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EMOND HARNDEN

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

2019 Employment Law Year End Wrap Up

January 22, 2020

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).

Session Overview

Case Law Developments

- Does a “tort of harassment” exist?
- Notice and damages update
- Effect of criminal proceedings on limitation period for wrongful dismissal

Legislative Update

Ontario

- Bill 66 amendments to *Employment Standards Act, 2000* and *Labour Relations Act*
- Bill 124 limitations on public sector compensation increases
- *Accessibility for Ontarians with Disabilities Act, 2005* obligations

Federal

- New *Accessible Canada Act*
- *Canada Labour Code* amendments
- New *Pay Equity Act*

Dawe v. The Equitable Life Insurance Company of Canada, 2019 ONCA 512

Facts:

- Senior Vice President with 37 years of service terminated without cause at age 62
- Motion judge said where no comparable employment exists, “termination without cause is tantamount to a forced retirement”
- Motion judge found minimum 36-month notice period warranted, but awarded the 30 months claimed

Dawe v. The Equitable Life Insurance Company of Canada, 2019 ONCA 512

Findings:

- Court of Appeal reduced notice award to 24 months
- No basis for judge's reliance on his perceptions of change in society's attitude towards retirement
- Appropriate approach was whether exceptional circumstances warranted a notice period exceeding 24 months
- Senior position, lengthy service, age at termination and trouble finding new employment warranted lengthy notice period, but were not "exceptional circumstances"

Dawe v. The Equitable Life Insurance Company of Canada, 2019 ONCA 512

Takeaways:

- Alleviates concern over new high-water mark for notice
- Awards in excess of 24 months permissible, but still only in exceptional circumstances
- Retirement plans not determinative of notice periods
- Notice periods are determined based on the circumstances

Merrifield v. Canada (Attorney General), 2019 ONCA 205

Facts:

- RCMP officer participated in nomination meeting to be Conservative candidate in upcoming election without following RCMP regulations
- Employee alleged that management's actions towards him after that time constituted harassment
  - Was refused assignments, transferred, investigated for credit card misuse
- Trial judge found that "tort of harassment" exists in Ontario
- Found test was met: RCMP's conduct was outrageous, had reckless disregard of causing him emotional distress, and was proximate cause of his severe emotional distress

Merrifield v. Canada (Attorney General), 2019 ONCA 205

Findings:

- Court of Appeal found that tort of harassment does not exist, and no basis to recognize it as a new tort in this case
- However, did not close door on "development of a properly conceived tort of harassment that might apply in appropriate contexts"
- Intentional infliction of mental suffering exists as legal remedy, with similar elements
- RCMP's conduct did not constitute intentional infliction of mental distress

Merrifield v. Canada (Attorney General), 2019 ONCA 205

Takeaways:

- There is no standalone “tort of harassment” in Ontario at this time
- Tort of intentional infliction of mental suffering is sufficient legal remedy to address harassment allegations
- Possible that, with different facts or context, “properly conceived” tort of harassment could be found to exist in the future

McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home), 2019 ONSC 4108

Facts:

- Owner (McGuinty) sold his shares and real property related to his family's funeral home business
- Entered into a ten-year "Transitional Consulting Services Agreement" as managing director for the new owner
- Shortly after the sale closed, issues and a lack of trust developed
- Employer took various actions against him, like taking away company vehicle, limiting his commissions, requiring him to complete time cards, and changing locks to funeral home without notice

McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home), 2019 ONSC 4108

Facts (continued):

- He went on sick leave
- He sued his employer claiming constructive dismissal, intentional infliction of mental suffering, and discrimination
- Employer denied such allegations and argued that McGuinty left his employment as he found himself ill-suited to the role of employee and suffered from seller's remorse

McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home), 2019 ONSC 4108

Findings:

- Employer's actions constituted constructive dismissal
- Course of conduct demonstrating that employer no longer intended to be bound by contract
- Conduct not flagrant or outrageous, so was not intentional infliction of mental suffering
- Court awarded damages for nine-year balance of ten-year fixed-term contract totaling $1,274,173.83

McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home), 2019 ONSC 4108

Takeaways:

- Without appropriate early termination language, damages are awarded for balance of fixed term contract and are not subject to mitigation
- Fixed term contracts without appropriate early termination language can be a significant liability
- Given inherent difficulties in proper implementation and potential significant liability, employers are well advised not to use them
- In an exceptional circumstance that can only be managed through the use of a fixed term contract, seek advice about early termination language and proper implementation

Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343

Facts:

- Employee complained to President of company about colleague's prolonged abusive, harassing and unprofessional conduct
  - Alleged that he constantly yelled and said abusive things to her
- She followed up with President over the next month about her complaint, but no steps were taken
- About two months after initial complaint, employee alleged colleague slapped her across the face three times
- Employee (not her colleague) was fired that same day

Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343

Findings:

- 19 months of notice appropriate ($129,433.17, including benefits)
- $15,000 for employer's vicarious liability for employee's assault
- $50,000 in aggravated damages
  - Failure to investigate or act despite employee's growing anxiety and frustration about increasingly toxic work environment
- No intentional infliction of mental suffering: no visible and proven illness
- No punitive damages considering amount of compensatory damages awarded, small size of company, less egregious conduct over shorter time compared to other punitive damage cases

Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343

Takeaways:

- Employers must take appropriate action to investigate and address harassment and assault allegations
- Failure to do so can result in costly claims for damages beyond wrongful dismissal

Heller v. Uber Technologies Inc., 2019 ONCA 1

Facts:

- Uber driver, a resident of Ontario, entered into several contracts with Uber and he delivered food from restaurants to consumers
- He brought a proposed class action on behalf of Uber drivers, alleging that he and the other Uber drivers are employees of Uber and are entitled to the benefits of Ontario's *Employment Standards Act, 2000* ("ESA")
- Motion judge granted Uber's request to stay the action due to arbitration clause in agreement between Uber and the driver(s)
  - Clause required mediation or, if not settled, arbitration in The Netherlands
- Motion judge found that ESA did not "preclude resort to arbitration"
- Also found that the agreement between the parties was not unconscionable

Heller v. Uber Technologies Inc., 2019 ONCA 1

Findings:

- Pursuant to applicable legislation governing agreements to arbitrate matters, a court is not required to stay a matter covered by an arbitration agreement if the arbitration agreement is invalid
- Investigative process initiated by an employee complaint under the ESA is an "employment standard"
- Arbitration clause prohibiting an ESA complaint is attempt to contract out of ESA, which is prohibited by ESA (s. 5) and therefore illegal and invalid
- Arbitration clause also unconscionable due to unfair bargain, differential in negotiating power between parties
- Stay set aside

Heller v. Uber Technologies Inc., 2019 ONCA 1

Takeaways:

- Arbitration clauses preventing employees from bringing ESA complaints amount to illegal contracting out of an employment standard and are invalid
- They may also be deemed unconscionable
- However, case was appealed and Supreme Court reserved judgment in November
- Forthcoming decision from the Supreme Court should provide further guidance on this issue

Sosnowski v. MacEwen Petroleum Inc., 2019 ONCA 1005

Facts:

- Employee dismissed for just cause in November 2009 for theft
- Waited until after he was acquitted of criminal charges for theft and fraud in November 2014 to commence wrongful dismissal action
- Argued did not know civil proceeding was “appropriate” until acquittal
- Action dismissed for being commenced after limitation period expired
- Employee knew on date of termination that civil proceeding was appropriate means to redress termination
- Not entitled to wait for conclusion of criminal proceedings

Sosnowski v. MacEwen Petroleum Inc., 2019 ONCA 1005

Findings:

- "Appropriate" means whether legally appropriate to bring action, not evaluation of whether civil proceeding will be successful
- Employee not entitled to wait until conclusion of criminal proceedings to assess chance of success in civil litigation
- Would cause uncertainty, contrary to purpose of limitations legislation
- Not like cases where criminal and civil issues are mirror images
  - Civil proceeding for negligent investigation and battery, criminal proceedings for assault and resisting arrest
- Appeal dismissed

Sosnowski v. MacEwen Petroleum Inc., 2019 ONCA 1005

Takeaways:

- Determination of whether civil proceeding is “appropriate” dependent on factual and statutory context of case
- Situations where it is not “appropriate” to start civil proceeding are limited
- Appropriateness of civil proceeding in wrongful dismissal case not dependent on outcome of criminal proceedings
- Individuals not entitled to wait for conclusion of criminal proceedings to assess chances of success of civil proceedings for strategic reasons

LEGISLATIVE UPDATE

Bill 66, *Restoring Ontario's Competitiveness Act, 2019*

- Amendments to ESA and *Labour Relations Act, 1995*
- No longer required to post ESA poster (must still provide to employees)
- Director approval no longer required for hours in excess of 48 hours per week and for overtime averaging agreements
- Certain public sector entities deemed "non-construction employers"
  - Employees of these employers no longer represented by their trade union, collective agreement will no longer apply
  - Employer or union can apply to Ontario Labour Relations Board to redefine composition of bargaining unit

Bill 124, *Protecting a Sustainable Public Sector for Future Generations Act, 2019*

- Caps Ontario public servant and broader public sector compensation increases
- Compensation capped at 1% per year for three-year moderation period
  - "Compensation" applies to salary, benefits, perquisites, and payments
- Start date of applicable moderation period depends on circumstances
  - Unionized employees: determined by status of collective agreement as of June 5, 2019
  - Non-unionized employees: starts on earlier of a) date selected by employer that is after June 5, 2019, or b) January 1, 2022
    - Note: exception for those employees who, while not part of a bargaining unit, have compensation plans by which salary increases correspond to those of represented employees under collective agreements
- *Act* contains anti-avoidance and oversight provisions

Accessibility for Ontarians with Disabilities Act, 2005 (AODA)

- Employers with 20+ employees must file Accessibility Compliance Report by December 31, 2020
- Employers should already be doing or have done the following:
  - Created accessibility policies and, if applicable, multi-year accessibility plan
  - Established process for receiving and responding to feedback
  - Trained staff and volunteers on accessibility standards and requirements
  - Provide accessible customer service and employment practices
  - Provide accessible information to public and staff
  - Make new or redeveloped public spaces accessible
- See the handout “Accessibility Rules for Businesses and Non-Profits” as a quick reference guide

Accessible Canada Act

- Goal to ensure barrier-free Canada by 2040
- Regulated entities to prepare and publish accessibility plan within one year after date set by regulation
  - Address identification and removal of barriers, and prevent new barriers
- Employers to create feedback processes
- Mechanism for complaint to Accessibility Commissioner
  - Monetary compensation to complainant a possible remedy
- Administrative monetary penalties

Canada Labour Code Amendments

- Many employment standards amendments came into effect in 2019
  - Right to request flexible work arrangements
  - New breaks, rest periods, and scheduling provisions
  - Improved vacation entitlements
  - New and increased leave entitlements
- Other amendments not yet in effect
  - New harassment and violence provisions (expected 2020)
  - Various employment standards amendments (expected 2020 or later)

Federal *Pay Equity Act*

- New proactive *Pay Equity Act* expected to come into force in 2020
- Will require federally regulated employers to:
  - Prepare, post, and update pay equity plans
  - Make required compensation increases to female job class employees in accordance with pay equity plans
- Creation of Pay Equity Commissioner with audit, investigation, and dispute resolution powers
- Administrative monetary penalties for violations

QUESTIONS?

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