the ESA (the total amount of statutory payments, therefore, was 23.8 weeks).

The plaintiff began to earn income from her new job immediately after her constructive dismissal.

The first issue was whether the mitigation income earned by the plaintiff during the 23.8 weeks payable under the ESA could be deducted from damages?

The answer is "no". According to the Court, "as a general rule, '[a]n employee who is dismissed without reasonable notice is entitled to damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of loss during the notice period." See: Brake v. PJ-2MR Restaurant Inc., 2017 ONCA 402 The defendant argued that all income received by the plaintiff from her new job must be credited against her common law damage claim.

The Court relied on the Divisional Court case of *Boland v. APV Canada Inc.*, 2005 CanLII 3384 case of "any employment income that [the plaintiff] earned during her statutory entitlement period is not deductible as mitigation income". After defining termination and severance pay under the ESA as "statutory entitlements", Gillese J.A. in *Boland* stated:

> Statutory entitlements are not damages. Ms. Brake was entitled to receive her statutory entitlements even if she secured a new full-time job the day after the Appellant terminated her employment. Therefore, the income that Ms. Brake earned during her statutory entitlement period is not subject to deduction as "mitigation income".

In the circumstances, no mitigation income received in relation to the periods represented by both termination and severance pay under the ESA (23.8 weeks) was deductible from the plaintiff's overall damages award.

The next issue that the Court had to address was what damages are recoverable by Ms. Robinson on account of mitigation expenses? The plaintiff has a duty to take all reasonable steps to mitigate her loss. She did so by finding other work in Southwestern Ontario, where she was from, at a reduced income. She also sought reimbursement for various expenses that she says she incurred in order to transition to her new employment, essentially in relocating to Southwestern Ontario to start her job. For example, land transfer tax, and other expenses in selling and purchasing a new home. The Court accepted this as a reasonable recovery:

> In my view, the weight of authority in Ontario supports recovery of real estate commission, moving expenses and legal fees incurred by an employee as a result of wrongful dismissal: see *Earl v Northern Purification Services (Eastern) Limited*, [1980] O.J. No. 160 (at paras. 16 and 17) (H. C. J.); *Hayden v. Richards-Wilcox of Canada Ltd.*, [1985] O.J. No. 2835 (D.C.O.). Moreover, it is broadly accepted that that "an employee who is wrongfully dismissed is entitled to recover the value of all losses from the failure to have been given reasonable notice of the termination of his or her employment": Paquette v. TeraGo Networks Inc., 2015 ONSC 4189 (CanLII), at para. 36 and *Adjemian v. Brook Crompton North America*, [2008] O.J. No. 2238, at para. 24.

In the circumstances of this case, Ms. Robinson was entitled to damages on account of expenses on sale of her Mississauga home which included carrying costs of two (2) homes, real estate commission and listing costs, mortgage pre-payment penalty and discharge fees and legal fees. In addition, she was entitled to expenses on the purchase of the Southwester Ontario property which included land transfer taxes, legal fees and related expenses incurred on the acquisition of the new house. Finally, she was entitled to recover moving and transitional expenses as a result of commuting back and forth to Mississauga while working at her new job, meals and living expenses while there, and costs of moving the plaintiff's goods to her new residence. The total recovery was $45,010.32.

This case provides an excellent review of the law of mitigation, what mitigation income can be used to reduce common law damages, and the circumstances in which mitigation expenses associated with relocation and real estate will be recoverable.

Costs and Litigation - Think Hard Before You Go to War and on the Approach You Adopt

I used to litigate - a lot. I don't anymore. I came to that decision for many reasons, most of which are irrelevant to this discussion. As a mediator, I sincerely believe that most labour and employment cases should settle. There are, of course, exceptions, and in those cases, there are

litigators who live and breathe this type of fight and can assist.

Employers and employees sometimes really look forward to going to war. They want to prove that they are right and the other side is wrong. This means a lot to them. Most lose that fire in the belly as the litigation proceeds and the invoices from the lawyer have to be paid. The employee might find other work and the litigation isn't as important as it might have been at the outset. Time heals all wounds I suppose.

But I digress. What I would like to discuss is the recently released decision of *Ruston v Keddco Mfg. (2011) Ltd.*, 2018 ONSC 5022 which was a cost endorsement in a wrongful dismissal case. The plaintiff was successful in the case, was awarded 19 months reasonable notice (less mitigation), bonus, benefits, punitive damages of $100,000, moral damages in the amount of $25,000, pre and post judgment interests and costs. You can read the trial judgment at Ruston v. Keddco Mfg. (2011) Ltd., 2018 ONSC 2919.

In terms of costs, the judge commented that the plaintiff was successful after an 11 day trial with an award totalling $604,627.09 plus interest and costs. The employer counter-claimed for $1.75 million and that counter-claim was dismissed in its entirety.

The plaintiff served an Offer to Settle on the defendant with the statement of claim and Rule 49 of the *Rules of Civil Procedure* applied:

> 49.10(10)(1) Where an offer to settle,
>
> (a) is made by a plaintiff at least seven days before the commencement of the hearing;
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
> (c) is not accepted by the defendant,
>
> and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

The plaintiff, being the successful party, sought its costs on a substantial indemnity basis of $546,684.73 including HST and disbursements. The judge agreed with the plaintiff for the following reasons:

(a) The costs requested are proportionate to the result. $700,000 was in dispute for the plaintiff's claim plus $1,750,000 in the counterclaim. Out of a total of $2,450,000 in dispute, the plaintiff was successful on $2,354,628.00, calculated as the amount won, plus the entire value of the counterclaim which was dismissed in its entirely.
(b) The defendant pursued unfounded allegations of fraud. This was a matter of utmost importance to the plaintiff. Both his financial and professional future were at risk if the allegations were proven in court.
(c) It was the defendant's conduct that contributed to the plaintiff's costs. The plaintiff's costs can be said to be what a reasonable party would expect to spend upon pursuing litigation against a party who engaged in conduct like that of the defendant. The defendant refused to admit facts but failed to contest them at trial. The defendant only provided relevant financial documents after the plaintiff brought a motion. The defendant provided will say statements 14 days in advance of the trial and not 30 days in advance as ordered. The defendant relied on only 45 of the 163 documents it produced on the first day of trial. The defendant caused an adjournment of the first trial less than six weeks before the date scheduled due to the introduction of a 25 person witness list. This led to a one year delay, double preparation and the requirement to have a second pre-trial. The defendant called only two fact witnesses at trial. By this conduct, the defendant caused the plaintiff to incur far greater costs than expected, substantially increasing the costs of trial preparation and the length of trial.
(d) The counter-claim rendered this action much more complex than a simple case of wrongful dismissal. Because of the fraud accusations the plaintiff had to hire an expert witness costing approximately $30,000.
(e) The defendant threatened the plaintiff with expensive litigation if he pursued his wrongful dismissal matter and then proceeded to follow through on the threat. The plaintiff would have been denied access to justice had his lawyers not agreed to defer their fees. The plaintiff survived financially by relying on his RRSP's,

selling his house below market value and breaking his car lease.

(f) The use of two counsel at trial was reasonable for this case, considering the complexity of the counter-claim and the serious consequences to the plaintiff if he was unsuccessful in defending the counter-claim.

(g) The amounts claimed by the plaintiff to prepare the trial record were reasonable as the plaintiff had to determine if it was appropriate to set the matter down for trial. This requires a detailed documentary review to ensure full disclosure and that there will be no need for further motions.

(h) Having reviewed the costs outline submitted by the plaintiff, I have concluded that the time spent for various steps in the litigation is reasonable. It cannot be compared to the costs outline submitted by the defendant which is not certified. Further, my observation at trial was that plaintiff's counsel was well prepared for trial while the defendant's counsel was comparatively unprepared in that he arrived late or not at all in one instance, could not advise the court of the sequence and timing of his witnesses, failed to effectively use his book of documents and delivered materials at the last minute. The plaintiff's costs outline is reflected of more time spent than the defendant in preparing for trial. This difference was demonstrated at trial to the detriment of the defendant's counsel.

(i) The plaintiff was awarded both punitive and moral damages. The costs awarded herein are done so to indemnify the plaintiff, as the successful litigant, for the costs of litigation. Any references to the defendant's conduct are meant to explain why the plaintiff's costs are higher than one would reasonably expect from litigating a simple claim for wrongful dismissal and in no way reflect an overlap of the punitive or moral damages awarded.

This case highlights the dangers of litigation and the impact that the strategies that are adopted to fight the case can have on the outcome and the costs awarded.

Reprisal under the *Occupational Health and Safety Act*

The Ontario Labour Relations Board ("OLRB") issued a decision on August 30, 2018 in William Joseph Thorogood v North 44 Property Management, 2018 CanLII 8272 in which the OLRB found that a decision to terminate the applicant contravened section 50 of the *Occupational Health and Safety Act* ("OHSA") which provides:

> 50 (1) No employer or person acting on behalf of an employer shall,
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> a) dismiss or threaten to dismiss a worker;
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> b) discipline or suspend or threaten to discipline or suspend a worker;
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> c) impose any penalty upon a worker; or
>
> d) intimidate or coerce a worker,
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> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

There is a reverse onus under section 50(5) of the OHSA provides that "the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer."

The OLRB relied on Fullerton v. Nygard International, 2008 CanLII 67281 (ON LRB), 2008 CanLII 67281:

> The combined effect of these provisions is that, for the Board to find that there was a reprisal in this matter, it must be satisfied that the applicant was engaged in the exercise of his statutory rights, and that the exercise of those rights was a motivating factor, no matter how small, for Nygard's decision to terminate the applicant's employment. Even if the employer has what would otherwise be legitimate reasons for termination, if one factor in the decision is the applicant having exercised his rights under the OHSA, the termination will be found to be a violation of section 50 of the OHSA (see for example, *MLG Enterprises Limited*, [1994] OLRB Rep. Nov. 1550).

Though not referring to it specifically, the OLRB echoed the Supreme Court of Canada decision in Rizzo & Rizzo Shoes Ltd. (Re) 1998 CanLII 837 (SCC) where Iacobucci J. speaking for the Court stated:

> Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, 1988 CanLII 67 (SCC), [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

It is important to note that in these types of cases, if any part of the employers decision, for example to terminate the employee, was based on the employee's exercise of rights under the OHSA, the entire decision will be tainted and will be found to contravene section 50.

In these cases, as in many cases, the timing and context in which the decision is made is important. The OLRB in *Thorogood* stated:

> The timing of the termination of the applicant's employment is suspicious. Given that the applicant was fired shortly after he raised directly health and safety concerns, there is a heavy onus on [the employer] to explain the suspicious circumstances.

The employer put forward business reasons in support of the termination, namely lack of work, which existed for some time prior to the applicant's articulation of health and safety concerns. Here is the context/optics:

> According to the employer's evidence, it knew at the earliest by February 1, 2018, and definitely by February 14, 2018, that it wasn't successful in gaining the additional building. In February, Ms. Vowels was tasked with deciding which employee would be released. Moreover, the employer provided the applicant with a raise effective March 5, 2018, confirming his successful completion of the probationary period. On the same day, the regional manager's internal email response on its face indicates that Mr. Gardner would be laid off soon for lack of work, after having raised health and safety concerns. Two days later, on March 7, 2018, the applicant had his performance assessment, at which time he articulated several health and safety concerns. It was only after this point that the applicant's employment was terminated.

The fact that the Ministry of Labour inspector who investigated the employees' OHSA complaint issued no orders against the employer was not a defence to a reprisal complaint. In the words of the OLRB, "statutory compliance is not the focus of the Board's enquiry."

In the circumstances, the OLRB found that the employer had violated section 50 of the OHSA.

In terms of remedy, the applicant was awarded lost wages for eight weeks from the termination date to the hearing date, loss of the value of the job which, in accordance with Board practice, was calculated as one month's pay per year of service, and emotional pain and suffering. The total monetary award was $4,002.70.

When Can an Employer Unilaterally Make Deductions from Wages?

Employers will sometimes want to make unilateral deductions from an employee's wages whether at the time of termination or during the employment relationship. This issue comes up in many ways:

- the employer discovers that, through inadvertence, an employee has been overpaid;
- the employee damages a machine and the repairs cost $1000; or
- the employee is terminated and provided with severance. It is discovered that the employee has taken more vacation than she has accrued.

The examples are endless, the point is that there are a myriad of circumstances where an employer will want to

make a deduction from the employees wages. But is this permitted?

The *Employment Standards Act, 2000* ("ESA") allows only a few circumstances in which the employer can unilaterally make a deduction from wages. These are:

1. Statutory deductions (e.g. income tax, CPP and EI)
2. Court orders (e.g. garnishment or family support)
3. Written authorization

In terms of written authorizations, these aren't as straightforward as many think. For example, some employers have a statement in their letters of employment, employment contract, or Handbook to the effect that the employee authorizes the employer to make deductions from wages in the event that the employee has been overpaid. Seems pretty clear, but that's not good enough, at least according to the Ministry of Labour.

An employee's written authorization must state that the employer may make a deduction from their wages and, further, the authorization must also:

- specify the amount of money to be deducted; or
- provide a method of calculating the specific amount of money to be deducted.

An employee's oral authorization or a blanket authorization that an employer can make a deduction from wages in certain circumstances is not sufficient to allow a deduction from wages.

On August 10, 2018 the Ontario Labour Relations Board ("OLRB") considered the matter in *Halpin Dentistry Professional Corporation v Sangeeta Thibault*, 2018 CanLII 76786. The employee ("ST") was the office manager at the dental office and was responsible for payroll. She resigned her employment on September 6, 2016. The employer admitted that it withheld ST's last paycheque in September 2016 but argued that it was entitled to do so because it had recently discovered that ST had overpaid herself without the employer's knowledge or authorization. In addition, it was alleged, ST had failed to pay back loans from the employer. The employer withheld the final cheque in order to recovered just a fraction of what it said ST owed to it.

ST denied having overpaid herself or that she had been loaned money by the employer.

The OLRB set out some of the legal principles dealing with "set off" and deductions from wages:

> Employers may recover wage overpayments made to employees by deducting wrongly paid wage amounts from later-issued paycheques in certain circumstances (see, for example Brown Bear Day Care v. Hollander, 2010 CanLII 35656 (ON LRB), 2010 CanLII 35656). These amounts can be recovered without offending the prohibition in section 13 of the Act because they are in the nature of a reconciliation of the employee's entitlement to wages in a case where wages were improperly overpaid, rather than a prohibited set-off.
>
> In this case, the Employer argues that Dr. Halpin discovered that [ST] was periodically paid wages to which she was not entitled beginning in approximately January of 2014 and continuing until August of 2016.
>
> The purpose of the Act is to ensure that employees are paid for the work they do. In this case, the wages that the Employer is entitled to recover are wages to which [ST] was not entitled in the first place.

In terms of loans, however, the OLRB referred to its earlier case of Serpa Automobile (2012) Corporation o/a Serpa BMW, 2017 CanLII 31530 (ON LRB), as follows:

> 31. Even on the employer's evidence, the facts in this case do not support [the] application of the principle in *MenuPalace*. First of all, as I have found, the $5,000.00 was not an overpayment of wages. It was a loan to Mr. Lane in response to his personal request which does not constitute "wages" within the meaning of the Act. Secondly, in *Menupalace* the wage overpayment was deducted soon after it was made. On that fact alone, the case is distinguishable. Finally, to characterize the loan in this case as "unearned money" broadens the narrow exceptions to the prohibition in section 13 and would enable employers to justify recovery of virtually any amount they believe they are owed, even where

> the amount owing is not related to the employee's wages. Such an approach is inconsistent with the principle that exceptions in the Act are to be interpreted narrowly because the Act is remedial legislation for the benefit of employees (*Blais (Re)*, [1995] OESAD No. 31).
>
> 32. The question of whether Mr. Lane owes $5,000.00 to Serpa is not before me. Even if he does, the purpose of section 13 is to prevent employers who may be owed money from engaging in self-help and deducting what they believe they are owed, rather than seeking remedies through the courts (see, for example, *Chul v Bedini*, 2011 CanLII 28474 (ON LRB).

If the employer makes a demand for repayment of the loan and the employee refuses, the employer will be required to sue (perhaps in Small Claims Court, depending on the amount of the loan), to recover the debt.

Some overpayments, on the other hand, at least according to *Halpin* may be deducted provided that they are discovered quickly and that the employer did not know and could not have reasonably been expected to know of the overpayments.

This is a helpful case for employers though, as always, the circumstances of each case will determine the outcome.

Suspensions Without Pay are Still a Challenge for Employers

Under what circumstances can an employer suspend an employee, without pay? The Court of Appeal weighed into the discussion in Filice v. Complex Services Inc., 2018 ONCA 625 (CanLII) decided on July 10, 2018. In this case, the employee ("AF") worked as a Security Shift Supervisor. The Security Department was responsible for managing the Casino's lost and found processes, which includes the collection of property and money from the Casino's facilities. According to the *Gaming Control Act* an individual is prohibited by law from working anywhere in the Casino's Security Department without a valid gaming registration.

Following a routine audit, it was determined that there were several discrepancies that corresponded with entries that AF had made. The Ontario Provincial Police ("OPP") interviewed AF. The employer was informed that AF was under investigation for theft in the workplace, and that he was not charged. The employer suspended AF, without pay.

The Casino maintained an Associate Handbook Security Edition (the "Handbook"). The Handbook provided:

> Investigative Suspension may be used as part of the coaching and counselling process to verify allegations of misconduct. During an investigation, the Associate may be prohibited from working. If a decision is made to separate the Associate's employment, he or she may not be reimbursed for time spent on Investigative Suspension.

In addition, the Casino maintained a discipline policy that says something similar.

On January 21, 2008, the OPP charged AF with four counts of theft under $5,000 and one count of breach of trust. Also on that date, the Alcohol and Gaming Commission of Ontario ("AGCO") suspended AF's gaming registration, thus preventing him from performing the duties of Security Supervisor.

The employer indicated that the workplace investigation was separate from the criminal investigation, but that the workplace investigation would be deferred until the AGCO and criminal matters were concluded.

On November 3, 2008, three of the five criminal charges were withdrawn. On February 7, 2009, the remaining two criminal charges against the respondent were dismissed. The dismissal of the charges appears to have happened after an adverse ruling was made by the trial judge regarding the Crown's ability to rely on certain business records. The Crown then chose not to call any further evidence and the charges were dismissed.

On May 12, 2009, prior to an appeal on the AGCO suspension being heard, AF directed his legal counsel to voluntarily surrender his gaming registration to the AGCO. On May 15, 2009, the AGCO cancelled AF's gaming registration. As a result, he was precluded from reapplying for another registration for at least two years.

On May 29, 2009, the employer wrote to AF and advised him that, in light of the requirement that he maintain a valid gaming registration, his employment was at an end since he had surrendered his gaming registration.

AF sued and claimed, among other things, that he had been constructively dismissed and this proceeded to trial over 7 days. The employer called only the Casino's Director of Security but no one called either the OPP or the AGCO who were involved in their respective investigations of AF.

The trial judge decided in favour of AF and awarded damages of $75,723.64 for constructive dismissal, punitive damages of $100,000, and costs. The compensatory damages were calculated as the amount of pay that had been withheld by the employer during his unpaid suspension that spanned about 17 months.

The employer appealed.

The Court of Appeal overturned the trial judgment.

It considered the two (2) branch test for constructive dismissal in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 (CanLII):

> The first branch of the test applies where there has been a single act by the employer that may constitute a breach of the contract of employment. The second branch applies where there has been a continuing course of conduct by the employer that may, collectively, give rise to a finding that the contract of employment has been breached. It is the first branch of the test for constructive dismissal that is engaged here.
>
> The first branch of the test for constructive dismissal requires a review of the specific terms of the contract of employment. It involves two steps that must be considered independently of each other: Potter, at para. 38. The first step is to identify an express or implied contractual term that has been breached. The second step is to then determine if the breach is sufficiently serious to constitute constructive dismissal. The first step is assessed on an objective basis, whereas the second step is analyzed on a modified objective standard of a reasonable employee in similar circumstances: *Chapman v. GPM Investment Management*, 2017 ONCA 227 (CanLII), at paras. 16-17.

A suspension without pay is a breach of contract unless "it was an express or implied term of the contract that the employer could suspend an employee without pay". In this case, the Court of Appeal said, "both the Handbook and the appellant's discipline policy expressly provide that the respondent could be suspended" albeit at the discretion of the employer. The Court held that the parties seem to have "treated [the policies and Handbook] as forming part of the contract of employment".

When is a suspension justified? The Supreme Court of Canada in Cabiakman v. Industrial Alliance Life Insurance Co., 2004 SCC 55 (CanLII) considered the following factors to be relevant:

> .... whether there is a sufficient connection between the act with which the employee is charged and the kind of employment the employee holds; the actual nature of the charges; whether there are reasonable grounds for believing that maintaining the employment relationship, even temporarily, would be prejudicial to the business or to the employer's reputation; and whether there are immediate and significant adverse effects that cannot practically be counteracted by other measures (such as assigning the employee to another position).

In the *Felice* case, the Court had no problem concluding that a suspension was clearly justified and it would have been irresponsible of the employer not to have suspended AF. The employer had, under its policies and Handbook, a discretion to make the suspension with pay or without pay and, in exercising that discretion, it had the onus of proving that it had acted reasonably. The Court considered this and found that the employer never turned it's mind to the issue and instead proceeded on the basis that the suspension without pay was automatic.

In the Court's view, suspensions without pay would only be justified in exceptional circumstances. The *Felice* case did not fall into the "exceptional" category and the court concluded that the suspension without pay resulted in a constructive dismissal.

In terms of damages, the Court of Appeal found that the trial judge's determination of damages was flawed and, specifically, that damages of 17 months was unreasonable. The Court considered the usual factors in Bardal v. Globe & Mail Ltd. (1960), 1960 CanLII 294 (ON SC) - length of service, age, position and availability of other employment (it was noted that AF found work 7 months after the termination). In the circumstances, the Court found that the period of reasonable notice at common law was 7 months.

The Court of Appeal then considered the trial judge's award of punitive damages. Such damages, as was noted by the Supreme Court of Canada in Whiten v. Pilot Insurance Co., 2002 SCC 18 are awarded in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency".

These damages are also only "awarded where compensatory damages are inadequate to accomplish the objectives of retribution, deterrence, and condemnation". The Court of Appeal found that the trial judge gave no consideration to why the compensatory damage award he made was inadequate. The Court of Appeal set aside the award of punitive damages.

This case provides an excellent discussion of the law of constructive dismissal as applied to suspensions without pay. Employers who have no contractual right to suspend face an uphill battle where the suspension is without pay. Expressly providing for the right to suspend without pay in a contract is the best practice. Where the employer has a discretion to suspend with or without pay, it will have to establish that the suspension without pay was reasonable.

Severance and the Short Service Employee

An employee employed under an oral contract of employment of indefinite duration may only be terminated for just cause or in the absence of just cause with reasonable notice or pay in lieu of notice at common law. How do we determine the period of reasonable notice? You've certainly heard of the leading case of *Bardal v. Globe & Mail Ltd.* (1960), 1960 CanLII 294 (ON SC). In that case, the court made the following statement which has been cited in almost every wrongful dismissal case:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the [employee], the age of the [employee] and the availability of similar employment, having regard to the experience, training and qualifications of the [employee].

These are the *Bardal* factors which, when applied on an individual basis will yield a range of reasonable notice, rather than a specific number (again, there are no formulas).

Should the employer fail to give reasonable notice of termination, however, the employer will be liable in damages for the value of salary, benefits and, depending on the circumstances, most other types of compensation and incentives, that the employee would have received during the period of reasonable notice.

It has been said in a number of cases that reasonable notice is the period of time it should reasonably take the terminated employee to find comparable employment (see Lin v. Ontario Teachers' Pension Plan, 2016 ONCA 619 (CanLII) and Michela v. St. Thomas of Villanova Catholic School, 2015 ONCA 801).

The hardest cases to advise about are those where the terminated employee has short service (at least, to me these are the toughest cases). The recent British Columbia Court of Appeal case of *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2018 BCCA 23 (CanLII) is a case in point.

P was an experienced bid estimator and construction professional. He commenced employment with B & B as a bid estimator in or about January 2014. His employment was terminated 12 months later for reasons that are not relevant to this discussion. At the time he was 55 years of age. At the time of termination he was offered $5,000 which was the equivalent of 2 weeks pay. He sued and, at trial, the judge awarded 5 months reasonable notice which he increased by 3 months based on the view that "Mr. P's physical and medical condition would make it more difficult for him to obtain new employment and accordingly, he was in a position of vulnerability that was known to his employer."

In other words, the trial judge awarded an 8 month common law period of reasonable notice to an employee with 12 months of service.

The employer appealed and one of the questions before the Court of Appeal was whether 8 months was within the range of reasonableness. Following a review of a number of British Columbia cases, the Court of Appeal agreed that the trial judge's initial assessment of a 5 month period of reasonable notice was within the range of reasonableness. However, when the trial judge added 3 months to that, it took the assessment beyond the reasonable range and was overturned. According to the Court of Appeal:

> In my view, the initial assessment by the trial judge that the applicable notice period is five months is within the range of reasonableness having regard to this jurisprudence, though perhaps on the high side. Adding three months for the respondent's vulnerability takes the notice period outside the range of reasonableness unless there are very special circumstances that could support this assessment.

Further and importantly, an employee's "worsened medical condition" does not provide a basis for increasing the notice period beyond the period determined based on the *Bardal* factors particularly where the employee was able to look for and find full-time employment after his termination. This said, the Court correctly stated that " it may be that in an appropriate case an employee's health could be relevant to the assessment of reasonable notice (as opposed to an independent factor increasing the notice period)".

In another recent case out of British Columbia, *Greenlees v Starline Windows Ltd.*, 2018 BCSC 1457 the court considered the common law period of reasonable notice applicable where the employee was terminated without cause, was 43 years of age, had been employed for 6 months at the time of termination and received an annual base salary of $38,000, plus commissions and bonus. Mr. G was not actively looking for employment when he received a cold call from Starline. A couple of meetings took place, and it seems he was made a number of representations, including with respect to potential earning capacity. This was a factor in his decision to accept the offer of employment.

Shortly after his hiring there was a change to Mr. G's responsibilities. His employment was terminated a short 6 months after he started work, and he was paid 1 weeks' pay. The employer also refused to provide him with a letter of reference.

The Court in *Greenlees* referred to the Court of Appeal decision of *Saalfeld v Absolute Software Corp.*, 2008 BCSC 760 (CanLII), aff'd 2009 BCCA 18 in which it suggested that:

> Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility. … [Emphasis added]

In the circumstances of *Saafeld* the trial judge awarded 5 months reasonable notice, which the Court of Appeal found to be on the high end of the range. in a case where a sales employee with six months of employment was awarded a 6 month period of common law reasonable notice.

In *Greenlees*, it was argued that inducement was present, such that the common law period of reasonable notice should be increased. It was suggested by the judge that "there can be some degree of inducement without an explicit representation, promise or guarantee by the prospective employer." Here, it was found that, although there were no discussions about job security, Starline did, by suggesting earning potential and future prospects created a reasonable expectation in Mr. G and "carry some weight as inducements affecting the notice period".

Further, Mr. G was found to have conducted a diligent job search which was lengthened by a "hole in his resume represented by his employment with Starline and its refusal to provide a letter of reference." It took him 7 months to find other employment. The judge found that there was "limited availability of alternate employment following termination" which warranted an increase in the notice period.

In the circumstances, the Court fixed a common law reasonable notice period of 6 months for an employee with only 6 months of service at the time of termination.

The point is that short service does not necessarily equate with a short period of reasonable notice of

termination. In fact, in many cases, the period of reasonable notice is disproportionate to the terminated employees' length of service. I have found that the short service employee often gets a disproportionately long period of reasonable notice than would a longer service employee.

Further, the *Greenlees* case suggests that "inducement" comes in many forms and that weight may be attached to statements in the hiring process which could effect the common law period of reasonable notice. This is somewhat troubling and it remains to be seen whether this BC approach finds its way into Ontario.

Requests for Employer Lists under section 6.1 of the *Labour Relations Act, 1995*

If you are a non-union employer you need to be aware of the changed rules of union organizing that have come into force with the passage of Bill 148, *Fair Workplaces, Better Jobs Act, 2017*. These are new provisions, but, as we are seeing through the handful of cases decided since the coming into force of the Bill 148 amendments, unions are certainly coming to terms with the changes and how they can be used to assist them in their organizing efforts.

The specific provision I want to discuss relates to a union's ability to file an Application for a List of Employees under section 6.1 of the *Labour Relations Act, 1995* which provides:

> Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees are not bound by a collective agreement, a trade union may apply to the Board for an order directing the employer to provide to the trade union a list of employees of the employer.

This is a fairly mechanical exercise and there are really a couple of things that the employer can dispute. It can disagree with the description of the proposed bargaining unit suggested by the union and/or it can disagree with the estimate of the number of individuals in the bargaining unit proposed by the union in their application.

If the OLRB determines that the description of the bargaining unit included in the application could not be appropriate for collective bargaining, the OLRB will dismiss the application. If, on the other hand, the OLRB determines that the description of the bargaining unit included in the application could be appropriate for collective bargaining, then it will use that description in deciding the union's entitlement to the list under section 6.1.

Specifically, the OLRB will look at the information filed by the union and employer and determine whether 20 per cent or more of the individuals in the bargaining unit proposed in the application appear to be members of the union at the time the application was filed. If it so determined, the OLRB will direct the employer to provide the list to the trade union.

There are two (2) possible parts to the list - a mandatory part and a discretionary part.

The mandatory element of the list requires that the employer provide the union, when ordered to do so, with:

(a) the name of each employee in the proposed bargaining unit; and
(b) a phone number and personal email for each employee in the proposed bargaining unit, if the employee has provided that information to the employer.

In terms of the discretionary aspect of the list, if, in the opinion of the OLRB, it is equitable to do so in the circumstances, the Board may order that the list also include:

(a) other information relating to the employee, including the employee's job title and business address; and
(b) any other means of contact that the employee has provided to the employer, other than a home address.

Employers, in the past, would consistently reject these sorts of requests (if they were made at all) from an organizing trade union on the basis that they have no legal right to the information and citing privacy and confidentiality, among other things. Where the Board orders the production of a list under section 6.1 of the *Labour Relations Act, 1995*, there are certain protections surrounding the list:

- the employer shall ensure that all reasonable steps are taken to protect the security and confidentiality of the list, including protecting its security and confidentiality during its creation, compilation, storage, handling, transportation, transfer and transmission;
- if a list of employees of an employer is provided to a trade union in compliance with a direction made by the Board under the Act the use of that list is subject to the following conditions and limits:
    - The list must only be used by the trade union for the purpose of a campaign to establish bargaining rights.
    - The list must be kept confidential and must not be disclosed to anyone other than the appropriate officials of the trade union.
    - The trade union shall ensure that all reasonable steps are taken to protect the security and confidentiality of the list and to prevent unauthorized access to the list.
    - If the trade union makes an application for certification in respect of the employer and employees on the list and the application for certification is dismissed less than one year after the Board's direction to provide the list, the list must be destroyed on or before the day the application is dismissed.
    - If the list is not destroyed in accordance with the above, it must be destroyed on or before the day that is one year after the Board's direction to provide the list was made.
    - The list must be destroyed in such a way that it cannot be reconstructed or retrieved.

The OLRB has published an Information Bulletin No. 37 that is of assistance.

One employer raised the possibility of a Charter of Rights and Freedoms challenge to section 6.1 of the *Labour Relations Act, 1995* and reserved its right to do so. The case is United Food and Commercial Workers International Union (UFCW Canada) v The Original Cakerie Ltd., 2018 CanLII 77175 and was decided by the Chair of the OLRB Bernie Fishbein. The Ontario Federation of Labour ("OFL") was given standing in the case (United Food and Commercial Workers International Union (UFCW Canada) v The Original Cakerie Ltd., 2018 CanLII 63060). The argument regarding the Charter was, generally put, as follows:

> The Employer says that the Charter is the primary law of the country and that it contains a constitutional right to privacy and therefore it should have the right to argue that section 6.1 of the Act is invalid under the Charter, particularly when that provision of the statute will mandatorily require the employer to perform acts (the granting of a list of employees with their names and addresses to the Union, without their consent) which on their face are an invasion of their privacy rights and therefore contrary to the Charter.

The Applicant (union), the Attorney General and the OFL argued that the employer did not have standing to raise the Charter Question on behalf of its employees. The employer put forward many arguments in support of its position that, in fact, it had standing to bring the Charter challenge. The Chair of the OLRB reviewed, in detail, the law with respect to this issue and shut the employer down on every point. The OLRB invoked fundamental labour relations principles on several occasions to support its decision:

> Not surprisingly, in such a frequently adversarial context as labour relations, this Board, other labour relations Boards across the country, and the courts, have been particularly wary of permitting an employer to argue the interests or issues on behalf of its employees.

In support of this, the OLRB referred to Canada Labour Relations Board v. Transair Ltd., [1977] 1 SCR 722 where the Supreme Court of Canada stated, in part:

> If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-à-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii* [Latin for a right of a third person], especially when those whose position is asserted by the employer are not before the Court.

In this case, the employees didn't intervene, though the employer filed a couple of Affidavits which the OLRB did not accept saying:

> Simply put, the Board, in the field of labour relations, where the power imbalance between an employer and an employee is so profound, has never permitted employers to speak on behalf of employees, especially through affidavit evidence where not only are the employees not identified, but not subjected to any cross-examination whatsoever, including, most significantly, why or how these statements came about.

In the end, the *Charter* challenge was dismissed as the employer did not have the status to raise these constitutional questions as it could not speak for its employees, by asserting *Charter* rights not belonging to it (but to its employees who have chosen not to appear before the Board and not to participate).

Is a Terminated Employee Entitled to RRSP Matching Contributions and Pension

When considering an employees' entitlement on termination Courts have increasingly restated the general damage principle in employment cases. The Court of Appeal, for example, in *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 put it this way:

> 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: *Sylvester v. British Columbia*, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315, at para. 1. 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: *Davidson v. Allelix Inc.* (1991), 1991 CanLII 7091 (ON CA), 7 O.R. (3d) 581 (C.A.), at para. 21. [Emphasis added]

A leading Ontario case on the issue of pension is *Taggart v. Canada Life Assurance Company*, 2006 CanLII 53345. The Court again stated that where an employer terminates an employee without cause, the employer is liable for "damages for breach of contract, measured by the loss of wages or salary and other benefits that would have been earned during the reasonable notice period". Unless there is some contractual term limiting the employee's right, this would typically include compensation also for loss of any pension rights which would have accrued during that period. (see for example the British Columbia Court of Appeal case of *Durrant v. British Columbia Hydro and Power Authority* (1990), 1990 CanLII 271 (BC CA)).

The Court said that, to the extent that the pension plan requires "active service as a prerequisite for the accrual of pension benefits", that this was unpersuasive in denying the claim for damages relating to the loss of pension rights that would have been earned during the period of reasonable notice. Furthermore, any restriction on a terminated employees pension entitlement that are found in the "fine print" of the pension plan and not clearly stated in the employment contract will be strictly construed against the employer.

With respect to a terminated employees' entitlement to RRSP matching contributions during the period of reasonable notice at common law, the British Columbia Court of Appeal in *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2018 BCCA 23 most recently considered this issue. In this case, Mr. Pakozdi was entitled to join the B & B Group Registered Retirement Savings Plan after one year of employment, which, in the circumstances, was approximately the date of his termination. The benefit under the matching program is described in the Employee Guidebook:

> Each pay period your employer will match your contributions by 100% up to a maximum of 5% of your salary.

The trial judge refused to award any damages to Mr. P. in respect of the RRSP match through the common law notice period because there was no evidence that the plaintiff "was making RRSP contributions during the notice period". The Court of Appeal overturned this aspect of the decision. The Court stated:

> In my opinion, the applicable principle is that damages in a wrongful dismissal action are to be assessed on the basis of the plaintiff's entitlement to benefits throughout the period of reasonable

> notice. A plaintiff is entitled to compensation for the loss of the opportunity to share in whatever pecuniary benefits would have flowed from being an employee during the notice period

In other words, the plaintiff was entitled to damages equivalent to the benefits he would have received if he had remained as an employee until the expiration of a period of reasonable notice and this included RRSP matching contributions under the program.

The way I think of it is that an employer may chose to terminate an employee by providing actual working notice of termination and satisfy its common law obligations. If it does that, the employee would continue to receive everything they would have through that period of notice (including pension and RRSP match). So why should the employer be placed in a better position because it chose to terminate immediately, without actual working notice? Put another way, why should the employee be placed in a worse position because the employer decided to terminate immediately?

Does Sexual Harassment Training Stop Sexual Harassment?

As many of you know, for nearly 25 years now, I've taught labour law and employment law at the University of Toronto. In 2017 I designed and taught a seminar entitled *Regulation of Workplace Discrimination, Harassment, and Violence,* which was an amazing experience for me and was well received by the students and I hope to teach the seminar again. I also love to design and conduct training for clients and others who retain me for that purpose. I'd like to think that the training I do is "different" because of my teaching. Teaching adults is, not surprisingly, different from teaching kids. What works, what is effective, what is memorable, what sticks, are different.

Why do I say all of this? Partly, it's to put workplace training in some context knowing full well that, in most cases, clients will conduct the training themselves. Because of my teaching, I get to read a lot of academic papers, literature and studies on a broad range of employment law topics. In the #metoo era, there is a lot being published about workplace training and its effectiveness as a deterrent to workplace sexual harassment. For example, I read the *Select Task Force on the Study of Harassment in the Workplace* published in June 2016 by the U.S. Equal Employment Opportunity Commission. This is a comprehensive report that, in part, looks at what they call "anti-harassment compliance training" and it's effectiveness in preventing harassment and whether there are some forms of training that have better outcomes than others. To Coles Notes it for you, according to the Report:

> We came to two overarching conclusions:
>
> - There are deficiencies in almost all the empirical studies done to date on the effectiveness of training standing alone. Hence, empirical data does not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment.
>
> - The deficiencies notwithstanding, based on the practical and anecdotal evidence we heard from employers and trainers, we conclude that training is an essential component of an anti-harassment effort. However, to be effective in stopping harassment, such training cannot stand alone but rather must be part of a holistic effort undertaken by the employer to prevent harassment that includes the elements of leadership and accountability described above. In addition, the training must have specific goals and must contain certain components to achieve those goals.

Whenever someone asks me to conduct so-called workplace harassment training, I always ask them "what are you hoping to achieve through the training?" or "what's your goal?" That helps focus the discussion and also serves to determine "what" the training looks like.

The way I put it, during that initial discussion, is "are you looking to check the box?" In other words, is the training designed to provide some sort of preemptive or defensive litigation strategy, by "showing" (because you're taking attendance) that you (the employer) have provided workplace harassment training and have given employees information about the employer's anti-harassment policy, including what is and is not harassment, what to do if they experience or witness harassment and how to file a complaint.

This training is reasonably simple to develop and present. An attendance sheet is circulated, materials are prepared and distributed and you put it all in a file hopefully never

to have to be located again. It's a defence strategy - it will not change attitudes. If the objective of the training is to "prove" that you've conducted training, then mission accomplished. You roll it out for new hires and once a year as a refresher.

The effectiveness of workplace harassment training was discussed in the mainstream media in an interesting article that appeared in the Washington Post entitled Why sexual harassment training doesn't stop harassment.

One thing that has become clear through the many complaints that have arisen post-#metoo is that people knew, but remained silent in the face of conduct that allegedly fell offside not only policies, but laws. These bystanders stood by in the face of misconduct and remained silent. What has also emerged is that victims were fearful of coming forward with their complaints and, in some cases, viewed HR as ineffective.

To be effective, training must be seen not as the silver bullet, but as a piece in a larger strategy.

If the objective is to mobilize bystanders and empower victims while communicating to would-be harassers the implications and consequences of their unacceptable behaviour, training can be one element that helps bring about or enforce cultural change.

Importantly, perhaps most importantly, is the attitude of leaders in developing through their words and, most critically, actions that allegations of harassment, irrespective of who the alleged harasser is and his or her position on the org chart, will be treated seriously, investigated promptly and thoroughly and dealt with fairly and decisively.

Setting the cultural and behavioural tone, from the top, communicating that credibly and often through word and deed, and including training as a component to enforcing that behavioural expectation, is what is required if any organization wants to make meaningful change in attitude.

Training must be geared towards adults - this should include role play, group and individual exercises, testing, among other things. Believe me, this isn't rocket science, but adults *must* be involved in the learning process and they *must* see that participation and compliance are not options.

Again, check-the-box training has a purpose, no question. But if the goal is to change the corporate culture or enforce an expectation of acceptable and unacceptable conduct, check-the-box training may well undermine that objective.

The reason I raise this is because, in the #metoo environment, there's been, with good reason, a lot of talk about training as a defensive or proactive litigation defence strategy. I get it. But training, in isolation, isn't the magic potion that solves all problems. It is a component of a much larger strategy.

Dress Code Policies and Human Rights

Does your Company have a dress code policy? Does it say something like:

> Professional personal appearance of all staff help form a positive impression to our clients and visitors. Cleanliness and neat appearance are required as part of our dress code. Dress during business hours must reflect the professional nature of the Company and its services. Business casual attire is generally appropriate; t-shirts are too casual. Please consult with your manager if you have any questions as to what constitutes appropriate attire, particularly if you are representing the Company with clients, potential clients or representatives of other firms.

Or is it much more specific and directive?

The Ontario Human Rights Commission has published an article OHRC policy position on sexualized and gender-specific dress codes and other materials dealing with dress codes.

In 2004 the BC Human Rights Tribunal in *Mottu v. MacLeod and Barfly Nightclub* 2004 BCHRT 76 considered an allegation of sex discrimination where female servers were required to wear to an event an article of clothing that was gender-specific and had sexual connotations associated with it - in this case a bikini-top. The complainant was given a choice, either to wear the bikini top and work her shift, or she be replaced. In other words, according to the Tribunal, "if she did not conform to the chosen dress for the evening, she would lose her scheduled shift and the associated pay and tips."

This was found to be discriminatory and contrary to the BC *Human Rights Code*.

If you have a dress code policy, you should keep an eye on a human rights case that has reportedly been filed with the British Columbia Human Rights Commission. The CBC has an article that summarizes the allegations 'It's a human rights issue': Women fight for the right to be braless on the job. This is not the first time that a gender specific and sexualized dress code has come under attack.

You should also be aware that Bill 148, Fair Workplaces, Better Jobs Act, 2017 amended the *Occupational Health and Safety Act* to prohibit employers from requiring a worker to wear footwear with an elevated heel unless it is required for the worker to perform work safely. An exception will be made for employers looking for a "performer" in the entertainment and advertising industries.

The point is that if you have a dress code policy in place, you should review it for compliance with the *Code*.

Accommodating Depression in the Workplace

Accommodation under the *Human Rights Code* is, certainly, one of the most challenging of tasks facing HR professionals and their lawyers. Everything is grey, with no "right" answers and so many pitfalls and legal and human challenges along the way. This is more so as when the underlying disabling condition is of a psychiatric or psychological nature.

I recently read a couple of articles in the July 2018 issue of the *Journal of Occupational Rehabilitation* that I thought I'd mention.

The first, entitled *Return-to-Work Following Depression: What Work Accommodations Do Employers and Human Resources Directors Put in Place?* (Bastien, MF. & Corbière, M. J Occup Rehabil (2018)). The study aimed to determine which return to work accommodations were implemented, following depression, by human resources directors and employers. In terms of accommodations, the summary provides:

> The most common categories identified were related to: work schedule, task modifications, job change and work environment change. Accommodations directly related to the employee or the colleagues were considerably less mentioned and those concerning other RTW stakeholders, including supervisor, were almost absent. Conclusion Our results suggest that accommodations directly related to work aspects seemed to predominate in our sample of HRD/employers when an employee returned-to-work following depression. The relational aspect and the involvement of the different stakeholders are also not prioritized to accommodate the RTW. These results contrast with employer best practice guidelines for the RTW of workers with common mental disorders.

The study suggests that accommodations of the work (i.e. arrange, modify, reduce working schedule/flexible schedule and gradual return to work) are common, but that "task" accommodation designed to reduced job strain which is "strongly associated with the development of depressive symptoms among employees" were perhaps less understood. The authors suggest:

> … implementing work accommodations focused on the work task with specific attention on job strain could significantly reduce the risk of depression and, thereby, prevent relapses among employees returning to work following depression.

Modifications and accommodations of the psychosocial work environment and increasing the involvement of all stakeholders (employee, physician, supervisors, HR, employer, unions) in the accommodation process should assist in a more positive and smoother return to work. What is also clear is that mental health disabilities including depression, remain misunderstood. Attitudes, empathy, and understanding by those involved in accommodation (for example supervisors) and setting expectations of colleagues and peers, are important. Unfortunately, at least according to this report, only 3% of HRD/employers implemented work accommodations that involved the supervisor.

The authors helpfully outline the steps in the RTW process:

(1) time off and recovery period;
(2) initial contact with the worker;
(3) evaluation of the worker and his job tasks;

(4) development of a return-to-work plan with work accommodations;
(5) work resumption, and
(6) follow-up of the return-to-work process

Which brings me to the second article entitled *How Can Supervisors Contribute to the Return to Work of Employees Who have Experienced Depression?* (Negrini, A., Corbière, M., Lecomte, T. et al. J Occup Rehabil (2018) 28: 279). Among other findings was "maintaining contact during the absence helps employees to RTW because they feel appreciated." While "nearly 90% of the supervisors encouraged their employees to focus primarily on their recovery before their RTW, but 43% pressured their employees to RTW as soon as possible." The "pressure applied to RTW quickly is reported as increasing the duration of the work absence". According to the authors:

> Our findings support earlier research showing that good communication with the absent employee can contribute to RTW success. On the contrary, the pressure exerted by supervisors to speed up the RTW could be perceived as a source of stress for the employees given their difficulty estimating when they will be ready to RTW. Consequently, supervisors do not want to encourage a RTW too soon

There's another paper from the Conference Board of Canada entitled Depression in the Workplace from September 10, 2013 that "highlights the perspectives of both employees and supervisors, and provides insight into how employers can best support these employees."

Accommodating and managing employees suffering from mental health disabilities is complicated. Supervisors play a critical role in the process yet they are often either not involved or lack the awareness, resources or support to assist in a successful return tor work. HR also plays a central role in the accommodation process, yet, like supervisors, struggle to deal with the complexities and vagaries of accommodating mental health disabilities. These articles were eye opening.

Articles of Interest (to me)

The Open Concept Office

I remember that many clients went to an "open office" structure and spent a lot of money to make that happen. There was often resistance from employees but the thinking was that, in part, an open office configuration would encourage collaboration and communication. Many companies forged ahead. A recent study by Associate Professor Ethan Bernstein of the Harvard Business School entitled The impact of the 'open' workspace on human collaboration discredits the theory of an office without walls. For example, the authors conclude:

> In two intervention-based field studies of corporate headquarters transitioning to more open office spaces, we empirically examined—using digital data from advanced wearable devices and from electronic communication servers—the effect of open office architectures on employees' face-to-face, email and instant messaging (IM) interaction patterns. Contrary to common belief, the volume of face-to-face interaction decreased significantly (approx. 70%) in both cases, with an associated increase in electronic interaction. In short, rather than prompting increasingly vibrant face-to-face collaboration, open architecture appeared to trigger a natural human response to socially withdraw from officemates and interact instead over email and IM.

So much for collaboration and face-to-face communication.

Publicly Naming Replacement Workers

I did my major paper in law school on Quebec's so called anti-scab law under the supervision of the former Chair of the Ontario Labour Relations Board, Dean of the law school and preeminent arbitrator Don Carter. Employers involved in a strike or lockout who decide to continue to operate often hire replacement workers or bargaining unit members might chose to cross the picket line and continue to work while their union colleagues are on the picket line. As you might imagine, this engenders a range of emotions, on both sides.

From the perspective of those who are on the picket line anger often comes to the surface as they see their co-workers undermining, in their view, the collective efforts of the membership to bring economic pressure on the employer to better the lot of the entire bargaining unit.

I read an article entitled Union defends video identifying 'scabs' at D-J Composites after workers report threats that discusses one union's decision post a video entitled "Meet the SCABS" in which it identifies by name and photo seven replacement workers at employer in Gander, Newfoundland where the employees have been locked out for 21 months. Unifor's Twitter account introduced the video in the following way:

> "Crossing a picket line hurts families. As Unifor Local 597 members enter month 21, locked out in Gander, meet some of the scabs D-J Composites has hired to do their work."

The debate about whether this tactic is acceptable or not is on. On the one hand, crossing a picket line is seen as a betrayal that undermines collective action and representation. On the other hand, publicly naming individuals who have chosen to work during a labour dispute for whatever reason, has been criticized as being tantamount to public shaming. The replacement workers have said they feel bullied and threatened (see also D-J Composites worker says 'scabs' hurting chances of going back to work and What's the point of a picket line? To stop scabs).

The video has been widely criticized, but has also been supported and defended in many quarters. The video has certainly served to bring this long and drawn out labour dispute back into the media and public attention.

But at what cost?

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