Welcome Issue 11 of the *Fitzgibbon Workplace Law Legal Alert.*

October was another busy month for labour and employment law developments.

The PC government introduced Bill 47, Making Ontario Open for Business Act, 2018 and are aggressively pushing the bill forward. As I write this, the Bill is being debated at Second Reading with brief public hearings on the horizon. I sent around a Special Alert providing a "high level" overview of some of the substantive changes being introduced by Bill 47. You can check the Status of the Bill here. Unions and employee advocacy groups are, to put it charitably, not pleased and have, held emergency actions across the province (see Emergency actions to be held across Ontario, in protest of Doug Ford's attack on decent work laws).

With the Cannabis Act came the legalization of recreational cannabis effective October 17, 2018. The world has not fallen apart as some had predicted, though prudent employers are at least reviewing their current policies to determine if they need a refresh in light of the legislation. I have seen many employers send memos to their employees, in addition to and updated policy, clarifying some misconceptions that may exist about the legalization of recreational cannabis as it relates to the workplace and reafirming their expectations.

This *Alert* deals with a number of recent legal developments (or issues that arise frequently). I do hope you enjoy the *Alerts* and I thank you for your comments and feedback.

Mike

In this Edition

When is and Employer Required to Investigate?

This is an important, though misunderstood question. It arises in many circumstances, including under the *Human Rights Code* and the *Occupational Health and Safety Act* where allegations of workplace harassment are present.

Human rights jurisprudence has established that an employer is under a duty to take reasonable steps to address allegations of discrimination and harassment in the workplace. A failure to do so will, itself, result in a finding that the employer has breached the Code with all the liabilities that flows from such a finding.

Although there is no specific duty to investigate under the *Code* the Tribunal has also held that an employer has a duty to investigate complaints of discrimination or harassment and that the duty to investigate is the means by which an employer ensures that it is achieving the *Code* mandated responsibility of operating a discrimination/harassment free environment.

The question is when is there a duty to investigate?

The leading case is *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 where the Human Rights Tribunal of Ontario set out three (3) criteria for determining if an employer responded reasonably:

1. **Awareness of issues of discrimination/ harassment, Policy, Complaint Mechanism and Training**: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;

2. **Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action**: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and

3. **Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication**: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?

An employee who comes to you with harassment allegations on their own behalf or as a witness to harassment against another person and says this is "off the record", provided "as an FYI" or "just so you know, but I don't want you to do anything with it" does not mean that you can file it away and do nothing.

You cannot unscramble the proverbial egg. Once you become aware of allegations that might represent a breach of the *Code* you must do "something". You must take reasonable steps to address the allegations which will include conducting an investigation.

Doing what is legally required might make the complainant unhappy, or, perhaps, hamper the bringing forward of complaints, but the reality is that the legal duty to investigate trumps those practical issues which will have to be managed.

Criticizing Your Employer or Your Boss - Bad Idea

Anytime I can mix hockey and employment law, I'm going to take the opportunity.

While watching *SC with Jay and Dan* on November 6, 2018 I saw the report that some members of the Ottawa Senators while out together were caught on video in an UBER being critical of a variety of things including their penalty-killing abilities, mocking one of their coaches and laughing at the ineffectiveness of special-team meetings This has, of course, gone viral.

The players have issued an apology. The Ottawa Senators have also issued a statement. The Senators statement ends with "we are now treating this as a team matter, and we will be making no further comment to the media."

The employment and HR issue is obvious - you've got employees openly critical of their employer and one of their assistant coaches (management).

Now, the video has been said to be a "clear violation" of UBER's terms of service. One of Canada's leading privacy experts called the recording "appalling" ('Who would think they could do that': Former privacy commissioner critical of Sens recording). The Uber driver has been terminated and has given an interview.

The issue is being dealt with internally by the Senators and in the closed world of professional sport, where the

sanctity of the locker room is sacrosanct, we will hear dribs and drabs, and there will be rumours, but, like all employers, they will deal with it in their own way and move on.

But, as an employer, what do you do? You can't wave a magic wand and forget that this ever happened and go along your merry way.

Off Duty Misconduct

We've read a lot about off-duty misconduct and, arguably, this was "off-duty" misconduct (though as professional athletes, they are never "off").

An employee can be disciplined or even terminated for misconduct that occurs outside the workplace where there is a nexus or connection between the off duty misconduct and the workplace. The employee's conduct must either detrimentally affect the employer's reputation, cause the employee to be unable to discharge employment obligations properly; cause other employees to refuse to work with the individual; or adversely affect the employer's ability to direct or efficiently manage the business.

Statements Critical of the Employer

There are cases where an employee publicly criticizes the employer or management and this results in a finding of a breach of the duty of fidelity or insubordination and amounts to just cause for the imposition of some form of discipline.

According to Peter Neumann and Jeffrey Sack, the authors of *eText on Wrongful Dismissal and Employment Law*:

> While as a general proposition the courts have held that an employee should be entitled to criticize his or her superiors without fear of immediate dismissal, as noted by the court in *Van Der Meij v. Victoria Immigrant & Refugee Centre Society*, 2008 BCSC 954 (CanLII), at para. 60, "in some circumstances criticism can undermine the employment relationship and render it impossible for the employee and her manager to continue working together. When this occurs it is clear that the employee's conduct will constitute just cause for immediate dismissal. On the other hand, "[w]here an employee's complaint or criticism about her manager is provoked by unreasonable conduct or where the complaints are reasonably justified on the facts the employer may dismiss the employee; however, the obligation to give proper notice or pay in lieu of notice remains": *Van Der Meij*, supra, at para. 61.

The manner in which an employee voices his or her criticism of the employer is also relevant. The comments are also important in assessing whether a continued work relationship is possible. Were the comments clearly exaggerated, disrespectful, personal and inflammatory?

Conclusion

This is an unfortunate case but it does provide a teachable moment. Criticizing or second guessing your employer is a team sport. It happens everywhere. The difference in the Senators case is that the discussion was caught on video and released. But what about public criticism on social media, or over a coffee or drink? Is the manner in which the criticism is made any less "wrong" as an employment law issue?

The point is not to analyze this particular situation, but to note that public criticism of the employer can have employment law consequences.

Your Words Can Come Back - Email and the Boomerang

Speaking of words coming back on you, I was recently reminded of the issue of legal privilege and how it cannot protect communication between human resources and senior management (or within the human resources department). Employers often believe that communication between management and HR is somehow protected from disclosure in any subsequent litigation. This belief is, generally, wrong.

A case in point is Guthrie v. St. Joseph Print Group Inc., 2018 ONSC 1411 (CanLII).

Guthrie was a long-service employee (34 years). In May 2015, he was placed on a performance improvement plan by senior management. As part of that plan, he was required to meet certain sales targets. He did not do so and his salary was reduced by 10% in February 2016. The plaintiff left his employment on March 1, 2016, alleging that he had been constructive dismissed and claiming that the employer had acted in bad faith.

During examinations for discovery, the plaintiff became aware that the defendant had not disclosed five (5) email chains between senior management and the human

resources department. There were references in other disclosed email to these undisclosed email (subsequently, the defendant redacted those references).

The plaintiff brought a motion for disclosure of these five (5) email. The defendant put into the record an Affidavit by one of its managers in which he reviewed the interaction between management and HR:

> …. management relies on its HR department as trusted advisors for full and frank "without prejudice" discussions. He states that the HR department provides opinions and advice on how to cautiously proceed while minimizing legal risks. [the manager] swears that management expects those discussions to be confidential otherwise, the department's usefulness would be diminished and its role would be limited to an administrative function rather than an advisory one. He adds that at the time that the emails were exchanged, the defendant was contemplating litigation.

The plaintiff claimed that, to the extent that the emails in question were relevant to an issue in dispute in the litigation, that they ought to be disclosed. The defendant resisted disclosure "because [the email] either meet the test for litigation privilege or they meet the *Wigmore* test for a privileged document."

The email were produced to Master Champagne who commented that:

> They are between senior management, a HR employee, and a senior HR manager. The emails discuss the establishment of a performance management strategy to address the defendant's concerns regarding the plaintiff's poor sales. The emails request advice on a proposed performance management strategy and discuss the legal implications of the strategy.

The Master ordered the employer to produce the documents.

Rules of Civil Procedure

The Rules of Civil Procedure set out a process (in *Rule* 30.02 and 30.03 for law aficionados among you) by which a party to litigation must identify in their Affidavit of Documents those documents in their possession that they believe are privileged and are not being produced. The five (5) email were not so identified and the Master found that the defendant had "breached its obligation under rule 30.02(1) which requires privileged documents to be disclosed and identified", but that this was "not fatal".

Privilege

I've written about the concept of privilege as a means of resisting the disclosure of documents (for example, investigation reports or, as in this case, intra-company communication or communication with counsel). For example, most recently, you can have a read of *The Scope of Documentary Production at Arbitration*, *Disclosure of Investigation Reports - Supreme Court of Court Weighs In (Sort Of)* and *Workplace Investigation Reports and Documents - Be Really Careful* if you're so inclined.

There are a number of possible "privileges" that, if they apply, can serve as a defence to production of a document or documents. For purposes of the *Guthrie* case, we are looking at two of these.

Litigation Privilege

The Master summarized litigation privilege as follows:

> In order for litigation privilege to apply to a communication or document, it must have arisen when litigation was reasonably anticipated and its dominant purpose must be litigation (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII)).

The Master indicated that, as this was a constructive dismissal case, it is difficult to see how litigation could have been contemplated. In addition, the email were written a year before the employees' departure, so litigation was not contemplated (or at least was not sufficiently "proximate" to the email).

Wigmore Test

John Henry Wigmore wrote a multi-volume *Treatise on the System of Evidence in Trials at Common Law* (commonly known as *Wigmore on Evidence*). In that dense tome, Professor Wigmore laid out four (4) criteria that, if established, will cloak a communication in a form of privilege and shield it from production. This has become known as the *Wigmore Test* and the four (4) criteria are:

1. The communications must originate in a confidence that they will not be disclosed.

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The defendant argued in the *Guthrie* case that the *Wigmore* privilege ought to be extended to communications between management and HR. The defendant relied on arbitration cases in unionized workplaces where, the Master observed, the context of the communications was very different.

She observed that "in a non-unionized environment, as a general rule, an HR department serves employees as well as management". This appears to have been conceded before the Master on the motion.

Master Champagne made the following important comment:

> Extending the *Wigmore* privilege to cover the relationship between a HR department and management in circumstances such as these could have wide-ranging implications for employment law and must be based on persuasive and compelling evidence. Such evidence is simply not before me. While I accept that the parties to the impugned emails might have thought that their communication was confidential, that is not enough. The third and fourth branch of the *Wigmore* test must be satisfied.
>
> There is insufficient evidence as to the nature of the relationship between the defendant's HR department, management and employees. Defendant's counsel concedes that HR "both assists employees and advises management". In the course of regular performance management and absent any threat of litigation, I am not persuaded that in this case, or as a general rule the relationship between HR and management is one in which confidentiality is essential or that the community would say "ought to be sedulously fostered" such as might be the case between a doctor and patient or journalist and _____ for instance.

The circumstances of the case dictated the result - the emails had to be produced, but it represents yet another helpful reminder that you should assume that communications will be ordered produced if litigation ensues. The converse is that you should not assume that your communications (email, texts etc..) will be shielded from production under the guise of a privilege.

Certainly, communications with HR are at risk and though, as in the *Guthrie* case, you assume that the communication was confidential, that doesn't mean that they won't be ordered produced..

The lesson here is clearly to watch what you say and how you say it. Email and texts are convenient and, of course, normal means of business communication, but their simplicity often leads to problems and I have seen my share of cases sunk as a result of a poorly chosen word, or a quickly dashed off email or text.

To add insult to injury, the defendant was ordered to pay the plaintiff costs of the motion fixed at $5,000 inclusive of disbursements and HST.

Fiduciary Duties and Just Cause at the Court of Appeal

The Ontario Court of Appeal recently upheld the employers' decision to terminate a Senior Vice-President and Chief Financial Officer for just cause on the basis of breach of fiduciary duty. The case is *Dunsmuir v. Royal Group, Inc.*, 2018 ONCA 773. Of note is that the plaintiff Douglas Dunsmuir settled his claims with the employer before trial.

Briefly, Royal Group Inc. is a public company where the plaintiff (Ronald J. Goegan (hereinafter referred to as ""RJG") acted as its Senior Vice-President and Chief Financial Officer until his termination in 2004 for just cause.

The trial judge (decision reported at *Dunsmuir v Royal Group, Inc.*, 2017 ONSC 4391) accepted the following three (3) incidents amounted to just cause and justified the termination:

1. **The Vaughan West Land Flip** - The controlling shareholder of the employer, together with senior officers of the employer, bought property through a third party then immediately after closing, sold it to the employer for $6.5 million more than they had paid, thereby profiting personally. At the time, RJG was the senior officer of the company responsible for real estate acquisitions and was approached by the

vendor, on behalf of Royal, to see if they were interested in purchasing the property. He consulted with the controlling shareholder of Royal and told the vendor that Royal wasn't interested in the property.

Shortly after this, RJG was asked by the controlling shareholder to assist him in effecting the acquisition of the property by the controlling shareholder group. He then assisted them with the acquisition and with their immediate resale to Royal of the same property at a $6.5 million markup.

Although RJG did not profit personally from this arrangement, he also did not disclose this to anyone within the company that had oversight authority.

2. **The Premdor Warrant** - There was a sale of a subsidiary of Royal to another public company called Premdor. The purchase price included a share warrant that entitled Royal to purchase an additional 200,000 shares of Premdor at a strike price of $13.25. After the share price rose, the warrants were redeemed for the benefit of Royal's senior management – including RJG – for a total profit of approximately $ 2 million.

   When management's bonuses, which included the profits made by senior management on the exercise of the warrants, were disclosed as part of Royal's regular reporting, there was a public outcry from shareholders. RJG then allowed a different story to be told to the independent directors that covered up the reason for which senior management's bonuses were greater than what the approved bonus plan provided.

3. RJG then allegedly misled the Canada Revenue Agency about the exercise of the warrants in order to reduce senior management's tax liability.

The judge assessed credibility of the various witnesses and held that, where the evidence of RJG conflicted with the independent directors, the judge preferred the evidence of those independent directors.

The trial judge held that:

- A fiduciary employee owes the employer duties of loyalty, honesty, candour, and scrupulous avoidance of actual and potential conflicts of interest.
- A fiduciary is prohibited from usurping corporate opportunities presented to the employer. This is generally a strict area of the law.
- Misappropriation of corporate assets is a breach of duty of a most serious nature. Serious breaches of statutory or fiduciary duties generally sever the employment relationship and meet the common law definition of cause for dismissal. *Unique Broadband Systems, Inc. (Re)*, 2014 ONCA 538 (CanLII), at para. 125.
- A person who owes fiduciary duties to a corporation is not entitled to just do as he or she is told by the dominant shareholder. The duties are owed to the corporation and not the majority or any shareholder. The fiduciary's duty to the corporation includes the duty to tell the dominant shareholder that what he proposes is wrongful and to disclose misconduct committed even by the undoubted leader. It may well be that the corporate life of person who crosses the dominant shareholder will be "neither happy nor long" as Farley J. famously wrote. But doing what is right is the standard required of corporate fiduciaries in *Ontario. 820099 Ontario Inc. v. Harold E. Ballard Ltd.* 1991 CarswellOnt 142 (ON SC).
- The court enforces fiduciary duties strictly to ensure that there is no incentive for fiduciaries to violate their high ethical and legal duties.
- Even if an employee is not a fiduciary, like all employees, there is a duty of fidelity owed to the employer. Breaches of this duty also generally justify summary dismissal. Misappropriation of assets and taking a secret profit are the types of infidelity that sever the employment relationship for non-fiduciary and fiduciary employees alike. So too does participating in a dishonest scheme even under the direction of a superior.
- A fiduciary who knows about wrongdoing committed against the beneficiary has a duty to tell the beneficiary. (Canson Enterprises Ltd. v. Boughton & Co., 1991 CanLII 52 (SCC))

The Court then considered the issue of whether the Board of Directors condoned the conduct. The judge cites the following:

> In Paglioroli v Rite-Pak Produce Co., 2010 ONSC 3729 (CanLII) Grace J. applied the law as set out

> by the Court of Appeal in *McIntyre v Hockin* (1889), 16 OAR 498 (Ont CA) that an employer who retains an employee for a considerable period of time after discovering that the employee committed misconduct will be found to have condoned the wrongdoing and will be prohibited from dismissing the employee thereafter absent further, new misconduct. The Court of Appeal was clear however that a finding of condonation requires that the employer be fully informed about the wrongdoing alleged so that its decision to act or to refrain from acting can be said to have been an informed decision.

In this case, according to the trial judge, "all of the senior managers upon whom [RJG] relies were themselves participants in the unlawful conduct." The argument here was that the Board of Directors would have done what the controlling shareholder told them to do. In other words, had the issues been brought to the Board's attention they would have fallen in line and done nothing. The corporate culture was such.

In this case, the wrongdoing was not disclosed to the Board, hence, they were not afforded any opportunity to do anything about it. The duty to disclose is an absolute one. Where the Board (or independent directors of the Board) are not aware of the issue, it is difficult to predict what they would or might have done.

The trial judge dismissed RJG's claim for wrongful dismissal and he appealed.

The Court of Appeal

Interestingly, from an employment law perspective, the trial judge, in dismissing the case, never mentioned *McKinley v. BC Tel*, 2001 SCC 38 (CanLII) and the contextual analysis of just cause. The Court must determine whether the employee's misconduct gave rise to a breakdown in the employment relationship (i.e. is there just cause) and, if there was, whether termination was the appropriate disciplinary response? Underlying the contextual approach is the principle of proportionality - we must consider the suitability of alternative disciplinary measures to dismissal in the context of the entire circumstances.

RJG appealed arguing:

1. That the trial judge did not conduct a contextual analysis (per *McKinley*) of the entire employment situation (including an alleged corporate culture dominated by an autocratic controlling shareholder).
2. The judge made a mistake in applying *Advanced Realty Funding Corp. v. Bannink*, (1979), 1979 CanLII 1681 (ON CA), 27 O.R. (2d) 193 (C.A.), to conclude that what the board of directors would have done had he disclosed the events in question was irrelevant. It was argued that *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377 overruled *Advanced Realty* in the result that it was incumbent on the employer to show that the board would have taken action had it known of the misconduct.

The Court of Appeal dismissed the appeal as follows:

> The trial judge was clearly alive to the corporate culture and made factual findings that were open to him on the evidence. In any event, no corporate culture existing in a public company can reasonably support the course of conduct of this fiduciary as evidenced by these three incidents of misconduct. They struck at the heart of the employment relationship.
>
> Nor do we agree that *Hodgkinson* overruled *Advanced Realty*. *Hodgkinson* involved an assessment of damages, not a fiduciary's duty to disclose. With respect to condonation, the trial judge concluded, and we agree, that the appellant cannot rely on other senior managers who were themselves participants of the unlawful conduct to establish condonation.

In dismissing the appeal, the Court ordered that the appellant (RJG) pay the agreed to costs of the respondent (Royal) in the amount of $65,000 inclusive of disbursements and HST.

Moral of the Story

Fiduciary duties impose significant obligations upon those to whom they attach. They impose obligations to "swim against the tide" in the interest of the corporation, irrespective of the personal costs or implications associated with asserting those duties.

Even so-called "mere employees" owe a duty of fidelity and loyalty to their employer that may require that they not act as mere bystanders.

It's not surprising that the trial judgment was appealed. The words used by the trial judge to reach the conclusion are more unequivocal than we might expect in an employment law case (there is no automatic penalty of

termination for any infraction, irrespective of the gravity, and the contextual analysis must be undertaken) and the failure to even mention the *McKinley* case or expressly engage in the analysis is not helpful. That said, the Court of Appeal dismissed the appeal and found that the "trial judge did not err in law and his findings of fact were grounded in the evidence."

What is a Resignation and When is it Effective?

The Ontario Superior Court of Justice considered this in *English v Manulife Financial Corporation* 2018 ONSC 5135. The plaintiff sued alleging that she had been wrongfully dismissed. The employer defended on the basis that she had resigned by way of having provided a notice of retirement. The plaintiff argued that this notice had been rescinded and the question before the court was whether a notice of retirement (resignation) can be rescinded.

Manulife announced that it would be converting its customer information system to a new computer system beginning in January 2016.

On September 22, 2016, the plaintiff met with her immediate supervisor and advised him that she would be retiring effective December 31, 2016. The plaintiff attended the meeting with her supervisor, with a written notice of retirement that she had typed up herself and which she gave to her supervisor. The notice provided in its entirety:

> Dear Clive,
>
> This will serve formal notice that I will be retiring effective December 31, 2016.
>
> I have enjoyed working at Standard Life/Manulife for the past 10 years very much, and want to thank you very much for all your support during my tenure.
>
> I especially want to express my gratitude for all your support and understanding during my very difficult times in 2012 and again in 2015.
>
> I will entertain a part-time position, two or three days per week, should be possible (sic), but I understand if it is not.
>
> Again thank you so much for everything.
>
> Sincerely,
>
> Elisabeth English

It was agreed that this notice was freely given without any duress. In fact, at the meeting the supervisor asked the plaintiff if she "was sure" she wanted to retire. At his examination discovery, the supervisor agreed that "he did tell the Plaintiff that she could rescind or reconsider her resignation". The plaintiff understood that she could rescind the resignation at any time before the effective date, in this case December 31, 2016.

The employer accepted the notice of resignation.

Time marched on, as they say, and Manulife indicated that it was not pursuing the conversion.

The plaintiff argued that her decision to resign was predicated on the announced conversion of the computer system. She informed her supervisor "a number of weeks, or possibly a month later" that she had reconsidered her decision to resign, in view of what she'd heard about the conversion not proceeding.

The question is can an employee rescind a notice of retirement or notice of resignation after it has been accepted by the employer?

There are a number of cases that establish that:

> Unless the employer acted to its detriment on the expressing of intention to resign, the plaintiff remained free to change his mind… (*Tolman v. Gearmatic Co.*, 1986 CanLII 1212 (BC CA))

More recently, the Ontario Court of Appeal in *Kieran v. Ingram Micro Inc.*, 2004 CanLII 4852 (ON CA) stated that "an employee may resile from a resignation, provided the employer has not relied upon it to its detriment". Of note, this statement arose in a case where both counsel agreed to this principle and the comments were made in *obiter* (i.e. said in passing) as the court had concluded that Kieran's resignation was not clear and unequivocal).

The Court in *English* held that:

> The law in my view has evolved, and is now more a reflection of basic contract law. If the evidence establishes that there has been an offer in the form of a notice of resignation and an acceptance of that offer by the employer, basic rules of contract dictate that there is a binding contract between the parties which cannot be resiled from.

In *Kerr v. Valley Volkswagon*, 2015 NSCA 7 (CanLII) the plaintiff argued that, even if he had clearly and unequivocally resigned, that he was entitled to withdraw his resignation unless the employer had acted to its

detriment. The Court rejected that argument stating that it:

> … runs contrary to the basic principles of contract law, which hold that all that is necessary to bring a contract to a close is the communicated acceptance of a valid offer (S.M. Waddams, *The Law of Contracts*, 6th ed. (Aurora: Canada Law Book Ltd., 2010), p. 20). Whether or not a party relied upon an offer to their detriment is only relevant in cases where the offer has not been accepted. Once it has been accepted, the contractual bargain (to terminate the employment relationship) has been struck.

In other words, if the resignation has been accepted, an employer's detrimental reliance upon the resignation is irrelevant. In that regard, see *Johal v. Simmons da Silva LLP*, 2016 ONSC 7835 (CanLII).

In *English,* the employee had tendered a clear and unequivocal notice of resignation which was accepted by the employer. It was, therefore, no longer open to the employee to resile from or withdraw her notice of resignation absent some agreement on the part of the employer.

The Moral of the Story

The point here is that when an unequivocal, clear, freely given resignation without duress is tendered, the employer should accept it.

Best practice suggests that both the resignation and acceptance should be in writing, but this is not required (it is possible to argue that a verbal agreement exists, but then the issue of proof and the nature of the agreement comes into play).

If the employee resigns, verbally, ask that they put it in writing and accept it in writing. If the employee refuses, query why that is? Is it because the employee isn't sure, in which case the resignation may not be unequivocal. Is it for some other reason, for example the verbal resignation was given in the heat of the moment, in which case it might not be voluntary or freely given.

Examine the circumstances, and consider whether providing the employee with a "cooling off period" is called for. For example, was the resignation given in a "a spontaneous outburst of anger", for example, during an heated discussion with a supervisor, or disciplinary meeting? Where the employer acts hastily in accepting an emotionally tendered resignation, the resignation might not be effective. In fact, the acceptance might not be reasonable or fair minded and the resignation will be set aside. This has been considered in many cases including *Robinson v. Team Cooperheat-MQS Canada Inc.*, 2008 ABQB 409; *Bru v. AGM Enterprises Inc.*, 2008 BCSC 1680; *Avalon Ford Sales (1996) Limited v Evans*, 2017 NLCA 9).

Having said that, as noted in *English*, where the resignation is clearly, freely and unequivocally given and is accepted by the employer, the employee will not be able to resile/withdraw the resignation absent the agreement of the employer. The employer, according to these cases, need not show detrimental reliance.

An employee is, however, entitled to withdraw a clear, unequivocal and freely given resignation before it has been accepted.

Probationary Clauses and Inducement in Employment Law

The Ontario Divisional Court considered the interaction between a probationary clause and an inducement argument. The case is *Van Wyngaarden v. Thumper Massager Inc.*, 2018 ONSC 6622 (CanLII).

The employee was a six-year employee of Zebra Technologies. He was hired by Thumper Massager Inc. as a full-time in-house designer for a new product line that would likely take upwards of three years to launch. He and Thumper engaged in email negotiations which culminated in an email dated February 17, 2015 attaching a one (1) page offer of employment. The offer contained a probationary clause (something that had not previously been discussed). The clause provided as follows:

> There is a 6-month probation period associated with this role. During this time we will review your performance and development. This work offer will automatically become permanent upon successful completion of your probation period. Your professional performance and compensation package will be reviewed yearly, every July.

Van Wyngaarden signed back and accepted the offer. He resigned his employment with Zebra and began his employment with Thumper on April 7, 2015.

His employment was terminated 2 days shy of the end of the 6 month probationary period (i.e. on October 5, 2015).

Van Wyngaarden argued that he had been induced to leave secure employment with Zebra through the inducements of Thumper. As a result, Thumper ought to assume his service with Zebra for purposes of determining his damages. In that regard he sought damages of $60,000.

The employer denied having induced the plaintiff to leave secure employment. It further relied upon the probationary clause in the employment agreement.

The employee brought a motion for summary judgment. The motion judge held that the employee was bound by the probation clause in the offer of employment and that, following the decision in *Nagribianko v. Select Wine Merchants Ltd.*, 2016 ONSC 490 (CanLII), aff'd 2017 ONCA 540 (CanLII), a probationary period is inconsistent with any inducement or promise of long-term employment.

The Divisional Court summarized the next stage of the motion judge's decision (i.e. whether the employee was entitled to reasonable notice when being terminated during the probationary period)"

> The motion judge next considered whether the Appellant was entitled to reasonable notice of termination of his probationary employment. He followed *Walford v. Stone & Webster Canada LP*, 2006 CanLII 37409 (ON SCDC) in concluding that, unless the dismissal was in bad faith, an employer is entitled to dismiss an employee during the probationary period without cause and without notice.

There was no "bad faith" on the part of the employer. The motion judge found that the employee had been given "a fair opportunity to demonstrate his suitability for employment and had considered matters relevant to that suitability when deciding to terminate the Appellant's employment."

The motion judge dismissed the claim.

At the Divisional Court

The employee appealed to the Divisional Court arguing that he was not bound by the probationary clause and that he had been induced to leave his employment of 6 years with Zebra Technologies.

The Divisional Court held that the employee was subject to a probationary period and that he was bound by the 6 month probationary clause contained in the contract. The Court seems to have agreed with the general proposition as found by the motion judge that, "a person who signs a contract is taken to have read the contract that he or she signs and to have agreed to its terms."

The Divisional Court also agreed with the motion judge's conclusion that a contractual probationary period is inconsistent with a finding of inducement.

On that point, whenever you look at an inducement argument, it is important to understand what that means. The way I look at it, is that there is a 2 sides to a successful finding of inducement:

- the employee must be in a secure employment relationship; and
- the employee must be induced to leave that employment through promises of secure and long term employment.

The employee must not be a willing seducee (to quote my late friend and former partner Mr. Justice Randy Echlin in *McCulloch v. Iplatform Inc.*, 2004 CanLII 48175 (ON SC) a leading inducement case) or in an insecure position. Also, an inducement must go beyond the ordinary level of persuasion. As Echlin J. said in *Laszczewski v. Aluminart Products Limited*, 2007 CanLII 56493 there will always be some element of "courtship" in any employment hiring process, but that doesn't automatically rise to the level of inducement.

The Divisional Court also agreed that the employer had given the employee a fair opportunity during the 6 month probationary period to demonstrate his suitability. As such, there was no bad faith.

Moral of the Story

Employment contracts can and should be used in every hire (period). Including certain clauses in the contract can serve to undermine an inducement argument, as was the case in *Van Wyngaarden*. While you should never over promise during the hiring process, the contract can assist if the employer is challenged. The contract is not a panacea but it can be used to minimize problems and misunderstandings.

Legalization of Recreational Cannabis

October 17, 2018 has come and gone and the smoke has cleared… sort of. Employers continue to grapple with the implications of the legalization of recreational cannabis on

the workplace though, by now, most have reviewed and updated their policies in light of the Cannabis Act.

I thought I'd draw your attention to two (2) recently published documents from the Ontario Human Rights Commission:

- *Policy Statement - Cannabis and the Human Rights Code*; and
- *Questions and Answers - Cannabis and the Human Rights Code*.

Policies published by the Commission lack the force of law, but they are certainly instructive. As you will see, there are significant differences between medical cannabis and addiction, and recreational cannabis consumption. For example, the duty to accommodate applies to those prescribed medical cannabis as a result of an underlying medical condition but it does not extend to recreational cannabis use.

Furthermore, the Policy Statements discuss the employers duty to inquire which may be triggered depending on the circumstances.

These Policy Statements are certainly worth reading. Again, while lacking the force of law, they do provide some helpful commentary.

There's also a valuable publication from The Conference Board of Canada called *Blazing the Trail: What the Legalization of Cannabis Means for Canadian Employers*.

Frustration of the Employment Contract - What is Needed?

On occasion, the contract of employment may become "frustrated" giving the employer the ability to terminate the contract (and the employee) on that basis. The "frustrating" event is often an illness or disability.

The issue was recently considered in *Roskaft v. RONA Inc.*, 2018 ONSC 2934. Here the plaintiff commenced employment with a predecessor company of RONA Inc. ("RONA") on September 16, 2002 and started a leave of absence for a medical reasons on September 28, 2012. The plaintiff was approved for and received short term disability and long term disability ("LTD") benefits.

On October 20, 2014, the plaintiff completed a Return to Work Form which stated that he was unable to work and that his return to work date was "N/A". According to the court:

> In correspondence dated December 5, 2014, from SunLife, RONA was advised that the Plaintiff could not return to work and it is alleged by RONA that in that correspondence, Sun Life concluded that he was "permanently" totally disabled in relation to both his own occupation and any occupation.

In September, 2015, the employer reviewed the plaintiff's file and, on the basis of the correspondence from SunLife from December 2014, and in the absence of further documentation, determined that he "was "permanently" totally disabled from employment in any occupation and that it was unlikely that Mr. Roskaft would be able to return to work within a reasonable time."

The plaintiff was informed of his termination on September 15, 2015 and that he would continue to be paid LTD benefits so long as he qualified and would be paid his entitlements under the *Employment Standards Act, 2000*.

The plaintiff sued claiming damages for wrongful dismissal. He argued that his contract was not frustrated.

According to the Court:

> The parties agree that if there was no reasonable likelihood, at the time of termination of employment, that Mr. Roskaft would be able to return to work within a reasonable period of time, his employment contract had become frustrated. The doctrine of frustration applies because the Plaintiff's permanent disability made his performance of the employment contract impossible and the obligations of the parties are therefore discharged without penalty: *Fraser v. UBS Global Asset Management*, 2011 ONSC 5448 (CanLII); *Nason v. Thunder Bay Orthopaedic Inc.*, 2015 ONSC 8097 (CanLII), at para 180; *Lemesani v. Lowerys Inc.*, 2017 ONSC 1808 (CanLII), at para 137.

The plaintiff argued that "at the time of his termination from employment, it was not known if he would be returning back to work within a reasonable time-frame." Specifically, he said that he was starting to feel better and that RONA did not make any inquiries to ascertain his condition. The plaintiff abandoned his claim at trial under the *Human Rights Code* (presumably for damages under the *Code*) and, as such, here was "no argument made with respect to the employer's obligations to reasonably accommodate the Plaintiff".

RONA also relied on post termination evidence contained in a Sun Life form completed by the plaintiff dated January 4, 2016 in which he stated that his current medical condition had not improved. This was also confirmed by the plaintiff in a form dated February 21, 2017. At the time of the motion, the plaintiff was still receiving LTD benefits.

This was post-termination evidence and the plaintiff argued that the employer was not entitled to rely on this post-termination evidence. The court disagreed stating:

> I find that the post-termination evidence does "shed light on the nature and extent of the employee's disability at the time of an employee's dismissal." This evidence contradicts the Plaintiff's assertion that had RONA or Sun Life asked for further medical evidence at the time of his termination of employment, he would have provided it and he would have been able to return to work.

In that regard, see *Ciszkowski v. Canac Kitchens, a division of Kohler Canada Co.*, 2015 ONSC 73 (CanLII).

Although the court concluded that RONA could not rely on the December 2014 letter from SunLife that the plaintiff was "permanently" disabled. However, the court did find that:

> … there was enough evidence at the time of the termination of employment on the basis of the decision of SunLife that the Plaintiff was sufficiently disabled to qualify for his LTD benefits; as well as the continued representations of the Plaintiff that his medical condition has not improved and he was totally disabled from performing the duties of any occupation, and the Plaintiff's continued receipt of LTD benefits, to reasonably conclude that there "was no reasonable likelihood" that the Plaintiff would be able to return to work within a reasonable period of time.

The defendant's motion for summary judgment was allowed and the claim was dismissed.

The Moral of the Story

This case confirms that the determination of whether or not the contract has been frustrated is to take place at the time of the termination, but that post-termination evidence may be relied on if it sheds "light on the nature and extent of the employee's disability at the time of an employee's dismissal."

That said, the most recent evidence of the employees condition that it had at the time of termination was dated early December 2014. It made no inquiries in the months between that evidence at the termination on September 15, 2015. The Court held that the December 2014 evidence was not sufficient to establish that the contract had been frustrated.

Notwithstanding that, the employer was able to get the post-termination evidence admitted and that evidence, completed in part by the plaintiff, established that his condition had not improved. The court appears to have been moved as well by the fact that the plaintiff continued to receive LTD benefits at the time of the motion.

The employer got lucky in this case. A lot of things fell into place and, in the end, it won.

As a best practice, employers are encouraged to manage disability claims by periodically requesting updates from the absent employee including functional abilities forms. It is appropriate to conduct this assessment independently and not rely exclusively on information supplied by the insurer which, in many cases, is limited and geared towards determining if the definition of "total disability" under the applicable insurance policy has been met. That definition is not the same as "frustration" of the employment contract.

Furthermore, and as highlighted by the court in *Roskaft,* the employee abandoned his claims under the *Human Rights Code* and, therefore, the issue of the duty to accommodate was not argued or considered.

The $15 Minimum Wage - Brilliant Business Strategy or Job Killer?

The juxtaposition of the minimum wage debate came into stark focus over the past few weeks.

On the one hand, Jeff Bezos announced that Amazon would begin paying all US employees, including part-time, seasonal, and temporary workers, at least $15 an hour. (see: Amazon to Raise Minimum Wage to $15 for All U.S. Workers). There's an article in *The Atlantic* Amazon's $15 Minimum Wage Is a Brilliant Business Strategy in which Amazon's motivations are discussed (including public relations) as are the political, social and competitive pressures that are present in this move.

Closer to home, in a recent *Financial Post* Op-Ed entitled Our PC government will keep its promise to ease the minimum-wage burden Minister of Labour, Laurie Scott wrote:

> According to Statistics Canada, after the minimum wage surged up to $14 in January 2018, Ontario immediately lost 59,300 part-time jobs. And recent StatCan data show losses in jobs that typically pay minimum wage.
>
> The worst news came from the August employment data released on Friday. Ontario lost 80,100 jobs — our province's largest monthly job loss in a decade. Every single one of those lost jobs was a part-time job.

The suggestion is that employers are not able to cope with the minimum wage increase and that this is having negative and adverse effect on part-time employment. The article pitches for a freeze on the minimum wage increase and targeted tax relief to minimum wage earners.

Minister Scott recently confirmed that "the Ford government will not go ahead with an increase in the minimum wage to $15 an hour scheduled for Jan. 1. Instead, the minimum wage will stay at $14/hour, and Scott did not give a timetable for any future increases." (see: Business groups lobby Ford government to repeal workplace reforms).

The minimum wage increased from $11.60 to $14 an hour on January 1, 2018 with a further increase to $15 scheduled to occur on January 1, 2019. Business groups have lobbied the government to freeze the minimum wage increase saying that a 20% increase in one year was sufficient and would require employers time to catch up.

Again, as recently confirmed, the second increase won't happen and the Conservatives plan on scrapping a significant part of the Bill 148, *Fair Workplaces, Better Jobs Act* introduced by the Wynne government. *Bill 47, Making Ontario Open for Business Act, 2018* is now winding its way through the legislature.

At the same time, advocacy and labour groups in Ontario are lobbying hard for the promised increase in the minimum wage to $15 arguing that workers cannot survive below $15 hour.

These are really difficult and emotional discussions. Perhaps with the roll back of the Bill 148 amendments and the costs that have to be borne by employers, an increase in the minimum wage to $15 may be more achievable.

Of note is that the minimum wage was not one of the items before the Special Advisors in the *Changing Workplaces Review* process and that the Wynne government took it upon themselves to include the minimum wage increases in Bill 148. These have been described as "crassly political".

These are interesting times to be working in HR in Ontario.

Alberta Court of Queen's Bench Affirms Damages Principles in Employment Law

Damages principles in wrongful dismissal cases are now well settled. It is always important to keep this principle front of mind when fashioning your severance offer and in considering how and what to include in the severance offer and in any negotiated settlement.

Most recently, an Alberta court in *Jones v Temple Real Estate Investment Trust*, 2018 ABQB 606 put the principle this way:

> The law is that the wrongfully dismissed person should be put into the position they would have been in but for the dismissal, that is, that person is entitled to compensation for all losses as a result of the 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] 2 S.C.R. 315 (S.C.C.) cited in *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 (Ont. C.A.), which was cited by Justice Gill in *Lalonde v. Sena Solid Waste Holdings Inc.*, 2017 ABQB 374 (Alta. Q.B.) at para 54.

So the "default" is total compensation, unless, for example, there is some agreed to contractual term that suggests otherwise. Damages are intended to put the employee in the "same financial position he or she would have been in had such notice been given". This means that the employee is entitled to receive by way of damages (money) what he or she lost through the period of common law reasonable notice less mitigation earnings. The purpose of reasonable notice is to provide the employee with a fair opportunity to obtain similar or comparable re-employment (*Chapple v Big Bay Landing Ltd. (Inc. No. 0764163)*, 2018 BCSC 1666 (CanLII)).

In *Jones* the Court awarded a period of reasonable notice of 24 months. It then looked at reported T4 employment income ($156,219.60 in 2011), which included a bonus and something called a northern allowance, and held that this would be used as the basis for calculating his losses and the appropriate damages.

As noted, a terminated employee has a duty to mitigate any damages by making reasonable efforts to secure alternate employment. In this case, Mr. Jones earned $139,386.42 in mitigation income during the 24 month period of reasonable notice and this was deducted from the damages awarded.

Mr. Jones was also awarded so called "special damages" in respect of reasonable out-of-pocket expenses incurred during his attempt to mitigate his damages. This related to storage costs and airfare.

There was also a third-party claim brought by the defendant, Temple Real Estate Investment Trust against a company named HL Reit (435 Gregoire Drive) Inc and Holloway Lodging Limited Partnership.

Temple purchased the business from Holloway and, as part of that process, certain information was required to be shared with Temple as the purchaser including Jones' length of service. It was alleged that the vendor misrepresented Jones' length of service and salary to the purchaser. The Court agreed, stating:

> I also find that Holloway is liable to Temple for contribution and indemnity with respect to the damages payable to Mr. Jones for wrongful dismissal. Holloway misrepresented Mr. Jones' length of employment and salary and is liable for both breach of the APS and for the tort of negligent misrepresentation. None of the exclusions or limitations of liability relied on by Holloway apply to assist, exclude or limit Holloway's liability, either in contract or tort.

This is another case that highlights the damages principles applicable in wrongful dismissal cases. It also deals with liability concepts applicable in corporate transactions and under asset purchase agreements and the need to include specific representations and warranties in the purchase documents.

These cases are raised over and over again by employees and their counsel in the demand letters and pleadings. If an employer is going to take the view that these well established principled are distinguishable in the particular case, it should be ready to offer a reasonable and demonstrable explanation.

Evidence Needed to Be Awarded Mental Distress and Aggravated Damages

Employees in a wrongful dismissal case will sometimes claim damages for mental distress (sometimes called aggravated or moral damages). There has been some confusion about what evidence the plaintiff in one of these cases needs to proffer to sustain a claim for such damages.

Specifically, is medical evidence required to support such a claim?

What are aggravated damages?

Aggravated damages in wrongful dismissal cases are compensatory in nature. The Supreme Court of Canada in *Honda Canada v. Keays*, 2008 SCC 39 (CanLII), held that aggravated damages are recoverable for breach of contract if the damages were contemplated by the parties at the time they formed the contract.

Since an employment contract is subject to termination on notice, "without regard to the ordinary psychological impact of that decision", damages for mental distress caused by the dismissal will not be in the contemplation of the parties and are not recoverable.

The Court in *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 (CanLII put the matter as follows:

> Damages resulting from the manner of dismissal (as opposed to the fact of dismissal) are available, however, if damages arise out of the conduct of the employer in the course of termination. To be compensable, such conduct must be unfair or in bad faith, in that it is "untruthful, misleading or unduly insensitive": *Honda* at para 57; *Wallace v United Grain Growers Ltd.* 1997 CanLII 332 (SCC), [1997] 3 SCR 701, 152 DLR (4th) 1 at para 98. There is an "expectation by both parties to the contract that employers will act in good faith in the manner of dismissal" and failure to do so "can lead to foreseeable, compensable damages":

An excellent distillation of some of the obvious and less obvious circumstances that could ground a claim for aggravated damages were discussed in *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251 (CanLII):

> [A] boss who tells all the fellow employees, or the employee's spouse and children, that the dismissed employee is stupid or incompetent. It is hard to think of circumstances where there would be any need to do that. Another example might be dismissing the employee within a day or two of a daughter's wedding, or of the death of a parent. Another example would be insincerely alleging to others embarrassing or demeaning (but unfounded) reasons for the dismissal (whether or not they would be just cause if true), when the employer does not honestly believe those grounds exist.

Similarly, the Supreme Court of Canada in *Keays* commented as follows:

> [I]f the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right ...

The reason that such conduct could (not will) result in an award of aggravated damages is because the plaintiff, following *Keays*, is required to prove his or her actual damages resulting from the conduct complained of. Generally, such proof will come in the form of medical documentation establishing that the terminated employee suffered anguish or distress because of the manner of her dismissal (as opposed to the dismissal itself).

The employee, in other words, bears the burden of proving that the employer's conduct in the manner in which he or she was dismissed was in bad faith and that this conduct resulted in actual harm as demonstrated through actual evidence of such harm.

The Latest Word

The British Columbia Court of Appeal recently considered this issue in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 (CanLII).

The trial judge found that the plaintiff had been wrongfully dismissed and awarded eight (8) weeks severance pay pursuant to her contract of employment. In addition, the trial judge awarded the plaintiff $15,000 as aggravated damages.

The employer appealed on the issue of aggravated damages arguing that the plaintiff had failed to present medical evidence in support of her claim and, as such, was not entitled to an award on account of aggravated damages.

The Court of Appeal agreed.

In *Lau v. Royal Bank of Canada*, 2017 BCCA 253 (CanLII), the BC Court of Appeal re-iterated that there must be an evidentiary foundation for an award for mental distress:

> On the other hand, damages for mental distress beyond the ordinary upset that accompanied termination of employment cannot be evidenced simply from the demeanor of the plaintiff in the witness stand. There must be an evidentiary foundation for such an award (see *Mustapha* at para. 9). That evidentiary foundation may be testimony demonstrating a "serious and prolonged disruption that transcended ordinary emotional upset or distress" (*Saadati* at para. 40).

The Court in *Lau* references the case of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (CanLII) where the Supreme Court of Canada commented:

> This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 1999 CanLII 2863 (ON CA), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute

> personal injury, and hence do not amount to damage. [Emphasis Added]

The trial judge in *Lau* awarded aggravated damages to the plaintiff without medical evidence but based on her "impression from the slow, quiet, and almost monotone manner in which he testified, that he is depressed."

In overturning the award of aggravated damages in *Lau* the Court of Appeal commented that "although not required, there was no expert evidence, medical or otherwise" and the only evidence available to the trial judge in support of the award was her own observations.

In overturning the trial judgment and the award of aggravated damages, the Court of Appeal in *Cottrill* commented:

> In this case, as in *Lau*, there was no evidence from the plaintiff or from family members, friends or third parties concerning the impact of the termination on Ms. Cottrill and her mental state. Although not required, there was no expert evidence, medical or otherwise.

Given the lack of an evidentiary basis for the finding of mental distress caused by the manner of dismissal, it was an error on the part of the trial judge to award aggravated damages.

Conclusion

This is, I think, another case where "palm tree justice" may have driven the result at trial. The employee had signed an employment agreement that limited her entitlement on termination to what was provided in the *Employment Standards Act*. The trial judge found the clause to be enforceable and awarded the plaintiff 8 weeks notice. This for an 11 year employee. Did the trial judge award aggravated damages as a means of getting the employee something and stretch the evidentiary requirement to get there? We'll never know, of course, but, in the end, and after considerable expense, that aspect of the decision was reversed.

Articles of Interest and Updates

Police Record Checks Reform Act, 2015

As I previously advised, the *Police Record Checks Reform Act, 2015* came into force on November 1, 2018. I wrote about this in the *September 2018 Legal Alert*.

Bill 47, Next Steps and Timing

Bill 47, *Making Ontario Open for Business Act* is making its way through the legislative process. The government is committed to moving this forward expeditiously.

It has proposed that a brief public hearing into Bill 47 take place on November 15, 2018 before the Standing Committee on Finance and Economic Affairs (requests to appear before the Committee by noon on November 13, 2018). A report by the Committee to the House to occur on November 20, 2018 with time limited debate occurring at Third Reading.

This schedule (which was proposed on November 1, 2018) has not been approved, it is expected that it will be on November 12, 2018 when debate resumes.

Imposter Phenomenon (Syndrome)

The amazing Centre for Industrial Relations & Human Resources at the University of Toronto where I have taught for over 20 years have provided some interesting information on the impostor phenomenon (sometimes called impostor syndrome). What is impostor phenomenon:

> Many people experience an illogical sense of being a phoney at work at some point in their careers. It's called the impostor phenomenon (also known, erroneously, as a syndrome). These impostor feelings typically manifest as a fear of failure, a fear of success, a sometimes obsessive need for perfection, and an inability to accept praise and achievement. The phenomenon is also characterized by a genuine belief that at some point you, as the "impostor," are going to be found out for being a fake in your role.

Here the link to the Centre's Toxic Workplaces Encourage Impostor Syndrome materials on this interesting subject.

Cell Phone Use and Driving

Bill 174, *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017* amends the *Highway Traffic Act* to provide that effective on January 1, 2019 penalties are increased for convictions of the offence of driving while a display screen is visible to the driver, or driving while holding a hand-held wireless communication device or similar device. The fine is a minimum of $500 to a maximum of $3,000. The driver's licence will also be suspended for a period between three and 30 days.

#Metoo One Year Later

Another interesting compilation of material from the Centre, this time reviewing *How Has Work Changed a Year After #MeToo?*

I've also recently re-read the *Harvard Business Review 8 Part Series - Managing #MeToo* that includes the following articles:

1. Now What?
2. Breaking the Silence
3. How Do Your Workers Feel About Harassment? Ask Them
4. Getting Men to Speak Up
5. Who's Harassed, and How?
6. Adapting to the New Risk Landscape
7. Bad Behaviour is Preventable
8. Work After #MeToo, Your Questions Answered

You Can't Contract Out the Duty to Accommodate

My former partner, Vice-Chair at the OLRB and arbitrator Graham Clarke reminds us of the fact that employers cannot contract out their obligation to accommodate under the *Human Rights Code* to anyone (including the insurer). Many employers abdicate that responsibility to a third party (for example, the insurer, the Workplace Safety and Insurance Board or medical professionals). That is a mistake.

Each of those stakeholders has their own interests, but the employer is responsible for managing and driving the accommodation and return to work process and, of course, the employee is required to cooperate in that process. In any event, Arbitrator Clarke put it this way in *International Union of Operating Engineers, Local 772 v University of Ottawa*, 2018 CanLII 105364 (ON LA):

> The University did not persuade the arbitrator that Manulife was solely responsible for determining whether the employee could be safely returned to work. *The University remained responsible to fulfill its duty to accommodate. That duty cannot be contracted out to Manulife*. [Emphasis added]

Although I've been telling clients this forever, it's nice to be able to point to a succinct statement from an arbitrator that backs that up.

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