FTR Now

The Year in Review – 2023 Cases of Note

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We are back with our annual review of the prior year's notable cases that we believe will be of interest to employers and human resources professionals. We also identify some cases to watch for in 2024.

Next week, we will bring you our review of notable 2023 legislative updates.

Cases of Note

Employment

Termination of Employment: Notice

- *Milwid v. IBM Canada Ltd.* and *Lynch v. Avaya Canada Corporation*: The Court of Appeal for Ontario (ONCA) upheld two summary judgment motions awarding terminated employees reasonable notice periods of 27 and 30 months, respectively. The ONCA upheld the lower courts' findings that exceptional circumstances existed to justify a notice period higher than 24 months. In both cases, the employees were over age 60, had over 35 years of service, had devoted their entire careers to their employers and had technical skills tailored specifically towards their employers' particular businesses.
- *Manthadi v. ASCO Manufacturing*: The Ontario Superior Court of Justice awarded an employee 12 months' notice when her employment was terminated after five weeks' service. The plaintiff had been previously employed by a company which sold its assets to a purchaser, and she accepted employment with the purchaser, which then terminated her employment. To arrive at an appropriate notice period, the Court applied the *Bardal* factors and weighed the experience the plaintiff, a long-time employee with the previous company, brought to the purchaser.

Termination of Employment: Just Cause

- *Park v. Costco Wholesale Canada Ltd.*: The Ontario Superior Court of Justice held that an employee with 20 years of service, who deliberately deleted his employer's website on two separate occasions, had engaged in wilful misconduct that was incompatible with the fundamental terms of the employment relationship, thereby justifying his termination from employment for just cause. (See our *Case in Point* Court Finds Employer Had Cause to Dismiss Employee After He Deleted Employer Website)
- *Shalagin v. Mercer Celgar Limited Partnership*: The Court of Appeal for British Columbia upheld a lower court finding that an employer had just cause to terminate the employment of an employee who had secretly recorded meetings, training sessions and conversations with co-workers. The Court stated the employee's recording activity "was underhanded and would be regarded by most employers as misconduct undermining the trust relationship between employer and employee."

Enforceability of Contracts

- *Celestini v. Shoplogix Inc.*: The ONCA applied the "changed substratum" doctrine to find that the terms of the employee's written employment agreement were unenforceable at the time of his termination from employment. The ONCA held that although the employee's job title had not changed, there had been "substantial and fundamental" changes to his role over the 12 years of his employment, including a substantially increased workload and responsibilities.

Mitigation

- *Monterosso v. Metro Freightliner Hamilton Inc.*: The ONCA held that independent contractors performing services under fixed-term contracts have a duty to mitigate, subject to an agreement providing otherwise. It stated that the general rule requiring mitigation following the breach of a contract applies to independent contractors. There were no circumstances present in this case to justify a departure from that general rule.

Restrictive Covenants

- *EF Institute for Cultural Exchange Limited v. WorldStrides Canada, Inc.*: The ONCA dismissed an appeal of a motion judge's decision which found that a departed employee did not breach his duty of confidentiality or non-competition obligations. The employee had accepted a position with a competitor that was to commence the day following the expiry of the non-competition period. The ONCA did not find any error in the motion judge's conclusion that the employee did not provide any sensitive information or advice to the prospective employer when he was interviewed during the non-competition period.

COVID-19-Related Cases

- Croke v. VuPoint Systems Ltd.: The Ontario Superior Court of Justice found that an employee's failure to comply with his employer's vaccination requirements amounted to frustration of contract and disentitled the employee to wrongful dismissal damages. (See our *Case in Point* Court Finds Employee's Contract Frustrated for Failing to Comply with Mandatory Vaccination Requirements)
- *Van Hee v. Glenmore Inn Holdings Ltd.*: The Alberta Court of Justice found that a plaintiff was not constructively dismissed when she was placed on an unpaid leave due to her failure to get the COVID-19 vaccination. The plaintiff's civil claim was dismissed.
- *Oostlander v. Cervus Equipment Corporation*: The Court of Appeal of Alberta followed the decision of the Court of Appeal for British Columbia in *Yates v. Langley Motor Sport* and held that CERB payments received by a plaintiff whose employment was terminated were not deductible from wrongful dismissal damages.
- *Cecchetto v. Canada (Attorney General)*: The Federal Court held that the Social Security Tribunal General Division was reasonable in its finding that the applicant was not entitled to employment insurance (EI) benefits when his employment was terminated because he had not complied with his employer's vaccination policy. It stated that employees who engage in "misconduct" by violating an employment rule (in this case, the employer's vaccination policy) are not entitled to EI benefits. (See our *Case in Point* Federal Court: No Entitlement to EI Benefits Where Employee Fails to Comply With Employer's Vaccination Policy)

Miscellaneous

- *Besse v. Reach CPA Inc*: The British Columbia Civil Resolution Tribunal found that an employee, a Chartered Professional Accountant, had engaged in time theft by improperly logging 50.76 hours that she did not work. The respondent employer had placed a time-tracking program called TimeCamp on the employee's work laptop, and the information gathered from TimeCamp established the time theft. The employee was ordered to pay the employer $2,603.07 in debt and damages for time theft, as well as the outstanding part of the advance the employer made to the employee.

Occupational Health and Safety

- *R. v. Greater Sudbury (City)*: A plurality of the Supreme Court of Canada, on equal division, confirmed the ruling of the ONCA which held that an "owner" of a construction project can also be considered an "employer" under the *Occupational Health and Safety Act*, with obligations to ensure safety on the project, even in circumstances where it does not employ workers performing the actual construction work on the project. (See our *FTR Now* "Owners" of Construction Projects Are Employers Under Ontario's *OHSA*: More on a Recent Ruling of the Supreme Court of

Canada)

Human Rights

- *Imperial Oil Limited v. Haseeb*: A decision of the Human Rights Tribunal of Ontario (HRTO), which concluded that an employer discriminated against a potential employee on the basis of citizenship when it required proof of eligibility to work in Canada on a permanent basis as a condition of employment, was found reasonable by the ONCA.
- *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*: The Court of Appeal for British Columbia clarified the test for determining discrimination on the basis of family status, confirming there is no need for an employer to have changed the terms of employment to establish a case of family status discrimination.
- *Hall v. Zurn Industries Limited*: The HRTO awarded an applicant lost wages for 5.5 years and $20,000 for injury to dignity, feelings and self-respect, among other things. In an earlier interim decision, the HRTO had concluded the respondent had discriminated against the applicant on the basis of age when it terminated her employment and placed a younger, lower-salaried worker into her position.
- *L.C.C. v. M.M.*: An applicant was ordered to repay all funds paid to them under a settlement of their HRTO application, as a result of the applicant having posted on their LinkedIn profile that they had resolved their human rights complaint against their employer for sex discrimination. The HRTO found that the applicant had breached the confidentiality and non-disparagement clauses in the settlement agreement.

Litigation

Class Actions

- *Phillip v. Deloitte Management Services LLP et al*: The Ontario Superior Court of Justice approved a $2.4 million settlement in a class action alleging employee misclassification and breaches of the *Employment Standards Act, 2000* (*ESA*). (See our *Common Ground? Class Action Updates* Ontario Court Approves Settlement Amount in Employee Misclassification Class Action)
- *Broutzas v. Rouge Valley Health System*: The Ontario Divisional Court dismissed an appeal from a motion judge decision that had denied certification in two class proceedings which were focused on the tort of intrusion upon seclusion. Three rogue employees had improperly accessed the hospital records of patients who had given birth at certain hospitals for the purposes of RESP sales. The Court found that although there had been an intrusion, it was not an intrusion on seclusion because the information accessed by the rogue employees had been primarily personal contact information rather than private information. (See our *Common Ground? Class Action Updates* Appellate Court Denies Certification of Class Actions Claiming Intrusion Upon Seclusion)

Anti-SLAPP

- *Hansman v. Neufeld*: A majority of the Supreme Court of Canada restored a decision of an application judge dismissing a defamation claim filed by a school trustee against the former president of the B.C. Teachers' Federation (BCTF) as a Strategic Lawsuit Against Public Participation (SLAPP). The school trustee had posted negative comments about materials to be used in schools to promote inclusive environments, among other things, regarding sexual orientation and gender identity. The former president of the BCTF, a gay man, publicly denounced these comments and accused the school trustee of undermining safety and inclusivity for transgender and other 2SLGBTQ+ students. The Supreme Court observed that the consistent defining feature of a SLAPP is that the proceeding acts to silence both the defendant and public debate on a matter of public interest, as opposed to remedying a serious wrong suffered by the plaintiff.
- *Boyer v. Callidus Capital Corporation*: The ONCA upheld a decision of a motion judge and dismissed a counterclaim brought by the defendant employer against the plaintiff as a SLAPP. The plaintiff had alleged constructive dismissal due to a toxic work environment. The defendant counterclaimed, alleging the plaintiff breached his fiduciary duties during his employment and sought damages of $150 million. The ONCA held the counterclaim was a SLAPP as it arose from an expression on a matter of public interest. (See our *Raising the Bar* – Year-End Edition)

Labour Relations

Construction

- *Carpenters' District Council of Ontario v. City of Hamilton*: The Ontario Divisional Court dismissed an application for judicial review of an Ontario Labour Relations Board decision in which the union challenged the constitutionality of the amendments to the non-construction employer provision in the *Labour Relations Act, 1995* (*LRA*). Those amendments deemed certain public sector entities (including municipalities and universities) as non-construction employers to whom the construction provisions of the *LRA* do not apply. The Court held that the amendments are constitutional and do not infringe the right to freedom of association protected by section 2(d) of the *Canadian Charter of Rights and Freedoms* (*Charter*). (See our *Case in Point* Divisional Court Confirms Non-Construction Employer Provisions in *Labour Relations Act* Do Not Infringe *Charter* Rights)

Arbitrations: COVID-19

- *Toronto (City) v. Toronto Civic Employees' Union, Cupe, Local 416*: Arbitrator Herman concluded that an employer's mandatory vaccination policy was no longer reasonable as of September 1, 2022. By way of a remedy, he ordered the employer to pay all employees who have been returned to work compensation equivalent to their salary at their regular rate of pay, subject to statutory and other deductions, provided they returned to work when requested to do so without undue delay, compensation to cover the period from September 1, 2022 to the date of their actual return to work.
- *Lakeridge Health v. CUPE, Local 6364*: Arbitrator Herman upheld a hospital's vaccination policy as reasonable in almost all respects, including the termination of employees for non-compliance. The Arbitrator did find that the hospital should have implemented a four-week leave of absence for all employees prior to terminating their employment, although no remedial relief with respect to this issue was ordered. (See our *FTR Now* Arbitrator Addresses Reasonableness of Hospital Vaccination Policy Providing for Termination of Employment)
- *Central West Local Health Integration Network v. Canadian Union of Public Employees, Local 966*: Arbitrator Goodfellow found that a mandatory vaccination policy which had "termination" as a consequence of non-compliance was reasonable. He rejected the union's argument that mandating "automatic" termination made the policy unreasonable. The Arbitrator did, however, state that each and every termination is subject to the just cause standard and no employer policy can oust an arbitrator's jurisdiction under s. 48(17) of the *LRA* to substitute a lesser penalty. (See our *FTR Now* Arbitrator Finds Mandatory Vaccination Policy to Be Reasonable)

Arbitrations: National Day of Mourning

- *Ottawa Police Services Bd. v. Ottawa Police Assn.*: A decision of Arbitrator Waddingham, which held that September 19, 2022 (the National Day of Mourning for the Queen's funeral) was a paid holiday under the applicable collective agreements, was found unreasonable by the Ontario Divisional Court. The Court concluded that the approach taken by the Arbitrator was not in keeping with the applicable principles of collective agreement interpretation and jurisprudence. The grievances were dismissed. (See our *Case in Point* Appellate Court Finds National Day of Mourning Not a Paid Holiday Under Collective Agreements)
- *Malton Village of the Regional Municipality of Peel v. Canadian Union of Public Employees, Local 966*: The question before Arbitrator McNamee was whether the federal government had "proclaimed" a holiday with respect to the National Day of Mourning for the Queen's funeral. Arbitrator McNamee determined the government's statement lacked the requisite formality of a proclamation. He stated: "[i]n effect, it is my view that the granting of a holiday to federal government employees was not an act of the federal government, *qua* government, but rather an action of the prime minister *qua* employer."

Cases to Watch for in 2024

- *Elementary Teachers Federation of Ontario v. York Region District School Board*: In October 2023, the Supreme

Court of Canada heard an appeal from this ONCA decision which found that public school teachers have a section 8 *Charter* right to be free from unreasonable search and seizure and have a reasonable expectation of privacy in the workplace. The decision of the Supreme Court is pending.

- *Ontario English Catholic Teachers Assoc. v. His Majesty*: In June 2023, the ONCA heard an appeal from this decision of the Ontario Superior Court of Justice which found that Bill 124, *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, was unconstitutional. Bill 124 limited wage increases in the broader public sector to 1% per year for a three-year moderation period. The decision of the ONCA is pending.