



**AMCTO**  
THE MUNICIPAL EXPERTS



**Cunningham Swan**  
LAWYERS

**2019**

# Human Resources Law Update

**Alan Whyte**

**613-546-8064**

**[awhyte@cswan.com](mailto:awhyte@cswan.com)**

**Kalen Ingram**

**613-546-8060**

**[kingram@cswan.com](mailto:kingram@cswan.com)**

( 1 )

# Outline

1. Employment Contracts
2. Wrongful Dismissal
3. Labour Arbitration
4. Human Rights
5. Occupational Health & Safety
6. WSIB
7. ESA
8. Privacy
9. Cannabis

# 1. Employment Contracts

## Primer

All employees are entitled to reasonable notice of termination without cause

- Notice defined in contract?
  - **YES** (and enforceable): contract prevails
  - **NO**: common law reasonable notice prevails

# 1. Employment Contracts

## Rebutting common law presumption of entitlement to reasonable notice

*Movati Athletic (Group) v. Bergeron* (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
- **Unenforceable**
- In order for Movati to successfully avoid common law damages, it should have included the word “only” in termination provision

# 1. Employment Contracts

## Excluding severance pay and benefits made termination provision void

*Menard v Centre for International Innovation* (2019 - ONSC)

- Employee terminated without cause after 6 years of service
- Termination provision:
  - No mention of severance pay
  - All inclusive language
- **Unenforceable**
- \$175K in pay in lieu of notice (instead of \$40K)
- \$175 in costs

# 1. Employment Contracts

**Failure to mention severance pay does not automatically invalidate termination clause**

*Nemeth v. Hatch Ltd. (2018- ONCA)*

- Termination clause provided notice period to be 1 week per year of service with minimum of 4 weeks or “*notice required by applicable labour legislation*”
- No mention of entitlement to severance pay
- No all-inclusive language
- **Enforceable**

# 1. Employment Contracts

## Courts shouldn't strain to create ambiguity

*Amberber v. IBM Canada Ltd.* (2018 - ONCA)

- 3 principles of interpreting employment contracts:
  - 1) Consider imbalance in bargaining power in interpretation
  - 2) *Contra proferentem* rule: where a contract is prepared by employer on a more or less take-it-or-leave-it basis, an ambiguity in the contract's terms should be interpreted in the employee's favour
  - 3) The *contra proferentem* rule applies only where there is a **genuine ambiguity**

# 1. Employment Contracts

## Termination for cause provisions

*Khashaba v. Procom Consultants Group* (2018- ONSC)

- **“just cause”** vs. **“willful misconduct”**
- Contract that provides for no notice of termination (or pay and benefits in lieu) on the basis of the (lower) common law standard will be unenforceable

## 2. Wrongful Dismissal

### Constructive dismissal from hiring decision

*Colistro v. TBayTel* (2019 – ONCA):

- TBayTel hired supervisor who had sexually harassed Colistro at City, been fired 11 years earlier.
- TBayTel offered to move Colistro's workspace to another building
- Finding:
  - **Constructive dismissal:** 12 months notice + \$100K bad faith damages
- Not Intention Infliction of Mental Suffering

## 2. Wrongful Dismissal

### Difficult co-worker ≠ constructive dismissal

*Baraty v. Wellons Canada Corp.* (2019– BCSC)

- Constructive dismissal claimed on basis of subordinate's insubordination and employer's failure to address it.
- Constructive dismissal claim denied:
  - **Some degree of conflict** in the workplace is **expected**
  - Contribution to the conflict can detract from constructive dismissal claim

# 2. Wrongful Dismissal

## **Frustration of contract due to illness**

*Hoekstra v Rehability Occupational Therapy* (2019 – ONSC)

- Employee (not employer) claims employment relationship is frustrated
- Court agrees
- Employee entitled to ESA Termination Pay and Severance Pay

## 2. Wrongful Dismissal

### Receipt of LTD evidence of frustration of contract

*Roskaf v. RONA Inc.* (2018 – ONCA):

- Employee's receipt of LTD evidence that **contract was frustrated**
- Employee's statements that condition had not improved also considered

## 2. Wrongful Dismissal

**Breach of fiduciary duty (without personal gain) just cause for dismissal**

*Dunsmuir v. Royal Group, Inc.* (2018 – ONCA)

- 3 incidents of misconduct for SVP/CFO
- A fiduciary who knows about wrongdoing committed against the beneficiary has a **duty to tell the beneficiary**

## 2. Wrongful Dismissal

### Qualitative component to working notice period

*Woods v. CTS of Canada Co.* (2018 – ONCA)

- Working notice weeks in which employees worked in **excess** of daily maximum hours do not count towards working notice period

# 2. Wrongful Dismissal

## Rescinding notice of resignation

*English v. Manulife Financial* (2018- ONSC)

- Employee resigned when employer announced new computer system - did not want to learn to use it
- HR department made plans to eliminate position
- Employer then announced it was forgoing new computer system – employee tried to rescind resignation
- **Rescinding not permitted**

## 2. Wrongful Dismissal

**Unfettered right to terminate must be in good faith**

*Mohamed v Information Systems Architects* (2018 – ONCA)

- Independent contractor disclosed prior criminal conviction to Company
- Contract terminated 1 month later due to vague contractual provision permitting termination if it's in company's "best interest"
- Finding of **Bad Faith**
- Consultant entitled to payment for remainder of 6-month contract

## 2. Wrongful Dismissal

### Resignation does not terminate ability to apply for LTD benefits

*MacIvor v. Pitney Bowes.* (2018 – ONCA)

- Employee suffered brain injury during company event
  - Not aware of permanent and disabling nature of his injury until after he resigned from his employment
- 2 years after resignation, employee applied for LTD, but insurer denied claim
- CA: Employee's claim **arose during employment**
  - Policy provided coverage

## 2. Wrongful Dismissal

### Working notice inappropriate for employees on disability leave

*McLeod v. Frontier Sales* (2018 – ONCA)

- Employee terminated while on unpaid disability leave - given 6 months “working notice”
- **Working notice did not count** towards employee’s notice entitlements
- Awarded 9 months’ pay

## 2. Wrongful Dismissal

**Employers should advise about reason for cause**

*Ruston v. Keddco MFG (2011) Ltd.* (2019 – ONCA)

- President terminated for cause on allegations of fraud but **told little else**
- Company threatened expensive litigation if E'ee sued – counterclaimed for \$1.7 million
- Court:
  - Dismissed counterclaim
  - Awarded E'ee 19 months' notice
  - \$100K punitive
  - \$25K aggravated damages
  - \$550K costs

## 2. Wrongful Dismissal

### Employers must investigate cases of harassment

*Bassanese v German Canadian News Company Limited et al* (2019 - ONSC)

- Employer found **vicariously liable for assault by co-worker** after failure to address harassment complaints that preceded assault
- 19 months' pay in lieu of notice
- Aggravated damages: \$50K
- Damages for assault: \$15K

# 3. Labour Arbitration

## Reasonable accommodation of addictions

*Waterloo (Sunnyside Home) v. Ontario Nurses' Association.* (2019)

- Nurse discharged for stealing narcotics and falsifying patient records to conceal actions
- Later diagnosed with severe opioid use disorder
- **Duty to accommodate**
- Reinstatement

# 3. Labour Arbitration

**Employer's right to dismiss employees for alcohol at work not unfettered**

*Canadian Pacific Railway v Teamsters Canada Rail Conference.* (2019-CA LA)

- Employee discharged for consuming whiskey while operating a train – involved in accident
- Employee disclosed that he had an addiction to alcohol, for which he had since sought treatment
- **Duty to accommodate**
- Reinstated

# 4. Human Rights

## Risks of relying on assumptions in accommodation cases

*IBEW, Local 636 v Tyco Fire and Security (2018 - ON LA)*

- Diabetic employee originally allowed insulin injections at work station
- When another employee complained, diabetic required to leave work station for insulin injections
- Requiring employee to use a private space on an **assumption** that there was a risk to co-workers without any medical evidence was discriminatory

# 4. Human Rights

## Co-worker personally liable for discrimination

*Phillip v. Andrews* (2018- HRTO)

- Single discriminatory comment made within earshot of Applicant, but not directed to/at/about Applicant found to have created a poisoned work environment.
- Employer settled, but Employee that made the comment was held **personally liable** for discrimination (not harassment).

# 4. Human Rights

## “Regarding employment” not limited to discrimination by co-workers

*BC Human Rights Tribunal v. Schrenk.* (2017 – SCC)

- Schrenk made racist and homophobic statements about an engineer working for another company on same construction project
- Schrenk argued that Section 13(1)(b) of the British Columbia Human Rights Code was not applicable in this case, alleged discrimination was not “regarding employment”
- SCC: **sufficient nexus to employment**

# 4. Human Rights

## Human Rights Damages

*A.B. v. Joe Singer Shoes Limited.* (2018 – HRTO)

- Vulnerable employee subjected to sexual harassment and sexual assault by boss
- **\$200K** in human rights damages awarded against company and owner

# 4. Human Rights

**Municipalities may be liable for harassment experienced by patrons**

*City of Toronto v. Josephs (2018 - ONSC)*

- One customer harassed another customer in City office
- HRTO: City liable for discrimination in provision of services
- Div. Ct: City staff took ***prompt, effectual and proportionate action*** when they became aware of slur – not liable for discrimination

# 4. Human Rights

**Accommodation is a “joint process” which requires applicant’s cooperation**

*Peternel v. Custom Granite & Marble (2018 - ONSC)*

- Employee requested flexible start time to accommodate child care
- Provided **little information** about her child care situation to justify accommodation
- Court: no discrimination

# 4. Human Rights

## Need for evidence when refusing to accommodate

*Skedden v. ArcelorMittal Dofasco (2019 - HRTO)*

- Employee accommodated upon return to work following hip surgery
- Employer ended accommodated position after observing employee limping - concern about health and safety of employee
- Failure to follow **procedural** and substantive duties
- \$16K in lost wages and \$15K in human rights damages

# 4. Human Rights

## Cutting employees off benefits at 65 violates Charter

*Talos v. Grand Erie District School Board (2018 – HRTO)*

- Section 25(2.1) of *Code* permits termination of employee benefits at age 65
- HRTO: provision **breaches Charter** guarantee of equality

# 5. Occupational Health and Safety

## No independent tort of harassment in Ontario

*Merrifield v. Canada (Attorney General) (2019 - ONCA)*

- Respondent sued federal gov't and RCMP members claiming damages for mental distress suffered as a result of bullying and harassment
- Trial judge recognized tort of harassment; **Overtured** on appeal
- Canadian employers may still face harassment-related liability pursuant to human rights legislation and occupational health and safety legislation

# 5. Occupational Health and Safety

## Supervisor not protected by release

*Watson v. Salvation Army of Canada* (2018 – ONSC)

- Plaintiff sued employer and supervisor for harassment
- Settled claim against employer and **signed release**
- Release addressed claims against anyone associated with the employer which arise out of employment relationship
- Allowed to proceed with claim against supervisor

# 5. Occupational Health and Safety

## Employer not vicariously liable for sexual assault committed by employee

*Ivic v. Lakovic* (2017 - ONCA)

- Sexual assault only “coincidentally” linked to activities of taxi company.
- “The power the driver allegedly wrongfully exercised was **not predicated on his employment.**”

# 5. Occupational Health and Safety

## Punitive damages for failing to conduct harassment investigation

*Horner v. 897469 Ontario Inc.* (2018 - ONSC)

- Employee made harassment complaint
- Took time off – employer told her “we’d figure it out in new year”
- 6 days later, complainant terminated for cause on the basis of **harasser’s account** of what happened
- 3 months’ notice, \$20K aggravated/moral damages and further \$10K in punitive damages awarded against employer

# 6. Workplace Safety and Insurance

## No right to sue WSIB employer for sexual assault by co-worker

*Decision No. 3096/17 (2018 - ONWSIAT)*

- Supervisor assaulted employee at work and outside of work. Employee sued employer and supervisor.
- *WSIA* permits parties to an action to apply to WSIB to determine whether right to sue is taken away by *WSIA*.
- Issue: was the sexual assault an “**accident arising out of employment**”?
  - YES for assaults in the workplace
  - Claim against supervisor allowed to proceed

# 6. Workplace Safety and Insurance

## NEW MENTAL STRESS PROVISION (January 1, 2018)

- Workers entitled to benefits for **chronic mental stress** arising out of the workplace
- Not entitled to benefits for mental stress caused by:
  - Decisions/actions of employer relating to employment
  - Decision to change work to be performed
  - Decision to change working conditions
  - Decision to discipline or terminate employment

# 6. Workplace Safety and Insurance

## POLICY GUIDANCE

- A worker will generally be entitled to benefits for chronic mental stress if an appropriately **diagnosed mental stress injury** is caused by a **substantial work-related stressor** arising out of and in the course of employment.

## Potential Impact on Employment Law

- Right to sue for mental stress?

## 6. Workplace Safety and Insurance

**Harassment may arise from a worker's employment, but does not relate to employment**

*OPSEU and Ontario (Ministry of Community Safety and Correctional Services) (Rosati), Re. (2018 - ON GSB)*

- Grievances alleged harassment from employer
- Employer argued arbitrator had no jurisdiction because of new chronic stress provisions in *WSIA*
- Decision: **chronic mental stress compensable under *WSIA***, Grievance Settlement Board had no jurisdiction

# 6. Workplace Safety and Insurance

## WSIB Injuries Can Be Given Preferential Treatment

*Carter v. Chrysler Canada Inc.* (2019 – ONSC)

- Duty to accommodate exists under *Human Rights Code* and *WSIA*
- Div Ct.: upheld Tribunal decision that employers can **prioritize** work-related injuries for accommodation over non-work related injuries

# 7. Employment Standards Act

## Bill 47 update

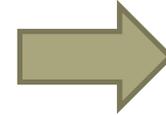
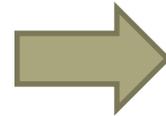
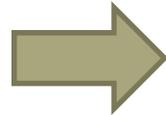
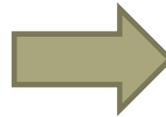
- Bill 47 **repeals or rewrites** numerous provisions of the previous government's *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148").
- The Bill 47 amendments to the *Employment Standards Act, 2000* came into force on January 1, 2019

# 7. Employment Standards Act

## Scheduling

### Bill 148

- 3-hour rule for shortened and cancelled shifts
- On-call rule
- Right to request scheduling or work location changes
- Right to refuse work or on-call requests made with less than 96 hours of notice



### Bill 47

• **Not impacted**

• **Repealed**

• **Repealed**

• **Repealed**

# 7. Employment Standards Act

## Minimum wage

### Bill 148

- Currently \$14/hour; increasing to \$15/hour on January 1, 2019

### Bill 47

- \$14/hour; annual inflationary adjustments to restart as of October 1, 2020

# 7. Employment Standards Act

## Equal pay for equal work

### Bill 148

- Pay differentials based on “difference in employment status” are prohibited (e.g., PT vs. FT; temporary vs. indefinite) or for temporary help agency workers

### Bill 47

- **Repealed**
- However, the prohibition on basing differences in pay on sex remains the same

# 7. Employment Standards Act

## Personal emergency leave (PEL)

### Bill 148

- 10 PEL days with the first 2 days paid
- Employer cannot require doctor's note

### Bill 47

- **8 unpaid** leave days: sick leave (3 days), family responsibility leave (3 days), and bereavement leave (2 days)
- **No prohibition** re: requiring doctor's certificate

# 7. Employment Standards Act

## No changes to:

- Domestic or sexual violence leave: Up to 10 days and up to 15 weeks of leave in a calendar year, with the first 5 days paid and the remaining days unpaid
- Vacation pay: the increase to 3 weeks of vacation after 5 years
- The \$14 minimum wage

# 8. Privacy

## Employer's collection of personal info considered reasonable

*Professional Firefighters' Association LOCAL 1517 v. City of Vernon* (2018 - BC LA )

- Fire Chief installed security camera in his office on suspicion that someone was accessing confidential information held in a locked filing cabinet
- Camera caught 2 employees having sex
- Employees terminated - grievance
- Union brought application to exclude video
- Camera was a **necessary, reasonable exercise of managerial authority**

# 8. Privacy

## In-cab cameras upheld as reasonable

*Lafarge Canada Inc. v. Teamsters, Local 213* (2018 – BCLA)

- Union grieved implementation of driving safety system that featured in-cab cameras that recorded continuously
- Access to feed limited to certain defined “triggering events” and reasonable cause scenarios
- Upheld as access to images **confined to intermittent safety-related events**; only viewed to advance legitimate incident-based objectives

# 9. Cannabis

1. Medical Cannabis
2. Recreational Cannabis
3. Impact of Legalization on the Workplace
4. What can you do?
5. Cannabis Case Law

# Medical Cannabis

- Has been authorized since 2001
- Legalization of recreational use does not significantly change the medical regime
- Must still
  - have an “authorization to possess”
  - be purchased from a federally licenced medical producer (or grown pursuant to an authorization)

# Accommodation

- *Human Rights Code* - duty to accommodate medical use
- What to ask:
  - Proof of medical authorization
  - Medical confirmation
    - When & how often taken?
    - Must be taken at work?
    - Taken in what form?
    - Side-effects/restrictions and duration

# Recreational Cannabis

## *Cannabis Control Act, 2017*

- Allows adults (>19) to possess and access regulated and controlled cannabis
- Broad scope of areas in which cannabis can be consumed
  - Previously limited to private residences with explicit prohibition on workplaces

# Recreational Cannabis

## *Smoke Free Ontario Act, 2017*

- Same prohibitions for cannabis as for tobacco, e-cigarettes
- Prohibits the smoking or holding of lighted cannabis in an “enclosed workplace”
  - Increases importance of having policies re: cannabis use in workplace

# Impact of Legalization on the Workplace

## Human Rights

### Duty to accommodate

- **Medical**
- **Abuse/addiction**

### Recreational use is not a human rights issue

- No duty to accommodate **recreational** spill-over effects
- Can discipline/terminate

# Impact of Legalization on the Workplace

## Human Rights

### Questions to Ask in Accommodation Process

- Proof of **addiction/disability**
- Usage:
  - ✓ Side-effects/restrictions/duration?
  - ✓ Treatment?
  - ✓ When + how often taken?
  - ✓ How long?

# Impact of Legalization on the Workplace

## Health & Safety

- No right to be impaired at work – impairment may endanger health/safety of the employee or others
- Employer has obligation to take “**every precaution reasonable in the circumstances** for the protection of a worker” (*OHSA*)
- Negligence & Vicarious Liability
  - Worker impairment could endanger non-workers

# What Can You Do?

## Create/Update Policies & Procedures

- Should apply to all drugs, medicines, treatments
- Emphasize promotion of **safety**
- Encourage employees to disclose substance use that could affect work performance and/or addictions
- Require disclosure for safety-sensitive positions
- Reassure that there will be no reprisal upon disclosure
- Emphasize **accommodation, rehab, return to work**

# What Can You Do?

## Create/Update Policies & Procedures

- Possession of Substances Policy
  - Can prohibit or restrict possession of drugs and alcohol
  - Policy needs enough **flexibility** to take into account accommodation issues, if necessary
  - Consequences should be proportional to offence
- Fitness for work policy

# What Can You Do?

## Create/Update Policies & Procedures

- Human Rights & Accommodation Procedures
  - Need to **avoid automatic discipline**
  - Reminder: *perceived disability*
  - Questions relevant to “undue hardship”:
    - Inability to measure impairment?
    - Potential for residual impairment?
    - Safety sensitivity of position?
    - Frequency and level of use?

# What Can You Do?

## What if you suspect impairment?

- Interview the employee
- If concern about impairment, then send home
- Take notes from witnesses
- Prior to return, meet with employee and ask for an explanation

**No explanation → discipline**

**Explanation - medical or addiction/disability**



**accommodation**

# What Can You Do?

## Training

### Policies and Safety at Work

- Encourage all workers to look out for each other – report if someone appears to be a risk to him/herself or others
- Train supervisors on **detecting impairment** and on responding appropriately (case-by-case assessment)
- Train supervisors on **accommodations processes**, medical cannabis and substance abuse

# What Can You Do?

## Testing?

- Random testing generally **NOT** legitimate
- Testing can be legitimate for
  - Pre-assignment (if safety sensitive position)
  - If reasonable basis to believe impairment
  - After an incident
  - Return to work after treatment
- If positive test result is due to addiction/disability, duty to accommodate applies

# Cannabis Case Law

## Inability to monitor residual impairment may constitute undue hardship

*IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers Association (2019- NLSC)*

- Employee disclosed use of medical cannabis - denied employment because of safety concerns
- Competing expert evidence re: residual impairment
- Arbitrator: as employer could not adequately measure impairment (effect and duration); it could not manage the **safety risk** – undue hardship

# Cannabis Case Law

**Employer policies even in a safety sensitive environment must involve a “balancing of interest”**  
*Airport Terminal Services Canadian Co. v. Unifor, Local 2002 (Sehgal) (2018 - CA LA)*

- Employee tested positive for cannabis metabolites after accident – medical marijuana user
  - Discharged
- Zero tolerance drug and alcohol policy – unless addiction
- Policy also mandated testing after all accidents
  - Employee reinstated; policies require **proportionality** and **balancing of interests**

# Cannabis Case Law

## No absolute right to use Cannabis

*Aitchison v. L & L Painting and Decorating* (2018 - HRTO)

- Employee painter was terminated for smoking medical marijuana on swing stage 37 floors above ground
- Zero tolerance policy that incorporated accommodation
- Employee had not requested accommodation
- **No “absolute right”** to use marijuana at work regardless of medicinal purpose
- Application dismissed

# Cannabis Case Law

## Violation of accommodation justifies discharge

*Kinderskey (Town of) v. Canadian Union of Public Employees, Local 2740.* (2018 - SK LA)

- Grievor prescribed to vape medical cannabis, but was told not operate heavy machinery for 20 to 30 minutes after vaping.
- Accommodation: moved grievor to a position with minimal interaction with public
- Grievor went on a work trip and used cannabis while operating Town vehicle → discharged
- Grievance dismissed

# 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. 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.

**Kalen Ingram** is a lawyer in our Labour and Employment Law Group. Kalen assists employers with all matters relating to labour and employment law.

In addition, Kalen acts as a prosecutor for municipalities and Public Health Units under a variety of by-laws and statutes. Kalen has appeared for the Ontario Superior Court of Justice and the Ontario Court of Justice.