CASS CONFERENCE

HUMAN RESOURCES

CASE LAW UPDATE AND HUMAN RESOURCE RELATED TIPS AND TAKEAWAYS

TERESA HAYKOWSKY

McLENNAN ROSS

March 18, 2022, 9:45 a.m. to 11:15 a.m., Fantasyland Hotel Edmonton, Alberta

Human Resources Updates

UPDATES

a) The right to disconnect (Ontario context)

b) Managing a hybrid workplace

c) Reasonable notice period beyond 24 months: a recent Ontario Court of Appeal decision

d) Electronic employee monitoring

e) Admissibility of surreptitious recordings in investigations

McCallum v Saputo, 2021 Manitoba Court of Appeal

Facts | Principles | Implications

- Plaintiff was a sales representative
- Saputo received information that the Plaintiff had taken products from a customer's store
- Employee was terminated without further investigation
- Just cause was found at trial and termination was upheld

McCallum v Saputo, 2021 Manitoba Court of Appeal

Facts | Principles | Implications

- Issue on appeal was whether the Employer had a duty to investigate before termination
  - Court found there is no legal duty to investigate prior to dismissing an employee
  - Unless a contractual term, there is no duty of procedural fairness when terminating employment
- Employer could rely upon information obtained after termination
- But failure to investigate can lead to higher damages if no just cause

McCallum v Saputo, 2021 Manitoba Court of Appeal

Facts | Principles | Implications

- Terminated employees often allege there was a poor or inadequate investigation
- This case helps defend such claims since there is no separate legal duty to investigate
- After-acquired cause is valid
- It is still very important and recommended to properly investigate misconduct

C.M. Callow Inc. v Zollinger, 2020 Supreme Court of Canada

Facts | Principles | Implications

- Plaintiff had winter maintenance contract with Defendant with termination on 10 days' notice
- Defendant knew it was going to terminate in early 2013, but led Plaintiff to believe it would continue contract for coming winter
- Defendant terminated with 10 days' notice
- Plaintiff filed claim for breach of contract
- Trial judge found breach of duty of honest performance
- Overturned by ONCA
- SCC restored decision of trial judge

C.M. Callow Inc. v Zollinger, 2020 Supreme Court of Canada

Facts | **Principles** | Implications

- Duty of honesty in contractual performance:
  - Includes more than just outright lies
  - Includes correcting mistaken impression
- Cannot knowingly mislead
  - Could include lies, half-truths, omissions, and even silence, depending on the circumstances
- Duty of honesty also requires exercising rights under the contract honestly
- Duty does not require more notice of termination
- Duty does not require a party to act in the other party's best interest

C.M. Callow Inc. v Zollinger, 2020 Supreme Court of Canada

Facts | Principles | Implications

- Duty applies to all contracts, including employment contracts and independent contractor agreements
- Duty could arise with respect to pay increases, promotions, scheduling changes, and renewals of term contracts
- Be careful not to actively mislead or deceive

Hucsko v A.O. Smith Enterprises Limited, 2021 Ontario Court of Appeal

Facts | Principles | Implications

- Hucsko was a 20-year employee in senior project management role
- Allegations of 4 incidents of inappropriate comments to female co-worker
- Investigation found comments fit definition of sexual harassment in policy
- Employer set requirements for corrective action, including apology to coworker

Hucsko v A.O. Smith Enterprises Limited, 2021 Ontario Court of Appeal

Facts | Principles | Implications

- Hucsko refused to accept conclusions of investigation and refused apology
- Refusal led to just cause termination
- Trial judge found conduct did not amount to cause
- Court of appeal overturned, finding complete breakdown in employment relationship

Hucsko v A.O. Smith Enterprises Limited, 2021 Ontario Court of Appeal

Facts | **Principles** | Implications

- Three-part test reaffirmed to determine whether termination for cause justified:
  - Assess nature and context of misconduct
  - Consider surrounding circumstances
  - Is dismissal a proportionate response?
- Sexual harassment not confined to actions – includes comments with sexual innuendo

Hucsko v A.O. Smith Enterprises Limited, 2021 Ontario Court of Appeal

Facts | Principles | Implications

- Importance of clear workplace policies on harassment and investigation – implement and follow them
- Delivering results and corrective action not necessarily end of the investigation process
- Lack of contrition / failing to follow reasonable direction for corrective action may justify dismissal for cause

Hogan v 1187938 BC Ltd., 2021 BC Supreme Court

Facts | Principles | Implications

- Plaintiff mechanic temporarily laid off as a result of COVID-19 pandemic impacts
- Shortly after, employer terminated Plaintiff
- Employee received $14,000 in CERB benefits
- Issues on summary trial:
  - Did the temporary layoff constitute a constructive dismissal
  - Should CERB benefits be deducted as mitigation income

Hogan v 1187938 BC Ltd., 2021 BC Supreme Court

Facts | **Principles** | Implications

- Constructive Dismissal
  - Layoff was unilateral
  - Followed by termination letter
  - Nothing in contract authorizing layoff
- Mitigation/CERB
  - But for his termination, Plaintiff would not have received it
  - Plaintiff did not contribute to benefit
  - CERB should be deducted

Hogan v 1187938 BC Ltd., 2021 BC Supreme Court

Facts | Principles | Implications

- Temporary layoff even in good faith in response to pandemic can constitute constructive dismissal
- Inquire about CERB benefits subsequent to termination

AG Growth International Inc. v Dupont, 2021 Alberta Court of Queen's Bench

Facts | Principles | Implications

- Employee was dismissed after a single incident of inappropriately touching a co-worker
- AG Growth International Inc. ("**Westeel**") had a zero-tolerance policy for unwanted touching
- Employee was dismissed for cause for breaching the company's policy
- Employee sued for wrongful dismissal

AG Growth International Inc. v Dupont, 2021 Alberta Court of Queen's Bench

Facts | Principles | Implications

- Provincial Court judge found Westeel did not successfully prove dismissal was a proportionate response to his one incident of transgression
- Trial judge held that Westeel failed to prove there was just cause for termination and awarded Employee the equivalent of 10 months' wages
- **Alberta Court of Queen's Bench overturned the trial judge's decision and held that termination was for cause**

AG Growth International Inc. v Dupont, 2021 Alberta Court of Queen's Bench

Facts | Principles | Implications

Framework to determine whether summary dismissal is warranted:

- The Court must analyze the proportionality of the employer's response to the misconduct
- The analysis begins with a determination of the seriousness of the misconduct
- Sexual assault is serious misconduct situated at the high end of the "spectrum of seriousness"
- Starting point for the analysis must be that this was a serious form of workplace misconduct

AG Growth International Inc. v Dupont, 2021 Alberta Court of Queen's Bench

Facts | Principles | Implications

Factors in the proportionality analysis:

- Employee was aware of Westeel's policy and that breaching it would lead to termination
- While he wasn't given a warning, the existence of the policy may be a warning, and no warning is required that employees not commit criminal offences such as sexual assault
- Court must assess the effect of the misconduct on the workplace as a whole, not only on the offender
- **Only mitigating factor –** This was a single incident, otherwise Employee held a 9-year incident-free record

AG Growth International Inc. v Dupont, 2021 Alberta Court of Queen's Bench

Facts | Principles | Implications

- Sexual harassment with a physical component is among the most serious forms of workplace misconduct
- Even a singular incident of inappropriate touching amounting to sexual harassment may lead to summary dismissal with cause
- An employer's zero-tolerance Harassment Policy may be considered a warning in itself

Northern Regional Health Authority v Horrocks, 2021 Supreme Court of Canada

Facts | Principles | Implications

- Unionized employee with alcohol dependency was terminated and filed a complaint with the Manitoba Human Rights Commission
- Commission adjudicator ruled there was jurisdiction to hear the complaint
- Reviewing judge overturned, saying the Commission adjudicator did not have jurisdiction
- Court of Appeal overturned, saying the Commission adjudicator did have jurisdiction
- SCC overturned, saying the Commission adjudicator did not have jurisdiction

Northern Regional Health Authority v Horrocks, 2021 Supreme Court of Canada

Facts | **Principles** | Implications

- 2-step test for jurisdiction contests between statutory tribunals and labour arbitrators:
  1. The relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters
  2. If it is determined that the arbitrator has exclusive jurisdiction, determine whether the dispute falls within the scope of that jurisdiction

Northern Regional Health Authority v Horrocks, 2021 Supreme Court of Canada

Facts | Principles | Implications

- This case may not apply in Alberta
- Marshalling provisions in Alberta's *Labour Relations Code* allow for consolidation of employment claims

Cybulsky v Hamilton Health Sciences, 2021 Ontario Human Rights Tribunal

Facts | Principles | Implications

- Dr. Irene Cybulsky was Head of the HHS Cardiac Surgery Service from 2009 until 2016
- She was the only female cardiac surgeon in a heavily male-dominated workplace
- In 2014, Dr. Reddy announced a review of the Cardiac Surgery Service, completed by Dr. Flageole
- Dr. Flageole interviewed members of the medical and administrative staff in conducting the review
- Dr. Flageole's report concluded Dr. Cybulsky would benefit from training and coaching to improve communication

Cybulsky v Hamilton Health Sciences, 2021 Ontario Human Rights Tribunal

Facts | Principles | Implications

- Based on the review, the Surgeon-in-Chief decided not to reinstate Dr. Cybulsky
- Dr. Cybulsky was not provided any of the recommended training or coaching
- Dr. Cybulsky met with a member of HHS's Human Rights and Inclusion office regarding concern of bias against female leadership
- Dr. Cybulsky filed the complaint and claimed HHS discriminated against her based on gender

Cybulsky v Hamilton Health Sciences, 2021 Ontario Human Rights Tribunal

Facts | **Principles** | Implications

- An employer's failure to consider stereotypes and biases against women during department reviews is likely to disproportionately impact women occupying leadership roles
- An employer's reliance on an employee's review that does not take into account bias and stereotypes can result in discrimination
- Allegations of bias and stereotyping by an employee will trigger the employer's duty to investigate, regardless of a formal or informal complaint

Cybulsky v Hamilton Health Sciences, 2021 Ontario Human Rights Tribunal

Facts | Principles | Implications

- Context is important when conducting investigations, reviews, and evaluations – consider potential bias or stereotypes faced by the employee
- Employer has duty to investigate allegations of bias or sex/gender discrimination regardless of a formal complaint or overt discrimination

CBC v Canadian Media Guild, 2021 Arbitration

Facts | Principles | Implications

- Khan took offence to Don Cherry remarks
- Tweeted about concerns – upon request of supervisor, took it down
- Told others in industry about request to remove tweet using CBC laptop
- Colleague found communications and alerted supervisor

CBC v Canadian Media Guild, 2021 Arbitration

Facts | Principles | Implications

- Khan acknowledged he leaked story
- Terminated for just cause
  - Violation of requirement for loyalty
  - Placed CBC reputation at risk
- Complete lack of attention paid to Khan's privacy rights – tainted process that led to termination
- Reinstated plus damages for privacy breach

CBC v Canadian Media Guild, 2021 Arbitration

Facts | **Principles** | Implications

- Employees have reasonable expectation of privacy even on employer owned equipment
- Searches must be reasonable and carried out in reasonable manner

CBC v Canadian Media Guild, 2021 Arbitration

Facts | Principles | Implications

- Before conducting search consider:
  - What is subject of search?
  - Does employee have direct interest in subject?
  - Does employee have subjective expectation of privacy in the subject?
  - Is that subjective expectation objectively reasonable?
- Is there a less intrusive manner of investigation?

Wilson v Alberta (Labour Relations Board), 2021 Alberta Court of Queen's Bench

Facts | Principles | Implications

- Discriminatory Action Complaint
- TA hired to work with autistic student
- Reported incidents of violence
- Terminated during probationary period
- Alleged employer retaliation
- Employer cited failure to meet expectations and follow training

Wilson v Alberta (Labour Relations Board), 2021 Alberta Court of Queen's Bench

Facts | Principles | Implications

- OHS Investigation
  - Site visit, document review and interviews
- OHS Findings
  - Ample evidence to support termination
  - The raising of safety concerns was not a factor
- Decision upheld on appeal & judicial review

Wilson v Alberta (Labour Relations Board), 2021 Alberta Court of Queen's Bench

Facts | **Principles** | Implications

- 3-part test to prove discriminatory action
  1. Act of compliance with Act
  2. Disciplinary Action taken
  3. Causal connection between 1 & 2
- Correlation in timing of events is relevant but not necessarily determinative
- OHS Appeals limited in scope
  - Fair Procedure?
  - Decision reasonable?

ENMAX Corp. and IBEW, Local 254 (Hedges), Re, 2021 Alberta Arbitration

Facts | Principles | Implications

- As part of workplace reorg., 3 employees declared redundant
- They were offered, and paid, "severance" as per CBA
- CBA (uncharacteristically) defined "'severance" as amount paid in certain situations; not (as term usually defined) as payment to end employment
- Union said,
  a) Employees *also* entitled to pay in lieu of notice (termination pay) under CA; and
  b) ENMAX cannot contract out of Employment Standards Code termination pay

ENMAX Corp. and IBEW, Local 254 (Hedges), Re, 2021 Alberta Arbitration

Facts | Principles | Implications

Prior to hearing, partial settlement reached; employees' remedies agreed to

Arbitrator to interpret CBA: are employees generally entitled to severance *and* termination pay under CBA in these facts?

Decision:

a) On unique facts, employees were entitled to minimum termination pay *and* severance pay
b) Employees not recalled but terminated; no work to be recalled to (positions eliminated)
c) No "pyramiding" of benefits: CA set out "termination pay" and "severance" for 2 different purposes

ENMAX Corp. and IBEW, Local 254 (Hedges), Re, 2021 Alberta Arbitration

Facts | Principles | Implications

- Where there is no reasonable probability of recall, layoff = termination
- Collectively bargained severance amounts cannot be less than minimum amounts set out in *Employment Standards Code*; clause void (Machtinger)
- No “pyramiding of benefits” when benefits are paid under two different collective agreement provisions for same purpose and same time period

ENMAX Corp. and IBEW, Local 254 (Hedges), Re, 2021 Alberta Arbitration

Facts | Principles | Implications

- Ensure bargained payments paid to employees under CBA meet Employment Standards' thresholds
- To rely on recall clause, there must be a real probability of recall
- If no expectation of employee RTW, or if position eliminated, employee has been terminated
- CBA language matters: presumption that all words in CBA intended to have meaning

ENMAX Corp. and IBEW, Local 254 (Hedges), Re, 2021 Alberta Arbitration

Facts | Principles | Implications

- Carefully consider use and purpose words such as “severance” clause vs. “termination pay”; arbitrator will give separate meaning/application to these terms when purposes are different
- In event of workplace reorg., as starting point carefully consider CBA language as part of reorg. Strategy
- Cannot rely on recall clause if no reasonable probability of recall when positions eliminated
- Arbitrators look at substance of transaction to assess whether employees were actually “recalled” or dismissed

Kal Tire and IAMAW, Local 99 (MacDonald) , Re, 2021 Alberta Arbitration

Facts | Principles | Implications

- The Grievor was a tire technician for Kal-Tire with 10 years of service and a history of sleeping on the job and failing to properly complete work orders
- The Grievor was terminated for dishonesty and theft of time, details of which included:
  - Taking extended and unpermitted breaks in hiding
  - Lying about his whereabouts while on these breaks
  - Recording false times on work orders to disguise the time and length of the breaks

Kal Tire and IAMAW, Local 99 (MacDonald) , Re, 2021 Alberta Arbitration

Facts | Principles | Implications

- The Union filed a grievance of the termination that alleged:
  - The Grievor was not sneakily taking breaks; he would combine his morning and lunch breaks together
  - In the event breaks were excessive, this should not be deemed “time theft”
  - The Grievor did not intentionally lie about his location during these breaks
  - Any mistakes on the job orders were a result of an honest error

Kal Tire and IAMAW, Local 99 (MacDonald) , Re, 2021 Alberta Arbitration

Facts | Principles | Implications

- Arbitrator Jim Casey determined the following:
  - The Employer had grounds for discipline, but not termination
  - The Employer did not establish that the Grievor acted with dishonest intent with respect to his breaks and job order errors
  - The Employer did not establish that he lied about his location - it was a genuine mistake
  - The Grievor was reinstated without back pay

Kal Tire and IAMAW, Local 99 (MacDonald) , Re, 2021 Alberta Arbitration

Facts | **Principles** | Implications

- What is time theft?
  - Can refer to a broad range of misconduct
  - In this case, the submission of inaccurate claims for hours with the **dishonest intent** of receiving compensation which an employee knows they are not entitled to
  - If proven, it is serious misconduct likely justifying termination
- Onus of proving time theft
  - The onus to prove such an allegation is on the employer; however, the Grievor is tasked with providing an explanation of honest intent

Kal Tire and IAMAW, Local 99 (MacDonald) , Re, 2021 Alberta Arbitration

Facts | Principles | Implications

- Time theft is a serious allegation that requires the element of dishonest intent
- This highlights the importance of investigating the circumstances surrounding suspicious employee conduct, as it relates to suspected time theft
- This is an important reminder of the comprehensive factors arbitrators consider in assessing the appropriateness of terminations for cause

Government of the Northwest Territories v PSAC (Hodgson), 2021 NWT Arbitration

Facts | Principles | Implications

- Grievor resigned filed grievance in 2016 because of toxic environment and harassment
- Before resigning, grievor sent emails to Employer alleging various types of mistreatment
- Employer sent request for details to union, but no response
- Nothing further until 2020

Government of the Northwest Territories v PSAC (Hodgson), 2021 NWT Arbitration

Facts | Principles | Implications

- Employer asserted delay in receiving details prejudiced its ability to investigate, mount defence, and receive fair hearing
- Union asserted Employer had sufficient facts to understand grievance and conduct investigation when circumstances leading to grievance arose
- Employer brought preliminary dismissal application based on doctrine of laches (prejudicial delay)

Government of the Northwest Territories v PSAC (Hodgson), 2021 NWT Arbitration

Facts | **Principles** | Implications

- Laches requires both delay and proof of "significant prejudice"
- Serious nature of the allegations combined with the information provided was sufficient to know what the grievance was about and gave rise to grounds to investigate
- Request for details from union doesn't give employer a free pass not to act

Government of the Northwest Territories v PSAC (Hodgson), 2021 NWT Arbitration

Facts | Principles | Implications

- When allegations of harassment arise, obligation is on employer to make reasonable efforts to investigate
- Poor communication by employee and/or union not an excuse not to act
- Take reasonable steps. Follow up if no response. Paper your file!

Alberta Teachers' Association v Medicine Hat Board of Education, 2021 Alberta Arbitration

Facts | Principles | Implications

- The Employer unilaterally introduced an Attendance Management Policy
- Purpose of the Policy was to monitor and manage the sick and personal days taken by teachers and support staff
- Monitoring began after the 8th day of absence
- Express purpose of the Policy:

  Identify the causes of absence, evaluate needs for supports, provide resources, and/or explore potential accommodation to improve attendance

Alberta Teachers' Association v Medicine Hat Board of Education, 2021 Alberta Arbitration

Facts | Principles | Implications

- The Policy stated: *attendance shall be considered as part of performance*
- Under the collective agreement, first year teachers are entitled to 20 sick/personal days and 90 days ("evergreen") thereafter
- The ATA grieved on the grounds the Policy was in fact a staged program of attendance management that was intended to be disciplinary in nature and designed to coerce teachers into taking fewer than 8 sick days per year, in contravention of their entitlements under the collective agreement

Alberta Teachers' Association v Medicine Hat Board of Education, 2021 Alberta Arbitration

Facts | **Principles** | Implications

- Management may unilaterally introduce new policies, but the policy must be consistent with the collective agreement, relevant legislation and the *KVP* rules
- KVP Rules:
  - **1. It must not be inconsistent with the collective a greement;**
  - **2. It must not be unreasonable;**
  - 3. It must be clear and unequivocal;
  - 4. It must be brought to the attention of the employee affected before the company can act on it;
  - 5. The employee concerned must have been notified that a breach of the rule could result in his discharge (if the rule is used as a basis for discharge); and
  - 6. It should have been consistently enforced by the co mpany from the time it was introduced

Alberta Teachers' Association v Medicine Hat Board of Education, 2021 Alberta Arbitration

Facts | **Principles** | Implications

- KVP Reasonableness test as applied to Attendance Management Policies:
  - Any obligations imposed on employee's must be required to safeguard and protect the employer's legitimate interests while being as least intrusive as possible on the employees' privacy and benefit entitlements
  - Policies which deal with culpable sick time abuse and non-culpable attendance management must remain distinct and separate
  - Employees must understand the difference between these two policies and should not be led to believe that discipline will follow as a result of non-culpable absences

Alberta Teachers' Association v Medicine Hat Board of Education, 2021 Alberta Arbitration

Facts | Principles | Implications

- Policy was upheld in part. The sections that did not meet the *KVP* reasonableness test were struck out.
  - Policy blended culpable and non-culpable absences and implied employees may be given poorer performance reviews (discipline) for non-culpable absences.
- Employer's need to be mindful of the *KVP* test when drafting new policies
- A new policy will be assessed based on its actual impact on employees
  - Though the policy may explicitly state it is non-disciplinary, if in application it has or may have a disciplinary impact on employees, it is disciplinary in nature

Ontario Power Generation v Society of United Professionals, 2021 Ontario Arbitration

Facts | Principles | Implications

- The grievor was a front-line manager
- Two colleagues made harassment and discrimination allegations
- Alleged behaviours included sexist, homophobic, and racist comments as well as swearing, yelling at, and belittling employees
- Many allegations were substantiated by an independent workplace investigation

Ontario Power Generation v Society of United Professionals, 2021 Ontario Arbitration

Facts | Principles | Implications

- The Grievor alleged he was subject to discrimination by both the investigator and the employer
- The Grievor's allegations were rejected
- Arbitrator found cause for discipline but (due to the passage of time) termination was not appropriate
- Financial remedy substituted for reinstatement

Ontario Power Generation v Society of United Professionals, 2021 Ontario Arbitration

Facts | **Principles** | Implications

- Harassment and discrimination are unacceptable in today's workplace
- Supervisors who condone or allow harassment to continue may be disciplined
- Allegations of harassment must be addressed in a timely manner

Ontario Power Generation v Society of United Professionals, 2021 Ontario Arbitration

Facts | Principles | Implications

- External workplace investigations are becoming the norm for serious harassment complaints
- Regular 360 reviews, and other avenues for employee feedback, are critical to identify issues before they escalate
- Employers are increasingly using workplace assessments as a tool where issues exist, but no formal complaint has been filed

Community Living Atikokan v OPSEU, 2021 Ontario Arbitration

Facts | Principles | Implications

- Former employee made Facebook posts and a “civil protest”
- Arbitrator ruled that the employee breached the non-disparagement and confidentiality clauses of the parties’ Memorandum of Settlement
- Employee ordered to repay the employer $3000

Community Living Atikokan v OPSEU, 2021 Ontario Arbitration

Facts | **Principles** | Implications

- Confidentiality
  - The fact that the Employer did not establish that anyone other than Executive saw the fax is irrelevant to a finding of a breach of the Settlement
- Non-disparagement
  - "Disparagement" ≠ defamation

Community Living Atikokan v OPSEU, 2021 Ontario Arbitration

Facts | Principles | Implications

- Be mindful of what former employees are posting about, especially when there is a Memorandum of Settlement in place
- The bar for breaching a non-disparagement clause is not very high

Kraft v Firepower Financial Corp., 2021 Ontario Superior Court

Facts | Principles | Implications

- The Plaintiff was a 5.5 year employee and was terminated mid- March 2020 right before the Government of Ontario declared a public health emergency
- The Plaintiff sought a notice period of ten months due in part to the pandemic
- There was evidence that the pandemic impacted the Plaintiff's ability to secure new employment

Kraft v Firepower Financial Corp., 2021 Ontario Superior Court

Facts | **Principles** | Implications

- The availability of replacement income is one factor to be taken into account in assessing an employee's common law notice claim
- The defendant decided to terminate the plaintiff when there was a large degree of economic uncertainty
- The Court assessed a 9 month notice period, but increased it by 1 month due to the pandemic

Kraft v Firepower Financial Corp., 2021 Ontario Superior Court

Facts | Principles | Implications

- Employee counsel will argue that the pandemic must lengthen any notice period
- There must be actual evidence of such an impact to be a valid consideration
- In some industries, it could be argued the pandemic has had a positive impact on reemployment opportunities

Iriotakis v Peninsula Employment, 2021 Ontario Superior Court

Facts | Principles | Implications

- Employee brought a summary judgment application. Cause was not in issue
- Terminated in March 2020 (when the COVID-19 pandemic had just reached Canada)
- 56 years of age and employed for nearly 28 months
- Business Development Manager, but his role was not managerial

Iriotakis v Peninsula Employment, 2021 Ontario Superior Court

Facts | Principles | Implications

- Employment governed by a contract that did not limit notice
- Base salary was $60,000, although he earned over $140,000 in 2019 with commissions
- Employer offered 4 weeks' base salary but no amounts for commissions
- Employee mitigated losses within 7 months and sought 6 months' notice

Iriotakis v Peninsula Employment, 2021 Ontario Superior Court

Facts | **Principles** | Implications

- Age and prospects of reemployment are considered with other factors on balance
- Pandemic likely impacted job search, but at the time of termination, its impacts were speculative and uncertain
- Principle of reasonable notice is not a guaranteed bridge to alternative employment

Iriotakis v Peninsula Employment, 2021 Ontario Superior Court

Facts | Principles | Implications

- Dangerous to apply hindsight in measuring reasonable notice
- CERB not deducted as it was insignificant relative to pre-termination earnings
- Employee awarded 3 months' notice
- Employee awarded damages for commissions on prior sales that became due during the 3 months' notice period

Iriotakis v Peninsula Employment, 2021 Ontario Superior Court

Facts | Principles | Implications

- COVID-19 may not affect notice, particularly if termination was early on when the pandemic's impact on jobs was uncertain
- Whether CERB is deductible is likely factual
- Commission payments are dependent on the wording of the applicable agreement and entitlement of the employee had working notice been given

UFCW, Local 333 and Paragon Protection Ltd., 2021 Ontario Arbitration

Facts | Principles | Implications

- Union filed policy grievance against employer's mandatory COVID-19 vaccination policy (the "**Policy**")
- Union alleged Paragon had breached Management Rights and Health and Safety provisions of the Collective Agreement by implementing the Policy
- Further alleged the Policy violated Ontario's *Human Rights Code*

UFCW, Local 333 and Paragon Protection Ltd., 2021 Ontario Arbitration

Facts | Principles | Implications

- In response, Paragon stated:
  - Majority of its clients had already implemented their own policies that included contract employees, such as Paragon's security staff
  - Many of the Paragon clients without policies indicated that they had vaccination policies forthcoming
  - Paragon employees had raised concerns about unvaccinated co-workers
  - It was an operational necessity (to access client sites with policies in place)
  - Policy was intended to maintain the health and safety of Paragon employees

UFCW, Local 333 and Paragon Protection Ltd., 2021 Ontario Arbitration

Facts | **Principles** | Implications

- Policy upheld
- The Arbitrator found the company had acted reasonably in implementing the Policy:
  - No breach of Collective Agreement
  - Policy was reasonable, enforceable, and compliant with the Ontario *Human Rights Code*
  - Policy respected the rights of unvaccinated employees while providing a safe workplace for Paragon employees, clients and the public
  - Policy protected the health and safety of Paragon employees, as mandated under OHS legislation
  - Subjective perceptions against vaccines cannot override available scientific considerations
  - Unilateral implementation of Policy contained reasonable rules and regulations for employees, in accordance with *KVP*

UFCW, Local 333 and Paragon Protection Ltd., 2021 Ontario Arbitration

Facts | Principles | Implications

- First Canadian decision on mandatory vaccination policies
- Guidance for employers:
  - Precedent for principle that mandatory vaccination policy might be reasonable, so long as it complies with human rights legislation
  - Policy should consider accommodation for those unable to get vaccinated on protected human rights grounds (e.g., disability, religious beliefs)
  - Mandatory vaccination policy might assist in maintaining general duty to protect the health and safety of workers as far as reasonably practicable under OHS legislation

Electrical Safety Authority and Power Workers' Union, 2021 Ontario Arbitration

Facts | Principles | Implications

- Union grieved mandatory COVID-19 Vaccination Policy
- No provisions in Collective Agreement addressing vaccinations
- No legislated vaccination requirement
- No previous outbreaks of COVID-19 in workplace

Electrical Safety Authority and Power Workers' Union, 2021 Ontario Arbitration

Facts | Principles | Implications

- Nearly 90% of employees vaccinated
- Prior policy combined vaccination and testing
- Most work could be done remotely
- Unvaccinated employees could be reassigned when problems with access to third-party sites or travel arose
- Only 7 of 415 employees infected; 2 infections possibly work related

Electrical Safety Authority and Power Workers' Union, 2021 Ontario Arbitration

Facts | **Principles** | Implications

- Context matters and is not static
- Mandatory vaccination policies are not the only reasonable response
- Combining vaccination with testing alternative can be reasonable
- Not unreasonable to require confirmation of vaccination status
- Employee medical information must be protected and only disclosed with consent

Electrical Safety Authority and Power Workers' Union, 2021 Ontario Arbitration

Facts | Principles | Implications

- Where risks are high and there are vulnerable populations, mandatory vaccination policies are more likely to be reasonable
- Where employees can work remotely and there is no specific problem or risk related to outbreak, infections or interference with operations, less intrusive alternative may be adequate
- Consider employee privacy concerns and consent
- Use JHSC to discuss vaccination policies

Thank you.

McLENNAN ROSS