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Friday, September 29, 2023

What you missed on your summer vacation

WEBINAR SERIES

LEGAL UPDATES

FOR CANADIAN EMPLOYERS

DENTONS

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Québec Labour & Employment update

Nicolas Séguin

An Act respecting the regulation of work by children

What employers need to know

- **As of June 1, 2023**, the minimum age for access to employment in the province of Québec has been set at 14 years.

- The employer must obtain the written consent of the person having parental authority over the child or the child's guardian using the form established by the Commission des normes, de l'équité, de la santé et de la sécurité du travail7 (the "CNESST").

- Exceptions to the prohibition on work by children under the age of 14.

- **From September 1, 2023**, an employer may not require a child subject to compulsory school attendance (aged between 14 and 16) to work more than 17 hours per week or more than 10 hours from Monday to Friday.

Psychological harassment in the workplace

Employer obligations and disciplinary measures

- **Act respecting labour standards**

  81.19. Every employee has a right to a work environment free from psychological harassment.

  Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it. They must, in particular, adopt and make available to their employees a psychological harassment prevention and complaint processing policy that includes, in particular, a section on behaviour that manifests itself in the form of verbal comments, actions or gestures of a sexual nature.

- Reminder that employers have an obligation to prevent and stop harassment in the workplace.

- *Couture v. Kleen Flo Tumbler Industries Limited* , 2023 QCCS 2175

Employees return to the workplace

Disciplinary measures

Gradation of sanctions

The following are some examples of gradual sanctions:

- a verbal warning
- a written warning (email, disciplinary notice, etc.)
- a letter placed in the worker’s personnel file
- suspension
- dismissal

Sanctions must be applied according to the seriousness of the behavior. Except in the case of gross misconduct, a worker should not be dismissed for disciplinary reasons unless all other sanctions have failed.

- Drake c. Équipement Trans Continental ltée, 2023 QCTAT 1218

Ontario Labour & Employment Update

Andy Pushalik

HRTO denies discrimination claim based on creed related to mandatory vaccination policy

- *Oulds v. Bluewater Health*, 2023 HRTO 1134 (CanLII)
- Employer dismissed employee for failing to comply with mandatory vaccination policy
- Employee sought exemption based on her creed belief that *"the Covid-19 vaccine alters in some fashion all, or some of a person's genetic material, Code, make up, of all or part of their body, or bodily systems"*
- Employee further argued that *"The right to bodily autonomy, being central and integral to the individual; as a spiritual person, the belief that the Creator made us perfect, and not to alter one's body unnecessarily; they cannot take any medication that alters or instructs DNA, RNA, or molecular structure; as a spiritual person, their belief that the Creator will protect them; their belief that an individual's private life, medication, treatments, and infections they may have, should be kept as private as possible; and that faith can be flexible and is not strictly regulated or tenented [sic]"*

HRTO denies discrimination claim based on creed related to mandatory vaccination policy

- Tribunal referenced the Ontario Human Rights Commission policy which notes that a creed:
  - Is sincerely, freely and deeply held
  - Is integrally linked to a person's identity, self-definition and fulfilment
  - Is a particular and comprehensive, overarching system of belief that governs one's conduct and practices
  - Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence
  - Has some nexus or connection to an organization or community that professes a shared system of belief.
- In this case, Tribunal ruled that the applicant's creed lacks an overarching systemic component and does not form a nexus to any organization or community with a shared system of belief – there looks to be only a focus on a singular belief around the lack of efficacy of the COVID-19 vaccine and some perception that the vaccine could alter DNA and the need for autonomy to make this specific vaccine choice

Former employee's breach of confidentiality clause leads to repayment of Settlement funds

- *L.C.C. v. M.M.*, 2023 HRTO 1138 (CanLII)

Confidentiality: The Applicant may disclose the terms of these Minutes of Settlement to [their] immediate family, legal and financial advisors, on the condition that they also agree to maintain strict confidentiality of these Minutes of Settlement. ***Upon inquiry by any person about the resolution of the Application or conclusion of the Applicant's employment with [the applicant corporation], the Applicant shall simply state that all matters have been resolved. The Applicant will make no mention of, or allude in any way whatsoever to, the receipt of money or the amount of money received from [the applicant corporation] in this Settlement.***

Mutual Non-Disparagement: The parties agree that the purpose of this Settlement is to resolve any issues the Applicant has with the Respondents on a confidential basis and without any disparagement of the parties. Accordingly, the parties agree to refrain from making any oral, written or electronic communications about each other that are untrue, defamatory, disparaging, or derogatory, or acting in any manner that would be likely to damage the opposite party's reputation in the eyes of customers, regulators, the general public, or employees, unless required by law. ***This non-disparagement includes but is not limited to any electronic communications through social media (such as Facebook, Twitter, Instagram, YouTube, Snapchat, etc.)***

Former employee's breach of confidentiality clause leads to repayment of Settlement funds

- Shortly after the mediation, M.M. posted to LinkedIn: "*To all those inquiring, I have come to a resolution in my Human Rights Complaint against [the applicant corporation] and [the individual applicant] for sex discrimination*."
- After finding the LinkedIn post, the employer asked M.M. to remove it. M.M. did not respond. Instead, M.M. revised the post to read "*To all those inquiring, all matters have been resolved in my Human Rights Complaint against [the applicant corporation] and [the individual applicant] for sex discrimination*."
- Tribunal ruled that M.M. had breached the confidentiality clause - Tribunal held that a plain language reading of the confidentiality clause only allowed disclosure to those who explicitly made inquiries to the respondent.
- Not only was the LinkedIn post publicly accessible but it included references outside the scope of the permitted language in the confidentiality clause. Specifically, the LinkedIn post indicated "sex discrimination" and the names of both the applicant corporation and the individual applicant (the respondents in the original Application).
- These additions to a public post would, to a reasonable and objective viewer, "carry a real potential of serious reputational damage"

Ontario court denies certification of overtime class action

- *Le Feuvre v Enterprise Rent-A-Car Canada Company*, 2023 ONSC 3425 (CanLII)
- Class action seeking to represent approximately 2,500 individuals with the title Branch Rental Manager, Assistant Branch Rental Manager or Station Manager
- Representative plaintiff employee alleged that the class members had been misclassified as managers and denied overtime
- Motions judge dismissed certification motion; Representative Plaintiff appealed
- Appeal Dismissed
- Key issue on appeal was whether the work experiences of the different class members were too diverse to permit a trial judge to make a common determination as to whether the individuals had been wrongfully denied overtime
- Divisional Court agreed with motions judge that "…the variability and mix of work actually performed by class members made it impossible to resolve the misclassification issue on a common basis in this case"

Alberta Employment & Labour Update

Kristi Wong

New tort of harassment

Alberta Health Services v Johnston, 2023 ABKB 209

Facts

- The defendant, Johnston, made numerous negative remarks publicly & on his radio show about AHS & AHS health inspector, Nunn
- Johnston repeatedly engaged in rants belittling Ms. Nunn
  - “terrorist”
  - “fascist”
  - “looked retarded”
  - “AHS Nazi”
  - “an alcoholic”
  - “I intend to make this woman’s life miserable
- Accompanied by pictures of Nunn and her family
- Plaintiffs sued for harassment

New tort of harassment

Alberta Health Services v Johnston, 2023 ABKB 209

Existence of tort of harassment controversial

- No formally recognized tort (specific civil action) of harassment in AB
- ON & BC have not recognized a tort of harassment

Considerations

- Existing torts did not address the harm caused by harassment
- Harassment is a criminal offence
- ABKB regularly grants restraining orders to prevent harassment, upheld by ABCA
- Common law torts could still be modified by AB Legislature

New tort of harassment

Alberta Health Services v Johnston, 2023 ABKB 209

Tort of harassment

A defendant has committed the tort of harassment where he/she has:

1. engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
2. that he/she knew or ought to have known was unwelcome;
3. which impugn the dignity of the plaintiff, would cause a reasonable person to fear for his/her safety or the safety of his/her loved ones, or could foreseeably cause emotional distress; and
4. caused harm

Nunn awarded **$100,000** in general damages for harassment

- “Ms. Nunn’s emotional distress and the negative impact on her quality of life was serious and should be recognized and compensated through a significant award of damages”

New tort of harassment

Alberta Health Services v Johnston, 2023 ABKB 209

Key takeaways for employers

- Employees have an additional route to compensation for harassment
- Employers could be vicariously liable
- Employers must be aware of their obligations under OH&S legislation
  - Anti-harassment policy & procedures
  - Promptly respond to complaints of harassment
  - Conduct thorough and proper investigations

Non-compliance with vaccination policies

1831760 Alberta Ltd. o/a Calgary Climbing Centre v Jones, 2023 CanLII 76366 (AB ESA)

Facts

- CCC imposed a mandatory vaccination for its employees
- Jones discussed her objection to vaccination with CCC
- Employees who did not wish to be vaccinated were placed on an unpaid suspension/administrative leave
- Jones alleged that CCC had constructively dismissed her & filed Employment Standards complaint
- When restrictions were lifted, CCC recalled employees but did not notify Jones
  - Ambiguous whether Jones intended to resign

Non-compliance with vaccination policies

1831760 Alberta Ltd. o/a Calgary Climbing Centre v Jones, 2023 CANLII 76366 (AB ESA)

Not constructive dismissal

- CCC's actions were reasonable
  - CCC subject to OH&S legislation to take reasonable steps to protect health & safety of employees & the public
- Relied on *Parmar v Tribe Management Inc.*, 2022 BCSC 1675
  - Introduction of a vaccination policy does not amount to constructive dismissal
- Earlier decision *Country Living Furnishings Inc. v Sellen,* 2023 CanLII 6256 (AB ESA)
  - Neither Code nor employer can remediate the economic consequences for employees who refuse vaccination
- However, failing to recall Jones when the other employees were notified they could return to work did constitute constructive dismissal

Key takeaways for employers

- Constructive dismissal involves a contextual approach
- Employer must show that continued suspension is justified

Non-enforceable termination clauses

Plotnikoff v Associated Engineering Alberta Ltd., 2023 ABCJ 200

Facts

- Employee was terminated without cause & received pay in lieu of notice pursuant to *Employment Standards Code*
- Employee claimed he was also entitled to notice or pay in lieu of notice pursuant to common law

> **Termination without cause**: The Company may terminate employment without cause upon providing the Employee with notice as may be mandated by the Employment Standards legislation or such additional notice as the Company, in its sole discretion, may provide or, at our option, pay in lieu of such notice.

Implied common law notice entitlement

- Employment contracts presumed to contain an implied term requiring an employer to provide reasonable common law notice of dismissal
- Employer can rebut that presumption but language used to limit or extinguish common law rights must be clear & unambiguous

Non-enforceable termination clauses

Plotnikoff v Associated Engineering Alberta Ltd., 2023 ABCJ 200

Termination Clause did not extinguish common law entitlement

- Inclusion of the words “or such additional notice” recognizes that a period notice extending beyond the *Code* requirement is a realistic possibility

> **Termination without Cause**: The Company may terminate employment without cause upon providing the Employee with notice as may be mandated by the Employment Standards legislation **or such additional notice** as the Company, in its sole discretion, may provide or, at our option, pay in lieu of such notice.

- Language did not create a ceiling that limits the employee’s notice entitlements to only the statutory minimum notice requirements
- Employee entitled to common law reasonable notice period of 10 months

Non-enforceable termination clauses

Plotnikoff v Associated Engineering Alberta Ltd., 2023 ABCJ 200

Key takeaways for employers

- Termination clauses are very important but very tricky!
- Requires clear and unambiguous language to oust common law reasonable notice entitlements
- Include language that:
  - imposes an upper limit on the amount of notice an employee is entitled to receive
  - specifically states and clearly identifies that no additional notice will be provided
  - emphasizes that the statutory minimum notice entitlements constitute full and final satisfaction of all rights or entitlements & no claims in common are permitted

British Columbia Labour & Employment Update

Jeff Bastien

Just cause – “kickback” conflict of interest

Chura v. Batten Industries Inc., 2023 BCSC 1040

- Senior sales and management employee with 9 years’ service, terminated for cause

- Employee sued for wrongful dismissal; Employer counterclaimed for losses suffered due to employee’s conduct

- Cause allegations included:
  - ✓ Dishonestly claiming expenses (receipts for dinner and room service meals she did not pay for, customs fees she did not incur, reimbursement of bike rental for personal purposes, etc.)
  - × Trading company products for personal benefit
  - ✓ Using corporate accounts for personal benefit (Staples, shipping, etc.)
  - × Charging family’s cell phone plans to company
  - ✓ Caused employer to enter contract with a website company which provided a “kickback” to the employee’s husband

Just cause – “kickback” conflict of interest

Chura v. Batten Industries Inc., 2023 BCSC 1040

- Website company kickback was sufficient to constitute just cause on its own
  - Employee’s “dishonesty and self-dealing went to the heart of the employment relationship, and was fundamentally and directly inconsistent with her obligations to her employer”
  - Failure to disclose conflict was a breach of fiduciary duties
  - Even if not fiduciary, it was a breach of her common law employment duties of good faith and honesty to her employer

- Some of the employee’s other misconduct might be characterized as negligent rather than dishonest: e.g. failing to ensure she was not reimbursed for expenses already paid for by the company
  - Taken in isolation, these examples of negligent misconduct would likely not reach the level of just cause
  - However, taken together with the various other forms of misconduct in which the plaintiff engaged left no doubt that she engaged in a long-standing pattern of dishonest and deceptive behaviour that meant that the employment relationship could no longer viably exist.

Just cause – “kickback” conflict of interest

Chura v. Batten Industries Inc., 2023 BCSC 1040

- Employer established just cause
- Court awarded approx. $16,000 to the employer for its counterclaim

- Note: Trial was scheduled for 5 days, but ballooned to 23 days spread out over nearly 1.5 years. The employer sought special costs, but issue had not been decided.

Resignation vs. Termination

Khangura v. Lumberwest Building Supplies Inc., 2023 BCSC 1053

- Building supply and lumber salesperson, with company for 10 months
- Company had concerns regarding the employee's performance
- Employee was unhappy with the state of the company's operations
- Employee interpreted emails from the company to mean that he was being terminated without cause

- Termination provision in employment agreement contemplated termination for cause in the event of "any failure by the Employee to perform or observe any of the provisions of this Agreement where such failure is not cured within thirty (30) days of written notification to the Employee" [underlining added]

Resignation vs. Termination

Khangura v. Lumberwest Building Supplies Inc., 2023 BCSC 1053

- Email #1: “…If you do not follow the directions of the President and/or the Director of Lumberwest Building Supplies Ltd., the company will then have a right to terminate your Employment Agreement for cause as per Article 6.2(a)”

- Email #2 (one week later): “…We have provided enough warning to follow the terms of your Employment Agreement. You have continued to refuse to do so. As such please consider this as our 30 days written notice to terminate our Employment Services Agreement”

- Email #3 (next day): “…As per my email that was sent to you on August 4, 2021 [Email #1], I have made it very clear regarding your duties, work time schedule and daily sign in/out. Again, you have continued to refuse instructions set out by the Director of the Company…Please refer to the attached email from August 4, 2021 [Email #1].”

Resignation vs. Termination

Khangura v. Lumberwest Building Supplies Inc., 2023 BCSC 1053

- Employee interpreted Email #2 as notification of termination without cause. His lawyer wrote a letter asserting that the Company was terminating the employee's employment.

- Several communications from the company (or its counsel) followed on September 3, 10 and 23, clarifying its position:

  - "…it was not Mr. Dhaliwal's intention to terminate Mr. Khangura's employment, but to provide a period of 30 days in which to address the concerns set out in their meetings, and the email dated August 4, 2021. Mr. Dhaliwal wants Mr. Khangura to continue his employment…"

  - "My client intents to make it very clear to Mr. Khangura that Lumberwest wants him to continue his employment. Lumberwest did not intend to express or imply a termination, but rather a period of performance improvement…"

  - "…we want you to continue working at Lumberwest. Your position remains available for you, and we have not terminated your employment…I understand how my e-mail of August 11, 2021 could have been misconstrued, but I want to emphasize again that it was not my intent to terminate your employment. In recognition of this error in communication, Lumberwest is prepared to make good on any lost salary sustained between your last day of active work and the date of your return…"

Resignation vs. Termination

Khangura v. Lumberwest Building Supplies Inc., 2023 BCSC 1053

- Decision: the employee was not terminated, he voluntarily left his employment
- Court affirmed that the test for determining if an employer dismissed an employee is purely objective – the subjective understanding of the employer's intention is not determinative. There must be a clear and unequivocal act by the employer that, objectively viewed, amounts to a dismissal and which would be understood as such by a reasonable person. Evidence of surrounding circumstances may be considered.

- Email #2 cannot be considered in isolation. The other emails set out concerns with performance and refer to the company's right to terminate for cause per article 6.2(a) of the employment agreement.

- While the emails were confusing, the subsequent correspondence clarified the company's position. It was not reasonable in the face of such clear and unambiguous statements for the employee to maintain that he was terminated without cause.

BC Legislative Update

Pay Transparency Act, S.B.C. 2003

- May 11, 2023 – received royal assent. All provisions except s. 2 automatically came into force.

- Prohibited Conduct
  - Employers cannot seek pay history information about job applicants “by any means”. Employers cannot ask applicants about their pay history, or seek this information from other parties, unless this information is publicly accessible.
  - Employers cannot retaliate against employees who:
    - Ask their employer about their pay;
    - Disclose information about their pay to another employee or applicant;
    - Ask about a pay transparency report;
    - Ask the employer to comply with the employer’s obligations in the *Pay Transparency Act;* or
    - Gives information to the Director of Pay Transparency about their employer.

- November 1, 2023: Employers in BC required to specify expected salary or wage, or the expected salary or wage range, in all publicly advertised job opportunities

BC Legislative Update

Pay Transparency Act, S.B.C. 2003

- Reporting requirements
  - Reporting employers will be required to prepare annual pay transparency report by November 1 each year
  - Report to be distributed to all employees and published on a publicly accessible website
  - Report to include information about the employer, composition of workforce, differences in pay in relation to employees' self identified gender and other characteristics, and any other information required by regulations (details are still being developed)

- Reporting introduced in stages – large employers first
  - 2023: Government of BC and six Crown Corporations
  - 2024: 1,000 employees +
  - 2025: 300 employees +
  - 2026: 50 employees +
  - After 2026: more than the lesser of 49 and any prescribed number

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Thank you

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