The Year In Review – Notable Cases Of 2024

Welcome to our annual review of notable cases over the past year that we believe will be of interest to employers and human resources professionals. We also identify some cases to watch out for in 2025.

Next week, we will bring you our review of the notable legislative updates from 2024.

Cases of Note

Employment

Termination of Employment: Notice

- *Dufault v. Ignace (Township)*: In one of the most anticipated employment law cases of 2024, the Ontario Court of Appeal affirmed the lower Court's ruling that the termination provisions of a fixed-term employment contract failed to comply with the *Employment Standards Act, 2000* (*ESA*), rendering them void and unenforceable. The Court found that the "for cause" termination clause violated the *ESA* in two key ways:
  1. it set a lower standard for termination than the *ESA*'s required "wilful misconduct" threshold, and
  2. its open-ended language allowed termination without notice for reasons beyond those permitted by law.

Following the precedent established in *Waksdale v. Swegon North America Inc.*, the Court held that when one termination provision violates *ESA* minimum standards, all termination provisions become invalid. Consequently, the Court upheld the award of damages to Ms. Dufault based on the full term of her fixed-term employment contract, while declining to rule on the separate issue of whether termination provisions allowing employers to terminate "in their sole discretion" and "at any time" are independently unenforceable. (See our *Case in Point*, Ontario Court of Appeal Dismisses Appeal in *Dufault*, Upholds Finding That "For Cause" Language in Termination Provision Contravened *ESA*.)

- *Preston v. Cervus Equipment Corporation*: The Ontario Court of Appeal ruled that an employee could not claim previously vested stock units after signing settlement documents, even though these units had automatic vesting rights upon termination under the company's plan.

While the employee argued that the stock units weren't part of the wrongful dismissal settlement since they were already their property, the Court found that the broad and specific release language in the settlement documents clearly precluded any such

claims.

The Court overturned the lower Court's decision, finding that the judge had erroneously allowed contextual factors to override the actual wording of the settlement documents, misapplied the doctrine of narrow construction for broad releases, and improperly evaluated the economic benefits of the settlement. (See our *Case in Point*, Employee's $76,000 Claim for Vested Stock Units Barred by Wrongful Dismissal Settlement and Release.)

- *Kopyl v. Losani Homes (1998) Ltd.*: The Ontario Court of Appeal dismissed an appeal regarding a plaintiff whose employment was terminated without cause. The plaintiff, who had completed six months of a one-year fixed-term contract, was found by the application judge to be entitled to the remaining six months' pay.

The judge had found that the termination clauses in the contract were void as they did not comply with the *ESA*. In so finding, the judge rejected the defendant's argument that the fixed-term contract itself was therefore void, as its one-year term was in essence a termination clause as employment would end after one year.

- *Bertsch v. Datastealth Inc.*: The Ontario Superior Court of Justice upheld the enforceability of a termination clause in an employment agreement that limited the plaintiff's entitlement to only the minimum standards under the *ESA*. The Court held the clause was valid and enforceable and consequently dismissed the plaintiff's claim for wrongful dismissal common law damages. (See our *Case in Point*, Ontario Court Upholds Termination Clause Excluding Employee's Common Law Entitlements, Ends Employee's Lawsuit Against Former Employer.)
- *Gazier v. Ciena Canada*: The Ontario Superior Court held that, while the plaintiff was entitled to damages for the bonus he would have earned during the reasonable notice period, he was entitled only to unpaid vacation pay at the time of termination that was calculated on his base salary.

The Court acknowledge that a non-discretionary bonus was considered wages for the purposes of the *ESA*. While the plaintiff had a reasonable expectation he would receive a bonus each year (and had received significant bonus payments in the prior years), this was not guaranteed in his employment agreement.

The Court held there was discretion both in whether he would receive a bonus and the amount of the bonus, as that was dependent on both the plaintiff's performance and that of the company. As such, the bonus was appropriately considered "discretionary" and was not factored into his vacation pay calculation for the purpose of the *ESA*.

- *Adams v Thinkific Labs Inc.*: The British Columbia Supreme Court held that a "letter agreement" executed prior to an employee's start date, but after the employee accepted employment based on the terms of an email offer, was not enforceable against the employee.

The initial offer provided to the employee was extensive (approximately 60 pages) but contained no termination provision. After the employee advised the employer of her acceptance of the role she was provided with a formal "letter agreement" that included a termination clause and restrictive covenants.

The Court held the initial offer and its acceptance was a "complete agreement" and the employee did not receive consideration for her agreement to the execution of the letter agreement. As such, its termination provisions were not enforceable, and the employee was entitled to damages for the reasonable notice period.

Mitigation

- *Krmpotic v. Thunder Bay Electronics Limited*: The Court of Appeal upheld the findings of a trial judge that an employee who is physically incapable of performing work during the notice period is not obligated to look for comparable work to mitigate their damages. The Court held that expert evidence to establish such incapacity was not required.

The Court also rejected the argument that aggravated damages were appropriate only if there was medical or psychological evidence to confirm the manner of dismissal resulted in mental distress. The Court confirmed an employee is not required to demonstrate they have suffered a diagnosable medical condition as a result of the employer's conduct in order to claim such damages. (See our *Case in Point*, Ontario Court of Appeal Finds Plaintiff Did Not Fail to Mitigate, Upholds $50,000 Aggravated Damages Award for Manner of Dismissal.)

- *Marshall v. Mercantile Exchange Corporation*: The Ontario Superior Court of Justice granted an employer's motion for a defence medical examination of a former employee who claimed an inability to mitigate their damages for the full 26-month notice period claimed due to a mental health condition.

The Court held that it would be unfair to allow the plaintiff to assert that his mental health condition prevented him from taking steps to mitigate his damages without permitting the defendant an opportunity to test the assertion. The Court held that if the plaintiff was taking the position he was unable to mitigate after 12 months had passed, he would have to submit to a defence medical examination. (See our *Case in Point*, Ontario Court Orders Defence Medical Examination of Terminated Employee Alleging Inability to Mitigate.)

Workplace Investigations

- *Metrolinx v. Amalgamated Transit Union, Local 1587*: The Ontario Divisional Court quashed a decision of Arbitrator Luborsky in which he found that five grievors should not have had their employment terminated as a result of inappropriate WhatsApp chats about a co-worker.

The Court held that the arbitrator's decision was not reasonable. The arbitrator's conclusion that the matter should have ended once a co-worker stated she did not want to make a complaint or participate in an investigation, was wrong in law and contrary to the employer's statutory obligations to investigate incidents of workplace harassment.

Among other things, the Court also found the arbitrator was too focused on the grievors' right to privacy: "Wherever it originated, the impugned conduct made its way into the workplace and, to that extent at least, became a workplace issue." The Court remitted the matter to another arbitrator to be reassessed in light of the Court's decision. (See our *Case in Point*, Ontario Divisional Court Finds Arbitrator's Decision to Reinstate Terminated Grievors Was "Fatally Flawed.")

- *Shannon Horner v Stelco Inc. Lake Erie*: The Ontario Labour Relations Board (OLRB) provided direction on an employer's obligations pursuant to section 32.0.7(1)(b) of the *Occupational Health and Safety Act*. This section requires an employer to inform a worker, in writing, of the results of a harassment investigation and of any corrective action that has been taken or that will be taken as a result of the investigation.

The OLRB held this requirement includes an obligation to inform a worker in writing of which respondents have been found to have engaged in harassment (in the case of multiple respondents) and the corrective action the employer will take.

However, an employer is not obligated to provide a report of the factual findings, indicate the specific acts of harassment that were found to have occurred, or specify the level of discipline the employer may impose as part of any corrective action taken. (See our *Case in Point*, OLRB Considers Employer's Disclosure Obligations Under *OHSA* After Workplace Harassment Investigation.)

- *Corporation of the City of Cornwall v Amalgamated Transit Union, Local 946*: Arbitrator Michael Bendel upheld the just cause dismissal of a City of Cornwall bus operator who was involved in a violent altercation with a pedestrian. While the operator was outside of the bus smoking a cigarette, he was approached by an individual who, after asking him for a lighter, allegedly grabbed his wrist. The grievor then head-butted the individual and forcefully pushed him up against the bus. While he claimed this was in self-defence, the investigation and video evidence supported the conclusion the grievor was the aggressor.

While the arbitrator held there were flaws in the investigation, he was satisfied on a balance of probabilities that the grievor was the aggressor. The arbitrator specifically commented on the fact that, even if the employer did not put the allegations to the grievor before terminating his employment, this was not relevant. If there was just cause for termination (which there was) "any defects in the process are of little or no consequence."

- *Max Aicher (North America) Limited v Richard Bell*: The OLRB held that, under the *ESA*, there is no duty of procedural fairness owed to an employee terminated for wilful misconduct. That an employer does not provide an employee the opportunity to provide their "side of the story" where misconduct is suspected or alleged does not deprive an employer of the right to rely on that misconduct and terminate the employee without termination or severance pay.

Human Rights

- *Aguele v. Family Options Inc.*: The Human Rights Tribunal of Ontario (HRTO) dismissed an application alleging discrimination in employment on the basis of family status after an employee, who was a single parent, alleged that her employer failed to accommodate her by giving her the shift changes she required to meet her childcare needs. The HRTO noted the duty to accommodate was a "collaborative process." The employer, a social services provider, did not have an obligation to go so far as to provide the applicant with shifts that did not exist or to split shifts, as such changes were not feasible given the nature of the employer's work and the needs of its clients. (See our *Case in Point*, Human Rights Tribunal of Ontario Confirms Childcare Preferences Do Not Trump Employer's Scheduling Needs.)

- *Zanette v. Ottawa Chamber Music Society*: The HRTO held that an organization's request that a volunteer remove a rainbow sticker from their nametag did not constitute discrimination on the basis of sexual orientation, gender identity or gender expression. The request was made to conform with the organization's dress code policy and there was no evidence that the policy was not uniformly applied. The HRTO also noted that there was no evidence that the wearing of a rainbow sticker was "an essential element of being a member of the 2SLGBTQ2 community." (See our *Case in Point*, Request for Volunteer to Remove Rainbow Sticker from Name Badge Not Discriminatory, Says Human Rights Tribunal of Ontario.)

Labour Relations

Arbitrations: Just Cause Termination

- *Toronto (City) v Canadian Union of Public Employees, Local Union No. 79*: Arbitrator Bernhardt ruled that the City of Toronto had just cause to terminate the employee, finding that her pattern of unauthorized absences constituted insubordination. In examining the evidence, the arbitrator found that the employee's explanations for missing shifts—including her claim about calling the wrong attendance line—were not credible, and noted her vague responses during cross-examination about whether she was working at Toronto Western Hospital during her absences.

While the employee alleged discrimination and harassment based on race and gender, including claims of disrespect and harsh treatment from supervisors, the arbitrator determined these allegations were not substantiated by the evidence presented.

- *Canada Post Corporation v Association of Postal Officials of Canada*: Arbitrator Nicholas Glass upheld the termination of a Canada Post supervisor who failed to disclose a four-year intimate relationship with a subordinate employee. The supervisor, who had direct supervisory authority over the subordinate for up to 15 hours per week, violated the company's Conflict of Interest Policy by not reporting the relationship despite multiple opportunities and explicit requirements to do so. While the supervisor's union argued that dismissal was too severe given the lack of proven harm and the supervisor's remorse, the arbitrator found that the length of deception and the timing of disclosure (which came only after the relationship was ending) had irretrievably broken the bond of trust essential to the employment relationship.

The arbitrator emphasized that the dishonesty itself prevented the employer from monitoring potential misconduct or addressing the conflict through appropriate measures, and that proof of actual harm was unnecessary given the potential risks created by the undisclosed conflict.

Arbitrations: Communicable Disease Paid Leave Entitlement

- *North York General Hospital v. ONA*: Arbitrator William Kaplan held that a nurse will be entitled to communicable disease leave with pay only where they are required by hospital policy, direction of a public health authority or by law to quarantine/isolate. The paid leave does not apply to circumstances where a nurse may have a communicable disease and is required by a hospital to remain off work until they are well. (See our *Case in Point*, Nurse Not Entitled to Communicable Disease Paid Leave If Not Required to Quarantine/Isolate.)

Arbitrations: Professional Sports

- *Canadian Football League v Lemon*: Arbitrator Allen Ponak upheld an indefinite suspension of a veteran CFL defensive end who placed bets totaling 73.46 euros on two CFL games in 2021, including one game in which he played. While the player argued he hadn't been adequately informed of gambling rules and characterized his actions as a "foolish mistake," claiming a $1,000 fine would be more appropriate, the arbitrator found the severity of the violation warranted the indefinite suspension. The arbitrator emphasized that betting by players on their own league is one of the most serious acts of misconduct possible, as it undermines league integrity and public confidence, and found it "incomprehensible" that a veteran player with NCAA, NFL, and CFL experience would be unaware that betting on league games was prohibited.

This marked the first instance in North American professional sports where a player or union challenged a gambling-related penalty imposed by a commissioner. (See our *Case in Point*, Landmark Arbitration Decision Upholds Indefinite Suspension of CFL

Player for Sports Gambling.)

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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