

# 2014 Year End Wrap Up: An Employer's Guide to The Year's Most Compelling Legislative and Employment Law Developments

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## Overview

- Employment Law Update
  - Impact and scope of new legal duty of honest performance
  - How to avoid triggering liability for constructive dismissal when adding to an employee's duties
  - Is employee dishonesty just cause for dismissal
  - Is an employer's difficult financial circumstances a factor in determining reasonable notice
- Legislative Update
  - *Employment Standard Act*
  - Insuring LTD plans
  - Pension reforms
  - Other developments

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## LABOUR NOTE:

*Saskatchewan Federation of Labour v. Saskatchewan* (January 30, 2015 – SCC)

- Struck down Saskatchewan legislation that prohibited designated essential service workers from engaging in strikes
- Right to strike is constitutionally protected under freedom of association provisions of the *Charter of Rights and Freedoms*
- Impact on existing jurisdictions that preclude strikes for essential services?

## Employment Law Update

## *Bhasin v. Hrynew* (2014 – SCC)

### **Facts:**

- Can-Am marketed education savings plans through retail dealers
- Had dealership agreement with Bhasin and his company. Contract renewed automatically, unless notice of non-renewal was given 6 months prior to the end of term
- Can-Am conspired with Hrynew, Bhasin's competitor, to have Hrynew take over Bhasin's business
- Can-Am gave Bhasin notice of non-renewal of the dealership agreement
- Due to non-renewal Bhasin lost the value of his business and majority of his sales agents were solicited by Hrynew
- Trial judge found Can-Am had acted dishonestly throughout the process
- Alberta Court of Appeal overturned trial judge's decision

## *Bhasin v. Hrynew* (2014 – SCC)

### **Court's Findings:**

- Established principle of good faith as a “general organizing principle” of the common law contract
- Identified new legal doctrine – “duty of honest performance”
  - Requires parties to be honest with each other in relation to performance of contractual relations
  - Parties must not lie or knowingly mislead each other about matters directly linked to performance of the contract
- How will this impact employment law?

## Practical Implications

- Impact difficult to predict
- Duty of good faith not new in the employment law context
  - Implied duty in the manner of dismissal – *Honda v. Keays* (2008 – SCC)
- Duty of honest performance – more expansive, beyond termination context

## Constructive Dismissal

- Unilateral change to a fundamental term of an employment contract
- Does it amount to constructive dismissal if an employer adds to an employee's job duties?

## *Damaso v. PSI Peripheral Solutions Inc.* (December 2013 – ONSC)

### **Facts:**

- Damaso worked as Field Service Technician/Computer Technician for 10 years. Duties were set out in writing and signed by parties
- Employer added additional responsibilities (IT Administrator), but with no increase in pay
- After one year, Damaso complained he was overworked, asked for increase to compensate him for additional duties
- Employer took position additional duties were “natural extension” of initial job responsibilities. Due to financial difficulties could not provide a raise
- Damaso took position he would not perform new duties
- Employer gave Damaso a termination letter which provided 12 months’ working notice and that he was expected to perform all his duties until his termination
- Damaso went on disability leave for a few months and then sued for constructive dismissal

## *Damaso v. PSI Peripheral Solutions Inc.* (December 2013 – ONSC)

### **Court’s Findings:**

- Additional duties resulted in constructive dismissal
- Constructive dismissal occurred not when duties first imposed but when employer provided Damaso with 12 months working notice of termination
- Court awarded 12 months notice
- Damaso did not fail to mitigate his damages
  - Owner’s treatment of Damaso resulted in an atmosphere of hostility, embarrassment and humiliation

## Practical Implications

- Court in *Damaso* acknowledged that employers are entitled to some flexibility in managing their business
- Changes must be reasonable
- Provide discretion in employment contracts for employer to change/expand job duties
- Fundamental changes implemented without notice to the employee may result in constructive dismissal

## Is Employee Dishonesty Just Cause for Dismissal?

- *McKinley v. BC Tel* (2001 – SCC)
- Contextual approach
- Assessing just cause, courts consider:
  - Nature and extent of misconduct
  - Surrounding circumstances
  - Whether in circumstances dismissal is appropriate (proportional) result

## *Fernandes v. Peel Educational* (2014 – ONSC)

### **Facts:**

- Fernandes, teacher at private school for more than 10 years
- Prior to termination performance reviews indicated he was a good teacher
- Performance deteriorated – sloppy and inconsistent record-keeping, inaccurate grading, failure to follow various school protocols, lied to school officials about his practices
- Finally admitted to falsifying grades after which school terminated him for cause

## *Fernandes v. Peel Educational* (2014 – ONSC)

### **Court's Findings:**

- School did not have just cause, despite Court finding that Fernandes:
  - Did an incompetent job of assessing his students, marking his students and recording those marks
  - Gave incorrect marks. Marks he gave were late
  - Lied to his employer
  - Admitted to falsifying marks on students' records
  - Lied to the Court about how student presentations were marked

## *Fernandes v. Peel Educational* (2014 – ONSC)

### **Court's Findings:**

- Considering nature and circumstances of misconduct, Court also considered:
  - Fernandes employed for 10 years as a “well-regarded” teacher
  - School allowed incorrect grades to be sent out to students and their parents when it investigated Fernandes’ misconduct over 6-week period. In Court’s view, school did not view incorrect grades as being that serious
  - Although late in process, Fernandes admitted to his misconduct

## *Fernandes v. Peel Educational* (2014 – ONSC)

### **Court's Findings:**

- 12 months reasonable notice
- Damages for loss of LTD disability benefits to age 65
  - Fernandes had become totally disabled after his employment was terminated, during common law notice period
  - Employer stopped LTD coverage as of termination date
  - Medical evidence clear that he would never work again and no contrary evidence led by employer
  - Court did not rule on specific amount, required further submissions

## Practical Implications – Just Cause

- High threshold
- Employer bears substantial burden
- Established on a case-by-case basis
- Fundamental violation of employment contract
  - Non-compliance with the essential terms
- Process is important
  - Employer's documentation efforts
  - Consistent application of progressive discipline policy (if it exists)
  - Thorough and fair investigation

## Practical Implications – LTD Benefits

- Benefit coverage – how long is required by law?
  - Statutory notice period – required by ESA
  - Common law reasonable notice period
  - Risk of not extending – becoming self-insured for the claim
- Address with termination package and release
  - Confirm understanding LTD benefit coverage ceased
  - Provide compensation in lieu of benefit coverage/alternate coverage
  - Provide reasonable notice
    - Easier to obtain a release

## Calculating Common Law Reasonable Notice

- *Bardal* factors
  - No strict test
  - Main factors
    - Character of employment
    - Length of service
    - Age
    - Availability of similar employment
- Is an employer's difficult financial circumstances a consideration in assessing reasonable notice?

## *Gristey v. Emke Schaab ClimateCare Inc.* (2014 – ONSC)

### Facts:

- Gristey, 52-year old residential gas technician with 12 years service, terminated due to lack of work along with 8 other employees
- Employer provided 8 weeks statutory notice plus offered an additional 8 weeks in exchange for a release
- Gristey declined and sued for wrongful dismissal, claiming 12 months notice
- Market downturn had reduced Gristey's hours leading up to his termination
- Employer submitted Gristey would have earned "nil income" had he worked during the reasonable notice period

## *Gristey v. Emke Schaab ClimateCare Inc.* (2014 – ONSC)

### **Court's Findings:**

- Had Gristey not been terminated he would have likely worked less hours during the notice period
- Took into consideration “economic factors” including the market and financial health of employer at time of termination
- Reduced initial reasonable notice assessment of 12 months by 1/3 to 8 months due to economic factors

## Practical Implications

- Using “economic factors” to reduce notice is limited
- Courts have used tough economic times to extend notice periods
- Provide for ability to temporarily layoff in employment contract
- Well-drafted employment contract at beginning of employment can reduce employer’s risk and costs when ending the employment relationship

# Legislative Update

## Bill 18 *Stronger Workplaces for a Stronger Economy Act, 2014*

- Omnibus legislation, amends several employment statutes
- Received Royal Assent November 20, 2014
  - *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009*
  - *Employment Standards Act, 2000*
  - *Labour Relations Act, 1995*
  - *Occupational Health and Safety Act*
  - *Workplace Safety and Insurance Act, 1997*

## Bill 18 Employment Standards Act

- Effective February 20, 2015:
  - Elimination of \$10,000 cap on recovery of unpaid wages
  - New 2-year time limit for wage claims
- Effective May 20, 2015:
  - Provide employees with most recent MOL informational poster
  - ESOs can order employers to conduct “self-audits”
- Minimum wage
  - Subject to automatic CPI adjustment starting October 1, 2015
- Effective November 20, 2015, temporary help agencies:
  - Clients joint and several liability with the agency for unpaid wages
  - Client and agency to keep record of hours worked by each assignment employee

## Bill 18 *Stronger Workplaces for a Stronger Economy Act, 2014*

- *Occupational Health and Safety act*
  - Expanded definition of “worker” to include unpaid workers (e.g. co-op students, interns)
  - Effective November 20, 2014
- *Workplace Safety and Insurance Act*
  - Adds and defines “temporary help agency”
  - Authority to make regulations to assign workplace injury costs to client
  - Effective on proclamation
- *Labour Relations Act*
  - Open period reduced from 90 to 60 days (construction industry)
  - Effective May 20, 2015

## Three New ESA Leaves in Effect October 29, 2014

Unpaid, Job-Protected Leave	Family Caregiver Leave	Critically Ill Child Care Leave	Crime-Related Child Death or Disappearance Leave
Purpose	Provide care or support, serious medical condition Designated family members	Change in baseline state of health and life at risk due to illness or injury Under 18	Child dies or disappears as a result of a crime Under 18
Duration	8 weeks	37 weeks	Death-104 weeks Disappearance-52 weeks
Qualifiers	None	6 consecutive months of employment	6 consecutive months of employment

## New Requirements to Insure Long-Term Disability Benefit Plans

- Private sector, federally-regulated employers
  - Part III, *Canada Labour Code*
  - Effective July 1, 2014, applies on a go forward basis
- Ontario *Insurance Act*
  - Bill 14 – Royal Assent July 24, 2014, not yet in force
  - January 16, 2015 – Government announced a public consultation on regulations to support the new requirement to insure LTD benefits
  - Written submissions due by March 6, 2015

## OHS Awareness and Training (O. Reg. 297/13)

- Requires completion of mandatory basic OHS awareness training for workers and additional training for supervisors
- When?
  - July 1, 2014, Regulation came into force
- Who must comply?
  - All workplaces under OHSA, regardless of size or sector
- Required to use external trainers?
  - Not required, however training backed by expertise is recommended

## Pension Reform In Ontario

- Bill 57 *Pooled Registered Pension Plans Act, 2014*
- 1<sup>st</sup> reading December 8, 2014
- Legal framework for establishment, administration and operation of pooled registered pension plans
- Federal framework for pooling of pension funds came into effect in 2012

## Pension Reform In Ontario

- Bill 56 *Ontario Retirement Pension Plan Act, 2014*
- 1<sup>st</sup> reading December 8, 2014
- Requires establishment of the Ontario Pension Plan by January 1, 2017
  - Mandatory participation
  - Will not apply to employees who participate in a “comparable” workplace pension plan
  - Equal contributions from employers and employees not exceeding 1.9% each on employee earnings up to the maximum annual income threshold of \$90,000
- December 17, 2014 – government released consultation paper – feedback on key design details and essential components of ORPP
- Comments due by February 13, 2015

## AODA Compliance

- December 31, 2014 – deadline to file accessibility report for private and not-for-profit organizations (20 or more employees in Ontario)
- 1<sup>st</sup> AODA enforcement decisions from the License Appeal Tribunal – 4 decisions released summer 2014 all regarding failure to file accessibility report
- AODA and 5 Accessibility Standards – various rolling deadlines

## Federally-Regulated Employers

- Significant changes to the *Canada Labour Code*
- Part I – Industrial Relations
  - Effective June 16, 2015, changes to certification and decertification process
- Part II – Occupational Health and Safety
  - Effective October 31, 2014
  - New definition of “danger”
  - Changes to work refusal process
  - Transfer of authority from health and safety officers to the Minister
- Part III – Standards
  - Effective April 1, 2014
  - Increased fines for Code violations
  - New statutory complaint mechanism and time limits
  - Time limits on payment orders
  - Administrative review procedure
  - Time limit to pay vacation pay on termination

# Questions?