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THE MUNICIPAL EXPERTS

HR Law Update

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Cunningham Swan
LAWYERS

Outline

1. Wrongful Dismissal
2. Labour Arbitration
3. Human Rights
4. Occupational Health & Safety Act (“OHSA”)
5. WSIB
6. New ESA
7. Privacy

Wrongful Dismissal

Enforceability of termination provisions

- *Bergeron v Movati Athletic Group* (2018 – ONSC):
  - *Provision for termination with notice or pay in lieu of notice, and severance, if applicable, pursuant to the ESA and subject to the continuance of group benefits coverage, if applicable, for minimum period required by the ESA*
  - **Termination clause invalid – insufficient warning that employer intended to provide only minimum amount of notice prescribed by the ESA**
  - Employee terminated without notice was entitled to reasonable notice
  - In order for Movati to successfully avoid common law damages, it should have included the word “only” in termination provision

Wrongful Dismissal

Enforceability of termination provisions

- *Nemeth v. Hatch* (2018 – ONCA):
  - Termination clause provided notice period to be 1 week per year of service with minimum of 4 weeks "*or the notice required by applicable labour legislation*"
  - **Termination clause was valid**
  - No mention of entitlement to severance pay
  - No indication that employer intended to contract out of ESA entitlements
  - Termination clause did not provide less than the minimum severance obligations under the ESA

However – to be enforceable, termination clause should clearly express the parties' intentions clearly

Wrongful Dismissal

"Working Notice" found inappropriate for employee on medical leave

- *McLeod v 1274458 Ontario Inc.* (2017 – ONSC):
  - 43 year old employee terminated from position as Mover while on unpaid disability leave- given 6 months "working notice"
  - Employee unable to return to work until 4 days prior to shut down of company
  - **Working notice did not count towards employee's severance entitlements**
  - Until employee was able to return to work he could not undertake serious job search
  - awarded damages for 9 months less pay received for 2 days worked and ESA entitlements paid by employer

Wrongful Dismissal

Employer not liable for defamation for a negative reference where the reference is true

- *Papp v. Stokes* (2018– Div. Ct.)
  - Employee appealed finding that employer was not liable for negative reference provided by president because it was substantially true
  - Appellate court upheld decision

  However:
  - Employers giving references must take steps to verify information if not firsthand knowledge and ensure they have a clear and objective justification, not acting with malice or in bad faith

Wrongful Dismissal

No constructive dismissal where employer takes appropriate steps to change terms of employment

- *Lancia v. Park Dentistry* (2018 – ONSC)
  - Employer implementing new employment contracts
  - Employee was terminated, signed offer to continue employment on terms of new contract
    - given 18 months working notice + $2,000 signing bonus
  - 1.5 years later, employee resigned claiming constructive dismissal
    - reduced vacation, sexual harassment, poisoned work environment
  - **Employer has the right to impose fundamental changes to employment contract as long as it provides the employee with reasonable notice of change**

Wrongful Dismissal

Term "probation" in employment contract has clear legal meaning

- *Nagribianko v. Select Wine Merchants Ltd*. (2017- ONCA)
  - Employee was terminated during 6 month probation period without cause
  - Termination was not valid
  - An employer may terminate an employee without notice while in probationary period ***as long as*** the employer makes good faith determination that employee is unsuitable for permanent employment and provides the employee with a fair and reasonable opportunity to demonstrate their suitability

Wrongful Dismissal

Income from second employment can constitute mitigation -- sometimes

- *Pakozdi v. B & B Heavy Civil Construction Ltd.* (2018– BCCA)
  - Employee was consultant for employer, continued to provide other consulting services on the side for other businesses
  - Employee terminated with 2 weeks notice
  - Trial: 8 months pay– extended 3 months because of medical condition
  - CA: Extension of 3 months inappropriate–still able to work
  - **If employee is able to earn the income as a result of termination it is mitigation income, and will be deducted from wrongful dismissal damages**

Labour Arbitration

Comments made in closed-door union meeting about workplace violence not just cause

- *North Bay Regional Health Centre v. CUPE, Local 139* (2018– ON LA)
  - Nurse made critical comments about workplace violence in hospitals, claiming that nurses often blamed directly for violence and face reprisals for reporting
  - Comments published online
  - Employer dismissed nurse for making false comments
  - Arbitrator: termination excessive; reinstated with 1 wk suspension

Labour Arbitration

Employer's liability for personal harassment

- *George Brown College v. OPSEU* (2017-ON LA)
  - Employee alleged harassment by another employee but had not made previous complaint to the employer
  - Employer's liability for personal harassment did not flow from the acts of the harassing employee but employer's response to a complaint
  - **A thorough and fair investigation by the employer & prompt and reasonable response may insulate employer from liability for underlying conduct**
  - Flaws in investigation and response may result in liability

Labour Arbitration

Imperfect conduct by management vis-à-vis subordinates in unionized workplace is not necessarily harassment

- *ONA v. Humber River Regional Hospital re Grievance of Maria (Rina) Cherubino* (2017 – ON Gr. Arb)
  - RN made complaint alleging harassment by manager
  - Hospital investigated, found complaint unsubstantiated
  - ONA grieved, alleging hospital breached CA, HR Code, OHSA and conducted biased investigation
  - **Management not held to "standard of perfection"**
  - Employer's duty is to conduct investigation in good faith

Labour Arbitration

Employer's reliance on outdated discipline does not automatically render terminations void

- *Ontario (Metrolinx – Go Transit) v Amalgamated Transit Union, Local 1587* (2018 - ONSC)
  - 2 Transit Safety Officers with history of discipline were terminated after misconduct during arrests
  - Sunset clause in CA stated that past discipline was to be removed from file after 18 months
  - Court found that it was a mistake to find that employer's breach of sunset clause automatically voided the terminations
  - Have to consider all relevant circumstances

Labour Arbitration

Employees under collective agreement with STD & LTD benefits not entitled to additional PEL days

- *United Steel Workers, Local 2020 and Bristol Machine Works Ltd*. (2018 – ON LA)
  - New PEL entitlements (Jan 1/18)
  - CA provided for:
    - STD of 65% of wages for 17 wks (max. $700/wk)
    - LTD for 65% of basic monthly earnings (max $2500/mo)
  - Arbitrator found that totality of CA conferred greater benefit than the ESA relating to personal illness

Labour Arbitration

Attendance management policy not discriminatory where no adverse effect on employees

- *Canada (Attorney General) v. Bodnar* (2017 – FCA)
  - If accommodation was required, the employee was removed from the AMP
  - To prove discrimination, must provide "proof of adverse impact by a claimant"
  - FCA found that absences due to disability/ family status can be included in AMP calculations as long as there was no adverse effect on the employees

Labour Arbitration

Arbitrator concludes harassment is "a departure from reasonable conduct"

- *Fanshawe College v. OPSEU* (2016 – ON LA)
  - An employee who complains about behaviour that is within the realm of reasonable conduct will not prove harassment, regardless of the effect that behaviour might have had on the employee.
  - Harassment involves conduct that is "a departure from reasonable conduct"
  - The particular work situation and the must be taken into account to determine the reasonableness of the conduct
  - Number of incidents also relevant

Human Rights

Legalization of recreational marijuana

- *The Cannabis Act, 2017* was passed Nov. 27/17 but is not in force yet - expected to come into force later this year
- The Act will prohibit individuals from consuming recreational cannabis in:
  - A public place;
  - A workplace within the meaning of *OHSA*;
  - A vehicle or boat; or
  - Any other prescribed place.
- **Employers have no obligation to allow recreational consumption of marijuana at work or tolerate impairment**

Human Rights

Dealing with medical marijuana in the workplace

- Employers have an obligation to **appropriately accomodate** the medicinal use of cannibis under the *Human Rights Code*
- Accomodation of disability to the point of *undue hardship*
- Balancing employee's rights under the *Code* with employer's oblgiations under *OHSA* to protect all workers
- Employers have the right to (and should!) ask for supporting medical documentation for marijuana use during work hours

Human Rights

Dealing with medical marijuana in the workplace

- If essential duties of a position are **safety-sensitive,** and employer can demonstrate **concrete safety risks**, an employer can refuse accomodation
- If essential duties are not safety-sensitive, some risk of impairment may be acceptable
- An employer cannot refuse to accomodate based on speculative evidence
- Employers should focus on the issue of **impairment**
- Anti-smoking laws apply to medical marijuana.....

Human Rights

Anti-smoking laws & medical marijuana

- *Smoke-Free Ontario Act, 2017 – in force July 1, 2018*
  - Will prohibit individuals from smoking or holding lighted medical cannabis in several places, including in an "enclosed workplace" or "enclosed public place"
  - The Act creates other obligations on employers, including:
    - Providing notice to employees regarding the restrictions;
    - Posting signs throughout the workplace;
    - Ensuring that employees or persons who do not comply with the above requirements are removed from the space.

Human Rights

Employer's zero tolerance policy re: medical marijuana at worksite was not discrimination

- *Aitchison v. L & L Painting and Decorating* (2018- HRTO)
  - Employee painter was terminated for smoking pot at work contrary to employer's zero tolerance policy
  - Applicant smoked on swing stage 37 floors above ground
  - No evidence that the employee had an addiction requiring or that he had requested accommodation
  - *OHSA* & public safety concerns
  - **No "absolute right"** to use marijuana at work regardless of medicinal purpose

Human Rights

Service providers have duty to respond to harassment between clients

- *City of Toronto v. Josephs* (Div Ct.)
  - Applicant paralegal trainee harassed by customer at Courthouse
  - HRTO found discrimination under the Code on basis of race and colour in provision of services, goods and facilities
  - Overturned by the Divisional Court
  - Guidance: service providers have an obligation to take *prompt, effectual and proportionate action* when they become aware of client-on-client harassment in a services environment.
  - Response need not be perfect but does need to be reasonable in the circumstances and context

Human Rights

Employers entitled to ask for medical information

- *Cristiano v. Grand National Apparel Inc.* (2012 – HRTO)
  - Employee was terminated while on medical leave of absence
  - Employer had requested additional medical information after employee gave medical note saying she was "off work until further notice" and "totally incapacitated"
  - Employee claimed this was harassment and did not provide the information; employer asserted its requests were *bona fide*
  - **The employer's requests were reasonable and it was entitled to this information**
  - The employee's response was inadequate because it provided no detail and no indication of how long the applicant would be off

Human Rights

Employers entitled to ask for medical information

- *Cristiano v. Grand National Apparel Inc.* (2012 – HRTO)
  - An employer is entitled to sufficient medical information that allows the employer to:
    1) assess the legitimacy of the leave request;
    2) determine if any accommodations need to be made to return the employee to work, and
    3) estimate how long the employee is expected to be absent.

Human Rights

Refusal of return to work plan

- *Catholic District School Board of Eastern Ontario v OECTA (2008)*
- Grievor high school teacher was disabled in car accident
- Grievor requested to be transferred to a high school closer to her home, because long commute worsened her disability
- Employer made offer to transfer her to elementary school, arguing that was reasonable accommodation
- **Accommodation offered by the employer was not reasonable, did not account for skill, capability or potential contribution of grievor**
- Grievor's refusal was justified

Human Rights

Refusal of return to work plan may be justified

- *Catholic District School Board of Eastern Ontario v OECTA (2008)*
- Employees may be justified in refusing a return to work plan if:
  - The plan is contrary to the employee's medical restrictions;
  - The plan would expose the employee to an unsafe work environment or the employee is reasonably entitled to believe it would; OR
  - The plan does not properly address the employer's obligation to consider the skills, capabilities and potential contributions of the individual employee.

Human Rights

Union does not have to be involved in all requests for accommodation

- *Telus Communications Inc. v. Telecommunications Workers' Union* (2017- BCCA)
  - Union argued it had a right to receive notice of all medical disability accommodation requests
  - Employer argued that union should only be involved when employee requested or accommodation required alteration to CA
  - The union's collective bargaining authority does not mandate its involvement in all accommodations for medical disabilities
  - **Without a negotiated right for union involvement, an employer may be able to directly deal with unionized employees during the accommodation process**

Human Rights

Union does not have to be involved in all requests for accommodation

- *Telus Communications Inc. v. Telecommunications Workers' Union* (2017- BCCA)
  - Court found that employers ought to involve the union only in certain circumstances:
    - If the union has participated in creating a discriminatory policy or rule;
    - If the union's agreement is necessary to facilitate accommodation (by easing the application of a CA term); or,
    - If an employee requests the union's involvement.

Human Rights

"Uncomfortable" workplace interactions not necessarily harassment or discrimination

- *Vlad v. Grand River Hospital Corporation* (2017- HRTO)
  - RPN made complaints that included co-workers inquiries into her personal life, her Christian faith, her age, and her sex life.
  - While these inquiries and comments made the employee uncomfortable, her complaints had no reasonable prospect of success – dismissed at preliminary stage
  - Not every workplace interaction that references a prohibited ground under the Human Rights Code will rise to the level of harassment or discrimination

Occupational Health and Safety

Employer penalized for failing to conduct harassment investigation

- *Horner v. 897469 Ontario Inc.* (2018 – ONSC)
  - Employee was harassed by another employee in the workplace
  - Instead of investigating, the employer terminated the employee "for cause"
  - Employer's conduct was highhanded, malicious and oppressive; termination was cowardly
  - **$10k wrongful dismissal damages, $20k aggravated/moral damages and further $10k in punitive damages awarded against employer**

Occupational Health and Safety

$75k in aggravated damages awarded against employer for "sham" investigation

- *Lalonde v Sena Solid Waste Holdings Inc.* (2017- ABQB)
  - Employee suspended for allegedly causing unsafe situation
  - Employee unsuccessfully attempted to communicate his side to employer, eventually went on stress leave – 1 month later received letter of termination "for cause"
  - Employer withdrew just cause argument at trial
  - Employee awarded 6 months pay in lieu of notice
  - $75k awarded against employer in aggravated damages for inadequate and unfair investigation

Occupational Health and Safety

Employee awarded $85k in damages for termination after sexual harassment complaint

- *Doyle v. Zochem* (2017- ONCA)
  - Employee was sexually harassed
  - Complaint was ostensibly ignored
  - Employee terminated
  - Misrepresentations to employee about job security
  - Employee pressured to sign release and drop harassment complaint
  - Awarded **$25K** in HR damages; **$60K** in moral damages

Occupational Health and Safety

Scope of an employer's OHSA obligations to protect workers

- O*ntario (Labour) v. Quinton Steel (Wellington) Ltd.* (2017 – ONCA)
  - Welder working on elevated platform fell and was killed
    - No guardrails and no fall arrest equipment
  - Employer was charged under OHSA
  - CA found that OHSA is public welfare legislation, should be interpreted *generously* to protect worker safety and ensure employers comply with duty to take every reasonable precaution, regardless of whether a specific Regulation prescribes it
  - Employers must comply with Regulations but also consider whether further precautions should be taken to protect worker safety to fulfil duty under s. 25(2)(h) of OHSA

Occupational Health and Safety

Mere fact of accident insufficient to convict City on OHSA charges

- *R v. St. John's (City)* (2017- NLCA)
  - Road construction site accident; worker hit by car and killed
  - 7 *OHSA* charges laid against the City
  - Appeal court found that the mere fact that car hit employee was not enough to convict the City; each charge must be analyzed to determine whether there was **sufficient evidence to prove all elements of offence**
  - Health and safety prosecutors cannot simply rely on the fact that an accident took place to obtain a conviction on *OHSA* charges

Occupational Health and Safety

OHSA does not apply to harassment outside the workplace by non-workers

- *Rainy River (Town) v. Olsen* (2017- ONCA)
  - Ongoing abusive correspondence from resident to mayor and municipal staff
  - Court: *neither the* ***Occupational Health and Safety Act*** *nor the Town's policy under it had any application to Mr. Olsen,* ***since the harassment occurred outside the workplace and Mr. Olsen is not a worker or co-worker as defined by the Act.***

Workplace Safety and Insurance

Chronic Mental Stress

New Entitlement - January 1, 2018

- Section 13 of the *WSIA* was significantly amended to remove the exclusion of chronic mental stress claims.
- Transitional provisions make this change applicable to most claims in respect of mental stress that occurred on or after April 29, 2014 (s. 13.1, *WSIA*).
- Policy 15-03-14 - Entitlement criteria:

1. DSM diagnosis of a mental stress injury

2. Substantial work-related stressor arising out of and in the course of employment

Workplace Safety and Insurance

- **Chronic Mental Stress**

  Important provision:

  - (5) A worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

Workplace Safety and Insurance

Chronic mental stress & workplace harassment

- *OPSEU and Ontario (Ministry of Community Safety and Correctional Services) (Rosati), Re* (2018- ON GSB)
  - Counsel for the union argued that the Grievor's WSIA claim was statute barred because most of the events that gave rise to Grievor's stress were actions of the employer (s.13(5), *WSIA*)
  - The Board rejected Union's argument, stating:

"Harassment and discrimination may arise from and in the course of a worker's employment, but they **do not relate** to that employment. They are not the kinds of actions and decisions which a worker might reasonably expect an employer might make in relation to their employment, such as "a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment". On the contrary, they are **prohibited acts**."

New ESA

Equal pay for Equal Work

- Non-union – as of Apr. 1/18.
- Transition for unionized employees until Jan. 1/20.
- No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status.
- Employment Status
  - Part-time, temporary, casual and seasonal employees

New ESA

Equal pay for Equal Work

Conditions

- The employees perform substantially the same kind of work in the same establishment;
- Their performance requires substantially the same skill, effort and responsibility; and
- Their work is performed under similar working conditions.

New ESA

Equal pay for Equal Work

Few exceptions

- Seniority system
- Merit system
- Based on quantity and quality of production
- Any other objective factor other than gender or employment status

New ESA

Equal pay for Equal Work

- Pay to be equal as of time of hire – no delay based on probationary period or other transition period.
- Contravention can include retroactive payment of prior wage differential.
- Firefighters exempted.

New ESA

Equal pay for Equal Work

How to Respond

- Review Employer's current structure of part-time, casual and seasonal allocation of work and positions.
- Implement seniority-based system for pay and pay increases.

New ESA

Equal pay for Equal Work

How to Respond

- Consider other objective pay systems as applicable.
  - Objective merit review.
  - Objective production system (but likely cannot distinguish within classification).
  - Objective classification review (education, licensing requirement).

New ESA

Scheduling – Jan. 1/19

5 Areas

1. Request for change in schedule or work location.
2. Minimum call-in – 3 hours pay at regular rate.
3. On-call – minimum 3 hours pay at regular rate (firefighters exempted).
4. 3 hours pay if shift or on-call cancelled within 48 hours of shift/call-in.
5. Right to refuse on-call assignment if given with less than 4 days' notice.

New ESA

Scheduling – Jan. 1/19

Exceptions

- An emergency, to reduce a public threat, or to ensure continued delivery of essential public services.

Privacy

Public disclosure of private facts

- *Doe 464533 v X* (2016- ONSC)
  - Ontario Superior Court of Justice recognized new common law right to sue for breach of privacy for "revenge porn"
  - Officially: public disclosure of private facts
  - Plaintiff had sent sexually explicit video of herself to former boyfriend (Defendant) who promised it would remain private
  - Defendant posted it to a pornography website without her consent
  - Woman's friends, family, and neighbours saw the video
  - Traumatized, she sought counselling
  - Plaintiff awarded **$100k** in damages

Privacy

Communications to HR not protected by privilege

- *Guthrie v. St. Joseph Print Group Inc.* (2018-ONSC)
  - Employee was put on performance improvement plan and failed to meet sales targets, leading to 10% reduction in salary
  - Employee resigned and claimed constructive dismissal
  - Discovered undisclosed emails between employer's senior management & HR
  - Employer claimed privilege
  - If "*management seeks confidentiality in dealing with an employee, it should consult with counsel and not its HR department.*"

Privacy

Court disapproves of employee's secret recordings of meetings with employer

- *Hart v. Parrish & Heimbecker, Limited,* (2017 – MBQB)
  - 42 year old Merchandising Manager dismissed after 15 years at company for several incidents with peers and subordinates
  - At trial he produced evidence of conversations with his employer that he had secretly recorded on his cell phone
  - Employee conceded that breach of confidentiality was sufficient for termination
  - These secret recordings were a factor in court's finding that the employer had just cause

Profile

Cunningham Swan offers a broad range of legal services to individual and corporate clients in the private and public sectors throughout Ontario.

Alan Whyte is a partner in our Labour and Employment Law Group and also provides mediation services.

Prior to joining our firm, Alan served as a Vice-chair of the Human Rights Tribunal of Ontario. Before joining the Tribunal, Alan represented employers throughout Eastern Ontario in all aspects of the employment relationship for over 25 years. He assisted clients in relation to both union and non-union matters and in both the public and private sectors.

Alan has extensive experience and is able to provide legal services in:

- Collective bargaining
- Interest arbitration
- Wrongful dismissal litigation
- Workplace Safety and Insurance matters
- Human rights proceedings
- Strike management
- Labour arbitration
- Restructuring
- OLRB cases
- Supervisor/management training

Alan has appeared before all levels of the courts in Ontario and numerous administrative tribunals.