Employment & Labour – Top Ten Cases of 2022

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IN THIS ISSUE

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For the past couple of years, our lives and legal system have been pre-occupied by the COVID-19 Pandemic and the many issues it has presented. However, there are many other decisions that have been released during this last year which may have an impact on employers.

Below we have summarized what we believe are the top 10 Canadian employment and labour cases of 2022 that employers should be aware of:

1. ***Yaschuk v Emerson Electric Canada Limited*, 2022 AHRC 62.**

Record-breaking $50,000 general damages award to complainant following years of workplace sexual harassment.

We previously wrote about the Alberta Human Rights Tribunal's decision in *Yaschuk* here.

The complainant was dismissed following three-years of service with Emerson Electric's human resources department. During this three-year period, the complainant was subjected to ongoing sexual harassment from her direct supervisor – the human resources manager (the "HR Manager"). A workplace harassment complaint was filed, after which the complainant was terminated for alleged performance issues. A superficial, insufficient investigation was completed, after which the Employer determined that the complaint of harassment was unfounded.

The complainant then filed a human rights complaint with the Alberta Human Rights Tribunal for discrimination on the basis of gender, alleging that she was sexually harassed by the HR Manager. The Tribunal ultimately determined that, contrary to the workplace investigation, the HR Manager's comments and behaviour constituted sexual harassment. The Tribunal categorized Emerson Electric's investigation as dismissive and cavalier and noted many shortcomings in its investigation procedure.

The Tribunal awarded the complainant $50,000 in general damages to compensate for the "profound effect" the discrimination and harassment had on her, as well as Emerson's mishandling of the workplace complaint. She was awarded an additional 11.4 weeks' pay, amounting to $42,750 for lost income. Her claims for various special damages were denied.

2. ***Richard v Matrix SMW Canada ULC*, 2022 NBQB 086.**

Wrongful dismissal damages held in trust subject to mitigation.

Mr. Richard was a 15.5-year employee who sought damages for wrongful dismissal after he was terminated without cause. This case was, for the most part, a straight-forward wrongful dismissal decision with nothing out of the ordinary. However, the way in which the New Brunswick Court of Queen's Bench established that Mr. Richard's damages were to be distributed was notable. The Court determined that Mr. Richard was entitled to 18 months' pay in lieu of notice. The judgment, however, was made during this 18-month period, so Mr. Richard was still obligated to mitigate his damages.

In a first of its kind decision in Atlantic Canada the Court ordered pay in lieu of notice be held in trust by Mr. Richard's lawyer, with a proportional payment to be made monthly. This monthly payment was to be made subject to Mr. Richard's duty to mitigate and his reported earnings. Any mitigated income earned was ordered to be deducted from the monthly payment and returned to Mr. Richard's former employer, Matrix.

We felt this decision should be included in our Top 10 because it signals a possible shift in how Atlantic Canadian Courts may treat future damage awards for wrongful dismissal.

3. ***Render v ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310.**

Single incident of sexual harassment enough for termination of employment.

The appellant was a 30-year employee who held a managerial role at time of termination. His dismissal followed a single incident that occurred in the workplace where he slapped a female co-worker on the buttocks. The trial judge found that the co-worker had made either a verbal or non-verbal joke about the appellant's height, he said that he then crouched down while about 12-inches from her and said "this is how short I am when I take my boots off". He then went down on his knees, crouching in front of her with his face close to her breasts for 2-3 seconds, at which point everyone, including the co-worker, was laughing. As he was getting up from his knees, he made a sweeping gesture with his right hand, intending to tap his co-worker on the hip and said, "get outta here", however, he said that he either lost his balance or she turned, with the result being that his hand touched her buttocks. When this happened, he said "good game". At trial, the dismissal was upheld.

The Ontario Court of Appeal found that the trial judge did not err in his approach or analysis and that he considered and weighed all of the relevant factors in finding that there was just cause for dismissal. It held that this was a most unfortunate situation that arose out of an overly familiar and, as a result, inappropriate workplace atmosphere that was allowed to get out of hand – a workplace atmosphere that can no longer be tolerated.

However, the Court of Appeal held that the appellant's conduct did not rise to the level of wilful misconduct required to disentitle him to his statutory Employment Standards Act entitlements and that the trial judge erred in failing to award him same. The Court noted that while the trial judge found that the touching was not accidental, there was no finding that the conduct was preplanned. The test for "wilful" misconduct was previously interpreted, and cited by the Court, as involving an assessment of subjective intent, almost akin to a special intent in criminal law. Therefore, as the slapping was not preplanned, it was not wilful in the sense required under the ESA and subsequently, the appellant was entitled to eight weeks of termination pay.

4. ***Power v Mount Pearl (City)*, 2022 NLSC 129.**

Criminal search and seizure standard applied in employment context. Limitation on employer access to work-issued electronics.

This decision followed the removal of two city councillors for failing to disclose a conflict of interest in communicating with the Council's Chief Administrative Officer (the "CAO") while he was on leave pending a workplace harassment investigation. The communications between the councillors and the CAO during the investigation appeared on the CAO's City owned iPad via the Facebook Messenger App. The CAO did not have possession of his iPad at the time the messages were sent, as it had been left with the City when he was placed on leave. The messages were composed, sent, and received on the CAO's personal devices. However, the messages were also transmitted and viewable on the CAO's work iPad. The CAO claimed breach of privacy against the City's actions of monitoring, reviewing and reading the Facebook messages.

The Newfoundland and Labrador Supreme Court held that the CAO's privacy rights had been breached and found that a common law right of privacy existed in the Province. The Court applied the test as set out in *R v. Cole*, 2012 SCC 53 – a test established in the criminal search and seizure context. The Court also found that the City's actions of monitoring, reading and storing the messages constituted a tort under the Province's *Privacy Act,* R.S.N.L. 1990, c. P-22.

It should be noted, however, that this decision has been appealed by the City to the Newfoundland and Labrador Court of Appeal.

5. **Newfoundland and Labrador WHSCRD Decision 2022172**

Co-worker in mental health crisis not an objectively traumatic event for purposes of workers compensation.

The worker in this case had filed a Worker's Report of Injury indicating that she was exposed to a traumatic event at work. Medical records for the worker showed that she had been diagnosed with acute stress response, secondary to a traumatic workplace event. The Employer's Report of Injury described the incident as one where a co-worker, in significant mental distress, expressed, to the worker, an intention of

self-harm. The worker claimed that her co-worker told her he wanted to commit suicide, described that he had a plan to do so, and began packing up his office stating that he wouldn't be in the following day. WorkplaceNL originally accepted the worker's claim, however, the employer filed a request for internal review of the decision. The Internal Review Specialist referred the matter back to the Intake Adjudicator who found that the evidence supported the worker's claim for a mental stress injury. This decision was then upheld by the Internal Review Specialist, however, the Employer subsequently requested a review by the Review Division.

The Review Division ultimately set aside the decision and held that the worker's injury was not compensable as per the Act and Policy EN-18: Mental Stress. Under the Workplace Health, Safety and Compensation Act, stress is excluded as a compensable injury, unless it fits within the recognized exception under section 2(1)(o) which provides that where the injury is stress based, it is only considered a compensable injury where the stress is a reaction to a traumatic event or events. Citing the most recent interpretation of section 2(1)(o) in *St. John's Transportation Commission v Workplace Health, Safety and Compensation Commission et al.*, 2009 NLTD 102, the Review Division stated that the determination of an event as "traumatic" is not dependent on the reaction of the individual worker to the event, but rather must be assessed objectively – from the point of view of the reasonable person faced with the same situation.

The Review Division noted that WorkplaceNL's Policy EN-18: Traumatic Mental Stress states that a traumatic event may be a result of witnessing, or being the victim of, a criminal act or a horrific accident, and that traumatic events may have elements of actual or potential violence. The Policy states that in all cases, the event must arrive out of and occur in the course of employment, and be clearly and precisely identifiable, and objectively traumatic.

The Review Division ultimately determined that the event as described by the Employer and worker was not objectively traumatic, noting that it did not appear this was a situation where the worker had to take steps to intervene to prevent immediate harm, she did not discover her co-worker actively trying to self-harm, any threat of harm was not imminent in the presence of the worker, and ultimately, there was no element of horror, no actual violence, and no exigent threat of violence against the worker (or possibly a relative). The Review Division found that the Internal Review Specialist misapplied Policy EN-18, section 60, and Policy EN-20 in determining the evidence weighted in favour of finding the event was traumatic by nature, as opposed to upsetting.

6. ***Ristorante a Mano Limited v Canada (National Revenue)*, 2022 FCA 151.**

Electronic gratuities to be included in tax assessment for purposes of CPP and EI.

This case dealt with a dispute in relation to gratuities (or tips) paid to employees of Ristorante a Mano Limited's restaurant. Customers sometimes tipped their servers in cash, which the servers were free to keep without advising the Employer. More often, however, customers paid their restaurant bills using a debit, credit or gift card and included the tip electronically at the time of payment which would be deposited into the Employer's account. The Employer would then transfer a portion of the electronic tips to the servers based on an established procedure.

At the end of each shift, each server would print a "summary of sales" which reported their food sales, beverage sales, cash and electronic payments received in satisfaction of restaurant bills, electronic tips and other details. 1% of the server's net food sales would go towards a kitchen staff "tip-out", and 2% of the electronic tips would be withheld to reimburse itself for the Employer's bank's charge for converting electronic tip dollars to cash. The amount of the server's electronic tips that exceeded this amount was then transferred to the employee via cheque or direct deposit. The Employer did not consider any part of the electronic tips received by servers to be pensionable salary and wages for purposes of the *Canada Pension Plan*, R.S.C., 1985, c. C-8 ("CPP"), or insurable earnings for purposes of the *Employment Insurance Act*, S.C. 1996, c. 23 ("EI"). However, the Minister took a different view and assessed the Employer on the basis a portion of the servers' electronic tips for 2015, 2016 and 2017 should have been taken into account. The Employer appealed this decision with the Minister, then the Tax Court of Canada, but the appeals were dismissed and the assessments upheld. The Employer then appealed the decision to the Federal Court of Appeal.

The Federal Court of Appeal noted that both statutory regimes are concerned with amounts "paid by the employer" to the employee. The Federal Court of Appeal agreed with the Tax Court of Canada's decision that any tips paid to the servers, particularly including if paid by the Employer itself, can be said to have been paid "in respect of employment", however, it put it another way: "but for" their employment as servers by the Employer, the servers would not receive any tips paid to them. The Federal Court of Appeal noted that the same is true of the electronic tips notwithstanding that they constituted only a portion of the electronic tips received by the Employer from the server's customers. The Federal Court of Appeal held that in each case, the question to be answered is whether the employer paid the amounts to the employees in respect of their employment. Accordingly, the Tax Court's conclusion that the electronic tips were "contributory salary and wages of the employee paid by the employer" for the purposes of CPP and EI was upheld by the Federal Court of Appeal.

7. ***Post v Hillier*, 2022 ONSC 3793.**

Defamation on social media compounds harm, Court awards $85,000 in damages.

While this is not expressly a labour and employment decision, defamation claims arising from social media regarding workplace issues are on the rise. It is important for employers to be aware of the view Courts take of such behaviour and the consequences to be faced by individuals who choose to commit such torts against their employers or co-workers.

Post sought damages, injunctive orders, and costs for false and defamatory tweets that Hillier posted about her. The tweets stated that Post, an English instructor at Carleton University was a sexual predator who had drugged her students. Hillier was a former student of Carleton University, who had more recently run unsuccessfully for public office. The parties first met in 2008 when Hillier took two undergraduate English courses taught by Post, they became friends the following year, and became so close that in 2014, Hillier was a member of Post's wedding party. However, their friendship deteriorated in 2020 over political differences, and Hillier began tweeting defamatory statements about Post on her twitter account which had over 9,300 followers. When these tweets were reported for violating Twitter's rules against targeted abuse and harassment, Hillier began posting from a new account which had 1,500 followers. Hillier even went as far as to tag Carleton University's twitter account, and her father, Randy Hillier's account, which had a combined following of roughly 50,000 people. Post sent a notice of libel to Hillier, and while Hillier acknowledged receipt by email, she announced via Twitter that she would not be removing her tweets. Hillier did not serve a statement of defence for the legal action that followed, and was therefore, noted in default.

The Ontario Superior Court of Justice found that Post had proved the required three elements of the tort of defamation, and that since the action was proceeding by default, it did not have to consider whether Hillier could have raised a defence. In its assessment of damages the Court noted that Post was particularly likely to be harmed by the allegations that she abused drugs and sexually exploited her students, and that the potential and actual harm to her reputation and professional standing was made more acute by Hillier's addition of her employer's twitter account to her posts.

What is particularly noteworthy about this decision are the Court's comments in relation to the statements' publication on social media. The Court commented that dissemination on social media compounds the harm inflicted on Post. It stated that Twitter's design, being not for an exchange of rational ideas or meaningful debate, but as a means to get the greatest amount of attention or traffic possible, regardless of the truthfulness or value of a tweet's contents, meant that users should face greater consequences, in terms of damages because of the impact of defamation through social media. The Court held that Hillier's use of social media and the steps she took to increase her audience, justified a higher damages award. Having considered this, as well as the lack of published retraction or apology, and its finding that Hillier was motivated by malice, the Court ordered Hillier to: (i) pay Post $75,000 in general and aggravated damages, and $10,000 in punitive damages; (ii) post a retraction for 60 days on her Twitter account; (iii) remove any and all tweets in relation to Post; and (iv) refrain from ever communicating or causing to be communicated, on any social media platform or by any other means, any false, defamatory, or otherwise disparaging information in regard to Post.

It should be noted that Hillier did not abide by this Order and continued to post defamatory statements about Post on her Twitter account. She was later found in civil contempt and was sentenced to 75-days house arrest and ordered to complete 120 hours of community service.

8. ***Miawpukek Band (Miawpukek First Nation) v Howse,* 2022 FC 1501.**

Reinstatement to different position beyond jurisdiction under Canada Labour Code.

Miawpukek sought judicial review of an Adjudicator's decision which allowed Howse's complaint of unjust dismissal and ordered Howse to be conditionally reinstated to a different position in the employ of Miawpukek. Howse is a member of the Miawpukek Band and became the Director of the Training and Economic Development department in 2011 after being employed by Miawpukek for over a decade. Howse took an extended medical leave beginning in May 2018, but continued to work during her leave, submitting overtime requests during periods for which she had requested medical leave benefits. Howse had a number of negative interactions with the Band's General Manager and other Miawpukek employees, and an investigation into mutual workplace harassment complaints was completed. It was found that Howse had engaged in workplace harassment against four individuals, and that the Director of Justice and Legal Counsel for Miawpukek and the General Manager did not engage in workplace harassment against Howse. The Chief of the Band terminated Howse's employment with cause in April 2019, citing the findings from the investigation report, and other issues with Howse's work performance. Howse filed a complaint for unjust dismissal against Miawpukek.

The Federal Court found that while Howse was subjected to a three-day suspension in May 2018, which did result in an apology to the General Manager, no other progressive disciplinary measures were taken by Miawpukek in an attempt to remedy Howse's conduct. The Federal Court held that the Adjudicator was reasonably concerned as to whether Howse had been given sufficient warning of the potential consequences of her behaviour and a formal opportunity to address it and improve her performance. The Federal Court noted that while Howse's termination followed the workplace investigation and report, these steps did not absolve Miawpukek from its obligation to consider a progressive disciplinary approach. Therefore, the Adjudicator's finding of unjust dismissal was upheld.

However, the Adjudicator's remedy of reinstatement to a different position than that which Howse had held pre-termination was not. The Federal Court cited *Royal Bank of Canada v Cliché*, [1985] FCJ No 424, stating that the limits on the powers of an adjudicator are dictated by

the common sense consideration that "[t]o carry [out such an order], the employer must either need to create a new position or free up an existing position by dismissing or transferring the employee already occupying it. The wrongful nature of such a remedy is immediately apparent: either the employer is being required to increase or reorganize its staff, or it will have to infringe the rights of an innocent third party." The matter was referred back to the Adjudicator to address the issue of remedy bearing in mind the limitations on their jurisdiction as described in the decision.

9. ***Hussey v Bell Mobility Inc.*, 2022 FCA 95.**

Court confirms two approaches to assessing pay in lieu of reinstatement under Canada Labour Code.

Hussey appealed from a decision of the Federal Court dismissing her application for judicial review of an Adjudicator's decision that found that Hussey was unjustly dismissed from her employment with Bell Mobility Inc. The Adjudicator had declined to reinstate her, and awarded compensation in lieu as well as costs on a partial indemnity basis. The Adjudicator found that Hussey's conduct was blameworthy and concluded that since Bell had tolerated this conduct and had promoted her in spite of it, it was not justified in dismissing her without first resorting to progressive discipline. However, he decided he would not order Hussey's reinstatement given her lack of remorse and her self-justification for not complying with the employer's workplace procedures. The Adjudicator indicated that he "lack[ed] any confidence that her behavior and attitude would substantially change if she were to be reinstated." He assessed Hussey's compensation at eight months' pay, reflecting her years of service, with an additional four months' pay for the loss of the just cause protection provided by the Canada Labour Code plus 2% interest on the sum of these amounts. He refused to award backpay.

Hussey took issue with the compensation decision based on her interpretation of the Supreme Court of Canada's decision in *Wilson v Atomic Energy of Canada Limited*, 2016 SCC 29, which she interpreted to disapprove of the common law approach to compensation (common law measure of damages for wrongful dismissal) which the Adjudicator had applied, arguing that instead, a fixed term approach (calculates the amount which the employee would have received with continued employment to retirement and then discounts this amount for various contingencies) should have been used. The Federal Court of Appeal held that *Wilson* dealt with the preservation of rights which the Canada Labour Code confers on non-unionized employees, but that the issue before it was the assessment of the value of those benefits in the case of non-reinstatement. The Federal Court stated that the common law approach is not simply a means of avoiding the Unjust Dismissal provisions by paying an amount as compensation in lieu of reinstatement instead of paying the same amount as reasonable notice. The Federal Court of Appeal held that despite the Supreme Court's decision in *Wilson* that the Unjust Dismissal provisions displaced the law of wrongful dismissal in federally-regulated employment, it did not stipulate how the loss of protection from unjust dismissal should be valued when an employee is not reinstated, and that there had been no judicial decisions to the effect that the common law approach is unreasonable or wrong in law. Therefore, the Adjudicator's application of the common law approach was reasonable. The Court further stated that simply because one approach may be found reasonable does not mean that all other approaches are unreasonable. Ultimately, this decision was not to be taken as a disapproval or rejection of the fixed term approach and both approaches remain valid means of evaluating compensation in lieu of reinstatement.

10. **Pokornik v SkipTheDishes Restaurant Services Inc., 2022 MBKB 178.**

Arbitration clause deemed inapplicable, unenforceable for gig economy worker.

Charleen Pokornik, filed an action on July 25, 2018 against SkipTheDishes Restaurant Services Inc. ("Skip") seeking, amongst other things, a declaration that she is an employee of Skip and not an independent contractor, and also an order certifying the proceeding as a class action. Skip applied to Court for an order staying the action in favour of arbitration – which is the subject of this decision. Skip submitted that the parties had an agreement to arbitrate the issue, however, Pokornik disagreed. Skip first notified Pokornik on July 19, 2018 by email of a new courier agreement which would take effect on July 26, 2018. The email included highlights of the new courier agreement, which contained an arbitration agreement, and made it clear that if she did not agree to the new terms she would not be allowed to continue working.

The parties were at odds as to whether Pokornik agreed to the new courier agreement. Skip said she did by clicking "I Agree" on the Skip platform and by acknowledging that by checking a clause that indicated if she did not "…accept the updated terms as set out herein…" that she would not be able to continue to provide her services via the Skip platform. Pokornik said she signed under protest and therefore did not agree to the terms of the new courier agreement. She wrote Skip seeking confirmation she was required to agree, and in a later communication made it clear that she did not agree to the new terms, but would indicate she agreed so that she could continue working, but was doing so under protest. Skip did not reply to this later communication.

The Court ultimately determined that there was no arbitration agreement in place when the action was commenced on July 25, 2018 as the new courier agreement did not take effect until the following day. In addition, the arbitration clause could not be construed as applying retroactively to a pre-existing court action. Furthermore, the Court held that Pokornik did not accept the new terms, and that their relationship was therefore governed by the original agreement. The Court, in considering the fact that Skip did not respond to Pokornik's email in which she indicated she was accepting the new terms under protest, and Pokornik continuing to work, held that Skip acquiesced to

Pokornik's position. The Court finally held that the arbitration agreement was unconscionable as it was satisfied that there was a clear inequality of bargaining power, and that even though Pokornik had independent legal advice, this did not change the inequality.