DENTONS

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

What you missed on your summer vacation

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Grow | Protect | Operate | Finance

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Normal exercise of management function and occupational injury

Nicolas Séguin

Normal exercise of management function and occupational injury

Compagnie des chemins de fer nationaux du Canada et Orsucci, 2024 QCTAT 2267

Facts

The worker has submitted a claim seeking recognition of a psychological occupational injury.

The worker's complaints fall into three primary categories:

1) Constant supervision by a supervisor;
2) Directives regarding work methods; and
3) Various behavioural or organizational issues.

The employer, however, asserts that the incidents described by the employee are either untrue or occurred in the normal course of employment, arising from the reasonable exercise of management rights.

Normal exercise of management function and occupational injury

Compagnie des chemins de fer nationaux du Canada et Orsucci, 2024 QCTAT 2267

A psychological occupational injury may result from a single event or from the cumulative effect of multiple incidents that, when viewed individually, may seem minor or inconsequential. However, when considered collectively, these events can become significant, exhibiting the necessary unpredictability and suddenness.

The criteria for establishing a psychological occupational injury include:

- 1) One or more events that fall outside the normal scope of work.
- 2) The event(s) must not be based solely on the worker's subjective perception.

Normal exercise of management function and occupational injury

Compagnie des chemins de fer nationaux du Canada et Orsucci, 2024 QCTAT 2267

Takeaways for employers

1) The standard for proving that an employer's conduct constitutes actions leading to a psychological occupational injury remains high.

2) This underscores the principle that employers retain the right to discipline, direct, and supervise their employees.

Summer 2024 Ontario cases of note

Mia Music

Arora v. ICICI Bank of Canada, 2024 ONSC 4115

Facts

- An Assistant Vice President with over 15 years of service was caught sending sensitive data to his personal email.
- A subsequent investigation by the Bank revealed he was:
    - Sharing confidential information with competitors.
    - Planning to compete with the Bank.
    - Violating privacy policies.
    - Being dishonest during the investigation.
- As a result, the Bank terminated his employment for cause.

Arora v. ICICI Bank of Canada, 2024 ONSC 4115

The Court's decision

- Did the employee breach his duties to the bank?
  - All employees owe their employers a **duty of good faith and fidelity**.
- Do the breaches amount to just cause for termination?
  - The Court considered the following factors:
    - The seriousness and repeated nature of the misconduct.
    - The employee being blindsided by the interview.
    - The employee's lack of honesty.
    - The employee's clean discriplinary record.

Arora v. ICICI Bank of Canada, 2024 ONSC 4115

The Court's decision (cont'd)

- The Court upheld the just cause for termination and dismissed the employee's claim.
  - The severity of the breaches went "to the heart of the employment relationship, engaging basic duties of loyalty and honesty."
  - Termination for cause is a significant step, available to an employer in certain circumstances, but "**it is in no way comparable to capital punishment**, which in Canada is considered to 'engage the underlying values of the prohibition against cruel and unusual punishment.'"

Arora v. ICICI Bank of Canada, 2024 ONSC 4115

Key takeaways

- If an employee's misconduct breaches fundamental duties like loyalty and honesty, just cause can be justified, even for long-term employees with no prior disciplinary issues.
- Investigations are a crucial tool in determining whether an employee's actions warrant disciplinary action.
- Ensure workplace policies are clearly defined and well-drafted.

415909 Canada Inc c.o.b. PARS 2000 v. Moghadam, 2024 ONSC 3886

Facts

- The employee was dismissed after the company discovered certain financial irregularities.
- During his employment, the employee had the use of two company vehicles. After his dismissal, the company requested their return, but the employee refused.
- The employee had not filed a wrongful dismissal action.
- The company filed a motion to compel the return of the company cars and was successful, but the employee still refused to comply.
- The company then filed a second motion for recovery of the property. The employee argued he was wrongfully terminated and claimed he was entitled to continue using the vehicles during the reasonable notice period he believed was owed.

415909 Canada Inc c.o.b. PARS 2000 v. Moghadam, 2024 ONSC 3886

The Court's decision

- If the employee is successful in his wrongful dismissal action, he may be compensated for the value of any employment benefits he would have enjoyed during the reasonable notice period, but he is not entitled to use the vehicles before proving his case for wrongful dismissal.
- The employee was ordered to return the vehicles. If he fails to comply, the Sheriff is authorized to seize and deliver the cars to the company.
- The employee was also required to pay the costs of the motion, totaling $10,000.

415909 Canada Inc c.o.b. PARS 2000 v. Moghadam, 2024 ONSC 3886

Key takeaways

- Employers have the right to recover property post-dismissal and should not hesitate to assert this right. If an employee refuses to return a company car, the employer can seek recourse from the court.
- Upon termination of employment, all terms and conditions must continue during the minimum statutory notice period. However, **there is no obligation to permit the continued possession of a company car during the common law reasonable notice period**. If the employee successfully proves wrongful dismissal and entitlement to common law reasonable notice, they may be entitled to monetary damages for the loss of the benefit of the company cars.
- Clearly outline in an employment agreement each parties' rights and obligations in relation to the use of a company car once an employment relationship ends. A well-drafted employment agreement will expressly contract out of the obligation to continue perks after dismissal (other than during any statutory notice period).

Employee obligations to participate in the accommodation process

Taylor Holland

NOV Enerflow ULC v Maude, 2024 ABKB 432

Facts

- An employee occupying a safety-sensitive position tested positive for cocaine during a random drug and alcohol test.
- In accordance with the employer's drug and alcohol policy, the employer suspended the employee and referred him to a third-party company for an assessment to be conducted by a substance abuse professional ("SAP").
- The employer required the employee to comply with all the SAP's recommendations, including attendance at a residential treatment program, before allowing the employee to return to work.
- The employee did not want to attend a residential treatment program. Instead, the employee proposed to attend an outpatient treatment program (an option proposed by Alberta Health Services counsellors).

NOV Enerflow ULC v Maude, 2024 ABKB 432

Facts (cont'd)

- The SAP was willing to engage in further discussions with the employee, but required the employee to provide a consent form so they could speak directly to the AHS counsellors regarding the alternative treatment options that had been proposed.
- The employee failed to sign the consent form and did not attend any treatment program.
- The employee ultimately filed a human rights complaint alleging discrimination of the basis of disability (i.e. substance abuse disorder).

NOV Enerflow ULC v Maude, 2024 ABKB 432

Alberta Human Rights Tribunal decision

- The Tribunal found fault with the employer because the employer relied on the SAP's recommendation of residential treatment "as the only acceptable path forward."
- The Tribunal also determined that "[t]he facts themselves establish that attendance by the complainant at a residential treatment program was not required" since the employer "gave no acceptable explanation for its refusal to consider the complainant's suggestion of attending a day treatment program".
- As a result, the Tribunal awarded $25,000 in general damages for injury to the employee's dignity and self-respect, as well as compensation for lost wages plus interest.

NOV Enerflow ULC v Maude, 2024 ABKB 432

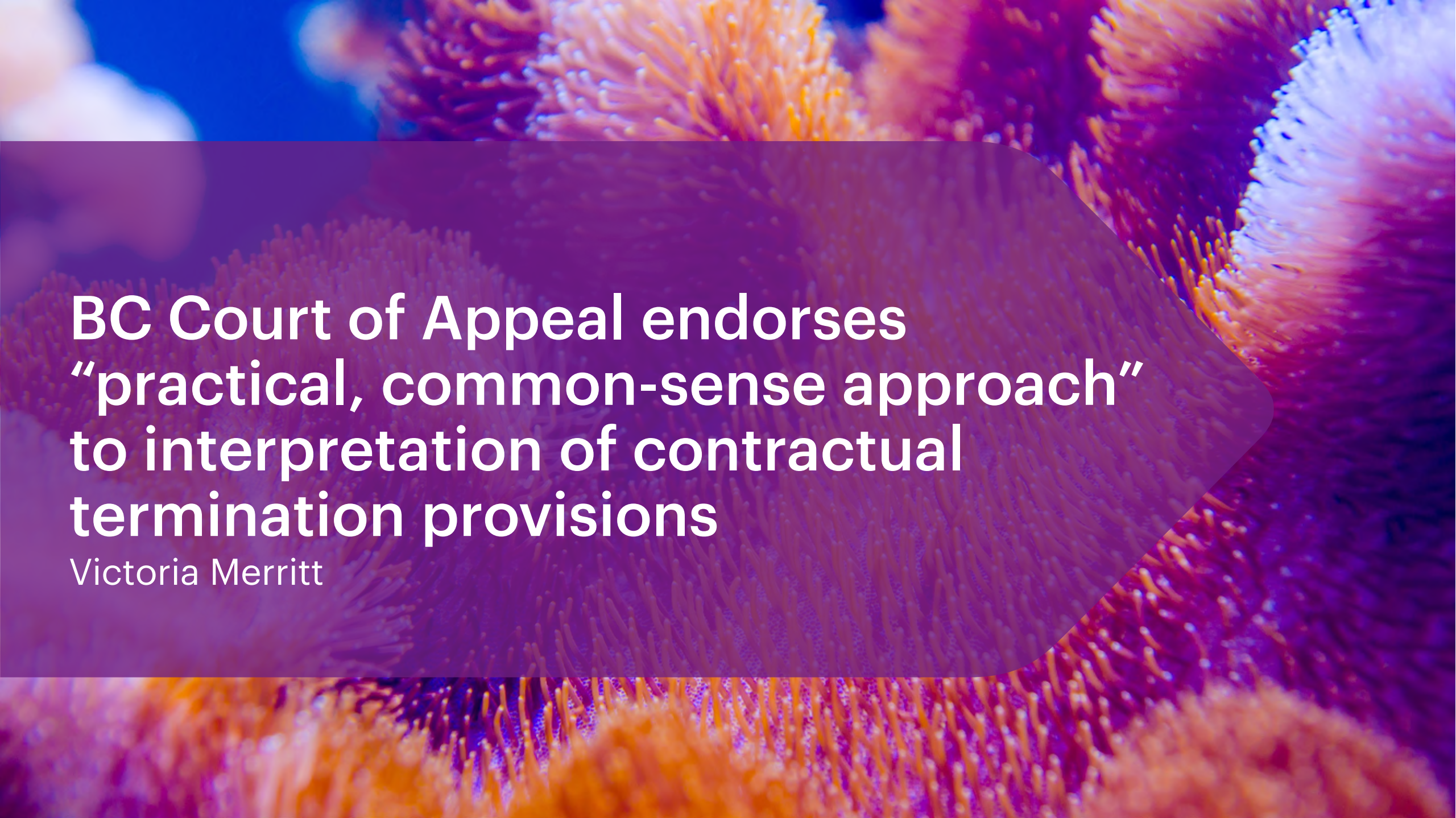
Appeal to the Court of King's Bench

- On appeal, the Court found that the Tribunal made a palpable and overriding error because there was "no evidence that a day treatment program was an acceptable, effective alternative."
- The employee had not provided any evidence to the employer at the time, nor to the Tribunal, that a day treatment program was an effective alternative to the residential treatment program recommended by the substance abuse professional.
- The Court stated "in order to make out a case of discrimination, it was incumbent on [the employee] to put forth evidence as to how he could have been accommodated by [the employer]. He failed to do so."
- Further, when the employee refused to sign the required consent form, he stymied the employer and the SAP from engaging in any further discussion to assess alternative treatment recommendations.
- The Court ultimately reversed the Tribunal's decision and dismissed the employee's human rights complaint.

NOV Enerflow ULC v Maude, 2024 ABKB 432

Key takeaways

- Employees have a duty to cooperate during the accommodation process.
- An employee cannot simply reject the recommendations of an employer's health professional on the basis that the employee has some other preferred treatment plan.
- Further, where an employee is proposing an alternative treatment plan, the employee must provide medical evidence that the alternative treatment program will satisfy the accommodation process.
- Having well-drafted drug and alcohol policies is key for employers engaging in the accommodation process for substance abuse disorders.



BC Court of Appeal endorses “practical, common-sense approach” to interpretation of contractual termination provisions

Victoria Merritt

Egan v. Harbour Air Seaplanes LLP, 2024 BCCA 222

Egan v. Harbour Air Seaplanes LLP

The Harbour Air group may terminate your employment at any time without cause so long as it provides appropriate notice and severance in accordance with the requirements of the Canada Labour Code.

Egan v. Harbour Air Seaplanes LLP

The BC Court of Appeal concluded that:

"Applying the practical, common-sense approach to contractual interpretation, the termination clause in Mr. Egan's contract was neither ambiguous nor non-compliant with the *Code* and was therefore sufficient to rebut the presumption of reasonable notice."

Egan v. Harbour Air Seaplanes LLP

"Proper contractual interpretation that seeks to determine the true intentions of the parties is **not** accomplished by disaggregating the words in a termination clause looking for ambiguity as a means to find the clause unenforceable." [my emphasis]

Egan v. Harbour Air Seaplanes LLP

"Whether termination clauses that do no more than referentially incorporate statutory provisions into an employment contract are sufficiently clear to displace the common law presumption of reasonable notice appears to be a matter of **some controversy** across Canada.

The controversy arises, in large part, from the differences between provincial employment standards legislation — more specifically whether the legislation provides for prescriptive periods of notice depending on an employee's length of service (as in British Columbia) or provides for only minimum periods of notice, using language requiring "at least" specified periods rather than prescriptive ones (as in Ontario and Alberta)."

Other examples

The Employer may terminate this Agreement by giving the Employee,

a) After the first three months of continuous employment, one week's notice or wages,

b) After the first year of continuous employment, two weeks' notice or wages, and

c) After three consecutive years of employment three weeks' notice or wages, plus one additional week's notice or wages for each additional year of employment to a maximum of eight weeks' notice or wages.

(*Forbes v Glenmore Printing Ltd*., 2023 BCSC 25)

Thank you

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