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Recent developments in Canadian employment law

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

大成 DENTONS

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Recent Labour & Employment law cases (Québec)

Camille Paradis-Loiselle

Pinard v. Laplante, 2022 QCCA 1119

Facts

- A unionized employee, Mr. Laplante, was dismissed for a harassment-like situation and for comments described as inappropriate, misogynistic and racist, which the union grieved.

- The employee and his spouse concurrently initiated a civil action against the human resources manager (HR Manager) working for the employer for alleged defamatory remarks about him.

- At the outset of the proceedings, the HR Manager filed an application for declinatory exception, asking the Court of Québec to declare that it had no jurisdiction to hear the dispute, which falls within the exclusive jurisdiction of an arbitrator.

- The trial judge dismissed this declinatory exception on the basis that if, in this case, the alleged defamatory statements had in fact been made at employee meetings by an employer manager, they could just as easily have been made outside the employer's walls. Moreover, the trial judge concluded that since the statement of claim alleged that some of the comments had been made after the dismissal, the dispute could not fall under the collective agreement.

Pinard v. Laplante, 2022 QCCA 1119

Decisions of the Québec Court of Appeal

- The trial judge erred in finding that the dispute fell within the scope of civil liability and not the interpretation, application, administration or violation of the collective agreement. In this regard, the Court of Appeal noted that a dispute based on allegations of defamation may fall under the collective agreement, depending on the context in which the allegedly defamatory statements are made.

- The Court of Appeal also found that the judge erred in stating that the dispute did not arise from the collective agreement because the defamatory comments were made after the respondent's dismissal.

- Indeed, the fact that the alleged defamatory statements were made after the letter of termination was sent does not affect the jurisdictional issue. What is determinative is that these comments were made during work meetings or during meetings that were intimately related to the investigation and disciplinary process which led to the suspension and then to the dismissal of the respondent.

Pinard v. Laplante, 2022 QCCA 1119

Points to remember

1. A dispute based on allegations of defamation may fall under the collective agreement and thus fall under the exclusive jurisdiction of the arbitrator.

2. The exclusive jurisdiction of the arbitrator extends to events occurring after the termination of employment if they are related to his or her employment.

Commission des droits de la personne et des droits de la jeunesse (T.J.R.) v. Procureur général du Québec (Sûreté du Québec), 2022 QCCA 1577

Facts

- After making a promise to hire him, but before the start of his employment, the employer, the Sûreté du Québec (SQ), learned that the complainant had Tourette syndrome (TS), for which he had mild symptoms. The candidate did not declare this condition in the pre-employment and medical questionnaires or during the medical examinations administered as part of the hiring process. For this reason, the employer suspended the hiring of this candidate in order to conduct an investigation.

- As part of this investigation, the employer's physician determined that the complainant remained fit to perform the police job, despite his TS. However, the employer decided to cancel the promise to hire the candidate on the grounds that the bond of trust had been broken and that the candidate no longer met the requirements of ethics and good character required to work as a police officer.

- The employee filed a complaint alleging with the Human Rights Commission which was ultimately referred to the Human Rights Tribunal (HRT). The HRT found that certain parts of the pre-employment medical process violated section 18.1 of the *Charter of Human Rights and Freedoms* (the Charter). However, several other information requested was "directly related to the aptitudes or qualifications required" for the job, which is particularly the case for mental health issues. Thus, the candidate should have declared his TS.

Commission des droits de la personne et des droits de la jeunesse (T.J.R.) v. Procureur général du Québec (Sûreté du Québec), 2022 QCCA 1577

Facts

The HRT finds that the refusal to hire was not discriminatory, as it is based on the employer's assessment that the candidate does not meet the requirements of the job, and not on the fact that he had TS. However, the HRT awards damages to the candidate in compensation for the moral damage he suffered in answering certain discriminatory questions and undergoing certain medical examinations that infringed his right to integrity.

Commission des droits de la personne et des droits de la jeunesse (T.J.R.) v. Procureur général du Québec (Sûreté du Québec), 2022 QCCA 1577

Decision of the Québec Court of Appeal

- The onus is on the employer to demonstrate that the health-related questions asked in the hiring process relate to information that is required for a purpose rationally connected to the performance of the work in question and that is reasonably necessary to achieve that purpose.

- Although the questions asked in a pre-employment medical questionnaire must be sufficiently precise, it would not be reasonable to require an employer to list every condition or symptom that a candidate may have. Moreover, the fact that a person believes they are personally cured of a relevant condition, or the fact that they experience few symptoms related to it, does not exempt them from declaring it.

- In the context where the evidence shows that the complainant made false statements and lacked transparency during the pre-employment questionnaire, the employer was justified in concluding that the bond of trust required for any employment relationship no longer existed and thus refusing to follow up on its promise to hire the complainant.

Commission des droits de la personne et des droits de la jeunesse (T.J.R.) v. Procureur général du Québec (Sûreté du Québec), 2022 QCCA 1577

Points to remember

1. The fact that some questions on the pre-employment medical questionnaire are discriminatory does not completely invalidate it if they are justified.

2. Every candidate have a duty to act in good faith during the hiring process and in this case bad faith of the candidate was at the core of the decision.

3. The onus is on the employer to demonstrate that the health-related questions asked in the hiring process relate to information that is required for a purpose rationally connected to the performance of the work in question and that is reasonably necessary to achieve that purpose.

To watch in the upcoming months

Obligations under the *Charter of the French Language*

Employers with employees in Québec have until June 1, 2023 to have application forms, documents relating to conditions of employment and training documents that existed before June 1, 2022, translated in French if they were not already available in French.

Recent developments in Canadian employment law (Ontario)

Claire Browne

Celestini v Shoplogix Inc.

2023 ONCA 131

- Employee was terminated from his employment without cause.
- Employer provided employee with contractual termination entitlements under employment agreement.
- Employee alleged he was entitled to common law damages as employment contract was no longer enforceable.
- Motion judge: Former employee was entitled to common law damages for wrongful dismissal.
  - “Changed substratum” doctrine applied.
- Ontario Court of Appeal upheld motion judge’s conclusion that the “changed substratum” doctrine applied.

Celestini v Shoplogix Inc.

2023 ONCA 131

- “Changed substratum” doctrine
  - Limits when an employee’s common law entitlements are restricted by a written employment contract.
  - Employee’s level of responsibility and corresponding status escalates to a point where it can be **implied** that the employment contract **could not have intended** to apply to the employment relationship.

- However, a written employment contract may:
  - “Oust” the doctrine if it **expressly provides** that the terms will continue to apply where there are substantial changes to the employee’s duties.
  - Have continuing force where there are substantial changes to the employee’s duties if the parties **ratified** the employment contract’s **continued applicability** at the time that the changes occurred.

Croke v VuPoint Systems Ltd.

2023 ONSC 1234

- Plaintiff: former employee of VuPoint Systems Ltd. (“VuPoint”).
- VuPoint provides satellite television and smart home installation services on behalf of Bell.
- Bell implemented mandatory vaccination policy that applied to its suppliers.
- As a result, VuPoint implemented the following mandatory vaccination requirement:
  - All installers must be vaccinated against COVID-19; and
  - Provide proof of vaccination.
- Plaintiff refused to comply with VuPoint’s mandatory vaccination requirement.
- Plaintiff’s employment was terminated on September 26, 2021, by notice, effective October 12, 2021.
  - VuPoint alleged the Plaintiff’s employment contract was frustrated.

Croke v VuPoint Systems Ltd.

2023 ONSC 1234

- Court concluded that Bell's vaccination policy frustrated the Plaintiff's employment.

- Frustration occurs:
  - Where an unforeseen circumstance arises that is not contemplated by the contract; and
  - Performance of the contract becomes "radically different" from the terms undertaken.

- Key Findings:
  - VuPoint's vaccination policy was a **"supervening" event** that was beyond the parties' control.
  - VuPoint's vaccination policy was **not contemplated** by the parties when they entered the employment contract.
  - VuPoint was **required to comply** with Bell's mandatory vaccination policy.
  - Plaintiff was **unable to perform** any duties of his employment while he remained unvaccinated.
  - Plaintiff was advised his employer "in very clear terms" that he would not become vaccinated.

Time theft

Salim Visram

Besse v Reach CPA Inc.

2023 BCCRT 27

- Facts:
  - The Employee was terminated for cause (time theft) after six months' employment.
  - She commenced an action before the CRT seeking damages of $5,000.00. Employer counterclaimed for $2,603.07 including $1,506.34 in relation to the alleged time theft.

Analysis

- Employer had installed time tracking software on the Employee's computer as part of an investigation that commenced a month prior to the employee's dismissal.
- Employer recovered damages of $2,603.07, including $1,506.34 in relation to the alleged time theft:
  - 50.67 hours * $27.50 hourly wage ($1,395.90)
  - CPP contributions ($79.57)
  - EI premium contributions ($30.88)

Time-theft and cause for dismissal

Considerations

- *McKinley v BC Tel*:
  - Considering the matter in context, just cause exists when the employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship.

- Theft and dishonesty (including time theft) are serious forms of misconduct and may amount to cause for dismissal where it is of such a degree that it is irreconcilable with sustaining an employment relationship.

- *Enbridge Gas Inc. v UNIFOR, Local 975, 2023 CanLii 2937 (ON LA)*
  - Grievor was dismissed for cause after a review of the GPS system in his truck showed discrepancies of approximately 200 hours of time, where the grievor was either at home, a sports complex, a Tim Hortons coffee shop, or in an abandoned parking lot.
  - Analysis focused on the willful character of the grievor's misconduct, his lack of remorse, the fact that he had been recently trained in the Company's Business Conduct Policy, and the ongoing nature of the misconduct over the course of five months.

Monitoring software

Privacy considerations and investigations

- British Columbia's Personal Information Protection Act ("*PIPA*") contains considerations for collection, use, and disclosure of employee personal information.

- If monitoring software is necessary, employees should be advised in advance, and clear policies should be implemented to explain the employer's expectations, the purpose of the monitoring software and disciplinary consequences for time-theft.

- In the case of investigations, there is an exemption where consent is not required where it may compromise the investigation, however, this is a limited exemption and all other privacy laws, including the nature of the information that may be collected and storage, retention and destruction of information will continue to apply.

Deductibility of CERB payments

Kristi Wong

***Oostlander v Cervus Equipment Corporation*, 2023 ABCA 13**

Should CERB payments be deducted from wrongful dismissal damages awards?

- Canada Emergency Response Benefit (CERB): federal income assistance program introduced March 15, 2020 in response to COVID-19 pandemic
- Wrongful dismissal damages award employees for income they would have earned during notice period
- “Compensating advantage”: benefit that over-compensates employee beyond actual loss & benefit is sufficiently connected to employer’s breach of employment contract
- Lower-level courts divided on whether CERB payments should be deducted
  - If deducted, employer can offset amount of the CERB payment against damages it owes
  - If not deducted, employees receive windfall & are not required to repay benefits

***Oostlander v Cervus Equipment Corporation*, 2023 ABCA 13**

Oostlander v Cervus Equipment Corporation, 2022 ABQB 200

- Employee wrongfully terminated
- Awarded 24-month notice period (July 2020 – July 2022)
- Trial judge deducted CERB benefits during notice period from damages award
- Employee appealed CERB benefits deduction

***Oostlander v Cervus Equipment Corporation*, 2023 ABCA 13**

CERB Income NOT Deductible

- Policy considerations from BCCA in *Yates v Langley Motor Sport Centre Ltd.*, 2022 BCCA 398:
  - Desirability of ensuring all CERB deductibility cases decided on same basis.
  - Avoiding possibility that employers incentivized to terminate employees without notice in hopes of reducing liability through deduction of CERB.
  - Need for clear rules that are easy to apply.

- If windfall to result, should go to employee.

- Whether employee receives overcompensation & repayment is required is between employee & appropriate authority & does not concern employer.

Oostlander v Cervus Equipment Corporation, 2023 ABCA 13

Takeaways for employers

- To date, only AB and BC have appellate-level decisions confirming non-deductibility of CERB payments.
- AB & BC employers likely will not succeed in deducting CERB payments from wrongful dismissal damages.
- Impact on wrongful dismissal cases where termination occurred as a result of, or in same timeframe as, COVID-19 pandemic.
  - Dismissal does not need to be as a result of pandemic.

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