



2017 Employment Law Year End Wrap Up

February 1, 2018

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As a boutique labour and employment law firm, Emond Harnden has represented the interests of management in both official languages for over 30 years.

Originally rooted in the Ottawa community, we have grown to represent employers in all territories and provinces of Canada.

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JACQUES A. EMOND
613-940-2730
jemond@ehlaw.ca

ABOUT

Jacques is a co-founding partner of Emond Harnden. Along with his experience in wrongful dismissal matters, he has considerable experience in the areas of public-private partnerships, constitutional and administrative tribunals, negotiation/mediation of public and private sector collective agreements.

He has appeared before various provincial and federal labour Boards and Courts of all levels in Ontario and the Supreme Court of Canada. He also brings unique capabilities in the areas of employment issues arising from the purchase and sale of businesses, as well as in amalgamation and privatization matters, having managed both the privatization of very large organizations formerly operated by the federal government, and the amalgamation of local municipalities.

He is an elected Fellow of the American College of Labor and Employment Lawyers, and The Advocates' Society's 2014 Ottawa Honouree. He recently completed his Director Education Program and received his ICD.D designation. At the national level, Jacques has consistently been ranked by The Canadian Legal Lexpert® Directory since 1997 as the "most frequently recommended leading practitioner in labour relations and employment law" in peer surveys.

Jacques and his partner, Lynn Harnden were awarded the Carleton Medal by the Carleton County Law Association in 2017 in recognition for "great diligence, high ideals and outstanding leadership in the practice of law." Jacques was the past Chair of the University of Ottawa Heart Institute Foundation and is currently a member of the Board of Directors for the UOHI.



**PORTER
HEFFERNAN**
613-940-2764
pheffernan@ehlaw.ca

ABOUT

Porter is a partner of Emond Harnden. He advises his public and private sector clients in respect of all aspects of labour and employment law, and provides representation before numerous tribunals and all levels of courts.

Porter's practice is focused on labour and employment advocacy. For his unionized clients, Porter frequently appears before labour arbitrators in response to grievances filed on behalf of employees. In the case of non-unionized employers, he is regularly called on to represent clients in defence of wrongful dismissal and other employment related claims.

In addition to his employment and labour law advocacy practice, Porter provides strategic advice and guidance to a number of public and private sector clients in respect of information management issues, including in particular in respect of privacy and access to information matters. Porter has particular experience in freedom of information/access to information matters and is pleased to be able to assist his public sector clients in this challenging field.

Porter is a member of the County of Carleton Law Association, the Ontario and Canadian Bar Associations, the Advocates' Society, and the International Association of Privacy Professionals.



Session Overview

- **Employment Law Update**

- When can employers request an independent medical evaluation (IME)?
- What does it take for a termination provision in an employment agreement to be upheld?
- What happens if a Record of Employment is issued out of time?
- What types of employee income count as mitigation?
- When can an employee be terminated for drug or alcohol use?



Session Overview

- **Employment Law Update Cont'd**

- Can employees on sick leave be given working notice of termination?
- What's new in punitive and moral damage awards?
- What are the risks of giving a negative reference?
- Can long-service employees ever be terminated for cause?
- Is it possible to avoid paying out a bonus to a terminated employee?
- What are the courts saying about workplace harassment claims?



Session Overview

- **Legislative Update**

- In case you haven't heard...major changes to the Ontario *Employment Standards Act, 2000*
- Changes to maternity, parental and other leaves under the *Canada Labour Code*
- Ontario's new budget measures, including the availability of WSIB benefits for chronic mental stress
- Marijuana legalization



Session Overview

- **Legislative Update Cont'd**

- Changes to certification and decertification under the *Canada Labour Code*
- Addition of gender identity and gender expression under the *Canadian Human Rights Act*
- Changes to protections against harassment under the *Canada Labour Code*
- Annual *Accessibility for Ontarians with Disabilities* update



Employment Law Update

Bottiglia v. Ottawa Catholic School Board **2017 ONSC 2517**

Facts:

- Superintendent off work for 2 years due to depressive condition triggered by workplace conflict
- Doctor advised his condition was treatment-resistant and he required an extended leave
- A few months later – when paid sick leave was about to end – doctor said Superintendent was fit for a gradual return to work over 6 to 12 months
- School Board requested an independent medical evaluation (IME)
- Superintendent applied to the Human Rights Tribunal, alleging a failure by the School Board to accommodate his return to work



**Bottiglia v. Ottawa Catholic
School Board
2017 ONSC 2517**

Findings:

- Tribunal dismissed the application, finding the request for an IME reasonable
- Judicial review by Divisional Court:
 - Tribunal's decision was reasonable
 - In certain circumstances, an employer can request a second opinion, including when there is a "reasonable and *bona fide* reason to question the adequacy and reliability of the information provided"



**Bottiglia v. Ottawa Catholic
School Board
2017 ONSC 2517**

Practical Implications:

- While there is no freestanding right to require an employee to undergo an IME, one can be requested in some cases
- An IME request may be appropriate where:
 - The employee's prognosis is uncertain or unclear;
 - The employee's doctor does not appear to understand the nature of the workplace and/or the employee's job duties; or
 - The employee's doctor is unlikely to provide the information needed for the employer to fulfil the duty to accommodate



North v. Metaswitch Networks Corporation, 2017 ONCA 790

Facts:

- North was an employee paid via base salary plus commission
- His employment contract contained a without cause termination provision that limited his entitlements to the minimum set out in the *ESA*, but specified that any termination payments would be based on his base salary only, excluding commissions
- Terminated after 3 years
- Employer relied on the termination provision
- North brought an action for wrongful dismissal



North v. Metaswitch Networks Corporation, 2017 ONCA 790

Findings:

- The termination clause violated the *ESA* by excluding commission from the termination entitlements
- That portion of the termination clause could not be struck (allowing the rest of the termination provision to be relied upon) **even though the employment agreement contained a “severability” clause**
 - An attempt to contract out of a minimum standard in a termination clause means the **entire** clause is void
- As a result, North was entitled to common law reasonable notice of termination



North v. Metaswitch Networks Corporation, 2017 ONCA 790

Practical Implications:

- Clear, unambiguous and legal language is essential when drafting employment agreements, and especially termination clauses
 - Ambiguities or illegalities in a termination clause can render it unenforceable and allow a court to award common law reasonable notice
 - A severability clause **will not** save an illegal termination provision



Ellis v. Artsmarketing Services Inc., 2017 CanLII 51563 (ON SCSM)

Facts:

- Employee terminated after 9 years due to poor performance
- Employee immediately requested Record of Employment (ROE) for Employment Insurance (EI) purposes
- Employer intentionally delayed issuing employee's ROE for 5 months
- Once issued, the ROE incorrectly indicated employee had quit



Ellis v. Artsmarketing Services Inc., 2017 CanLII 51563 (ON SCSM)

Findings:

- Employee was denied EI, which resulted in financial hardship
- The employer's intentional delay before submitting the ROE was "inexcusable" and "caused the plaintiff stress and inconvenience for no good reason"
- \$1,000 in inconvenience damages awarded



Ellis v. Artsmarketing Services Inc., 2017 CanLII 51563 (ON SCSM)

Practical Implications:

- Failing to issue an ROE in a timely fashion can result in "inconvenience damages"
- Avoid the hassle – issue an accurate ROE on time, every time



Brake v. PJ-M2R Restaurant Inc., 2017 ONCA 402

Facts:

- Employee was a manager at a McDonald's, and also worked at a grocery store
- McDonald's eventually told her: take a demotion or be terminated
- Manager refused demotion, alleging it would be humiliating, as she would have to report to people she had previously trained and supervised
- She instead accepted the termination, and brought a wrongful dismissal action in which she alleged she had been constructively dismissed



Brake v. PJ-M2R Restaurant Inc., 2017 ONCA 402

Findings:

- Trial judge:
 - Found constructive dismissal
 - Awarded 20 months' pay, without deduction for mitigation income
- Ontario Court of Appeal:
 - Decision upheld
 - Grocery store income **not** mitigation income, as it was not mutually exclusive from Manager's former earnings



Brake v. PJ-M2R Restaurant Inc., 2017 ONCA 402

Practical Implications:

- Mitigation just became even more difficult to prove
- The following will **not** count as deductible mitigation income:
 - EI benefits
 - Income earned during the statutory entitlement period
 - Income earned from a non-mutually exclusive source (i.e., a pre-existing second job)



Stewart v. Elk Valley Coal Corp., 2017 SCC 30

Facts:

- Employee used cocaine on his days off, but had not disclosed usage to his employer, contrary to its workplace policy
- Employee worked as a loader in a mine (safety-sensitive position)
- Tested positive for cocaine after workplace accident
- Terminated in accordance with employer's policy
- Only then did he allege he was addicted to cocaine



Stewart v. Elk Valley Coal Corp., 2017 SCC 30

Findings:

- Supreme Court of Canada upheld decision of Alberta Human Rights Tribunal that termination was valid
- Employee was terminated, not because of his addiction, but because he breached the employer's drug and alcohol policy, which required him to have disclosed his addiction **before** an incident
- Expert evidence indicated that employee's addiction did not diminish his capacity to comply with employer's policy



Stewart v. Elk Valley Coal Corp., 2017 SCC 30

Practical Implications:

- In order to support termination for alcohol/drug use, it is critical for employers to adopt clear and comprehensive policies regarding alcohol and drug use
- Employers need to demonstrate that they have measures in place to accommodate employees with an addiction to the point of undue hardship
 - Includes support measures such as EAP, peer-to-peer support, treatment leave, job protection, etc.



McLeod v. 1274458 Ontario Inc., 2017 ONSC 4073

Facts:

- Employee worked as a mover for 18 years
- When injured in a non-work-related car accident, placed on an unpaid leave of absence, uncontested by employer
- Doctor confirmed medically unable to work
- Employee then received notice of termination providing for working notice
- Employee was only able to work for 2 partial shifts during the working notice period



McLeod v. 1274458 Ontario Inc., 2017 ONSC 4073

Findings:

- Because the employee was incapable of working when he received the termination notice, he was entitled to pay in lieu of notice
- Considering the *Bardal* factors and his successful mitigation, Court awarded 9 months' salary



**McLeod v. 1274458 Ontario Inc.,
2017 ONSC 4073**

Practical Implications:

- Working notice doesn't apply when an employee is on an approved leave of absence and unable to work due to:
 - Sick leave (illness/injury); or
 - Maternity/parental leave



**Galea v. Wal-Mart Canada Corp.,
2017 ONSC 245**

Facts:

- Vice President, General Merchandising was told she was being removed from her position, and was left without a role
- Wal-Mart planned to “dismiss or denigrate” the VP until she resigned
- She did not resign, and was terminated without cause 10 months later
- Wal-Mart failed to provide her full contractual termination payments



Galea v. Wal-Mart Canada Corp., 2017 ONSC 245

Findings:

- Employer's conduct in last 10 months of employment was "callous, highhanded, insensitive and reprehensible", breached its implied duty of good faith, and caused mental distress
- Employer's conduct after termination was "deplorable"
- Employer's conduct during litigation (e.g., delays; excessive disclosure) caused additional mental distress
- Court awarded \$750,000 in punitive and moral damages



Galea v. Wal-Mart Canada Corp., 2017 ONSC 245

Practical Implications:

- "Bad behaviour" by the employer leading up to, during or after a termination can cost you
- Courts are willing to hand out large damage awards when an employer's conduct is particularly egregious



Papp v. Stokes, **2017 ONSC 2357**

Facts:

- Staff Economist terminated without cause, though he did have issues with working with others
- Employee asked for a reference and the President of the company agreed
- When asked about the employee's ability to work with others, President said he did not work well in a team setting
- When asked if he would rehire the employee, the President said, "No way"
- Employee was, unsurprisingly, not hired for the job and brought an action for wrongful dismissal and defamation against the President



Papp v. Stokes, **2017 ONSC 2357**

Findings:

- Wrongful dismissal action allowed and 4 months' notice awarded
- Defamation action dismissed
 - Though statements made during the reference check were defamatory, they were protected by "qualified privilege" – i.e., they are defensible as long as there was no malice in the making of the statements
 - In this case, the defence of justification (i.e., the statements were true) applied, as did the defence of qualified privilege



Papp v. Stokes,
2017 ONSC 2357

Practical Implications:

- Employers can be candid when discussing the performance and interpersonal skills of former employees during a reference check, as long as:
 - Their comments are true; and/or
 - They are made without malice or recklessness



De Jesus v. Linamar Holdings Inc.
(Camcor Manufacturing),
2017 ONCA 384

Facts:

- Production Supervisor with 19.5 years of service failed to ensure production line was checked for defects, resulting in a large amount of product having to be scrapped
- Despite evidence from other employees that the Supervisor knew of the production defect and did nothing, the Supervisor maintained that he had conducted regular checks and the defects could not have happened on his shift
- Terminated for just cause as a result of his negligent performance of duties and dishonesty during the investigation
- Supervisor brought a claim for wrongful dismissal



***De Jesus v. Linamar Holdings Inc.
(Camcor Manufacturing),
2017 ONCA 384***

Findings:

- Ontario Court of Appeal upheld termination for cause
 - Found Supervisor:
 - a) caused a significant production incident; and, more importantly,
 - b) lied about it
- Employer awarded its costs



***De Jesus v. Linamar Holdings Inc.
(Camcor Manufacturing),
2017 ONCA 384***

Practical Implications:

- Courts will uphold a dismissal for cause, even of a long term employee, where an employer can establish negligence and dishonesty
- However, the just cause threshold remains high
- Seek legal advice before terminating for cause



Kielb v. National Money Mart Company, **2017 ONCA 356**

Facts:

- In-house legal counsel terminated without cause after 2 years
- Termination occurred a few days before the lawyer would have qualified for an annual bonus in excess of \$100,000
- His employment contract required him to be either actively employed or within the statutory notice period as of the bonus payout date in order to be entitled to a bonus
- He brought a claim alleging that the bonus provision was ambiguous and violated the *ESA*



Kielb v. National Money Mart Company, **2017 ONCA 356**

Findings:

- The restrictive bonus entitlement language was enforceable
 - The language was clear, unambiguous and legal
 - The employee understood and agreed to the contractual language



Kielb v. National Money Mart Company, 2017 ONCA 356

Practical Implications:

- To avoid paying a bonus to a terminated employee, ensure their employment agreement and/or bonus plan has clear, unambiguous language to that effect



Merrifield v. The Attorney General, 2017 ONSC 1333

Facts:

- An RCMP officer brought a claim alleging, among other things, that he had been harassed by his superiors over a period of 7 years
- The alleged harassment was **not** based on a ground protected by human rights legislation



Merrifield v. The Attorney General, 2017 **ONSC 1333**

Findings:

- The Ontario Superior Court of Justice found that the “tort of harassment” exists
- The test is:
 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?



Merrifield v. The Attorney General, 2017 **ONSC 1333**

Practical Implications:

- It is now possible for Ontario employees to bring a freestanding court claim for workplace harassment
- Engaging in harassment, or permitting your employees to, just got even more risky and potentially expensive



Legislative Update

Bill 148 *Fair Workplaces, Better Jobs Act, 2017*

- Several of the changes to the *ESA* are now in force, including:
 - Minimum wage increase
 - Increased vacation leave and pay
 - New public holiday pay calculation
 - Changes to personal emergency leave and other statutory leaves
- Other changes are on the horizon:
 - Equal pay regardless of employment status
 - Changes to scheduling rules



Bill C-44
Budget Implementation Act, 2017, No. 1

- **Amendments to Employment Insurance:**
 - Permits employees to receive parental benefits:
 - At 55% for 35 weeks (status quo); or
 - At 33% for 61 weeks (for a combined maternity and parental benefit of 18 months instead of 12)
 - Maternity benefits payable as early as 12 weeks prior to the due date (up from 8 weeks)



Bill C-44
Budget Implementation Act, 2017, No. 1

- **Amendments to the *Canada Labour Code*:**
 - Extends job protected leaves to cover new and lengthened EI leaves
 - CIRB now has the powers, duties and functions of appeal officers
 - New complaint mechanism under Part III for employer reprisals
 - 90 day timeframe



Bill 177 *Stronger, Fairer Ontario Act (Budget Measures), 2017*

- *Pensions Benefits Act*
- *Occupational Health and Safety Act*
- *Workplace Safety and Insurance Act, 1997*
- *Broader Public Sector Executive Compensation Act*



Bill C-45 *Cannabis Act*

- Will legalize and regulate the production, distribution, sale, and possession of cannabis in Canada
- Employees may increasingly use marijuana:
 - To treat a mental or physical condition (e.g., anxiety, sleep disorder, chronic pain, arthritis, cancer, etc.)
 - Because they are addicted
 - Recreationally



Bill 174 *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017*

- The *Smoke-Free Ontario Act, 2017* replaces the former *Smoke-Free Ontario Act* and the *Electronic Cigarettes Act, 2015*
- Vaping tobacco or medicinal marijuana is treated the same as smoking: it is **not** permitted in enclosed workplaces



Bill C-4 *Canada Labour Code*

- Repeals reforms to the certification and decertification processes for unions passed by the previous government:
 - Secret ballot certification votes are no longer mandatory; the “card check” system is restored
 - A full 50% +1 is required to trigger a decertification vote
- Previously-enacted financial disclosure obligations for unions are also repealed



Bill C-16 *Canadian Human Rights Act*

- As of June 19, 2017, the *Act* was amended to add gender identity and gender expression as protected grounds
- Employers should update workplace discrimination and harassment policies to reflect these changes



Bill C-65 *Canada Labour Code (Harassment and Violence)*

- Proposes to amend the *Code* to ensure employers:

(z.16) take the prescribed measures to prevent and protect against harassment and violence in the work place, respond to occurrences of harassment and violence in the work place and offer support to employees affected by harassment and violence in the work place;



Accessibility for Ontarians with Disabilities Act

- New for 2018:
 - All Ontario employers, regardless of size, must make new or redeveloped public spaces accessible
 - e.g., any new or redesigned:
 - Parking lots
 - Service counters
 - Waiting areas



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QUESTIONS?

**AN INTEGRAL
PART OF
YOUR TEAM**

**PARTIE
INTÉGRANTE
DE VOTRE
ÉQUIPE**



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