Welcome to the first issue of the *Fitzgibbon Workplace Law* Newsletter for 2019.

Although I have, historically (and, I confess, reluctantly and with reservations), done a "year in review" or "top 10 cases" from the preceding year, I decided not to do that this year. Instead, given the feedback I've received, I'll just carry on with the format of providing updates largely on developments that have taken place in the preceding month.

As you know, the Ford governments' amendments to the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995* are in place and we're largely back to the world that existed pre-Bill 148.

The articles in this Edition touch on a number of discreet topics from human rights, the duty to accommodate medical cannabis, frustration of contract and defamation, among others. I hope you enjoy the newsletter.

Mike

In this Edition

Ministry of Labour Published New ESA Poster and Your Obligations

The Ontario Ministry of Labour has published a revised *Employment Standards Act, 2000 poster* (Version 8.0) to reflect the amendments introduced by Bill 47, *Making Ontario Open for Business Act, 2018*.

It is a violation of the ESA for an employer not to post the most recent English version of the poster in a conspicuous place where it is likely to come to the

attention of the employees. Where the majority language of a workplace is not English, the employer must also post the poster in the majority language if the Minister has prepared a copy of the poster in that language and post this beside the English poster.

Employers are required to provide any employees who are covered under the *Employment Standards Act, 2000* with a copy of the most recent version of the employment standards poster within 30 days of the date the individual becomes an employee. Employers are also required to provide current employees with the most recent version of the poster.

This can be done by providing the employee with a physical copy, a copy electronically by email or by other electronic means where the employee is directed to a link to the poster on an internet database, but only if the employer ensures the employee has reasonable access to that database (*i.e.* must ensure the employee has access to a computer and is able to access a working link to the document) and ensures the employee has access to a printer and that the employee knows how to use the computer and the printer).

Employers should distribute the new poster (Version 8.0), and post it, as soon as possible.

Of note is that the government introduced *Bill 66, Restoring Ontario's Competitiveness Act, 2018* on December 6, 2018. If passed, the Bill would amend the *Employment Standards Act, 2000* to provide that the Director, and not the Minister, is required to publish a poster providing information about the Act and regulations and, importantly, that employers are no longer required to post the poster in the workplace. The Bill is, as of this writing, only at First Reading.

Permanent Residency as a Condition of Employment

The *Human Rights Code* prohibits discrimination on a variety of grounds including citizenship. The *Code* provides as follows:

> 16 (1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law.
>
> (2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence.
>
> (3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions.

The Ontario Human Rights Tribunal recently considered whether an employer could require, as a condition of employment, that the applicant be a permanent resident of Canada. The case is *Haseeb v. Imperial Oil Limited*, 2018 HRTO 957 (CanLII).

The applicant was a student at McGill University in the engineering department. He was an international student and his visa permitted him to obtain a work permit for on-campus part-time work and for full time work during regular breaks between academic terms. Aside from internships, for which he obtained temporary social insurance numbers (SIN), the applicant did not work (on or off campus) while he was a student.

On graduation, he became eligible for something called a "postgraduate work permit" (PGWP) for a fixed term (3 years). This allowed him to work anywhere in Canada for any employer. He expected that he would be granted permanent residence status within the 3 years.

The applicant applied for an entry level position at Imperial Oil. It was a condition of employment that the applicant have permanent residency or citizenship. The applicant applied for the position and was interviewed. The applicant heard from a friend that the friend had not proceeded past the first round of interviews because he had answered truthfully and said he was not a permanent resident. As such, when asked if he was eligible to work in Canada on a permanent basis, the applicant said that he was. This response was false.

The applicant was offered the position conditional upon his providing proof of his eligibility "to work in Canada on a permanent basis" by way of (1) Canadian birth certificate (2) Canadian citizenship certificate or (3) Canadian certificate of permanent residence (permanent resident card).

Although the applicant expected to obtain the PGWP with no difficulty upon graduation, he was not able to produce anything to Imperial Oil when the job offer was made to him. As such, he failed to satisfy the condition of the offer, and the offer of employment was rescinded. Imperial Oil said that this was because the applicant misrepresented his status throughout the hiring process.

The applicant filed an application under the *Code* alleging that Imperial Oil had discriminated against him on the basis of citizenship contrary to the *Code* by making *permanent* citizenship a condition of employment.

The Tribunal agreed.

Regarding the three (3) defences available under section 16 of the *Code* the Tribunal stated:

> .... the legislature contemplated that any requirement, consideration etc. that distinguished among individuals on the basis of either "Canadian citizenship", "permanent residence" status or "domicile in Canada with intention to obtain citizenship" is discrimination unless the requirement is imposed or authorized by law, or the other criteria are met for each of three defences. More specifically, in the Tribunal's view, IO's requirement amounted to a direct breach of the Code when it distinguished among job candidates who were eligible to work in Canada on the basis of citizenship and created categories of "eligible" and "ineligible" for progressing through IO's screening process. IO's requirement was not excused by s.16(1) of the Code as IO was not adhering to a requirement that was authorized or imposed by law. The further defence available for corporations under s.16(3) of the Code is also inapplicable in the circumstances of an entry level position ("as opposed to chief or senior executive position").

Imperial Oil argued that the permanent residency requirement was an occupational requirement and employment strategy that supported succession planning.

The Tribunal noted that the *bona fide* occupational requirement (BFOR) defence is only available in cases of indirect or constructive discrimination. The BFOR defence, according to the Tribunal, "is not available to IO for a direct breach of the *Code*, notwithstanding the unified approach to the BFOR defence articulated by the Supreme Court of Canada in *Meiorin*".

In this case, the Tribunal found that there was *direct* discrimination on the basis of citizenship and the BFOR defence was not available.

The Tribunal went on to say that if it was wrong that the discrimination is not direct or that the BFOR defence is not limited to direct discrimination, the Tribunal held that the BFOR was not available because:

1. An "occupational requirement" must *per se* be linked to the performance of essential tasks relating to a job; and,
2. A *bona fide* occupational requirement is a necessary requirement and cannot be subject to waiver for varying business reasons, unrelated to accommodating and individual to successfully perform the essential tasks of the job.

The Tribunal, further, held that if it was wrong on the above, that Imperial Oil had failed to demonstrate (a) that this requirement was *bona fide* and "necessary" and (b) that accommodating the applicant, a PGWP holder, with a waiver of the requirement, would have caused the corporation "undue" hardship (as opposed to some hardship or uncertainty).

The Tribunal found a breach of the *Code* and held that the Applicant's dishonesty in responding to questions regarding his permanent residence status were irrelevant to the issues about whether the *Code* had been contravened.

Practice Points

An employer policy requiring a job applicant to disclose in writing or verbally that she or he is a citizen or permanent

resident of Canada is prohibited conduct under the *Code* that is not saved by any defence available in the *Code*.

Review your hiring policies, including application forms and interview questions and hiring documents (including conditional offer letters) to ensure that references to *permanent* residence are brought in line with the *Code*.

Employers should continue to ask questions such as "are you legally entitled to work in Canada" but questions regarding *permanent* eligibility are to be avoided.

Does a Non-Solicitation Clause Require a Geographical Limitation?

Restrictive covenants (*i.e.* post-employment restrictions on a departed employee) that are contained in an employment agreement are *prima facie* void and unenforceable as being in breach of public policy. What is the public policy? Well, according to Lord Macnaghten in the leading English case, *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535 (U.K. H.L.) at 565:

> The public have an interest in every person carrying on his trade freely: so has the individual. All interference with individual liberty of acting in trade, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.

At common law, restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and should be free.

Restrictive covenants include non-solicitation and non-competition provisions.

As with most general rules, there are exceptions to this one. According to the Supreme Court of Canada in *Payette v. Guay inc.*, 2013 SCC 45 (CanLII) to be enforceable, the party seeking to enforce the provision must establish that it is clear and unambiguous and that it is reasonable. Normally, the party seeking to enforce the provision must show that it has a proprietary interest deserving of protection and the extent of the activity sought to be prohibited and the extent of the temporal and spatial scope of the prohibition are reasonable in the circumstances.

Where the clause is ambiguous, it will be unenforceable. As the Supreme Court of Canada said in *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] 1 SCR 157, "an ambiguous restrictive covenant is, by definition, *prima facie* unreasonable and unenforceable."

So back to the question posed in the title of this article, "Does a non-solicitation clause require a geographical limitation?"

For some time, I thought the answer was "yes".

The Court of Appeal in *IT/NET Inc v. Cameron*, 2006 CanLII 912 (ON CA) struck down a non-solicitation clause where, among other things, the clause had no spatial (geographic) limitation. This was followed in a number of cases, including *Trapeze Software Inc. v. Bryans*, 2007 CanLII 1882.

However, more recently, it would appear that the answer is "not necessarily" or "not as a blanket statement". The Court of Appeal discussed, without deciding, the matter on December 12, 2018 in a far reaching case called *Kerzner v. American Iron & Metal Company Inc.*, 2018 ONCA 989. It referred to the following comment from the Supreme Court of Canada in *Payette:*

> Moreover, I am of the opinion that a territorial limitation is not absolutely necessary for a non-solicitation clause applying to all or some of the vendor's customers to be valid, since such a limitation can easily be identified by analyzing the target customers. In *World Wide Chemicals Inc. v. Bolduc*, 1991 CarswellQue 1157, *L.E.L. Marketing Ltée v. Otis*, [1989] Q.J. No. 1229 (QL), and *Moore Corp. v. Charette* (1987), 19 C.C.E.L. 277, for example, the Superior Court noted that a non-solicitation clause does not require a geographic limitation. Finally, in the context of the modern economy, and in particular of new technologies, customers are no longer limited geographically, which means that territorial limitations in non-solicitation clauses have generally become obsolete.

The Court of Appeal commented that "it does not follow from *Payette* that non-solicitation clauses never can be found unreasonable based on geographic scope." They said that the *Payette* case dealt with a non-solicitation

clause in a commercial contract rather than an employment contract. In the end, the Court of Appeal held that it was not necessary to consider the enforceability of the non-solicitation clause because the employee had been "scrupulously refrained from soliciting any and all customers" of the employer.

Practice Points

Courts don't like restrictive covenants because, as a matter of policy, we, as a society, want to encourage people to earn the living they want. Restrictive covenants run counter to that policy, and courts will not enforce them except where they are required in the circumstances and are reasonable in all respects.

Clear drafting is essential - you don't get past go unless the clause is unambiguous. The court certainly won't fix drafting errors.

Ask yourself before including a restrictive covenant (non-solicitation and/or non-competition) whether it is necessary to protect your business interest. There's a big difference between *want* and *need* here. Sure you *want* to tie people up post-employment, but do you *need* (and I mean *absolutely* need) to do that?

If the answer is "yes", then the next question is "what at a minimum do you need to accomplish that"? In other words, what is minimally required to protect what you're looking at protecting? What I mean, is that, as I see it, there are gradations of post- employment restrictions:

- Confidentiality (least open to challenge)
- Non-solicitation (middle ground - may be okay , for example, where customer contact or responsibility is a component of the job)
- Non-competition (to be used sparingly as this expressly prohibits the employee from working in the industry or for specified competitors)

What do you need to protect your legitimate business interest? Is a confidentiality clause sufficient? If so, why go farther? I encourage you to *think* through the issues and not default, as is increasingly common these days, to templates or precedent. These are no substitute to understanding the issues, working through them methodically, and coming to a decision.

Once you figure out *what* you need, then you draft the clause.

Frustration of the Employment Contract - What's this Mean (Really)?

I've had a number of questions about "frustration" of the employment contract over the past few months, and thought it worthy of a brief review since it is an important, complicated and misunderstood principle of employment law.

The following principles can be distilled from the cases:

- Frustration of contract occurs when a permanently disabled employee cannot return to work because the disability makes it impossible for the employee to perform the contract. Put another way, frustration of contract may occur when the contractual obligation is incapable of being performed through no fault of the parties. If the inability to perform the contract continues into the foreseeable future, frustration is made out (*Nason v. Thunder Bay Orthopaedic Inc.*, 2017 ONCA 641).

- The onus is on the employer to prove that the contract was frustrated (*Naccarato v. Costco*, 2010 ONSC 2651).

- Frustration of contract is established at the time of termination (*Fraser v. UBS*, 2011 ONSC 5448 and *Ciszkowski v. Canac Kitchens, a division of Kohler Canada Co.*, 2015 ONSC 73 (CanLII)).

The question to be determined is whether, on the basis of the evidence, there is no reasonable likelihood that the employee would be able to return to work within a reasonable period of time. According to the case law, "permanent disability will frustrate a contract. However, employment is not frustrated by temporary sickness. The law permits temporary sickness and moreover, allows the disabled to recover" (*Boucher v Black & McDonald Ltd.*, 2016 ONSC 7220). In *Boucher*, the employee had been absent for 28 months due to illness and that wasn't, on the facts of the case, sufficient to result in the frustration of the contract.

Practice Points

When an employee is absent for a protracted period of time, it's natural for the employer to look at the options. The business must carry on and that is difficult when an employee goes off work and the prognosis is unknown or unclear. Complicating the issue is the employer's duty to accommodate under the *Human Rights Code*.

More often than not the employer loses track of the employee. They remain off work and the employer defers to the employee, the employees' physician, the disability insurance provider or the Workplace Safety and Insurance Board. To put it politely, this is a mistake and it happens over and over again.

So, what's the employer to do? Well, manage the absence and don't defer to third parties. Sure, third parties, like the doctor or the insurance provider are helpful, but the employer has an obligation under the *Code* to accommodate and the employee has a corresponding duty to cooperate in the accommodation process. Further, the duty to accommodate has a procedural aspect (i.e. gathering information from the employee and making requests of the employee) to allow the employer to determine if accommodation is possible (the substantive obligation).

The secondary purpose of gathering medical evidence from the employee on a periodic and reasonable basis, is to determine if the contract has become frustrated and can be terminated. In other words, based on the timely and current evidence, there is no reasonable likelihood that the employee would be able to return to work within a reasonable period of time.

Don't lose the employee and don't abdicate your responsibility to manage the claim and the workplace to anyone. The Supreme Court of Canada recently endorsed this approach in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, one of the more important cases of 2018.

This process is time consuming, and it requires organization and consistency, but it is imperative to keep on it and to be diligent.

Anticipatory Termination of Contract

The employer hires someone, but then pulls the offer before they start working. Unfortunately, in the time between giving the contract (offer) to the employee and the withdrawal, the employee accepts the offer, and resigns his employment with the former employer. Not surprisingly, this situation creates some real challenges and hardships.

Fortunately, this is an uncommon situation, but it does happen.

The case of *Khashaba v. Procom Consultants Group Ltd.* 2018 CarswellOnt 21687 considered this issue.

Khashaba brought an application under the *Rules of Civil Procedure* to interpret the employment contract.

Following a recruitment process, Procom extended an offer of employment to Khashaba to work at one of Procom's clients. Believing that Procom had hired him, Khashaba gave notice of resignation to his employer. Following this, Procom told Khashaba that its client did not want to move forward with hiring him and, so, the Khashaba did not commence employment.

The employment contract was for a fixed term, but contained a robust early termination clause the relevant portions of which I will set out:

> 5. Early Termination
>
> (b) Termination for Cause Procom may, at its option, terminate your employment immediately for cause, without prior written notice or compensation of any nature. For these purposes, "cause" means any grounds at common law for which an employer is entitled to dismiss an employee summarily without notice or compensation in lieu of notice.
>
> (c) Termination without Cause Notwithstanding the fixed Term of this Agreement, Procom may terminate your employment without cause at any time by providing you with only the minimum amount of notice of termination or pay in lieu thereof (at the Company's sole discretion, in any combination), minimum benefits continuation (if applicable), and minimum severance pay (if

> applicable), as required by the *Employment Standards Act, 2000*, as well as accrued wages and vacation pay up to and including the date of termination. In no event will you receive less than your minimum entitlements under the *Employment Standards Act, 2000*. If a greater entitlement is required under the *Employment Standards Act, 2000* than this provision grants to you, your entitlements shall automatically be increased to satisfy only the minimum entitlements required by the *Employment Standards Act, 2000* on the termination of your employment. You understand and agree that the entitlements set out in this paragraph will constitute your full, exclusive and final entitlements to notice or pay in lieu of notice, severance pay (if applicable), and benefits continuation (if applicable), including in the event of a constructive dismissal and including any entitlements to common law notice and by your acceptance of this Agreement waive any further other claim at common law relating to such termination.
>
> (d) You agree that these provisions respecting resignation and termination shall remain in effect throughout this Agreement and any renewal or extension of this Agreement, notwithstanding any other changes to the terms and conditions of this Agreement or to any renewal or extension of this Agreement, unless a specific written agreement is made to change these provisions.

Procom argued that a contract of employment had not been consummated, and so the plaintiff could have no claim. The plaintiff argued that there was a contract formed, but that the termination clause was void and unenforceable. Specifically, he argued, paragraph 5(b) dealing with termination for cause was not enforceable because it was an unlawful contracting out of the *Employment Standards Act, 2000.* He suggested that the language used in the termination for cause provision (which used the word "cause" at common law) did not comply with the *ESA* which used the words "wilful misconduct" which was a higher standard (*Plester v. Polyone Canada Inc.*, 2011 ONSC 6068 affd by the Court of Appeal at 2013 ONCA 47).

The plaintiff then argued that, because the termination for cause clause failed to comply with the *ESA* that the entire Early Termination clause was void and unenforceable and that he was entitled, on termination, to be paid the compensation he would have received during the term of the fixed term contract.

Decision

The argument the plaintiff made was creative, but was not accepted by the court. The Early Termination clause was made up of five (5) separate clauses, two (2) of which related to termination. The non-compliance argued by the employee was limited to the termination for cause portion of the contract. The Court concluded that the illegality rendered illegal the paragraph in question (for cause termination), but not the entire Early Termination clause. These other clauses remain in full force and effect and did not violate the *ESA*. According to the Court:

> In this case, the contract evinced a clear intention to comply with the ESA, the violation of the ESA was in a separate provision from the rest of the contract, and the contract contained a severability clause.

But this was not a typical termination. The Court opined that this was more typical of a case of negligent misrepresentation under the principles set out in *Queen v. Cognos Inc.*, [1993] 1 SCR 87:

> A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in his or her representations. It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.

The Court, in this case, was to provide its views on the proper interpretation of the employment contract, and it commented that the wrong committed by Procom (failing to take more care to ensure that Khashaba was aware of the truth of the situation) was not really related to the violation of the *ESA* in the employment agreement.

In the circumstances, the Court concluded that the employee was not entitled to the compensation lost during the term of the employment agreement but to the termination without cause damages under clause 5(c) of

the employment agreement. A terminated employee is only entitled to be provided with notice of termination or termination pay under the *ESA* after having worked for the employer for 3 months or more, and since Khashaba hadn't worked at all, he was not entitled to anything under the *ESA* or the contract.

Practice Points

The issue came before the judge under Rules 14.05(3)(d) and/or (h) of the *Rules of Civil Procedure* and required the court to interpret the contract. The employee got nothing under the contract in the unique circumstances of this case. That may seem a harsh result, but the judge came to the conclusion based on strict contractual interpretation principles.

In anticipatory breach situations, there may be contractual claims, where there is no written contract that sets out, in a legal and enforceable manner, the employees' entitlement on termination. In addition, as the Court alludes in the *Khashaba* case, there may be claims brought under the principles in *Queen v. Cognos Inc.* for negligent misrepresentation.

The practice point is to include an enforceable termination clause in the offer of employment (though an enforceable termination clause can't be guaranteed these days). But the larger issue is to be thorough and honest in the hiring process. If there are contingencies, make them known to the applicant. If the offer is conditional, make those conditions express and clear in the offer of employment. Allow the employee (or prospective employee) to decide whether or not to accept those contingencies and whether to act upon them.

Sometimes things fall apart, and sometimes they fall apart quickly. Things happen, and, in certain limited cases, that is unavoidable. In those few cases, a legally enforceable termination clause may save the day for an employer.

Defamation and Employment Law - A Bad Mix

An action for defamation can sometimes arise in the context of a dismissal or wrongful dismissal case. The claim often comes up where the employee is terminated and the employer communicates something that might, directly or indirectly, cast aspersions or damage the reputation of the terminated employee.

The most recent discussion of the issue comes from the Alberta Court of Queen's Bench in *Roberts v Edmonton Northlands*, 2019 ABQB 9 (CanLII) decided on January 12, 2019.

This was a case of partial summary judgment brought by the defendants in the context of a claim by the plaintiffs for defamation and constructive dismissal.

The defendant engaged KPMG to conduct a "business optimization assessment". Out of that came certain recommendations including that Northlands convert to the use of an automated system with respect to parking lots. Northlands then conducted an "internal audit" and concluded there was an issue with respect to loss of revenue in the parking department and it engaged a company to conduct a third party audit.

The audit "identified an issue of transactions not being accounted for, resulting in losses to Northlands parking department. The audits revealed shrinkage of 10.5% to 19%, which administration equated to an estimated maximum lost revenue of $1,200,000 annually."

Neither KPMG or the company that conducted the audit referred to "theft occurring by cashiers employed by the parking department."

Following the audit report dated September 8, 2015, the administration of the defendant decided to outsource all existing cashier staff, and recommended on September 25, 2015 to approve and proceed with the recommendation to terminate the cashiers. On October 1, 2015 the Board of Directors approved the expenditure to implement an automated parking system.

The cashiers were dismissed without cause on October 5, 2015. The following day, Northlands posted a notice in the parking services office, and sent an email to its employees which is the genesis of the plaintiffs defamation claim. You can read the notice in full at paragraph 12 of the decision.

Shortly thereafter, some of the terminated cashiers contacted the media to "complain about the dismissal and the reasons given, specifically the allegation of theft which is disputed." Northlands responded to the media by publishing a statement which elaborated upon the previous notice. The statement is found at paragraph 14 of the decision. Further comments were made by the

individual defendant during a media scrum where, according to the court, "further comments were made concerning the reasons for the termination of the cashiers, including the allegation of theft."

Nineteen of the 35 terminated cashiers sued alleging defamation and wrongful dismissal. One of the plaintiffs was the cashiers' supervisor and her claim was constructive dismissal.

The Decision

The judge was considering a motion for partial summary judgment. Under the *Rules of Court,* in order to succeed in an application for summary judgment, the defendant must demonstrate that there is no merit to the claim or part of the claim. The leading case comes from the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 (CanLII).

After reviewing the test, including the restatement of the test by Alberta Courts, the judge dismissed the motion and stated as follows:

> Under either test articulated by the Alberta Court of Appeal in the foregoing decisions, the Defendants have not proved that the defamation and constructive dismissal claims have no merit. The defences to these claims cannot be characterized as "unassailable", with a "very high likelihood of success" were these claims to go to trial. On the record before this Court, the Defendants have not proven their case on a balance of probabilities. There are disputed issues of material facts, and issues of credibility, that cannot be fairly resolved summarily.

In other words, a trial was necessary and the issues could not be decided on a motion.

Defamation Claims by the Group of Cashiers

In reaching this decision, the judge had to consider the various claims. The leading defamation case in Canada is *Grant v Torstar Corp*, 2009 SCC 61 (CanLII) where the Court put the test as follows:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism.... The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

The motion judge found that the notice and statement were "clearly defamatory and was communicated to at least one person other than the Plaintiffs."

The defendants argued, however, that the statement was not directed towards any individual, but, rather, to the group of cashiers. No individual was identified as having committed the theft. As such, the defendants argued that the plaintiffs were unable to establish that "they were defamed individually and, accordingly, that they have suffered injury as a result."

The judge commented that, although that may be true, there is nothing which absolves any of the individual plaintiffs from the thefts, and a cloud of suspicion hung over all of them.

In terms of "group defamation" the court cited *Bou Malhab v Diffusion Métromédia CMR inc*, 2011 SCC 9 (CanLII) where the Supreme Court of Canada observed that in a group defamation case "special attention will then have to be paid to the personal nature of the injury. The plaintiff or plaintiffs must prove that an ordinary person would have believed that each of them personally sustained damage to his or her reputation."

There is no maximum size of the group beyond which the defamatory nature of the comments become so diluted as to be beyond claim. The Court noted that the "personal nature of injury can be determined only through a contextual analysis." and that "In general, the more strictly organized and homogeneous the group, the easier

it will be to establish that the injury is personal to each member of the group."

In the circumstance, the judge found that the defendants had not established that the plaintiff's *prima facie* claim for defamation had no merit. The trial judge will also have to determine that, if the comments were defamatory, whether the individual plaintiffs can establish a claim for injury as a result of the comments.

Qualified Privilege

The defendants argued that, even if the comments were defamatory, they were subject to the defence of qualified privilege. We see this in the context of employment law when dealing with allegations of defamation in the context of references (see my article in the January 2018 Newsletter, *Giving References - Some Further Clarification*).

Qualified privilege is available as a defence against a claim of defamation when the defendant has an "interest or a duty – legal, social or moral – to communicate the defamatory material to the person to whom it is made and the recipient of the communication has a corresponding interest or duty to receive the communication" (Ramirez v. Gale, 2017 YKSC 29 (CanLII) application to extend time to appeal dismissed at 2017 YKCA 18 (CanLII)).

This defence is not absolute (hence the word *qualified*) in that it can be defeated if the plaintiff can show that the statement was made with malice. In Korach v. Moore 1991 CanLII 7367 (ON CA) the Court of Appeal discussed malice as follows:

> Evidence of malice may be extrinsic or intrinsic. Extrinsic evidence is evidence of surrounding circumstances. Intrinsic evidence is the wording of the document itself. The wording may be so violent, outrageous or disproportionate to the facts that it furnishes strong evidence of malice.
>
> Extrinsic evidence that the defendant made the defamatory statements knowing them to be untrue will ordinarily be conclusive evidence that the defendant lacked an honest belief in the truth of what he wrote. But the evidence need not go that far. If the defendant was reckless in making the statements, that will be sufficient. "Recklessness" in this branch of the law means indifference to the truth or falsity of what was said.

The motion judge in *Roberts* held that there was a triable issue (whether qualified privilege applied and whether malice was present) and dismissed this aspect of the motion for summary judgment.

Practice Points

While it is important to understand that qualified privilege *may* apply to certain aspects of the employment relationship (for example giving references) it does not apply in all circumstances. In the circumstances of the *Roberts* case, that issue (among others) will require a full airing in a trial.

Optics and timing are important in employment law. Spin is also important - what do the words reasonably and objectively mean? What are the implications of the words used, in context?

The *Roberts* case is unique as it involves multiple plaintiffs which will require somewhat different considerations when analyzing the impact on any individual (that is a really interesting issue from a legal perspective).

But there are similarities that probably come up in every termination case, irrespective of the context. What should you say? Who should you communicate with? Be careful, don't be cavalier or reckless. Sometimes saying nothing is the preferred course, but if you feel you need to say something, be aware that words are powerful, and while your intention might have been neutral, that might not help you out if you and the company are sued.

Medical Cannabis and the Duty to Accommodate

A case came to my attention recently that I thought I'd review. It's not a "new" case, having been decided in April 2018, but it does provide an excellent overview of the law with respect to medical cannabis and the duty to accommodate. The case is *International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard)* (2018) 292 L.A.C. (4th) 1 (Roil). I'd also point out that this is an arbitration case decided under a collective agreement and comes to us from Newfoundland. It is not, therefore, binding (but it is interesting).

Facts

The grievor was a member of the union. He used medically-authorized cannabis to control pain that he suffered from medical conditions. He applied for employment as a labourer and then assembler with Valard Construction LP ('Valard' or 'the Employer'), who was one of the major contractors working on a construction project involving the transmission line corridor. This was a safety-sensitive workplace.

He consumed cannabis the night before bed. He said he was able to work without impairment by the following morning.

He was declined employment at every turn. He filed a grievance arguing that the employer had failed to accommodate his disability. The employer defended on the basis that the accommodation would result in safety-risks that would amount to undue hardship.

Decision

The issue in the case was the extent of the duty to accommodate and whether the safety risks would amount to undue hardship. The difficulty faced by the arbitrator was that there was no reliable way to measure impairment from cannabis.

The arbitration reached the following conclusions:

1. The regular use of medically-authorized cannabis products can cause impairment of a worker in a workplace environment. The length of cognitive impairment can exceed simply the passage of 4 hours after ingestion. Impairment can sometimes exist for up to 24 hours after use.

2. Persons consuming medical cannabis in the evening may sincerely believe that they are not impaired in their subsequent daily functioning; they can, however, experience residual impairment beyond the shortest suggested time limits. The lack of awareness or real insight into one's functional impairment can be a consequence of cannabis use. In that context, a person may not experience 'euphoria' (as mentioned in the Health Canada Guidance), yet still not function, respond or react normally while impaired by cannabis use.

3. A general practicing physician is not in a position to adequately determine, simply grounded on visual inspection of the patient in a clinic and a basic understanding of patient's work, the daily safety issues in a hazardous workplace. Specialized training in understanding workplace hazards is necessary to fully understand the interaction between cannabis impairment and appropriate work restrictions in a given fact situation.

4. There currently are no readily available testing resources within the Province of Newfoundland and Labrador to allow an employer to adequately and accurately measure impairment arising from cannabis use on a daily or other regular basis.

The arbitrator then asked "should the Employer be required to compromise safety at the Project and assume the risk associated with cannabis impairment?"

The Newfoundland *Occupational Health and Safety Act* contains a clear provision dealing with impairment:

> An employer, supervisor or worker shall not enter or remain on the premises of a workplace or at a job site while his or her ability to perform work responsibilities is impaired by intoxicating substances or another cause that endangers his or her health or safety or that of other workers.

In the circumstances the arbitrator held that the worker could not be accommodated without undue hardship:

> The safety hazard that would be introduced into the workplace here by residual impairment arising from the Grievor's daily evening use of cannabis products could not be ameliorated by remedial or monitoring processes. Consequently, undue hardship, in terms of unacceptable increased safety risk, would result to the Employer if it put the Grievor to work. As previously stated, if the Employer cannot measure impairment, it cannot manage risk.

Furthermore, there is "currently no effective or practical means to accurately measure impairment in the workplace from evening cannabis use." The inability to test for *real* impairment was critical in this case.

The arbitrator concluded as follows:

> The Employer did not place the Grievor in employment at the Project because of the Grievor's authorized use of medical cannabis as directed by his physician. This use created a risk of the Grievor's impairment on the jobsite. The Employer was unable to readily measure impairment from cannabis, based on currently available technology and resources. Consequently, the inability to measure and manage that risk of harm constitutes undue hardship for the Employer.

The grievance was, therefore, dismissed.

Practice Points

The accommodation of medical cannabis in the workplace is not new. For Ontario employers I would commend you to the useful and recent document published by the Ontario Human Rights Commission entitled *Policy statement on cannabis and the Human Rights Code*. Although this document is not law it is, nonetheless, instructive and important.

Among other things, the Commission Policy is that:

- An employee can consume edible cannabis for a medical purpose related to a disability in an enclosed workplace, as long as it does not interfere with workplace health and safety or performing essential job duties.

- Accommodation does not necessarily require employers to permit cannabis impairment on the job. The duty to accommodate ends if the person cannot ultimately perform the essential duties of the job after accommodation has been tried and exhausted, or if undue hardship would result. It would likely amount to undue hardship to allow any employee, regardless of a disability or addiction, to be impaired by cannabis while doing safety-sensitive jobs like operating heavy machinery.

- Employers should routinely inform employees who work in safety sensitive positions about the need to disclose if they are using a drug that could lead to on- the-job impairment.

- Employers have a duty to inquire where an employee is clearly unwell or is known to have, or perceived to have, disability needs related to cannabis use for a medical purpose, or cannabis addiction.

Many of the cases dealing with accommodation of medical cannabis or cannabis addiction arise in the context of safety-sensitive positions or safety-sensitive workplaces. It is certainly easier to establish undue hardship in these settings, however, even in non-safety-sensitive positions accommodation may not be possible without incurring undue hardship.

Employers sometimes make the mistake of acting too quickly when an employer discloses that he or she is prescribed medical cannabis. Similarly, it is a mistake to apply a “zero tolerance” policy out of the blocks. Employers are expected to engage in an individualized process of dialogue and accommodation with the employee. Ultimately, they may come to the conclusion that accommodation cannot occur without undue hardship, but that conclusion should not be reached precipitously, as a knee jerk reaction or before laying the groundwork for a reasoned decision and defence.

Articles and Developments of Interest

Is there a gender punishment gap?

According to a recent study in the answer is a resounding “yes” (at least in the financial advisory industry and in the U.S.). The authors of *When Harry Fired Sally: The Double Standard in Punishing Misconduct* examined punishment for misconduct in the financial advisory industry and reached the following conclusions:

- Following an incident of misconduct, female advisers are 20 percent more likely to lose their jobs and 30 percent less likely to find new jobs relative to male advisers;
- Females face harsher outcomes despite engaging in misconduct that is 20 percent less costly and having a substantially lower propensity towards repeat offenses;
- The gender punishment gap in hiring and firing dissipates at firms with a greater percentage of female managers at the firm or local branch level;
- The gender punishment gap is not driven by gender differences in occupation (type of job, firm,

market, or financial products handled), productivity, misconduct, or recidivism.

This was the first study to investigate the gender punishment gap in the financial advisory setting. There is a shorted article in Harvard's *Working Knowledge entitled Women Receive Harsher Punishment at Work Than Men*.

Interesting Statistics Website

I came across a website in my teaching at U of T that I thought I'd bring to your attention. It's part of the *OECD* site and includes a host of *labour and employment statistical information*.

CEO Pay in Canada

The Canadian Centre for Policy Alternatives released two reports in January 2019:

- Mint Condition: CEO pay in Canada
- *The Double-Pane Glass Ceiling - The Gender Pay Gap at The Top Of Corporate Canada*

Shortage of Adjudicators at the Human Rights Tribunal

Global News recently published an article entitled *Ontario human rights tribunal short of adjudicators causing widespread delay of cases* that discusses the strain on the resources at the HRTO and the impact on cases (including delay). In fact, the Human Rights Tribunal of Ontario website contains the following statement:

> Important Notice
>
> Over past months, parties have experienced service delays at the Human Rights Tribunal of Ontario (HRTO). The HRTO continues to work with the government to improve its services and recruitment is under way to fill adjudicator vacancies. On January 1, 2019, the HRTO became part of the newly created Tribunals Ontario organization. A review will be conducted of all tribunals, including the HRTO, to identify areas for improvement to make services more streamlined, cost-effective and efficient.

The most recent *Social Justice Tribunals Ontario 2017 – 2018 Annual Report* notes that, in 2017-2018, the HRTO experienced a 23% increase in the number of applications received as compared to 2016-17. This increase is, according to the Report, "putting pressure on the HRTO's administrative and adjudicative resources".

The Ontario human rights system was changed significantly effective June 30, 2008 in large part as a result of the systemic delays that the former system engendered. The system was reviewed in 2012 and the *Pinto Report* was produced.

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