



Employment Law Developments: #MeToo, Cannabis & Beyond

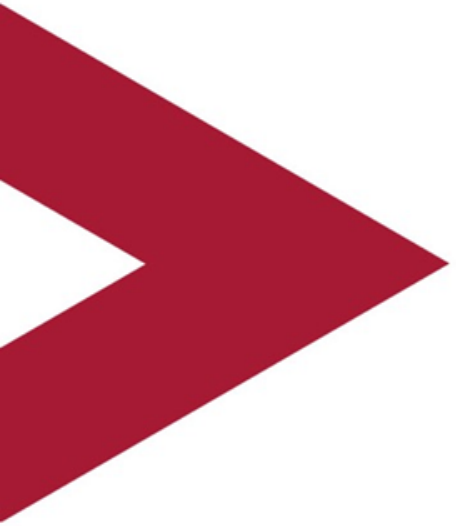
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Agenda

- Arbitration Agreements
- Contractual Interpretation
- Cannabis and Discrimination
- Frustration of Employment
- Sexual Harassment
- Transfers and Constructive Dismissal

Questions Always Welcome!



Arbitration Agreements

HELLER v. UBER TECHNOLOGIES INC, 2019

ONCA 1

Q: Is the arbitral clause in the standard Uber driver agreement enforceable?

A: The ONCA held that the arbitration clause was not enforceable on two grounds: (1) it represented an unlawful contracting out of the province's *Employment Standards Act*, and (2) it was unconscionable.

Key Takeaways:

- Contractual language in arbitration agreements should be reviewed to ensure that it does not offend statutory minimum standards. If it does, it is invalid.
- Unfairness can also invalidate arbitration agreements. This risk can be mitigated by ensuring employees/contractors have the opportunity to review and consider the terms, including by seeking legal advice, before signing.



Contractual Interpretation

OCEAN NUTRITION CANADA LTD v. MATTHEWS, 2018 NSCA 44

Q: In the event that an employee is (constructively) dismissed, should compensation be awarded for the loss of incentive plan payouts they would have received if employed over the full reasonable notice period?

A: *Not if the contractual language clearly precludes it.*

Key Takeaways:

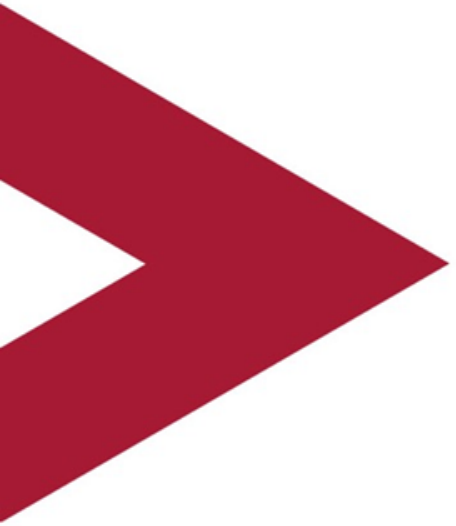
- Incentive plan agreements should be *carefully drafted* to clearly define how and when the plan will be realized.
- Clear and unambiguous contractual terms can effectively limit an employee's ability to receive damages under an incentive plan.
- Stand by: Leave grated to appeal to SCC.

AMBERBER v. IBM CANADA LTD, 2018 ONCA 571



Key Takeaways:

- Parties may agree to notice entitlements on termination that are less than what would be awarded at common law, provided the minimum entitlements in employment standards legislation are met.
- If there is *genuine* ambiguity in a contract provision, the courts will prefer the interpretation favourable to the employee.
- But courts should not strain to find ambiguity.



Cannabis and Discrimination

RE LOWER CHURCHILL TRANSMISSION CONSTRUCTION EMPLOYERS ASSN. INC. AND IBEW, LOCAL 1620 (TIZZARD), 2019 NLSC 48



Key Takeaways:

- If the safety risk posed by accommodating employees who use medical cannabis to treat disabilities is to be managed, an employer must be able to measure the impact of that cannabis on the worker's performance.
- The potential for several hours of residual impairment, and the current limitations on testing for impairment resulting from cannabis, present a legitimate safety risk which may amount to undue hardship for employers in a safety sensitive environment.

CANADIAN ELEVATOR INDUSTRY WELFARE TRUST FUND v. SKINNER, 2018 NSCA 31

Q: Is it discriminatory for an employer to exclude certain drugs (such as cannabis) from their Welfare Trust Plans?

A: The NSCA held that it was not. The plan in question did not exclude cannabis simply to discriminate against the employee, but rather, because the drug was not approved by Health Canada.

Key Takeaways:

- Employee benefit plans “*need not cover the sun, the moon and the stars.*”
- Courts and tribunals will pay deference to the administrators of benefit plans in selecting which drugs the plan will cover.



Frustration of the Employment Relationship

NOVA SCOTIA (ENVIRONMENT) v. WAKEHAM, 2018 NSCA 86



Key Takeaways

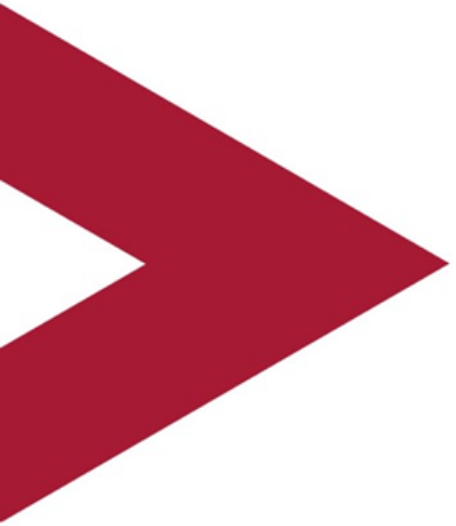
- Employers are entitled to expect some regularity of work from their employees if disabilities are accommodated.
- In the case of employees with long records of absenteeism and a history of unsuccessful accommodations, an employment contract can be frustrated if there is no prospect of a return to regular attendance in the reasonably foreseeable future.

ROSKAFT v. RONA INC., 2018 ONSC 2934



Key Takeaways:

- A determination by an LTD carrier of an employee's ongoing disability, coupled with their continued receipt of benefits, *may* be a sufficient basis for employers to allege frustration of contract.
- As a best practice, employers should request medical information from employees on disability leave and seek legal advice prior to making a final determination.



Sexual Harassment

WATSON v. THE GOVERNING COUNCIL OF THE SALVATION ARMY OF CANADA, 2018 ONSC 1066

Q: Is workplace sexual harassment connected closely enough to the employment relationship to be covered by a standard employment release?

A: **The Ontario Superior Court held that it was not.** While the ONSC recognized that the alleged events occurred at the place of employment and "perhaps, because of the employment", it concluded the complainant's sexual harassment claims were "clearly separate matters."

Key Takeaways:

- Be careful with pro forma releases.
- Standard release templates provided to employees upon dismissal should be reviewed to ensure they are drafted broadly enough to cover claims such as harassment and sexual harassment.

A.B. v. JOE SINGER SHOES LIMITED, 2018 HRTO 107



Key Takeaways:

- \$200,000 represents a new high water mark for HRTO awards for injury to dignity, feelings and self-respect, and is sure to have impacts beyond Ontario's borders.
- As the bar for the maximum damage awards has increased, it can be expected that the average award level will also increase.



Transfers & Mitigation

Clarke v Halifax Herald Ltd., 2017 NSSC 337



Key Takeaways:

- Transfer to new position found to constitute constructive dismissal based on employee's expectation of reduced future commission income.
- Employers can seek to mitigate risk by guaranteeing income for full notice period.
- Appeal to NSCA pending.



These materials are intended to provide brief informational summaries of legal developments and topics of general interest.

The materials should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law.

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