Fitzgibbon Workplace Law Newsletter, Volume 2, Issue 5

I hope you are enjoying the Fall and the more seasonal temperatures (and even the rain). After an unusually long summer vacation, and then helping our sons to get settled at their university, we find ourselves, officially, "empty nesters" with an eerily quiet house.

Time marches on and this is equally true for the always interesting world of labour and employment law! There have been many interesting and notable developments over the past couple of months and I've highlighted a few of them in this newsletter for your consideration.

As always, happy reading and enjoy the Fall.

In this Edition

When is a Settlement a "Settlement"?

In most cases you know when a settlement is achieved. The terms of the deal are memorialized, for example in Minutes of Settlement and/or correspondence, releases are signed and, in most cases, the employer and employee go about their lives, *occasionally* thankful for having met.

In other cases, unfortunately, the issue of whether there is a settlement is confused, unclear and messy and it's in those situations that problems can arise. Is there a deal or not and what are the terms?

Such was the case in *Shete, Lada, and Chung v. Bombardier Inc.*, 2019 ONSC 4083 (CanLII) recently decided by the Divisional Court.

Shete, Lada and Chuang (the "Employees") were long-service employees of Bombardiers. By letter dated September 30, 2015, Bombardier notified the Employees that their employment was being terminated effective November 25, 2015. It offered them termination packages in exchange for a release (the "Initial Offer"). They retained counsel and negotiations ensued. Their lawyer proposed new terms to resolve the matter.

The sequence of events is important (as it generally is):

- December 18, 2015 - Bombardier's Director of Legal Services sent an email to the Employees' counsel with a new offer. She stated that Bombardier was prepared to offer 13 to 16 months of base salary (depending on the Employee), minus *Employment Standards Act, 2000* notice and severance already paid. The offer was not subject to mitigation. She stated that allocation to legal fees could be made upon presentation of an invoice.

- April 4, 2016 - counsel for the Employees wrote to the Director of Legal Services saying "against my advice, my 3 clients are prepared to accept your offers of December 18, 2016 [sic] provided that Bombardier make an additional payment of $2,500 each towards their legal costs."

- April 11, 2016 - the Director of Legal Services emailed the Employees' counsel enclosing "the revised severance offers". The documents were in the same form as the initial offer, "except that they provided for the termination pay that the Employees had agreed to accept through their counsel on April 4, 2016. The documents also included a term for reimbursement of legal fees up to $2,500 on proof of payment. The revised offers enclosed a transaction and release document and stated "Your signature will confirm your acceptance of the terms and conditions for the termination of your employment."

The Employees did not sign the releases or return the documents. Instead, on July 19, 2016, each of the Employees filed a Statement of Claim against Bombardier seeking damages for wrongful dismissal.

According to the Court:

> Two days later, counsel for the Employees wrote to Ms. Picard, stating that his clients had not appreciated that the amounts in the April 11, 2016 letters were subject to a deduction for termination pay and severance pay that they had received. He advised that after much back and forth discussion, he had received instructions to reject the offers and proceed to litigation.

Bombardier defended and brought a motion for summary judgment arguing that the parties had entered into a settlement and that the claims ought to be dismissed.

The only evidence before the motions judge was the affidavit of Bombardier's Director of Legal Services. The motions judge dismissed Bombardier's motion and, in doing so, concluded that there was no settlement. The Divisional Court summarized the motion judge's decision as follows:

> He found that Bombardier's April 11, 2016 correspondence did not constitute an acceptance of the Employees' April 4, 2016 offer. Rather, he found that Bombardier's response was a new offer that impliedly rejected the Employees' offer. His conclusion was based on the language used in Bombardier's April 11, 2016 correspondence, namely, (i) Bombardier's email referred to "revised severance offers"; (ii) the language in the attached letter said that Bombardier was "prepared to offer you the following terms and conditions"; (iii) the letter stated that Bombardier would pay $2500 in legal fees "upon presentation of a document demonstrating that such legal fees were incurred"; and (iv) the letter required the Employee's signature to confirm acceptance of the terms and conditions.

Bombardier appealed to the Divisional Court.

The Court found that the motion judge had committed an error and overturned his decision.

The Court observed that settlements are enforced so long as the parties have agreed on the "essential terms" and there is a "mutual intention to create a legally binding relationship" (see *Ferron v. Avotus Corp.*, [2005] O.J. No. 3511 upheld at 2007 ONCA 73 (CanLII)).

The motion judge failed to analyze the essential terms of the settlement and where the differences between them

lay. Instead of doing this, the judge simply looked at the specific words in the exchanges between Bombardier and the Employees' counsel.

The Divisional Court looked at the chronology of events and concluded that the parties had reached a settlement. Counsel's correspondence of April 11, 2016 was not a new offer as the motion judge held. Instead, Bombardier accepted the Employees' offer of April 4, 2016. There was a meeting of the minds and an intent to settle. There was, in other words, a binding and legally enforceable settlement.

Importantly, the Court noted "the fact that the Employees may have subsequently re-considered their position does not undermine the existence of an enforceable settlement."

Practice Points

In most cases, settlements go smoothly and there are no issues. In some cases, there is confusion or a lack of clarity about whether the parties have reached an agreement. Sometimes employees (or employers) get "cold feet" or a "change of heart" and sometimes, where the settlement comes together quickly one of the parties might feel that it was "too easy" and try to backtrack.

In the end, where things unravel during settlement discussions or where one party maintains that there is no settlement, it's important to at least consider whether, notwithstanding any position to the contrary, there is a binding and enforceable settlement.

As the *Bombardier* case demonstrates, it's possible to achieve a settlement even where one of the parties says there isn't one. There are lots of cases on the point and it is important to be alive to the issue. It is also important to paper the deal as carefully and clearly as you can and nail down the terms of settlement in writing as that documentation and chronology will be important if one party argues that there is no settlement.

Withdrawal of Grievances - Is that With or Without Prejudice?

Can a union withdraw a grievance filed under a collective agreement without prejudice to any matter? In other words, can the union withdraw the grievance and then file another grievance of an identical nature in future without consequence? Can the grievor file an application under a statute relating to or touching upon the events giving rise to the withdrawn grievance?

The issue was considered in *Albright Gardens and ONA* (2015), 122 C.L.A.S. 74 (McNamee). After the employer closed its case, and the union advised that it was not calling evidence, the arbitrator adjourned the hearing to allow the parties to make written submissions. In lieu of written submissions, the union wrote, in part:

> I write to inform you and your client that ONA is withdrawing the above-noted Grievance without prejudice or precedent to either party's legal position on the interpretation of the collective agreement. I note that ONA has provided an estoppel notice to the Employer with respect to ONA's intention to rely on the strict wording of Article 12.02. I further note that ONA may be addressing this issue in the upcoming round of bargaining between the Parties. [Emphasis added]

To no ones surprise, the employer took the position "it is too late for the union to withdraw the grievance, and that it should be dismissed. It submitted that the union ought not to be able to listen to the evidence in an arbitration, and then seek to withdraw without prejudice, retaining the right to re-submit the matter to arbitration."

The arbitrator disagreed and concluded:

> As I understand the thrust of arbitral jurisprudence with respect to this issue, I should not take it upon myself to dismiss a grievance when a party wishes to withdraw it from arbitration. Instead, I should leave it to any subsequent arbitrator or arbitration board to determine how any grievance, including the current grievance, which is placed before him, her or it should be disposed of. I concur with the results in those cases, and accordingly these proceeding are terminated without prejudice to any position that either of these parties might take in a subsequent arbitration. [Emphasis added]

There are many cases that deal with this issue. On the one hand I understand the reluctance to foreclose future proceedings. On the other hand, it would be nice, from a

labour relations and cost perspective, to have some direction on the impact of the withdrawal on future proceedings.

The employer in the *Albright* case argued in the alternative, that the arbitrator:

> … should issue a decision with respect to the withdrawal request, and provide some context as to what the matter was about and when the grievance was withdrawn. It says that a decision outlining the grievance, the facts and the stage in the process when ONA decided to withdraw would go a long way to prevent duplicitous litigation.

To some extent, the arbitrator did this.

The arbitrator that decided the *Albright* case considered the issue even more recently in *Peterborough County – City Health Unit v Ontario Public Service Employees' Union, Local 327*, 2015 CanLII 19723 (ON LA).

Two days before what would have been the fourth day of hearing, the union sought to withdraw the grievance on a "without prejudice" basis. The employer argued that the grievance should be dismissed on the merits, or that any withdrawal be "with prejudice". In correspondence with union counsel, the employer requested that the Union "pick up" the cancelation fees associated with the cancelled hearing date. The union declined this request and pointed to the language in the collective agreement that provided that the cost of arbitration was to be shared equally between the union and employer.

The arbitrator set out the details of the withdrawal and terminated the proceedings "without prejudice to any position that any of these parties might take in a subsequent arbitration".

Perhaps the result would have been different had the arbitrator heard sufficient evidence upon which to make a decision on the merits. That being said, there is a growing body of case law supporting that a withdrawal of a grievance is without prejudice to any position that a party may take in any subsequent arbitration regarding the effect of the withdrawal.

The issue was most recently considered in Kawartha-Haliburton Children's Aid Society v Ontario Public Service Employees Union Local 334, 2019 CanLII 59147. The grievance was filed in November 2018, alleging a breach of the collective agreement, the *Human Rights Code* and the *Occupational Health and Safety Act*.
After the first hearing day and before the second scheduled date, the union withdrew the grievance. Specifically, on May 9, 2019, the union wrote to advise "without prejudice to any other matter and without precedent, the Union is withdrawing the above-noted and attached grievance of November 13, 2019 on behalf of Krista Knerr." About two (2) weeks later the employee (grievor) through her counsel "filed an application with the Human Rights Tribunal of Ontario raising some or all of the same issues raised by the grievance." The employer received this application on June 18, 2019.

A conference call was arranged with the arbitrator to decide whether the withdrawal of the grievance should be considered "without prejudice," or whether the grievance should be dismissed "with prejudice." This was important because if the withdrawal was "with prejudice" to any matter involving the grievor, the employer would raise this to attempt to block the employee's application before the Human Rights Tribunal of Ontario.

The employer argued, "the undisputed facts point to an abuse of process by the grievor, warranting a dismissal of the grievance with prejudice or as an abuse of process, or that the grievance be deemed to be withdrawn with prejudice".

The union argued that the arbitrator had "no jurisdiction to declare the withdrawal "with prejudice" to a proceeding before another tribunal. It asks me to end the proceeding because of the withdrawal without ruling on whether it was with or without prejudice."

The arbitrator considered the matter and reached the following conclusion:

> Any party is free to withdraw a grievance at any time. For a grievance to be withdrawn "without prejudice," both parties' agreement may be required. Here, the parties have agreed the grievance is withdrawn without prejudice to matters involving employees other than the grievor. It has long been accepted that, subject to exceptional circumstances, an arbitrator will not hear a grievance that has been withdrawn and later filed again. (See *Re City of Sudbury*

> *and CUPE Local 207* (1965) 15 L.A.C. 405 (Reville).) In that sense, the withdrawal of this grievance is "with prejudice" to this grievor's ability to pursue the same grievance in the future.
>
> It is understandable that the employer is upset that it has devoted time and resources to defending this grievance, only to have it withdrawn in favour of a human rights application. However, it is up to the Human Rights Tribunal to determine its disposition of her application to that tribunal. The employer is free to argue at the tribunal that there has been an abuse of process. Its request for a ruling on that point from me is dismissed.
>
> However, the matter before me is dismissed with prejudice to the grievor's right to grieve the termination of her employment under the collective agreement. [Emphasis added]

The arbitrator left it to the HRTO to determine the impact, if any, of the withdrawal of the grievance on the employee's human rights application. This seems consistent with the bulk of the authorities on the point.

Including Benefits in a Termination Clause

Enforcing a termination clause in an employment contract is a "coin toss" on the best day given the interpretive approach of some judges. A case comes out and we think "ok, we're getting some clarity" and then another case is decided and we're back to square one.

I recently read a case that I wanted to bring to your attention. It's called Cormier v. 1772887 Ontario Limited c.o.b. as St. Joseph Communications, 2019 ONSC 587 (CanLII). Although it was decided earlier this year, it is worth mentioning. I had discussed it in Volume 2, Issue 3 of this *Newsletter* when reviewing some cases on the difference between independent contractor and employee and the judge determining that the period of time spent working as an independent contractor should be used when calculating the period of common law reasonable notice of termination.

Now I'd like to discuss another aspect of the case. The court had to interpret the enforceability of the following clause in the employment contract:

> (a) The Company may terminate your employment at its sole discretion, at any time for any reason, without cause, upon providing you the minimum notice, pay in lieu of notice and/or severance pay required by the Ontario *Employment Standards Act, 2000*, as amended from time to time. You will have no other entitlement to notice of termination, pay in lieu of such notice, and/or severance pay.
>
> (b) In addition to the foregoing and subject to the consent of the Company's insurers, you will be entitled to continue to receive Company benefits (excluding STD and LTD benefits) during the notice period specified above. [Emphasis added]
>
> These payments are all inclusive of all amounts owing to you under the Ontario *Employment Standards Act* or other applicable legislation. Your receipt of any payments is conditional upon your signing the Company's form of Release.

The Court, after looking at the totality of the work relationship (see the earlier article in Volume 2, Issue 3), concluded that Cormier had 23 years of service. On termination, she would have been entitled to 8 weeks termination pay plus about 23 weeks severance pay under the *Employment Standards Act, 2000* (total of 31 weeks).

The Court found that the termination clause was unenforceable and determined that she was entitled to 21 months common law reasonable notice of termination.

In reaching this conclusion the Court commented:

> The problem, however, for St. Joseph's Communications is that while some aspects of the termination clause found in the 2012 employment contract were unobjectionable, the treatment of the employee's benefits during the notice period were contrary to the Act. There was a fatal flaw, an Achilles' heal so to speak, in the 2012 agreement making its termination clause void and unenforceable.

> To be more precise, the termination clause in the 2012 employment contract purports to allow St. Joseph Communication upon termination to provide Ms. Cormier with only some of the employee benefits that she received before termination and even then, only subject to the consent of St. Joseph Communication's insurers. With respect to the employee benefits, the termination clause therefore provides Ms Cormier with a lesser right than the rights set out in the Employment Standards Act, 2000 and therefore, the entire termination clause is void. [Emphasis added]

In *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 (CanLII) the employer tried to rely on the following contractual termination clause:

> [The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph, except for any amounts which may be due and remaining unpaid at the time of termination of your employment. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*.

Although the employer, on terminating Woods' employment, provided her with more than was required under the *Employment Standards Act, 2000,* Wood, nonetheless, argued that the termination clause was unenforceable because "the clause expressly excludes Deeley's statutory obligation to contribute to Wood's benefit plans during the notice period. Deeley's contributions to Wood's health and dental plan and her RRSP formed part of her compensation package. Thus, Wood argues, the termination clause contravenes sections 60 and 61 of the ESA and, under s. 5(1), is void."

The Court of Appeal agreed:

> Wood's compensation included Deeley's contributions to her two benefit plans. Under ss. 60 and 61 of the ESA, Deeley was required to continue to make those contributions during the notice period. Its obligation to do so was an employment standard under the ESA. Yet the termination clause's wording excludes and therefore contracts out of that obligation.

The termination clause excluded the employer's obligation to contribute to the employee's benefit plans during the statutory notice period and was unenforceable as an attempt to contract out of the ESA. The fact that the employer contributed to the benefits plans, notwithstanding what the clause provided, did not save the clause.

As you look at your own contractual termination clauses, are they similar to the ones found in *Cormier* and *Wood*? If so, you've got some decisions to make.

Shares and Bonuses on Termination

The Court of Appeal in *Mikelsteins v. Morrison Hershfield Limited*, 2019 ONCA 515 (CanLII) considered the appeal of an employer of a motions judges determination regarding a terminated employee's entitlement to the increase in the value of shares that he held in the parent corporation of Morrison Hershfield Limited ("MHL"), along with a share bonus, through the period of reasonable notice.

The motions judge determined that the period of reasonable notice was 26 months. The employee held shares in the parent corporation and those shares were governed by the terms and conditions of the Amended and Restated Morrison Hershfield Group Inc. Shareholders' Agreement, dated January 18, 2013 (the "Shareholders' Agreement"). He owned 5,108 shares at the time of his termination.

Under the terms of the Shareholders' Agreement, the employee was eligible to receive an annual "Share Bonus" to be determined based on an objective calculation of the company's financial results. With respect to the employee's shareholdings:

> … the motion judge determined that he was entitled to: (i) hold the shares until the end of the reasonable notice period (i.e. 26 months after he

> was notified of his termination and his association with MHL had ceased); and (ii) receive damages for the loss of the share bonus that would have been payable during such 26 month period.

The Shareholders' Agreement provided:

> A Shareholder whose association with the Corporation and its Affiliates ceases by reason of termination by the Corporation of his/her employment with the Corporation and its Affiliates shall, immediately after such termination, be deemed to have given a Transfer Notice covering all of the Shares held by him/her on a date which is 30 days from the date he/she is notified of such termination by the Corporation.

A shareholder who provides a Transfer Notice is entitled to be paid the fair value of his shares. The employer took the position that the plaintiff's association with it had ceased by reason of the termination of his employment on October 26, 2017, which "became the 'trigger' date for purposes of the above provision". That position would provide the plaintiff with the sum of $999,431.28

The motions judge disagreed and held that the plaintiff:

> … was entitled to receive payment for his shares with the value calculated at the end of the reasonable notice period. The motion judge also concluded that [the plaintiff] was entitled to the share bonus that would have accrued during the notice period. The motion judge reached this conclusion based on his view that the "basic principle to be applied is to put the person in the same position they would have been in if lawfully terminated": at para. 37. In so concluding, the motion judge relied on this court's decision in *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 (CanLII), 352 O.A.C. 1.

The employer appealed to the Court of Appeal.

The Court disagreed that the plaintiff was entitled to compensation in respect of his shares calculated at the end of the notice period. It held that the plaintiff's entitlement was to be determined by strictly interpreting the language in the Shareholders' Agreement. According to the Court:

> The common law relating to compensation for breaches of a contract of employment does not apply to Mr. Mikelsteins' entitlements regarding his shares.

Paquette has no application to this issue. Instead cases such as *Evans v. Paradigm Capital Inc.*, 2018 ONCA 952 and *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130 (CanLII) outline the applicable principles. In *Love*, for example, the Court of Appeal said:

> I therefore conclude that the appellant ceased to be an employee of the respondent on May 3, 2005, and that the trial judge erred in using the end of the notice period rather than his termination date as the trigger for the respondent's right to repurchase and for the valuation.

It's important to understand that contractual rights differ from common law rights:

> Contractual rights depend on the terms of the contract to which the parties have agreed. The principle enunciated in *Love*, and reiterated in Evans, is that there is a difference between what a dismissed employee is entitled to as damages in lieu of notice upon termination of the employment contract and what the employee is entitled to under the terms of more specific contracts.

The common law principle that a terminated employee is entitled to the benefits he or she would have received during the notice period was not applicable in this case. The Court of Appeal put it this way:

> As pointed out in *Love*, the fact that a dismissed employee may be entitled to certain benefits during the notice period does not change the date when his or her employment ends. In this case, Mr. Mikelsteins' employment ended on October 26, 2017. His entitlements relating to his shares are separate and apart from the relief to which he is entitled arising from his contract of employment. His entitlements relating to his

> shares fall to be determined by the terms of the Shareholders' Agreement.

This also disposed of the share bonus issue. As the court observed "once it is concluded that the shares had to be transferred resulting from Mr. Mikelsteins' termination, he ceased to have any entitlement to any bonus arising from the shares that he no longer owned".

The Court also dealt with a very interesting argument that the plaintiff advanced to the effect that the terms of the Shareholders' Agreement violated the *Employment Standards Act, 2000* and, specifically, sections 60(1)(a):

> During a notice period under section 57 or 58, the employer,
>
> (a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

The Court held that the *Employment Standards Act, 2000* has no application. The plaintiffs rights to the shares are contractual. The Shareholders' Agreement did not alter any term or condition of employment.

The Court allowed the employer's appeal.

Random Musings

This case and others, including some bonus cases, establish that legally enforceable contractual terms that are brought to the attention of the employee, are agreed to and entered into with consideration (or fresh consideration) will be enforced and will govern the terminated employee's entitlement on termination rather than the common law. The terms of the contract are critical as is the manner in which the contract is entered into.

Interim Measures in Workplace Harassment Cases

When an employer receives a workplace harassment complaint, it will have to consider what, if anything, to do with the complainant and respondent while it conducts an investigation into the allegations.

There is often a tension between the "presumption of innocence" on the one hand, and the need to act reasonably and appropriately in the circumstances. , on the other. Potentially irrevocably damaging the respondents reputation before having conducted an investigation must be weighed against other factors including the statutory and legal obligation to protect its workers.

Can an employer be ordered to take interim measures pending the completion of an investigation or the outcome of a hearing? Can an employer be ordered not to schedule a complainant with a respondent to a workplace harassment complaint? Does an arbitrator have jurisdiction to make such interim orders?

In the unionized environment, at least according to the recent case of *Sodexo Canada Ltd. (at NAV Canada Training and Conference Centre, Cornwall) v United Food and Commercial Workers Canada, Local 175*, 2019 CanLII 59358, the answer is "yes".

An employee, MR, filed a sexual harassment complaint against one of her supervisors/managers ("AV"). The employee alleged that the employer failed to provide her with a safe and harassment-free workplace, in violation of the provincial *Occupational Health and Safety Act* and the *Human Rights Code*.

The Employer conducted an investigation and on June 11, 2018 informed MR that her complaint was unsubstantiated. Notwithstanding that conclusion the employer arranged to remove MR from AV's direct supervision for three months in order to avoid any direct contact between them.

The union suggested that, at this meeting, the employer agreed to extend this agreement indefinitely. The employer disagreed (though it did try to separate MR from AV whenever possible). The union and MR allege that she has been scheduled to work with AV on many occasions.

The union that represented MR filed a grievance on her behalf. An arbitrator was appointed and a hearing began. At the end of the first day, the union asked that the arbitrator make interim arrangements so that the Grievor and AV were not scheduled to work at the same time until the arbitration process was completed.

A labour arbitrator has jurisdiction to grant interim relief under section 48(12)(i) of the *Labour Relations Act, 1995*. That section and (j) provide that an arbitrator has power:

(i) to make interim orders concerning procedural matters;
(ii) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.

The Union in the *Sodexo* case argued that:

> … Ranger establishes that interim accommodation measures sought in the context of a grievance that asserts Code violations fall within the ambit of "procedural matters" referred to under s. 48(12)(i); and implicitly recognizes the Employer's duty to accommodate to the point of undue hardship.
>
> The test for interim relief that comes from paragraph 14 of *Ontario Public Service Employees Union v. Ontario (Community Safety and Correctional Services)*, 2009 Can LII 59458 (ON GSB) as a two-fold test requiring that the Union proves:
>
> That the grievor has an arguable case on the merits and that the balance of harm or convenience favour granting interim relief.

The employer in this case did "not dispute that there is an arguable case on the merits as the Grievor's claims of violations of the Code are involved in this grievance, and that they thus have a duty to accommodate the Grievor until those claims are resolved". As such, the only issue that the arbitrator was required to determine was whether the balance of harm or convenience favours the granting of the interim relief.

There was no evidence before the arbitrator that the employer would suffer any harm or significant inconvenience by granting the interim relief requested by the union (i.e. that AV's shift not overlap with AR's). The Union's request for interim relief is granted.

As such, the employer was ordered not to schedule the Grievor to work at the same time as AV, "anywhere in the Banquet Department under any circumstances, pending the final disposition of the grievances".

Tribunal Adjudicative Records Act, 2019 in Force

The *Tribunal Adjudicative Records Act, 2019* ("TARA") came into force on June 30, 2019. This was the legislative response to *Toronto Star v. AG Ontario*, 2018 ONSC 2586 (CanLII) and an "open judicial system". The judge in the *Toronto Star* case found that certain provisions of the *Freedom of Information and Protection of Privacy Act* that impeded access to adjudicative records were unconstitutional and contravened the *Canadian Charter of Rights and Freedoms.*

Why is this important?

Well, it's important because, if you the employer has an application filed against it under a statute (for example, the *Employment Standards Act, 2000*, *Labour Relations Act, 1995, Occupational Health and Safety Act* or *Human Rights Code*), then TARA makes any adjudicative records (as defined in the statute) presumptively available to the public.

Adjudicative records under the TARA are:

1. An application or other document by which a proceeding before a tribunal is commenced.
2. A notice of a hearing before a tribunal.
3. A written submission filed with a tribunal in respect of a proceeding before the tribunal.
4. A document that has been admitted as evidence at a hearing of a tribunal or otherwise relied upon by a tribunal in making a decision or an order.
5. A transcript of oral evidence given at a hearing of a tribunal.
6. A decision or an order made by a tribunal and any reasons for the decision or order.
7. A docket or schedule of hearings of a tribunal.
8. A register of proceedings before a tribunal.
9. Any other record that relates to a proceeding before a tribunal and that is prescribed by the regulations made under this Act.

Adjudicative records do not include:

1. Personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a member of a tribunal in connection with a proceeding before the tribunal in which the member is presiding.

2. Personal notes created by or for a person appointed by a tribunal to help resolve a matter in a proceeding before the tribunal by means of an alternative dispute resolution mechanism.
3. Records related to any attempt to resolve a matter in a proceeding before a tribunal by means of an alternative dispute resolution mechanism, unless the record forms part of a decision or an order of the tribunal.

The specific Tribunal may set and charge fees for providing access to adjudicative records.

The Tribunal on its own or at the request of certain persons noted in the TARA make a confidentiality order with respect to the adjudicative records and these may be enforced as Court orders once certain procedural steps are taken.

There are certain statutory provisions that prevail over TARA. For example, under section 123(3) of the *Employment Standards Act, 2000* "A labour relations officer who receives information or material under this Act shall not disclose it to any person or body other than the Board unless the Board authorizes the disclosure."

Similarly, the list of the names of the union members in the proposed bargaining unit and evidence of their status as union members that would accompany an application for certification are not to be disclosed as provided in section 7(13) of the *Labour Relations Act, 1995*.

The Act makes it clear that it will only apply to administrative tribunal proceedings that commence on or after the day the legislation comes into effect (i.e. June 30, 2019).

The Ontario Labour Relations Board has amended their *Rules of Procedure* to address the TARA at Part VIII including requests for adjudicative records and confidentiality orders.

It will be important to consider the public nature of adjudicative proceedings in Ontario now that TARA is in force.

Prima Facie Discrimination and Addiction - Take 2

Those who subscribe to this newsletter will have seen my article in the June, 2019 edition (*Volume 2, Issue 3*) entitled *Prima Facie Discrimination and Addiction* in which I discussed the Divisional Court case of *Ontario Nurses' Association v. Royal Victoria Regional Health Centre*, 2019 ONSC 1268 decided on June 10, 2019.

The Divisional Court released its decision in *Ontario Nurses' Association v. Cambridge Memorial Hospital*, 2019 ONSC 3951 (CanLII) on July 17, 2019 in which it again considered the *prima facie* discrimination issue in the context of addiction in a hospital setting. The case involved an application for judicial review of an arbitration award in *Cambridge Memorial Hospital v Ontario Nurses' Association*, 2017 CanLII 2305 (ON LA).

The facts of the case were pretty straightforward. The hospital terminated the employment of a registered nurse after having established that she had misappropriated narcotics for her personal use. At the time of her termination, the nurse had "more than 28 years of impeccable service at the Hospital". She held the very responsible position of Flow Coach and was about to be promoted, at the time of her termination, to the position of Manager of the Emergency Department.

The union filed a grievance.

On August 15, 2014 , a colleague of the grievor noticed that Percocets were being taken out of the Omni Cell in suspicious circumstances. On August 21, 2014, the Hospital confronted the grievor, and she admitted to taking the Percocets. She informed the hospital that she had an addiction which developed following the death of her husband.

The hospital and the grievor agreed that she should see a doctor. She went on short term disability and then long term disability leave from August 2014 until September, 2015. While on leave she attended "Homewood Health Centre's 35-day inpatient treatment programme for addicted individuals, participated in Homewood's aftercare programme, attended Alcoholics Anonymous meetings for 90 consecutive days and continued to attend every other day afterwards."

The Hospital and grievor began discussing a possible return to work, though those discussions were abandoned when the Hospital discovered that the grievor had been stealing Percocet since 2011. The grievor admitted that she had stolen Percocet from the Hospital since 2011 and that she had diverted these away from

patients. The Hospital then examined additional records and "discovered that she had been stealing pain medication since at least 2003. The records showed theft of Percocet dating back to 2006 and theft of Tylenol 3 dating back to 2003. The Grievor did not recall misappropriating any Tylenol 3s."

The grievor's employment was terminated on November 2, 2015.

Following her termination and until December 3, 2015, the grievor continued under the care of an addiction specialist who concluded that she had made an "excellent early sustained recovery" and recommended that she return to work as a nurse.

She also underwent a third party assessment by her regulatory body, the College of Nurses of Ontario to determine her fitness to practice nursing. On January 28, 2016 she was permitted to practice nursing under certain conditions.

She had not used narcotics since August 15, 2014, and was permitted to return to the monitored nursing practice.

The arbitrator found that the nurse suffered from an addiction and, but for that addiction, she would not have engaged in the misconduct that, ultimately, led to her termination.

He considered two lines of cases dealing with addiction.

The arbitrator said that the arbitral consensus approach in Ontario which was relied on by the Union could be summarized as follows:

> …1) where there is an addiction, 2) which addiction has a nexus with the misconduct (stealing their drug of choice), and 3) where the RN has acknowledged her addiction, taken the cure, and come clean, it is discriminatory treatment for a hospital to then terminate the RN's employment rather than accommodate her addiction.

The employer argued that this approach was wrong and that the arbitrator should follow the approach in *British Columbia (Public Service Agency) v. BCGEU*, 2008 BCCA 357 (CanLII), leave to appeal to S.C.C. refused, [2009] 1 S.C.R. vi. Under this case, in order to establish discrimination, the employee must show that the Hospital treated her differently than it would have treated any other employee accused of the criminal offence of theft. *Gooding* also eliminates, according to the arbitrator:

> …the human rights defense of addiction to workplace misconduct, which is criminal in nature, on the basis of indirect or adverse treatment discrimination. Put simply, the Hospital argues that the *Gooding* line of authorities stands for the proposition that to hold an addict to the same standard of culpability as a non-addict for a criminal act is not prima facie discrimination, because there is nothing arbitrary about the norm being enforced.

The arbitrator telegraphed his thinking on the approach that he would be adopting in deciding the case:

> 79…. Without adopting *Gooding* full bore, I am guided by that line of authority. My view is that much of the arbitral case law has collapsed 2 steps of the legal analysis. Before turning to issues of accommodation, the first issue is whether an addiction to the drug is a defense to the criminal misconduct of stealing the drug from the Hospital and diverting same from patients. Obviously, the misconduct is serious employment conduct. It is hard to imagine more serious workplace misconduct. It is an absolute breach of the employment relationship, and a breach of an RN's essential duties to her patients.
>
> 80. In accordance with *Gooding*, I don't accept that pleading an addiction to the drug being stolen, which is to say, establishing a nexus between the addiction and the misconduct, is in itself, a defense to termination. Put differently, it is not prima facie evidence of discrimination. There is not an iota of evidence before me of direct discrimination, to use old nomenclature, which is what the BCCA required in *Gooding*.

The arbitrator tried to distinguish the case before him from those "consensus line" awards and also noted his view that the grievor was "unable to own up to the full extent of her misconduct" and that her addiction was not "compulsive". He was also concerned about general deterence and that "pleading addiction, only after being

caught stealing one's drug of choice, should be strongly deterred".

The arbitrator upheld the termination and dismissed the grievance.

The union sought judicial review of this award before the Divisional Court.

Before the Divisional Court, both the Hospital and the union agreed that the law with respect to *prima facie* discrimination was settled by the Supreme Court of Canada case of *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII), a decision that was released after the arbitration award. The test now requires that the complainant must establish:

1. that they have a characteristic that is protected from discrimination under the Code;
2. that they have experienced an adverse impact; and
3. that the protected characteristic was a factor in the adverse impact.

Gooding is no longer good law. Once *prima facie* discrimination is made out, the onus then shifts to the employer to establish that it had accommodated the complainant to the point of undue hardship.

According to the Court, the arbitrator reached an unreasonable decision as he found that the grievor had not shown a *prima facie* case of discrimination. He applied *Gooding*, which is no longer good law, rather than *Elk Valley* (which, it should be noted and importantly, was only released after the award).

The Divisional Court allowed the application, set aside the arbitration award and remitted the grievance to a new mutually agreeable arbitrator for a fresh hearing.

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