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EMOND HARNDEN

LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

2018 Employment Law Year End Wrap Up

February 7, 2019

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 provinces and territories of Canada.

Sheri Farahani

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ABOUT

Sheri, a partner with the firm, has worked exclusively in management side labour and employment law for her entire legal career. She regularly acts in both an advisory capacity and as litigation counsel, with a particular emphasis on advising employers in the hotel and hospitality industry. Sheri also draws upon her wealth of experience previously gained in her six years at a National business law firm to provide advice to clients in the high-tech and financial services sectors, both as counsel in day to day human resource issues and also advising vendors, investors and acquirers on the employment and labour aspects of complex corporate transactions.

She is experienced in the representation of employers in human rights proceedings, employment standards complaints, federal and provincial labour board proceedings, occupational health and safety matters, workers' compensation matters, collective bargaining, defence of wrongful dismissal claims and in regard to providing strategic advice in relation to union organizing drives.

Sheri is an engaging speaker and she is regularly invited to provide training seminars and to speak at employment and labour law conferences in both Toronto and Ottawa.

Porter Heffernan

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ABOUT

Porter graduated with an LL.B and an LL.M from Dalhousie Law School, with a specialization in Labour Law. He was the recipient of several major scholarships and prizes during his undergraduate and graduate work, including among others a Law Foundation of Nova Scotia scholarship, a Killam Foundation graduate scholarship, and an award for the top mark in Labour Law.

Porter is a committed advocate in the courts and before administrative adjudicators. He has appeared on behalf of numerous clients before labour arbitrators, the OLRB, and other tribunals. He has appeared before the Ontario Superior Court of Justice, the Divisional Court and the Court of Appeal, in respect of both employment litigation and administrative law matters. He has appeared before the Federal Courts as well, assisting with and participating in multiple applications before the Federal Court and the Federal Court of Appeal.

Porter is also the head of the firm's Privacy and Information Management group. He leads this group in providing strategic advice to private and public sector organizations to make sure that they stay on top of their privacy obligations, and helps them respond appropriately and responsibly when mistakes happen. He also assists numerous federal and provincial public sector clients in meeting their obligations under access to information/freedom of information legislation. He is particularly adept at helping institutions manage the most challenging requests. When their decisions are challenged, he makes sure their interests are protected in appeals and complaints before the provincial and federal commissioners.

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

Liability for Sexual Harassment

- #MeToo movement has had significant ripple effects
- New spotlight upon sexual harassment within the workplace
- Employers have duties under human rights and OHS legislation to prevent such harassment
- Recent cases address liability for sexual harassment and sexual assault committed within the workplace

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

Facts:

- Employer paid the employee $10,000 when her employment ended, and she signed a memorandum of settlement and a release
- Five years later, former employee sued the employer and its National Director of Operations personally in relation to sexual harassment allegedly committed by the Director
- Employer settled with the employee, so this decision dealt with her ability to sue the Director personally in light of the release agreement

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

Findings:

- Judge found that the scope of the release was the employment relationship
- The release only pertained to severance, and specific wording would have been required to be included in the release to bar claims relating to sexual misconduct
- The Director's summary judgment motion was dismissed

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

Takeaway:

- "Standard" release agreements for termination of employment may not be sufficient to protect from subsequent claims of sexual misconduct in certain circumstances
- In cases of sexual misconduct or harassment, a release that merely covers issues "arising out of employment" may not be sufficient to bar such claims

Decision No. 3096/17, 2018 ONWSIAT 1563

Facts:

- A Subway employee alleged she was sexually harassed and assaulted by her supervisor
- The incidents took place in the store, and in the supervisor's car
- The employee sued the Subway store where she worked, the owner of the Subway store, and the supervisor
- These parties brought an application to the WSIAT arguing that the employee was barred from suing them because of the WSIA

Decision No. 3096/17, 2018 ONWSIAT 1563

Findings:

- Entitlement to WSIA benefits is in lieu of all rights of action by reason of "accident" happening in the course of employment
- WSIA creates a no-fault insurance scheme, so negligence or breach of OHSA would not remove protection
- The employee was entitled to claim benefits under the WSIA. Her right to sue for those injuries was precluded by the WSIA
- WSIA does not preclude her action for incident outside of the workplace (in supervisor's personal car) for which she cannot claim benefits under the Act

Decision No. 3096/17, 2018 ONWSIAT 1563

Takeaway:

- An employee entitled to WSIA benefits in respect of an accident will lose the right to sue their employer/employer's executive officer
- An employee who is assaulted in the course of employment may be included in the scope of an "accident" and entitled to benefits

Update on Damages

- Reasonable notice (*Bardal)*
  - Age, character of the employment, length of service, availability of similar employment
- Other heads of damage in employment law include:
  - Moral damages
    - Flow from the manner in which an employee is dismissed and compensate an employee for mental distress
  - Punitive damages
    - Intended to punish an employer for malicious behavior
- 2018 gave rise to some significant damage awards

Dawe v. Equitable Life Insurance Company, 2018 ONSC 3130

Facts:

- 62-year-old Senior Vice President with 37 years of service terminated without cause
- Incident leading to termination was a disagreement about purchasing sporting events tickets for business promotion, which led to an audit and a verbal reprimand of Vice President
- Partial summary judgment motion to determine notice entitlement, including bonus entitlement under bonus plans (LTIP and STIP)
- Employee sought 30 months and full payment to LTIP and STIP for that period
- Employer argued for 24 months and LTIP and STIP payment limited to terminal amounts as calculated under those plans

Dawe v. Equitable Life Insurance Company, 2018 ONSC 3130

Findings:

- Age was a significant factor. Mitigation efforts showed lack of other opportunities
- Recognized employee had worked for the company his whole working career and held senior executive position
- Where no comparable employment exists, “termination without cause is tantamount to a forced retirement”
- Found employee would have worked until 65
- *Minimum* 36-month notice period warranted, but awarded 30 because that is what was claimed
  - LTIP and STIP payments in full during the 30-month notice period

Dawe v. Equitable Life Insurance Company, 2018 ONSC 3130

Takeaway:

- Unofficial 24-month notice period "ceiling" on notice carries much less weight
- New high-water mark for notice, but the judge's comment that a *minimum* 36-month notice period was warranted suggests the possibility of even greater notice awards
- As people work past the age of 65, considerations of reasonable notice may shift
- Notice entitlements must be determined on a case-by-case basis

Ruston v. Keddco Mfg. (2011) Ltd., 2018 ONSC 2919

Facts:

- Employee, the President of the company, brought a claim for wrongful dismissal
- Employer argued that it had just cause to terminate him, but did not tell him of the reasons for his termination until they counterclaimed
- Counterclaim alleged unjust enrichment and civil fraud
  - Alleged that the employee misrepresented the company's financial performance, was negligent/wilfully blind in purchasing inventory, and that he tried to hide his mismanagement

Ruston v. Keddco Mfg. (2011) Ltd., 2018 ONSC 2919

Findings:

- Employer was not able to establish that the plaintiff misrepresented the company's financial performance, or tried to hide the alleged mismanagement
- There was no cause to terminate him and employer failed to prove civil fraud or unjust enrichment
- Employee was awarded 19 months' notice, $100,000 in punitive damages and $25,000 in moral damages (over $600,000 total)
- Costs were awarded in the amount of $546,684.73

Ruston v. Keddco Mfg. (2011) Ltd., 2018 ONSC 2919

Takeaway:

- Unfounded allegations of just cause, unfounded counterclaims, and improper conduct during litigation can be very costly for employers
- Consider the merit of such claims before asserting them
- Improper conduct can lead to a variety of different damages

Employment Contracts and the Enforceability of Termination Clauses

- Another year, more decisions weighing in on the enforceability of termination clauses in employment contracts
- Employer attempts to limit employee entitlements upon termination subject to considerable scrutiny

Bergeron v. Movati Athletic (Group) Inc., 2018 ONSC 7258

Facts:

- General Manager of health and fitness facility's employment terminated without cause after 16 months
- Movati intended to pay 2 weeks' notice per the ESA and termination clause in employment contract. Made an error and paid 4 weeks
- Plaintiff claimed wrongful dismissal, brought motion for summary judgement seeking common law reasonable notice, bonus and benefits

Bergeron v. Movati Athletic (Group) Inc., 2018 ONSC 7258

Findings:

- Motion judge found clause complied with ESA but lacked "high degree of clarity" required to rebut common law notice
  - Provided an example of language that would be clear – use of the term "only"
  - Awarded 3 months' notice + bonus entitlement + 10% for lost value of benefits
- Upheld by Divisional Court
  - "pursuant to the ESA" may be interpreted to mean the notice period complies with the minimum statutory requirements but does not clearly provide common law notice no longer applies
  - Contracts must be read as a whole – Court also noted different wording used for termination clause vs. probation termination clause

Bergeron v. Movati Athletic (Group) Inc., 2018 ONSC 7258

Takeaway:

Divisional Court noted several steps to be followed in determining whether contractual provision can rebut common law notice:

1. All contractual provisions must meet the minimum notice requirements for termination without cause set out in the ESA
2. There is a presumption that an employee is entitled to common law notice upon termination of employment without cause
3. Provided minimum legislative requirements are met, an employer can enter into an agreement to contract out of the provision for reasonable notice at common law upon termination without cause
4. The presumption that an employee is entitled to reasonable notice at common law may be rebutted if the contract specifies some other period of notice as long as that other notice period meets or exceeds the minimum requirements in the ESA

Provision of Benefits Post Age 65

- In 2006, the Ontario *Human Rights Code* (Code) was amended to effectively eliminate mandatory retirement at age 65
- Despite this fact, the Code and ESA allow employers to choose to not provide benefits to employees aged 65 and over
  - S. 25 (2.1) of the Code states benefits/pension/group insurance plans complying with ESA do not infringe the right to equal treatment with respect to employment, including on the basis of age
  - ESA prevents benefit plans from treating employees differently based on age, but defines age as “any age of 18 years or more and less than 65 years”

Talos v. Grand Erie District School Board, 2018 HRTO 680

Facts:

- Secondary high school teacher's extended health, dental and life insurance benefits ceased at age 65, although he continued to work on a full-time basis
- Brought a constitutional challenge against s. 25 (2.1) of the Code – alleged violated s. 15 of the *Charter* which prohibits discrimination on basis of age

Findings:

- Interim decision
- Tribunal found s. 25 (2.1) of the Code is unconstitutional
- Not saved by s. 1 of the *Charter* as a reasonable limit

Talos v. Grand Erie District School Board, 2018 HRTO 680

Takeaway:

- HRTO specifically stated its decision did not address long-term disability insurance, pension plans and superannuation funds
- S. 25(2.1) of the Code is still in effect
- Now have competing decisions
  - *Chatham-Kent (Municipality) and ONA* (2010 – Arbitrator Etherington)
    - Arbitrator Etherington found s. 25(2.1) was saved by s.1 of the *Charter*
  - Tribunal in *Talos* noted actuarial evidence presented differed significantly with that presented in *Chatham-Kent* regarding the cost associated with benefits for employees in their 60's
- Impact of *Talos* remains to be seen

Legislative Update

Legislation Impacting the Ontario *Employment Standards Act* (ESA)

***Employment Standards Act*:**

- Bill 148 – *The Fair Workplaces, Better Jobs Act, 2017*
- Bill 47 – *Making Ontario Open for Business Act, 2018*
  - November 21, 2018 – Royal Assent
- Bill 66 – *Restoring Ontario's Competitiveness Act, 2018*
  - December 6, 2018 – 1st Reading

Other Developments:

- Bill 57 – *Restoring Trust, Transparency and Accountability Act, 2018*
  - Omnibus legislation
  - December 6, 2018 – Royal Assent
  - *Pay Transparency Act, 2018* was set to come into force on January 1, 2019
    - However, Bill 57 defers coming into force indefinitely

Bill 47 Changes to the ESA

What was repealed and not replaced:

- Equal pay for equal work regardless of employment status
- Temporary help agency assignment employee status
- Scheduling provisions (would have taken effect January 1, 2019)
  - Right to request changes to schedule or work location
  - Minimum pay for being on-call
  - Right to refuse – 96-hour rule
  - Shift or on-call cancellation
  - Associated record-keeping requirements

Bill 47 Changes to the ESA

What was revised/amended:

- Equal pay for equal work regardless of sex
  - Maintains original provisions
  - Repealed provision added by Bill 148 providing employee can ask employer to review rate of pay where employee believed did not comply
- Minimum wage
  - Remains at $14
  - Repealed January 1, 2019 increase to $15
  - Annual increases tied to CPI to restart October 1, 2020

Bill 47 Changes to the ESA

- Public Holiday Pay
  - Repeals Bill 148 averaging formula
  - Returns to previous prorating formula (temporarily reverted to former formula on July 1, 2018)
    - Total amount of regular wages earned and vacation pay payable to employee in 4 work weeks before the work week in which the public holiday occurred, divided by 20
- Three Hour Rule
  - Rule preserved and moved to new section of the ESA – new Part VII.1
- Misclassification of employees as independent contractors
  - Repeals employer's onus of proof in such cases

Bill 47 Changes to the ESA

- Personal Emergency Leave – repealed
  - Replaced with 3 new unpaid job-protected leaves:
    - **Sick Leave**: 3 days/calendar year for personal illness, injury or medical emergency
    - **Family Responsibility Leave**: 3 days/calendar year for illness, injury, medical emergency or "urgent matter" of defined family members
    - **Bereavement Leave**: 2 days/calendar year for death of defined family members
  - General restrictions for all 3 leaves:
    - Must be employed for at least 2 weeks
    - Employer may deem leave to be taken in entire days
    - Where employment contract or collective agreement provides:
      - greater right or benefit – terms of contract apply instead
      - similar leave – no duplication
    - Employer can require evidence reasonable in the circumstances (e.g. medical certificate)

Bill 148 Changes to the ESA
What was Maintained

- Overtime
  - Calculating overtime where employee has 2 or more regular rates
- Vacation
  - 3 weeks vacation time and vacation pay at 6% at 5 years or more
- Pregnancy Leave
  - Increased from 6 to 12 weeks in case of stillbirth or miscarriage
- Parental Leave
  - Increased from 35 weeks to 61 weeks for employees who take pregnancy leave
  - Increased from 37 weeks to 63 weeks otherwise

Bill 148 Changes to the ESA
What was Maintained

- Critical Illness Leave
  - Replaced former Critically Ill Child Care Leave
  - Critically ill minor child – up to 37 weeks in 52-week period
  - Critically ill adult – up to 17 weeks in 52-week period
- Family Medical Leave
  - Extended from 8 weeks in 26-week period to 28 weeks in 52-week period
  - Applies to expanded group of individuals

Bill 148 Changes to the ESA
What was Maintained

- Domestic or Sexual Violence Leave
  - Employed for at least 13 consecutive weeks
  - Up to 10 days, and up to 15 weeks (1st 5 days are paid)
- Child Death Leave
  - No longer restricted to crime-related death
- Crime-Related Child Disappearance Leave
  - Increased from 52 to 104 weeks
- Notice of termination of assignment – temporary help agencies

Bill 66 – More Proposed Changes to the ESA

***Not yet in force (1st Reading)**

- ESA Poster
  - Employers will no longer be required to post in the workplace (*until Bill is passed still required to post new version of Poster, version 8)
  - Will still be required to provide copy of Poster to employees
- Excess weekly hours of work
  - Will remove requirement to obtain Director approval to exceed 48 hours/week
  - Will still require written agreement between employer and employee or union
- Overtime averaging agreement
  - Will remove requirement for Director approval
  - Averaging period not to exceed 4 weeks

Bill 36 – *Cannabis Statute Law Amendment Act, 2018*

- Amendments to:
  - *Cannabis Act, 2017*
  - *Ontario Cannabis Retail Corporation Act, 2017*
  - *Smoke-Free Ontario Act, 2017*
  - *Highway Traffic Act*
- Enactment of *Cannabis License Act, 2018*, outlining a licensing scheme for private cannabis retail stores

Significant amendments to the *Canada Labour Code*

LEGISLATION	HIGHLIGHTS OF SOME OF THE CHANGES TO THE CLC LABOUR STANDARDS PART III

Bill C-63
Royal Assent: December 14, 2017
Regulatory Consultations: Fall 2018
In Force: Summer 2019
	• Right to request flexible work arrangements
	• Notice of shift changes (at least 24 hours)
	• Right to refuse request to work overtime in order to fulfill specific "family responsibilities"
	• Explicitly allow time off in lieu of overtime pay
	• Vacation interrupted for other statutory leaves
	• New unpaid leaves
	  ○ Family responsibility (3 days)
	  ○ Victims of family violence (10 days)
	  ○ Traditional aboriginal practices (5 days)
	• Bereavement leave (increased from 3 to 5 days; 3 days remain with pay where completed 3 months of employment)
	• Internships

Bill C-86
Royal Assent: December 13, 2018
Regulatory Consultations: Spring-Summer 2019
	• Breaks and rest periods
	• Work schedules (96 hours before, in writing)
	• Vacation enhancements
	• Leaves
	  ○ Court or jury duty
	  ○ Medical leave
	  ○ Personal leave (5 days - 1st 3 days with pay where completed 3 months of employment)
	  ○ Pregnancy & parental leave - aggregate leave
	  ○ Members of the Reserve Force
	  ○ Child death & disappearance (eliminate service requirement)
	  ○ Family violence leave (1st 5 days with pay where completed 3 months of employment)
	• Equal treatment based on employment status
	• Temporary help agencies
	• Increased individual notice of termination
	• Reimbursement of work-related expenses
	• Minimum age of employment (raised to 18)

Federal Legislative Update

- Bill C-65
  - *Canada Labour Code* (Part II – OHS) – harassment and violence
    - October 25, 2018 – Bill received Royal Assent
    - Winter 2019 – publication of summary of feedback received during online regulatory consultations
    - Spring 2019 – anticipated coming into force of the regulations and legislation
- Bill C-86
  - New *Pay Equity Act*
  - Not yet in force
- Bill C-81 – *Accessible Canada Act*
  - November 28, 2018 – passed by the House of Commons
  - November 29, 2018 – 1st reading in the Senate

Questions?

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