The Top Employment Law Cases of 2017

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It is undeniable that 2017 was an exciting and important year in employment law. The courts wrestled with complicated and difficult questions, including when can an employee be terminated for drug or alcohol use? And, can an employer require an employee to undergo an independent medical examination? There was a broad range of contentious issues such as these that came before the courts last year, with the end result being that a number of precedent-setting decisions were handed down in 2017. These cases were featured at Emond Harnden's "Year End Update Breakfast", hosted by Jacques Emond and Porter Heffernan on February 1st. Attendees of that event, as well as regular readers of Focus, will be familiar with many of these decisions. For HR professionals that are not familiar with the following cases, whether you are considering providing a negative reference, or terminating a long-service employee, you need to know about these 2017 cases.

When can employers request an independent medical evaluation? *Bottiglia v. Ottawa Catholic School Board* (May, 2017) ("*Bottiglia*")

One of the more useful and positive decisions for employers came from the *Bottiglia* case. The employer in this case was represented by Emond Harnden's Paul Marshall and Raquel Chisholm. *Bottiglia* involved the return to work of an employee who had been on sick leave for two years. The employee's physician provided somewhat contradictory prognoses and, only once the employee's sick leave was coming to an end, recommended a lengthy and gradual return to work period. Since the employer had questions about the changing prognoses and whether the physician understood the nature of the employee's duties, it requested the employee undergo an independent medical examination ("IME"). The employee refused and commenced an application to the Human Rights Tribunal of Ontario (the "Tribunal"), arguing that the employer failed to accommodate his return to work. In its first ever ruling on this issue, the Tribunal found that the employer's request was reasonable and dismissed the application.

On judicial review, the Divisional Court held that, although employers do not have a freestanding right to require employees to undergo IMEs, in certain circumstances, it can be justified. The test is whether the employer can reasonably expect to obtain from the employee's physician the medical information it needs to fulfill the procedural duty to accommodate. If the employer cannot, the request for an IME will be justified. The employee attempted to appeal the decision; however, leave to appeal was denied by the Ontario Court of Appeal.

It is important for employers to remember that there is no automatic right to require an employee to submit to an IME. Furthermore, an IME cannot be requested for the purpose of second guessing

an employee's medical practitioner. Instead, an IME will be justified if the employer cannot obtain from the employee the information it needs to fulfill the duty to accommodate. This may occur if the employee's prognosis is uncertain or unclear, if the employee's physician does not appear to understand the nature of the workplace or the employee's duties, or if the employer has another reason to question the adequacy and reliability of the information provided by the physician.

What does it take for a termination provision in an employment agreement to be upheld? *North v. Metaswitch Networks Corporation* **(October, 2017) ("*North*")**

The *North* case provides a somber warning to employers that termination clauses in employment contracts must be carefully and precisely drafted in order to be upheld by a court. In *North*, the employee was paid a base salary plus commissions. His employment contract contained a without cause termination provision that limited his entitlements to the minimums set out in the *Employment Standards Act, 2000* (*ESA*), but specified that any termination payments would be based on his base salary only, excluding commissions. Upon the employee's termination, the employer relied on the termination clause. The employee brought an action for wrongful dismissal, arguing that, by excluding his commissions from his termination payments, the termination provision in his employment contract was contrary to the *ESA*.

The Ontario Court of Appeal held that the termination clause indeed violated the *ESA* by excluding commissions from the termination entitlements. Although the employment agreement contained a "severability" clause (a statement that if any provision is found to conflict with the law it is "severed" and the remaining provisions remain intact), the entire provision was rendered unenforceable. The Court stated that an attempt to contract out of a minimum standard, without replacing it with a greater benefit, renders the entire clause void. The Court went on to hold that the employee was entitled to common law reasonable notice.

The *North* case drives home the importance of clear and unambiguous legal language when drafting employment agreements generally, and termination clauses in particular. Any ambiguities or illegalities can render a termination provision unenforceable and result in an award of common law reasonable notice. The courts are also clear that a severability clause will not save an illegal termination clause.

What happens if a Record of Employment is issued out of time? *Ellis v. Artsmarketing Services Inc.* **(March, 2017) ("*Ellis*")**

The *Ellis* decision underscores the importance of issuing an accurate Record of Employment ("ROE") "on time every time". In *Ellis*, the employee was terminated after nine years for poor

performance. The employer intentionally delayed issuing an ROE for five months. Once issued, the ROE incorrectly stated that the employee had quit. This resulted in the employee being denied Employment Insurance benefits which, in turn, created financial hardship.

The Court found that the employer's intentional delay in providing the ROE was "inexcusable". Although the Court refused to award punitive damages, it did award the employee $1,000 in inconvenience damages.

The *Ellis* decision reminds employers that they must submit an ROE to Service Canada within seven days of any interruption of earnings. The failure to submit an ROE in a timely fashion, and/or the failure to submit an accurate ROE, can result in inconvenience damages.

What types of employee income count as mitigation? *Brake v. PJ-M2R Restaurant Inc.* **(May, 2017) ("*Brake*")**

In *Brake*, the employee was a manager at McDonald's and held a second job at a grocery store. McDonald's told her to take a demotion or be terminated. The employee refused the demotion and brought an action for wrongful dismissal, alleging she had been constructively dismissed. At trial, the judge agreed and awarded her 20 months' pay without deduction for mitigation income. The employer appealed the decision

The Ontario Court of Appeal confirmed that employees are not obliged to accept demotions in order to mitigate damages if the demotion would be humiliating and a reasonable person would not accept it. The Court went on to hold that earnings from a pre-existing second job should not be deducted from the common law notice period. This income was not considered to be mutually exclusive from her former earnings, and therefore could not be used to reduce the common law notice period

As a result of the *Brake* decision, an employer's potential liability in a wrongful dismissal case may be greater than previously thought. In order to prove a failure to mitigate, employers will now be required to prove more than just that the employee earned (or could have earned) income: certain categories of income are now essentially excluded from consideration as mitigation. These are Employment Insurance benefits, income earned during the statutory entitlement period, and income from a non-mutually exclusive source, such as a pre-existing job.

When can an employee be terminated for drug or alcohol use? *Stewart v. Elk Valley Coal Corp.* **(June, 2017) ("*Stewart*")**

The *Stewart* decision is of particular relevance to employers with safety sensitive operations and drug and alcohol policies. In *Stewart*, the employer operated a mine. It implemented a drug and alcohol policy that required employees to disclose any dependence or addiction issues. If an employee made a disclosure, they would be offered treatment. If they failed to disclose and were subsequently involved in an incident in which they tested positive for drugs, they would be terminated. The employee in *Stewart*, who had made no previous disclosures, was involved in an accident and tested positive for drug use. He was terminated in accordance with the policy. The employee alleged that he was terminated because of his addiction and brought an application to the Alberta Human Rights Tribunal (the "Tribunal").

The case went all the way to the Supreme Court of Canada, which ultimately found in favour of the employer. It ruled that the employee was not terminated on the basis of his addiction, but instead because of his failure to disclose his addiction as required by the employer's drug and alcohol policy. Second, the Court held it was reasonable for the Tribunal to find that the employee's addiction did not diminish his capacity to comply with the employer's policy.

The *Stewart* decision is very positive for employers and demonstrates that termination for substance use can be supported if the workplace policy is clear and comprehensive. Employers also need to demonstrate that they have implemented measures to accommodate employee addiction to the point of undue hardship. Such measures could include Employee Assistance Programs, peer-to-peer support, or job-protected treatment leave.

Can employees on sick leave be given working notice of termination? *McLeod v. 1274458 Ontario Inc.* **(June, 2017) ("*McLeod*")**

In *McLeod*, the employee was injured in a non-work related accident and went on a medically-supported unpaid leave of absence. The employee was subsequently advised by the employer that it was closing part of its business and that he was being provided with working notice of termination. The employee provided a letter from his doctor re-confirming his inability to work, and only worked two short shifts during the period of working notice. Following his termination, he brought an action seeking pay in lieu of notice.

The Court applied the principle that damages are based on the premise that an employee would have worked during the notice period. If the employee is unable to work during that period, they are nevertheless entitled to the salary they would have earned. The employer had originally accepted that the employee was unable to work and was therefore precluded from later insisting that the employee work during the notice period or requiring him to prove that he was unable to. The Court found that the employee was incapable of working when he received the termination notice and was therefore entitled to pay in lieu of notice. Considering the *Bardal* factors and the employee's successful mitigation efforts, the Court awarded nine months' salary.

The *McLeod* decision reminds employers that the purpose of reasonable notice is to provide employees with an opportunity to secure new employment while still earning an income. This goal is undermined if the employee is unable to undertake a job search for medical reasons. As a result, working notice does not apply when an employee is on an approved leave of absence and is unable to work due to illness or injury, or is on maternity or parental leave.

What's new in punitive and moral damage awards? *Galea v. Wal-Mart Canada Corp.* **(December, 2017) ("*Galea*")**

The *Galea* case resulted in one of the highest damage awards in Canadian employment law history. It serves as a stark reminder of an employer's implied duty of good faith when dismissing an employee. The employee in this case was the Vice President, General Merchandising of Wal-Mart Canada. Although she had been considered a rising star in the company, in 2010 she was removed from her position and left without a role. The employer appeared to intend to "dismiss or denigrate" the employee until she resigned. She did not resign and, ten months later, she was terminated without cause. Although employment non-competition agreement required the employer to continue to pay her two years' salary, the employer only paid for 11.5 months.

The Court found that the employer's conduct in the last months of employment was "callous, highhanded, insensitive and reprehensible". The post-termination conduct was no better. The Court described this conduct as "deplorable", and noted that it too caused considerable mental anguish. The Court proceeded to award a total of $750,000 in damages. This consisted of $250,000 in moral damages ($200,000 for pre-termination conduct and $50,000 for the employer's litigation conduct) and $500,000 in punitive damages (five times the amount of punitive damages awarded against Wal-Mart previously in *Boucher* in 2014).

Although this damage award will likely be appealed (we will keep you apprised via Focus Alerts), the takeaway for employers is that courts are willing to award considerable amounts for damages when an employer's conduct is particularly egregious. Employers are reminded that they are under an implied duty to act in good faith before, during and after termination.

What are the risks of giving a negative reference? *Papp v. Stokes* **(April, 2017) ("*Papp*")**

The issue of an employer's exposure for providing a negative reference to a former employee was front and centre in the *Papp* case. The employee had been terminated without cause, although he did have issues working with others. When contacted for a reference, the employer stated that the former employee did not work well in a team setting. When asked whether he would rehire the former employee, the employer's response was, "No way". Unsurprisingly, the former employee

did not get the job. He brought an action against his former employer seeking significant damages for wrongful dismissal and defamation.

Although the employee was successful in his wrongful dismissal claim, the defamation action was dismissed. The Court held that, even though the employer's statements were defamatory (i.e., they would lower the employee's reputation, they referred to the employee, and they were communicated to another person) two defenses applied. The first was "justification": on the balance of probabilities, the statements made by the employer were substantially true. The second was "qualified privilege", meaning that the statements were defensible because there was no malice on the part of the employer in making the statements.

The *Papp* decision is very positive for employers. It confirms that qualified privilege applies to employment reference checks, and that employers can be candid in discussing the performance and interpersonal working relationships of former employees. The caveat for employers is that, where the reference is negative, they must try to ensure that the statements they make can be supported by the evidence. The facts may show that the statements are true, and therefore establish the defence of justification or, even if they do not, such facts may demonstrate that there was no malice or recklessness in making the statements and therefore assist in establishing the defence of qualified privilege. We also note that it remains safer to decline to provide a reference where your comments about an employee would be negative.

Can long-service employees ever be terminated for cause? *De Jesus v. Linamar Holdings Inc. (Camcor Manufacturing)* **(May, 2017) ("*De Jesus*")**

Terminating a long-service employee can present an employer with particular risks. Courts will often take into account the long period of service when considering whether there is cause for termination. In addition, where cause is not made out, the *Bardal* factors require a court to consider the length of service and increase the common law notice period accordingly. The decision in *De Jesus* is helpful for employers, as it sets out the circumstances in which even long-service employees may be dismissed for cause.

In *De Jesus*, the employee was a production supervisor with 19.5 years of service. The employer terminated his employment after a production line defect caused a large amount of product to be wasted. Throughout the employer's investigation of the incident, the employee maintained that he had conducted regular checks and that the defect could not have happened on his shift. This was contrary to the evidence of other employees who stated that the employee knew of the defect and did nothing to address it. The employee brought a claim for wrongful dismissal.

The case went before the Ontario Court of Appeal, which ultimately upheld the termination for cause. In upholding the termination, the Court found that the employee caused the production line

incident and, more importantly, that he lied about it. The employee's dishonesty factored largely in the decision. The court applied the principles from the Supreme Court of Canada decision in *McKinley v. BC Tel* (2001). This decision states that when dismissing an employee for dishonesty, the test is whether the employee's dishonesty creates a breakdown in the employment relationship. Employers are required to consider the nature and circumstances of the employee's conduct, and to strike a balance between the sanction and the severity of the misconduct. In the *De Jesus* case, the court found that there were no extenuating circumstances that would warrant overturning the penalty.

The *De Jesus* decision demonstrates that courts will uphold termination for cause, even in cases of long-service employees, where the employee was negligent and dishonest to the point of damaging the employment relationship beyond repair. Nevertheless, the threshold for just cause termination remains high. Employers should seek legal advice before terminating for cause and should have enforceable termination provisions in their employment agreements. This will ensure that, in the event that cause cannot be established, common law reasonable notice may still be avoided.

Is it possible to avoid paying out a bonus to a terminated employee? *Kielb v. National Money Mart Company* **(May, 2017) ("*Kielb*")**

The *Kielb* case once again demonstrates the importance of properly drafted employment agreements. In *Kielb*, the employee was terminated without cause a few days before he would have become entitled to an annual bonus in excess of $100,000. The employment contract stipulated that the employee be either actively employed or within the statutory notice period on the bonus payout date in order to qualify. The employee brought a claim alleging that the bonus provision in the employment agreement was ambiguous and violated the *ESA*.

The Ontario Court of Appeal disagreed and held that the restrictive bonus entitlement provision was in fact enforceable. The language was clear, unambiguous and legal. The employee understood the language and agreed to it. In this respect, it is noteworthy that the employee had in fact negotiated the employment agreement. In exchange for negotiated increases to the base salary and severance pay, as well as changes to the non-compete provision, the employer kept in the restrictive bonus provision. The employee was given three days to review the revised employment agreement and ultimately accepted it.

The *Kielb* decision is positive for employers. It shows that clear and unambiguous language restricting the payment of a bonus on termination can be upheld, once again driving home the importance of precisely-drafted employment agreements.

What are the courts saying about workplace harassment claims? Merrifield v. The Attorney General **(February, 2017) ("*Merrifield*")**

Employers should be aware of the *Merrifield* decision and the resulting increased exposure to workplace harassment claims. In *Merrifield*, an RCMP officer brought a claim against his employer, alleging that he had been harassed by his superiors over a period of seven years. It is important to note that the alleged harassment was not based on a ground protected by human rights legislation.

The Ontario Superior Court of Justice found that the "tort of harassment" exists as a freestanding cause of action. In order to establish this tort, a claimant must meet the following four part test:

1. Was the defendant's conduct outrageous?
2. Did the defendant intend to cause emotional distress or have a reckless disregard for causing the plaintiff emotional distress?
3. Did the plaintiff suffer severe or extreme emotional distress?
4. Was #1 the actual and proximate cause of #3?

The Court found that the employer's conduct was in fact egregious and that the test for the tort of harassment was met. The employee was awarded $100,000 in general damages and $41,000 in special damages.

We should note certain factors in the *Merrifield* case that may have come into play in this somewhat unusual decision. First, since the employee was an RCMP officer, the employment relationship was governed by the *RCMP Act*, and the employee was therefore unable to avail himself of remedies that otherwise may have been available under contract. In addition, the employer's conduct in the case was found to be particularly egregious. An appeal has been filed in this case and we will keep you apprised via Focus Alerts. Nevertheless, for the present, employers should be aware that the tort of harassment exists, and that it is in addition to the contractual and statutory protections already available to employees, such as the Ontario *Human Rights Code* and the *Occupational Health and Safety Act*. This means that engaging in harassment, or permitting employees to, carries significantly more risk as a result of the *Merrifield* decision.

In our view

As can be seen from the above review, 2017 saw a number of interesting and important decisions in employment law. Although the cases dealt with a considerable range of issues, there are a few re-emerging themes that employers and HR professionals should be aware of. First, it is critical to have carefully-crafted, clear and unambiguous language in employment-related documents. This applies to both workplace policies, such as those in *Stewart*, and to employment contracts, as seen

in *North* and *Kielb*. Second, when managing employees, employers must remember the implied duty to act in good faith. This applies to properly managing administrative aspects of termination, such as filing an ROE promptly and accurately, as seen in *Ellis*, to harassment in the workplace, such as that in *Merrifield*. A few of the decisions recognize an employer's right to properly and effectively manage their workforce. We saw a workplace policy providing for termination for substance abuse upheld in the *Stewart* decision. Also, an employer may in certain circumstances properly require an IME, as was the case in *Bottiglia*. Even long-term employees may be terminated for cause where they are negligent or dishonest to the point of damaging the employment relationship, as seen in *De Jesus*. Finally, employers may give negative references where they ensure that their statements are true and are made without malice (although whether this is wise may be another question).

For further information about these cases or the issues they raise for employers please contact Jacques Emond at 613-940-2730 or Porter Heffernan at 613-940-2764.