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Employment Law Developments: #MeToo, Cannabis, and Beyond

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Agenda

- Arbitration agreements
- Contractual interpretation
- Cannabis and discrimination
- Sexual harassment
- Frustration of employment
- Transfers and constructive dismissal

Questions always welcome!

Arbitration agreements

Heller v Uber Technologies Inc., 2019 ONCA 1

- Motion by Uber to stay proposed class action ($400m)
- Proposed class – Ontario Uber drivers claiming employees entitled to benefits under ESA
- Uber claims drivers are independent contractors not employees

Heller v Uber, cont'd

Except as otherwise set forth in this Agreement, this Agreement shall be exclusively ***governed by and construed in accordance with the laws of the Netherlands****, excluding its rules on the conflict of laws. The Vienna Convention on the International Sale of Goods 1980 (CISG) shall not apply.* ***Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement****, including relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such a dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and* ***shall be exclusively and finally resolved by arbitration*** *under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules") . . .* ***The Place of the arbitration shall be Amsterdam****, The Netherlands.*

Heller v Uber, cont'd

- ONSC stayed class action
- Arbitration agreements in employment context are common
- Arbitrator should first determine whether any part of the claim is outside his/her jurisdiction
- Not unconscionable. Many disputes handled internally.
- Nature of the action matters. $400m claim.
  Not unconscionable to require arbitration in Netherlands.

Heller v Uber, cont'd

- ONT CA overturned
- Arbitration clause invalid as it attempts to contract out of ESA (even though had not filed complaint – rather, seeking to bring a $400m class action)
- Arbitration clause also unconscionable – given expenses involved in bringing minor claims (even though this wasn't a minor claim)

Heller v Uber, cont'd

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. Need carve out.
- 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.
- Stand by: Leave to Appeal granted by SCC on May 23, 2019.

Contractual interpretation

Ocean Nutrition Canada Ltd. v Matthews, 2018 NSCA 44

- Matthews resigned from Ocean Nutrition and sued for wrongful (constructive) dismissal for portion of proceeds of sale under an Incentive Plan.
- Lower court found constructive (therefore wrongful) termination and awarded 15 months' notice
- Sale of business occurred within this period and Court thus awarded $1.1M under the Plan

Ocean Nutrition Canada Ltd. v Matthews, 2018 NSCA 44

- Ocean Nutrition appealed and was partly successful.
- NSCA found no error in judge's finding of constructive dismissal or ward of 15 months' notice period.
- However, NSCA found error in award pursuant to Plan which, on its plain wording, precluded payment to someone not an active employee.

Ocean Nutrition Canada Ltd. v Matthews, 2018 NSCA 44

- Dissenting justice, however, would have maintain the award under plan based on an implied duty of honesty and good faith under the employment contract.
- Dissenting justice found that dishonesty had led to Matthew's constructive dismissal and that it was within the reasonable contemplation of the parties that if Matthews was constructively dismissed, he would be entitled to the payment under the Plan.

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 to appeal granted by SCC.

Amberber v IBM Canada Ltd., 2018 ONCA 571

- Motion for summary judgement on enforceability of termination clause in employment contract
- Motion judge held that clause was ambiguous and did not clearly set out an intention to waive entitlement to common law damages

Amberber v IBM Canada Ltd., 2018 ONCA 571

If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary.

This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law.

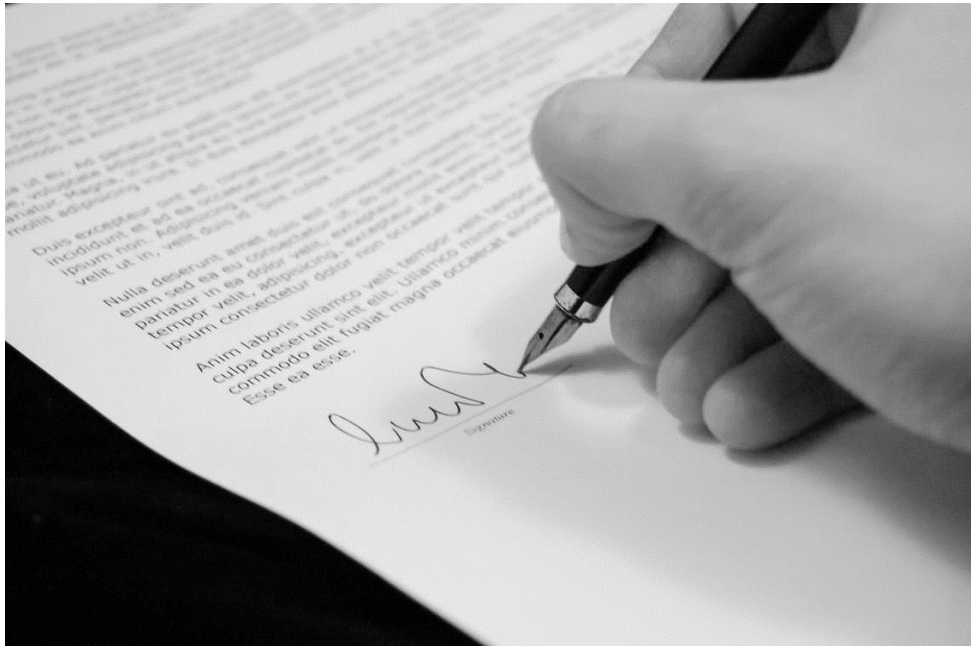
Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation.

In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

Amberber v IBM Canada Ltd., 2018 ONCA 571

- IBM was successful on appeal.
- Judge erred in subdividing termination clause into parts and interpreting them separately.
- ONCA said that when read as a whole, there can be no doubt as to the clause's meaning.

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*

- Labourer (30+ years) applied for employment at Lower Churchill project
- Authorized by physician to consume medical marijuana (controlled)
- All employees subject to drug and alcohol testing before working on project
- Disclosed use to testing agency

Re. *Lower Churchill*, cont'd

- Physician provides doctor's note. Employer demands more information. Delays / back and forth
- Employee's doctor:
  - Recommended four hours. Smokes at night. Okay next day.
  - Recognized some studies show residual cognitive impairment following day (up to 24 hours)
  - *Very unlikely to impair any of job functions*

Re. *Lower Churchill*, cont'd

- Employer's experts
  - Did not accept four-hour threshold
  - Opined that have to wait 24 hours (supported by Health Canada, NFLD College of Physician & Surgeons and College of Family Physicians Canada)
  - Best measure of THC through urine test but correlation with impairment weak
  - Better assessment through Drug Recognition Experts (not readily available to employers – employed by police)

Re. *Lower Churchill*, cont'd

- All experts agreed uncertainty in understanding risks of Cannabis
- Individualized assessment needed (e.g. non-safety sensitive positions, explore with physician other medications, etc.)
- Employers entitled to perform due diligence to determine whether can safely perform job (*Metron*)
- Federal Government Task Force

Re. *Lower Churchill*, cont'd

…I am satisfied that the lack of reasonable ability to measure impairment in persons using cannabis — blood and urine tests do not measure current impairment plus the lack of specially trained individuals who can observe and measure impairment in one's judgment, motor skills and mental capacity — presents a risk of harm that cannot be readily mitigated…

Re. *Lower Churchill*, cont'd

1. The regular use of medically-authorized cannabis products can cause impairment of a worker in a workplace environment. The length of cognitive impairment can exceed simply the passage of 4 hours after ingestion. Impairment can sometimes exist for up to 24 hours after use.

Re. *Lower Churchill*, cont'd

2. Persons consuming medical cannabis in the evening may sincerely believe that they are not impaired in their subsequent daily functioning; they can, however, experience residual impairment beyond the shortest suggested time limits. The lack of awareness or real insight into one's functional impairment can be a consequence of cannabis use. In that context, a person may not experience 'euphoria' (as mentioned in the Health Canada Guidance), yet still not function, respond or react normally while impaired by cannabis use.

Re. *Lower Churchill*, cont'd

3. A general practicing physician is not in a position to adequately determine, simply grounded on visual inspection of the patient in a clinic and a basic understanding of patient's work, the daily safety issues in a hazardous workplace. Specialized training in understanding workplace hazards is necessary to fully understand the interaction between cannabis impairment and appropriate work restrictions in a given fact situation.

Re. *Lower Churchill*, cont'd

4. There currently are no readily available testing resources within the Province of Newfoundland and Labrador to allow an employer to adequately and accurately measure impairment arising from cannabis use on a daily or other regular basis.

Re. *Lower Churchill*, cont'd

The safety hazard that would be introduced into the workplace here by residual impairment arising from the Grievor's daily evening use of cannabis products could not be ameliorated by remedial or monitoring processes. Consequently, undue hardship, in terms of unacceptable increased safety risk, would result to the Employer if it put the Grievor to work. As previously stated, ***if the Employer cannot measure impairment, it cannot manage risk.***

Re. *Lower Churchill*, cont'd

192 This fact situation is by no means a textbook example of how an accommodation should be considered. The delays and missteps were numerous. I have, however, concluded that the Employer considered the appropriate issues and reached the correct outcome in this long and tortuous scenario. ***It is easy to have sympathy for the plight of the Grievor, but he has chosen a therapy which, while effective in terms of his pain relief, requires more research and knowledge than is currently possible in order to ensure an employer's ability to determine impairment in a construction environment.***

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.

Skinner, cont'd

As the Tribunal properly recognized, to demonstrate prima facie discrimination, complainants are required to show:

> **[1]** that they have a characteristic protected from discrimination under the Code;
>
> **[2]** that they experienced an adverse impact with respect to the service; and
>
> **[3] that the protected characteristic was a factor in the adverse impact**.

Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

Skinner, cont'd

[87] Here, Mr. Skinner's "particular needs" become disassociated from the legislated requirement of enumerated grounds. Refusing Mr. Skinner a drug not approved by Health Canada does not differentiate him from others disabled by chronic pain. No beneficiary received medical marijuana. No beneficiary received drugs not approved by Health Canada. The Plan's exclusion of such drugs was not "based on" Mr. Skinner's disability. The Board's test for discrimination is therefore legally unreasonable because it fails to require a connection between the adverse effect and membership in an enumerated group.

Skinner, cont'd

The Board also placed reliance on the discretion of the Trustees to make a different decision as proof that Mr. Skinner's disability was in some way connected to their decision to deny coverage. "In denying the complainant's request, the complainant's disability was a factor in the Trustees' decision". This was unreasonable. It collapses qualification for a benefit into the basis for denying it. Absent disability, Mr. Skinner is not entitled to any medication. ***That disability does not thereby become a means for indefinite extension of benefits, the denial of which is automatically discriminatory****. As Meiorin, Elk Valley, and Bombardier exemplify, the mere existence of a protected characteristic does not in itself establish a connection*

…

[102] The Board's reasoning seems to be—because Mr. Skinner was denied coverage, his disability was a factor in the decision. Every person in Mr. Skinner's situation with a disability could make the same argument.

Skinner, cont'd

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.

Sexual Harassment

Watson v The Governing Council of the Salvation Army of Canada, 2018 ONSC 1066

- In 2016, Watson sued alleging acts of sexual harassment by superior and sought damages for negligence, intention infliction of emotional harm and breach of fiduciary duty.
- In 2011, Watson had entered into a settlement and provided a signed release.
- Employer sought summary judgement to dismiss the action based on the release.

Watson v The Governing Council of the Salvation Army of Canada, 2018 ONSC 1066

- Motion dismissed.
- Motion Judge found that Release limited to claims arising out of employment and sexual misconduct does not arise from the employment relationship

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

- AB immigrated to Canada. Her first job was to work at Singer Shoes.
- After she separated from her husband, AB move to apartment above store.
- Son of original owner became AB's boss and landlord. He sexually harassed and assaulted her for many years, not only in the store but in her apartment.

A.B. v Joe Singer Shoes Limited, 2018 HRTO 107

- Boss also making fun of AB's body, accent and English language skills, and by making derogatory comments about her place of origin.
- Human Rights Tribunal found allegations established and awarded $200,000 in damages for injury to dignity, feelings and self-respect.

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.

Frustration of the employment relationship

Nova Scotia (Environment) v Wakeham, 2018 NSCA 86

- Clerk Dept. of Environment
- Two car accidents
- 2009 – 2012 worked less than 45% of the time – increasingly lower attendance
- Pattern coming back to work for short periods of time
- On LTD
- Brought human rights complaint when employer issued letter about attendance

Wakeham, supra

Dear Ms. Wakeham:

This letter is in follow up to our conversation on February 21, 2012 in which we discussed concerns with respect to your excessive level of absenteeism from work. A review of your attendance over the last three (3) years (2009, 2010, 2011), shows that you have not worked more that (sic) 45% of regularly scheduled hours. […] I have attached a list detailing all of your absences in the last 3 years (please see attached). Although all of your absences are medically supported, your excessive absenteeism level is unacceptable and is a concern for myself and the Department.

Wakeham, supra

When an employee and employer enter into an employment relationship, there is an obligation on both parties. The employer has an obligation to provide employment and remuneration for work performed while the employee is expected to report to work on a regular and consistent basis and to complete assigned tasks. Your position is critical to our organization and to meet your obligation, you must attend work on a regular, timely and consistent basis. Your continued excessive absences from the workplace places a significant challenge on the office to meet its operational requirements. […]

Wakeham, supra

In order to assist you in improving your level of attendance at work, the Department has made several accommodations for you since 2008. On the basis of medical information, you were permanently placed in the Secretary I (later reclassified to Clerk III) position in 2008 as an accommodation. You were previously working in the Clerk II position. Unfortunately, there continued to be attendance concerns in this new role. Additionally, over the last 3 years, several ergonomic assessments have been conducted on your workstation. Based on medical recommendations from your physician, changes were made to your cubicle and workflow to accommodate the workplace based on your medical needs.

To date, specific accommodations that have been put in place to assist you include the following […]

Wakeham, supra

While we are willing to continue to work with you to help you achieve success and improved attendance in the workplace, it is expected that your attendance improve substantially upon your return from STI leave on February 20, 2012 and that you will take the necessary steps to attend work on a regular and consistent basis. […]

***Please be advised that continued excessive innocent absenteeism could lead to further action, up to and including termination of your employment**. Once you return to work, we will be meeting with you on a regular basis to review your attendance.*

Wakeham, supra

Quoting from Hydro Quebec:

- *The goal of accommodation is to ensure that an employee who is able to work can do so*.
- *The purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration*.
- *In a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.*

Wakeham, supra

The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

Wakeham, supra

[165] Hydro-Québec says that chronic absenteeism may frustrate the employment contract when the employee remains unable to work for the foreseeable future. To recall the court's summary: "The . . . duty to accommodate ends when the employee is no longer able to fulfill the basic obligations [of] . . . the employment relationship for the foreseeable future." ***This does not mean that an employee can preserve the relationship by making brief, intermittent and unpredictable appearances at work.*** *That had been Ms. Wakeham's pattern.*

Wakeham, supra

"The first order of business is the problem of absenteeism."

CartoonStock.com

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.

Roskaft v RONA Inc., cont.

…I find that there was enough evidence at the time of the termination of employment on the basis of the decision of SunLife that the Plaintiff was sufficiently disabled to qualify for his LTD benefits; as well as the continued representations of the Plaintiff that his medical condition has not improved and he was totally disabled from performing the duties of any occupation, and the Plaintiff's continued receipt of LTD benefits, to reasonably conclude that there "was no reasonable likelihood" that the Plaintiff would be able to return to work within a reasonable period of time.

[27] To conclude, I find on the totality of the evidence I have referred to above, that it was reasonable for RONA to conclude at the time of termination of employment that there was no likelihood of Mr. Roskaft returning to work within a reasonable period of time.

Transfers & Mitigation

Clarke v Halifax Herald Ltd., 2019 NSCA 31

- Clarke always worked at the Herald.
- He became an account manager in 1997.
- His compensation was a base salary of $24,000 per year plus commission on print advertising sales.
- Unchallenged evidence was that Clarke's income was generally in decline, as was case with other account managers, which in turn was consistent with broader trends in the traditional print media industry.

Clarke v Halifax Herald Ltd., 2019 NSCA 31

- Clarke presented with new position.
- Would work out of the same office, report to the same person and still work in sales, but sell different product.
- Base salary would be same ($24,000). Commission was at 1.5% of sales with current clients and 5% of new client business.
- Employer guaranteed that his compensation for the first three months would be $66,500 per year.

Clarke v Halifax Herald Ltd., 2019 NSCA 31

- Clarke accepted, then developed concerns with sales targets.
- After the three weeks, Clarke retained counsel who wrote to employer alleging constructive dismissal.
- Notwithstanding this, counsel offered that Clarke would work in the new position, but only if he received a base salary of $50,000 per year plus the same commission structure. If rejected, Clark would sue.

Clarke v Halifax Herald Ltd., 2019 NSCA 31

- Claim initially allowed, but employer successfully appealed.
- NSCA found that trial judge committed serious legal errors in restricting cross-examination of Clarke on actual sales results and her decision to bar the introduction of the evidence.
- Evidence was relevant to whether Clarke constructively dismissed and to mitigation.
- Trial judge erred in application of legal tests for constructive dismissal and the duty to mitigate.
- Did not appreciate the magnitude of unilateral change in terms of employment that satisfied the test for constructive dismissal and whether changes were so substantial as to demonstrate an intention not to be bound by the employment contract.

Clarke v Halifax Herald Ltd., 2019 NSCA 31

Key Takeaways:

- Not every change will constitute constructive dismissal. Changes have to be so serious or substantial to demonstrate intention not to be bound by employment contract
- If employee does not accept continued employment – can constitute a failure to mitigate

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