Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare

NORTON ROSE FULBRIGHT

Employment and labour update

2015

Contents

Cases We're Following

On the constitutional protection of rights of labour

In January, 2015, the Supreme Court of Canada issued its decisions in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, *Meredith v Canada (Attorney General)*, 2015 SCC 2 and *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4. The new decisions, which have been dubbed the court's new "labour trilogy", largely abandon principles espoused in its earlier decisions in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, *RWDSU v Saskatchewan*, [1987] 1 SCR 460 and *PSAC v Canada*, [1987] 1 SCR 424. These 1987 decisions denied constitutional protections to collective bargaining and the right to strike.

In *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, the court ruled that the guarantee of freedom of association in s. 2(d) of the *Canadian Charter of Rights and Freedoms* protected a meaningful process of collective bargaining. This was a departure from its former view of freedom of association under which only the bare formation of the association and the collective exercise of individual freedoms was protected.

The more expansive approach adopted by the court in this case requires that the collective bargaining process provide employees with a degree of choice and independence sufficient to allow them to determine and pursue their collective interests. The RCMP labour relations regime in force at the time of the application denied RCMP members that choice. Instead, it imposed on them a scheme that denied them the ability to identify and advance their workplace concerns free from management's influence. The exclusion of RCMP members from collective bargaining under the definition of "employee" in the federal *Public Service Labour Relations Act* also infringed s. 2(d) of the *Charter*. Neither infringement was justified under s. 1 of the *Charter*.

In a companion case, *Meredith v Canada (Attorney General)*, 2015 SCC 2, the court held that the federal *Expenditure Restraint Act* did not violate the constitutional right of RCMP members to collective bargaining protected by s. 2(d) of the *Charter*. This was so despite its rollback of scheduled wage increases for RCMP members for a 3-year period without prior consultation. The *Act*, which imposed limits on wage increases in the public sector, did not substantially interfere with the process of collective bargaining. The limits were imposed on all public servants, were consistent with the going rate reached in agreements concluded elsewhere in the core public administration and did not preclude consultation on other compensation-related issues, either in the past or the future. Furthermore, the *Act* did not prevent the consultation process from moving forward.

In its third labour decision, *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, the court addressed the constitutionality of Saskatchewan legislation that restricted the right of essential services employees to strike, made union certification somewhat more difficult and liberalized the scope of permissible communications between employers and their employees. By a 5 - 2 majority, the court found that the legislation restricting the right of designated employees to strike substantially interfered with meaningful collective bargaining, was in violation of s. 2(d) and was unconstitutional.

The legislation was not capable of justification under s. 1 of the *Charter* because it did not minimally impair employees' rights. It went beyond what was reasonably required to ensure the uninterrupted delivery of essential services during a strike. It did so by giving the employer a largely unreviewable discretion to decide what essential services would be maintained and the process and means by which that would be done and by providing no meaningful dispute resolution mechanism for bargaining impasses. The other challenged provisions did not violate s. 2(d).

In a strongly-worded dissent accusing the majority of departing from the court's recent s. 2(d) jurisprudence and introducing great uncertainty into the law, the minority justices warned that that part of the majority decision granting constitutional protection to the right to strike risked upsetting the delicate balance of labour relations in Canada.

On awarding damages by reference to pension eligibility

Last year, we reported on *Arnone v Best Theratronics Ltd., 2014 ONSC 4216*, a case involving a 53-year-old employee who was terminated after 31 years of service. On a motion for summary judgment, he was awarded wrongful dismissal damages based on the period of time required to allow him to acquire the service that permitted him to retire with an unreduced pension, a period of 16.8 months. The employer appealed and was successful in convincing the appellate court that the trial judge had erred in principle in assessing the employee's entitlement based on the bridging period.

However, the Court of Appeal upheld the alternate assessment made by the trial judge on the basis of correct principles: *Arnone v Best Theratronics Ltd.*, 2015 ONCA 63. Accordingly, it substituted an award of damages equal to 22 months' salary and benefits in lieu of reasonable notice. The court also confirmed the employee's entitlement to a retiring allowance equal to one week for each year of service to a maximum of 30 weeks.

On July 16, 2015, the Supreme Court dismissed the employer's application for leave to appeal: 2015 CanLII 43081.

On the right to claim anonymity in arbitration decisions

The B.C. Court of Appeal confirmed that grievors and witnesses in arbitration proceedings do not have the right to claim anonymity in the arbitration decision in *United Food & Commercial Workers Union, Local 1518 v Sunrise Poultry Processors Ltd.*, 2015 BCCA 354. Although the Court of Appeal reached the same conclusion as the tribunals below, its reasoning followed a different path.

The court found that an arbitration board was an "organization" within the meaning of B.C. *Personal Information Protection Act (PIPA)*. However, the provisions of that *Act* dispensing with the requirement for consent for the collection and disclosure of information "authorized by law" applied to arbitration proceedings. The B.C. *Labour Relations Code* required, as a matter of law, that an arbitration board disclose its reasons for decision to the director of the Arbitration Bureau and the director was required by law to make the award "available for public inspection". This disclosure was not subject to *PIPA*.

The court did note that its decision was not intended to detract from arbitrators' discretion to protect the privacy of witnesses or parties as they saw fit.

On dismissal for breach of a drug and alcohol policy

In 2012, we referenced a human rights case in which a complainant claimed discrimination after being terminated for breach of his employer's drug and alcohol policy: 2012 AHRC 7. The policy at issue distinguished between employees who had voluntarily disclosed their addictions and those

who were identified only after a breach of the policy. Harsher consequences were imposed on the latter under the policy. The complainant, who worked in a safe-sensitive position in a safety-sensitive workplace, had tested positive for cocaine in post-incident testing. He initially insisted that he was merely a recreational user and had not revealed his drug use because he did not believe that it affected his work. After his termination, he claimed a dependency.

The human rights tribunal found that the termination was not a result of the complainant's disability, but of his failure to stop using drugs and to disclose his drug use in accordance with the policy. The tribunal also held that the complainant had been accommodated to the point of undue hardship by the terms of the policy if discrimination had occurred. It dismissed the complaint.

On appeal, an Alberta Queen's Bench judge upheld the finding that no discrimination had been established, confirming the absence of a causal connection between the complainant's disability and his termination. The complainant's ability to control his drug use and his addiction meant that the adverse effect of the employer's policy was based on his failure to exert that control and not on his addiction. The adverse effect was not rendered discriminatory merely because an unacknowledged addiction existed at the time. The court did not agree that the policy was a reasonable accommodation. It reasoned that an existing but unacknowledged dependency prevented the complainant from accessing the accommodations made available by the policy.

The Alberta Court of Appeal dismissed the complainant's appeal in *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225. A majority of the court agreed with the tribunals below that the complainant had been dismissed for a breach of the employer's policy and not because of a disability. A disability revealed voluntarily prior to an incident or failed drug test would not have led to the adverse impact.

The court rejected the notion accepted by the court below that an addicted employee in the position of the complainant had no access to the accommodations offered by the policy while denying an addiction. It noted that both safety and human rights objectives would be undermined if such a subjective proposition was adopted. The Court of Appeal restored the tribunal's finding that the policy constituted accommodation to the point of undue hardship by providing disclosure and access to treatment without fear of discipline, reinstatement on reasonable conditions after 6 months and a contribution of 50% of the cost of the rehabilitation program upon rehire.

On 'self-accommodation' of childcare responsibilities

An Alberta court upheld the 2013 arbitration decision in *Communications, Energy, and Paperworkers Union, Local 707 v SMS Equipment Inc*, 2013 CanLII 68986, finding that an employer had discriminated against a single mother when it failed to accommodate her childcare needs. In *SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162, the court held that the employer's refusal to allow the employee to switch from rotating night and day shifts to straight day shifts, and the excessive childcare costs she had to bear as a result, had reasonably been regarded as discrimination on the basis of family status by the arbitrator.

The court agreed with the arbitrator that requiring an employee to make reasonable attempts to resolve childcare concerns before seeking accommodation from his or her employer made the proof of family status discrimination more onerous than other forms of discrimination and could not be countenanced.

The facts of this case suggest that the employer could easily have accommodated the employee's request for a shift change, given that another employee had volunteered to work straight night shifts. Accordingly, it is difficult to argue with the result. However, the approach taken by the arbitrator and by the court on the need for 'self-accommodation' as an element of a prima facie case is questionable. A requirement for an employee to take reasonable steps to address their own childcare problems before transferring that burden to their employer was recognized in *Canada (Attorney General) v Johnstone*, 2014 FCA 110 and *Canadian National Railway Company v Seeley*, 2014 FCA 111. It is certainly arguable that a requirement to prove that reasonable attempts have been made to address childcare needs is no different in character that a requirement, in the context of a disability

discrimination claim, to show that the existence of a "disability" by reference to its severity, permanence or persistence (see *Saunders v Syncrude Canada Ltd.*, 2015 ABQB 237 below).

On birth mothers' entitlement to two periods of salary top-up

In very brief reasons issued on November 12, 2014, the Supreme Court of Canada upheld an arbitrator's decision allowing birth mothers to receive a salary top-up during both pregnancy and parental leaves: *British Columbia Teachers' Federation v British Columbia Public School Employers' Association*, 2014 SCC 70. The Court held that the Court of Appeal had erred in failing to recognize the different purposes of pregnancy benefits and parental benefits and in failing to defer to the arbitrator's interpretation of the collective agreement as discriminatory to the extent it limited birth mothers to a single 15-week top-up.

On summary dismissal for breach of trust

In 2013, we reported on a BC decision in which a 21-year employee in an IT position was held to have been justifiably terminated for accessing a confidential file containing a parking spot waiting list. The file also contained employees' seniority dates and rates of pay. The employee was found to have breached the trust conferred upon her by virtue of her position in the banking industry and her access to private documents.

A majority of the BC Court of Appeal upheld the lower court decision in *Steel v Coast Capital Savings Credit Union*, 2015 BCCA 127. The Court of Appeal pointed out that the employee knew the protocol that was to be followed before she could access private documents, knew that following that protocol was part of her employment obligations and knew that a breach of the protocol could lead to termination. The trial judge did not err in determining that the nature of the misconduct, which the employee had admitted was the result of a deliberate choice, was not reconcilable with a continuing employment relationship. The Supreme Court of Canada dismissed the employee's application for leave to appeal with costs on September 17, 2015: 2015 CanLII 58373.

On the right of federally-regulated employers to dismiss without cause

In *Atomic Energy of Canada Limited v Wilson*, 2013 FC 733, the Federal Court overturned an adjudicator's finding that an unjust dismissal was established under the *Canada Labour Code* on proof that the complainant had been terminated without cause. The court acknowledged that a dismissal was not rendered 'just' merely because it was accompanied by notice or severance pay. However, it held that Part III of the *Canada Labour Code* could not reasonably be interpreted as allowing federally regulated employers to dismiss only for just cause.

The Federal Court of Appeal concurred with that assessment in a decision released on January 22, 2015: *Wilson v Atomic Energy of Canada Ltd.*, 2015 CanLII 39801.

In its decision, the Court of Appeal held that the unjust dismissal provisions permitted dismissal of an employee on a without cause basis despite the fact that the *Canada Labour Code* was benefits-conferring legislation. The requirement for a liberal construction of such legislation did not permit amendment of the legislation to provide benefits that had not actually been conferred by Parliament, i.e. the 'just cause' standard for discharge enjoyed by unionized employees. A dismissal without cause upon payment of the statutory or agreed upon amounts was neither necessarily just or unjust. Its character was for an adjudicator to determine, on an assessment of the circumstances, on the basis of well-established common law and arbitral cases concerning dismissal and on accepted principles of statutory interpretation.

The Supreme Court of Canada granted leave to appeal the decision of the Court of Appeal issued on July 9, 2015: 2015 CanLII 39801.

On the conflict between *Charter* freedoms and human rights

We previously reported on an Ontario human rights tribunal ruling that involved a clash between *Charter*-guaranteed freedoms of expression and association and an employee's right to be free of harassment "in the workplace" and discrimination "with respect to employment". The tribunal had concluded that

sexual stereotypes and mocking references to a manager's marital status in a blog written by a union president did not offend the Ontario *Human Rights Code* prohibitions. The comments had been made during a period of ongoing labour unrest and intense collective bargaining.

The tribunal held that blogs and other social media postings could form part of or an extension of the workplace, but that the blog at issue did not fall into that category. The climate of hostile collective bargaining and the intended purpose of the blog, i.e. to inform the members of the union about issues arising from negotiations, showed otherwise. In balancing the manager's human rights against core *Charter* rights relating to matters of concern in the union-management relationship, the latter took precedence in the circumstances. In a reconsideration decision, the tribunal pointed out that, in cases of ambiguity, human rights legislation would not be interpreted in a manner that restricted fundamental freedoms under the *Charter*.

The tribunal decisions were upheld as reasonable by the Ontario Divisional Court. The complainant was granted leave to appeal. The sole issue before the Court of Appeal was whether the conduct of the union president and the union itself amounted to discrimination with respect to employment.

The Ontario Court of Appeal affirmed the decisions below in a decision released on July 3, 2015: *Taylor-Baptiste v Ontario Public Service Employees Union*, 2015 ONCA 495. Like the Divisional Court, the Court of Appeal rejected the proposition that the human rights provision was ambiguous, opening the door to *Charter* values as an aid to its interpretation. The tribunal was, however, entitled to consider *Charter* values in interpreting the statutory phrase "with respect of employment" in the context of the facts before it. The tribunal had acted reasonably in assessing the relevant statutory objective, had selected and addressed relevant *Charter* values, and had engaged in a proportionate balancing of the statutory objective of s. 5(1) of the Ontario *Human Rights Code* with the *Charter* rights of expressive and associational freedom that arose on the specific facts of the case. The Court of Appeal specifically noted this last factor in answer to the suggestion that the decision had created a blanket exemption from the requirements of the human rights legislation protecting all forms of union speech.

On the need for careful drafting of termination clauses

In 2014, an Ontario court held that a contractual termination clause was void for non-compliance with employment standards legislation in *Miller v A.B.M. Canada Inc.*, 2014 ONSC 4062. The clause provided for payment of the minimum salary dictated by the legislation but did not provide for payment of a 6% pension contribution or a car allowance during the period of notice. It read: "Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation."

As the legislation required continuation of benefits during the minimum notice period and the termination clause did not provide for payment of those benefits, it did not comply with the statutory requirements.

In March, the Ontario Divisional Court upheld the decision in *Miller v A.B.M. Canada Inc.*, 2015 ONSC 1566. The court pointed out that the particular employment contract under consideration did not just limit the employee's notice on termination to the statutory minimum. It limited the employee's entitlement in terms of "salary". The contract expressly distinguished between "salary" and pension contributions and a car allowance elsewhere, in dealing the the employee's remuneration. Accordingly, an interpretation of the reference to payment of "salary" as excluding these benefits was warranted.

The court rejected the view that silence on the payment of benefits should lead to a presumption that benefits would be paid. At best, it led to an ambiguity and called for an interpretation against the employer which had drafted the provision and against the removal of common law entitlements of a vulnerable employee.

On human rights damages for injury to dignity

In *University of British Columbia v. Kelly*, 2015 BCSC 1731, a BC court set aside a human rights tribunal's award of $75,000 for injuries to a complainant's

dignity, feelings and self-respect. The complainant, a doctor, suffered from ADHD and a non-verbal learning disability. He had been referred to a psychiatrist when he disclosed his disabilities upon enrollment in the UBC residency program. Ultimately, he was terminated from the program with 2 months' severance pay. Although he was later reinstated, he suffered considerable difficulties in the intervening period including panic, depression, insomnia and feelings of despair and worthlessness. The tribunal concluded that the substantial non-pecuniary award was appropriate given the gravity of the effects of the discrimination; the complainant was pursuing an almost life-long desire to become a physician and the loss of that opportunity had had a serious and detrimental impact on him.

The court held that the tribunal had not erred in finding that the complainant had suffered disability discrimination. However, it had erred in making a patently unreasonable award of damages. The award exceeded the next highest award under this head of damages by some $40,000. Although there was no cap on dignity awards, the tribunal had not based its decision on principle or relied on evidence that justified the award. It had, instead, exercised its discretion arbitrarily. The matter was remitted to the tribunal for redetermination of damages.

The year in review

December 2014

December 16: The *Employees' Voting Rights Act* received Royal Assent with the effective date of the legislation to be six months later. The Act made significant changes to the processes of certification and decertification of unions under federal jurisdiction as set out in the Canada *Labour Code*, the *Parliamentary Employment and Staff Relations Act* and the *Public Service Labour Relations Act*. Among other changes, the amendments increased the level of employee support required to certify a union and decreased the level of support necessary for decertification.

January 2015

January 6: The BC Court of Appeal ordered a new wrongful dismissal trial in *Roe v British Columbia Ferry Services Ltd.*, 2015 BCCA 1, after finding that the trial judge erred in characterizing the conduct relied on as cause for dismissal of a senior manager.

The employee was discharged for distributing complimentary vouchers for food and beverages to his daughter's sports team without authorization and contrary to the employer's policy. It was the employer's contention that the vouchers were intended only for passengers who had been inconvenienced in some way; the employee had been dishonest and had knowingly misappropriated company property for his own financial and reputational benefit in using the vouchers as he had. The employee denied that he had engaged in knowing misconduct and claimed that the policy itself was ambiguous and any breach on his part was inadvertent. The trial judge had not made findings of fact as to which of the employer's or the employee's version of the facts was true. Instead, he had determined that, even if the employer's version of events was true, the conduct was insufficient to support a summary dismissal. The amount involved was trifling and there was neither a great amount of prestige nor other non-monetary personal gain garnered by the voucher distribution.

In the circumstances, the trial judge reasoned, the employee's dishonesty had not led to an irreconcilable breakdown of the employment relationship.

In allowing the appeal, the Court of Appeal held that the trial judge had erred in focusing on the monetary value of the vouchers, the lack of a personal benefit to the employee and the absence of any attempt to cover his tracks. The value of the donations was not relevant. A proper approach would have required consideration of: (i) the high standard of conduct expected of the employee given the responsibilities and trust attached to his senior management position; (ii) the essential conditions of integrity and honesty in his employment contract, including the requirement in the employee code of conduct "to act in an honest and ethical manner at all times"; and (iii) his deliberate concealment of his actions which he later acknowledged to have been wrong and unethical. The judge's failure to apply this contextual approach led him to commit a palpable and overriding error and necessitated a new trial.

January 7: An Ontario court determined that 18 months was a reasonable notice period for a middle manager with 18 years' service who was in his mid-fifties when he was constructively dismissed. The dismissal arose from a demotion and gave rise to a right to sue despite the fact that the employee had continued to work for some 8 months after changes were made to his responsibilities. The employee had continued to object to his new employment duties and reporting structure until he was terminated by the employer.

Although there was a generalized culture of suspicion and informant encouragement at the workplace, the circumstances did not justify damages for intentional infliction of nervous shock, damages for bad faith in the manner of dismissal or punitive damages. The court refused to deduct LTD benefits received by the employee from the award of damages in *Ciszkowski v Canac Kitchens*, 2015 ONSC 73 as the employee had contributed 50% of the cost of the plan.

January 21: An Ontario employer was found liable for 26 months' remuneration in lieu of reasonable notice to a couple who had been engaged as cabinet installers for some 20 years, ostensibly as independent contractors, in *Keenan v Canac Kitchens*, 2015 ONSC 1055. The court held that the couple were properly regarded as dependent contractors, considering that the majority of their earnings were from the employer; that the employer provided them with office space and equipment, albeit not the tools they used in their work; that the business was clearly that of the employer, which controlled the work flow, set the rates and service standards and required the display of its logo on vehicles used to transport product to the worksite; and that they assumed little business risk in the arrangement. The amount of reasonable notice took into account a period of time when the couple had been employees before being told that they must work as independent contractors, with the result that the couple had 32 and 25 years of service, respectively.

January 29: In *Pourasadi v Bentley Leathers Inc.*, 2015 HRTO 138, a human rights tribunal agreed that the employer was unable to accommodate a store manager with a permanent wrist injury without suffering undue hardship. The evidence indicated that the employee was expected to be alone in the store for 19.5 hours per week and would have been unable to provide assistance to customers seeking access to the employer's product during that period.

The employer was not obliged to accommodate the employee by permitting her to turn away customers until such time as another staff member was available. The sales and customer service component of the employee's position constituted 65-70% of her duties. If a duty was essential, as the duty to assist customers was in this case, it was one that was required to be performed whenever there was a need to perform it. It was not sufficient that the employee be able to perform the essential duty most of the time.

January 30: The Ontario Divisional Court dismissed an application seeking judicial review of the decision of a human rights tribunal in *Corrigan v Mississauga (City)*, 2015 ONSC 236. The tribunal had dismissed a claim by suppression firefighters seeking to avoid mandatory retirement as having no reasonable prospect of success.

The court held that the tribunal's decision was reasonable. The procedural duty to accommodate did not require that the employer research and engage in a search for individual testing protocols each time an employee made a general request. The applicants had presented no medical evidence showing that their personal health presented extremely low or negligible risk of cardiac events. In the circumstances, the tribunal had reached a reasonable conclusion in holding that the obligation to accommodate was met by the city's offer of alternative positions.

January 30: In *Corporatek inc. c. Khouzam*, 2015 QCCA 170, the Quebec Court of Appeal confirmed that an employer did not have cause to summarily dismiss its Vice President of Legal Affairs because of dissatisfaction with the quality of her work and her relationship with colleagues. The appellate court agreed with the lower court that it was significant that the employee had not been treated as a vice-president during her employment, despite her title and reporting relationship. As such, the employer's loss of trust in the employee's abilities was not cause for dismissal where she had not been given clear direction, expectations or support and where no efforts had been made to notify her of her shortcomings or to give her an opportunity to improve.

February 2015

February 6: Shortly before commencing employment as an investigator with the Alberta government, the employee had a joint injection to treat osteoarthritis from a knee injury. When his problems intensified in his new employment, he filed an application for LTDI benefits. Benefits were refused on the basis that the government's LTDI plan precluded coverage for an injury where treatment had occurred within 90 days prior to employment with the government. An appellate tribunal held that the insurer had correctly declined the application. However, it ruled that benefits should awarded in any event on the basis that "to do otherwise would result in an unfair and unjust decision and [one] not in keeping with the intent of the LTDI Benefit Plan." A Queen's Bench judge ordered a rehearing of the claim, ruling that the tribunal had no authority to ignore the terms of the plan: 2015 ABQB 103. In *Alberta v McGeady*, 2015 ABCA 54, the Court of Appeal agreed.

It held that a plan term that made a class of employees ineligible for long term disability benefits could not be disregarded on grounds of fairness and justice. The fact that the employee might have remained in his former employment as a police officer to protect his pension had he known of the limiting term was not a basis for ignoring the plan. The Supreme Court denied the employee's application for leave to appeal the decision: 2015 CanLII 43095.

February 15: The Ontario Labour Relations Board refused to reconsider a decision addressing the duty to bargain in good faith in *United Food & Commercial Workers Canada, Local 175 v WHL Management Limited Partnership*, 2015 CanLII 9929.

The case arose in the context of an ongoing strike during negotiations for a renewal collective agreement. In lengthy reasons, at 2014 CanLII 76990, the original panel found that both parties had failed to bargain in good faith. The Board found that the employer had engaged in a process of receding horizon and faux impasse bargaining. However, it was 'more disturbed' by what at it saw as a common theme running through the content of the employer's proposals. It characterized these proposals as an attempt by the employer to undermine the integrity and credibility of the union by reflecting positions that would be unacceptable to any reasonable union.

The Board saw this approach in proposals for a specific penalty of discharge for stipulated infractions, including acts of violence or threats of violence, in the course of employment; a back-to-work protocol that reinstated striking workers only as work became available; a proposal effectively seeking to monitor the union's ratification process; a proposal to bind the parties to a picket line protocol in future; a proposal to amend the grievance process to require a grievor to disclose to the employer information being relied on to substantiate an alleged breach of the agreement and to preclude any undisclosed information at a

grievance arbitration; and a proposal to limit the bumping rights of a displaced employee to the most junior person of the bargaining unit. In the end result, the employer was ordered to withdraw six of its proposals and the union was ordered to withdraw two.

February 16: In *Fortis Energy Inc. v IBEW, Local 213*, 2015 CanLII 15614, a BC arbitrator addressed the termination of a customer service technician after it determined that the grievor had followed and threatened his wife's manager during his working hours. The grievor had done so after he had received texts indicating that the manager had issued a suspension to his wife. Although the grievor was a long service employee, he occupied a position of trust serving the needs of its customers. His grave misconduct in the stalking, threatening and deliberate intimidation of the manager on company time and in a company vehicle was a betrayal of the trust that the company had bestowed upon him. His misconduct was compounded by his failure to act honestly and in a forthright manner when confronted by his employer. He was deceitful, displayed a lack of concern for the truth and removed relevant evidence from his company cell phone. The termination was justified.

February 26: A Quebec arbitrator held in *Unifor Section Locale 414 v Emballages RockTenn*, 2015 Can LII 6880 that active employment does not continue during the period of recall for employees affected by a permanent plant closure. Instead, it ends on the day of the closure. The arbitrator rejected the grievors' claims to early retirement benefits on the basis that they had reached the age of 55 during the 36 months they held recall privileges under the applicable collective agreement. It was the real possibility of a return to work and not simply the existence of recall privileges that was relevant in determining whether the grievors were continuing in active employment.

February 27: The Alberta Court of Appeal allowed an appeal against an order striking out an employee's statement of claim in *Ashraf v SNC Lavalin ATP Inc.*, 2015 ABCA 78.

The employee had originally sued his former employer for injuries said to have resulted from a campaign of harassment and bullying that eventually caused him to leave his employment on long-term disability. That claim was struck out on the basis that it lay within the exclusive jurisdiction of the Workers' Compensation Board. The employee appealed the order striking out the claim and obtained leave of the court to amend it to allege constructive dismissal arising from the same facts. The appeal was dismissed, however, with the court holding that the amendment did not change the essential character of the dispute. It remained an "accident" as defined by the workers' compensation legislation and within the Board's jurisdiction. The constructive dismissal claim was struck.

On further appeal, the Court of Appeal restored the constructive dismissal claim. It held that the lower court had erred in holding that the amendment to allege constructive dismissal had not altered the character of the dispute. Following the amendment, the claim had 2 aspects. Only one of those – the workplace injury – fell within the jurisdiction of the Workers' Compensation Board. The statutory worker's compensation scheme had no jurisdiction to deal with the constructive dismissal claim. If the decision of the lower court was allowed to stand, the employee would have been left without a forum to advance a claim that workplace abuse leading to termination also caused stress or other psychological injury.

March 2015

March 3: The Saskatchewan Labour Relations Board held that it could not invalidate a city bylaw that conflicted with the Saskatchewan *Employment Act*, by making changes to pension rights during a statutory freeze. However, the Board held that it could read down the bylaw so that it had no force and effect during the freeze period: *ATU, Local 615 v Saskatoon (City)*, 2015 CanLII 19980.

March 3: A long-term employee with a history of serving in a variety of roles was not constructively dismissed when she was advised by her employer that her role would change in the context of its changing workplace. It was an implied term of her employment contract that she could be asked to

fulfill different obligations. The changed role offered to her came with important responsibilities, the same salary and benefits, the same office and many of the same duties that she had previously performed. The employee's view that the position offered to her was a demotion was not objectively proven: *Bolibruck v Niagara Health System*, 2015 ONSC 1595.

March 5: An employer was found liable for $15,000 in general damages plus lost wages for discriminating on the basis of physical disability in *Horvath v Rocky View School Division No. 41*, 2015 AHRC 5. The employer had dismissed the complainant, a caretaker, when it learned that a permanent accommodation of her shoulder injury would be required. The employer had a policy of limiting its accommodation efforts to temporary disabilities of between 6 – 8 weeks and required employees to resume their pre-accident positions at the end of that period. It had followed that policy in the complainant's case.

The human rights tribunal found that the employer had made no real attempt to investigate the complainant's capabilities or to consider those capabilities in relation to other work available throughout its system of 40 schools. It had failed to comply with the procedural aspect of the duty to accommodate and, by doing so, had overlooked possible solutions that would have allowed the complainant to contribute meaningfully to the workplace. Its assertion of undue hardship was not supported by evidence relating to the expense of hiring another caretaker, particularly given the fact that deployment of the complainant in another position would have freed up her caretaker position for another employee.

March 6: The Supreme Court of Canada held that an employee had been constructively dismissed when he was suspended with pay during negotiations for a buyout of his employment contract in *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10.

The court found that the employer had no express statutory right or contractual right to impose an administrative suspension. In determining whether it had an implied contractual right to suspend, the court rejected the view that only commissioned employees or those who derived a reputational benefit from working could object to a withholding of work in the form of a suspension. Except in the case of a disciplinary suspension, an employer did not, as a matter of law, have an implied authority to withhold work without legitimate business reasons.

On the facts, the suspension was unauthorized, given its indefinite duration, the employer's lack of good faith in keeping the reasons for it from the employee and the employer's concealed intention to have the employee terminated for cause. The court noted that, in most circumstances, an administrative suspension

could not be justified in the absence of a basic level of communication with the employee. At a minimum, acting in good faith in relation to contractual dealings meant being honest, reasonable, candid, and forthright.

In the course of its decision, the court confirmed that a constructive dismissal could occur either through a unilateral and significant breach of an essential term or through a series of acts that, taken together, showed that the employer did not intend to remain bound by the contract. It also pointed out that, where an employee relies on a unilateral change, it must be shown that a reasonable person in the employee's position would have considered that the breach was a substantial one involving an essential term. A minor breach that could not be reasonably seen as having substantially changed an essential term of the contract was not a constructive dismissal.

March 6: The Ontario Divisional Court upheld an employment contract limiting the employee's entitlements on dismissal in *Luney v Day & Ross Inc.*, 2015 ONSC 1440.

The provision at issue stated that the contractual notice and severance payments would "satisfy any and all obligations owed to you by [the employer] including any obligations arising under the *Canada Labour Code* and similar legislation…". The trial judge had not erred in concluding that this provision rebutted the common law presumption of reasonable notice. It was clear and could not be read as confined solely to the employee's statutory entitlements. The phrase "any and all" was broad enough to cover the employer's obligations at common law and the word "including" made it clear that the "obligations" were not limited to statutory obligations.

The court also rejected the employee's argument that the termination provision breached the *Canada Labour Code* by failing to expressly mention the employee's entitlement to benefits on dismissal. The provision that "if the severance entitlements are not in conformity with the…severance provisions prescribed by the *Canada Labour Code* or other similar legislation, the statutory minimums shall apply and be considered reasonable notice and severance" indicated that the employee would receive whatever compensation he was entitled to under the *Code*.

A provision purporting to limit the amount of the employee's severance in the event of an unjust dismissal would not have bound an adjudicator hearing an unjust dismissal claim. However, it did not contravene the *Code* as it did not seek to prevent the employee from pursuing an unjust dismissal claim. The employee himself had chosen to pursue a different approach because of his assessment that an unjust dismissal claim would not succeed.

March 6: The Ontario Labour Relations Board refused to declare two companies to be a single employer in *United Brotherhood of Carpenters and Joiners of America, Local 93 v Les Industries CAMA*, 2015 CanLII 16122. Although they were under common control or direction and engaged in associated or related activities (general contractors for renovation and new construction), the Board retained discretion to refuse a declaration where there was no labour relations purpose to be achieved. The declaration sought in this case would have extended or expanded the union's bargaining rights by allowing it to claim work of a company that was a well-established and successful company prior to formation and unionization of the second company. The non-union company had not obtained work from the unionized company, with the exception of two jobs that the unionized company would not have been able to undertake in any event. There was no evidence of any meaningful erosion of the union's bargaining rights.

March 16: Changes to the general holiday provisions of the *Canada Labour Code* and *Canada Labour Standards Regulations* came into effect. These changes, summarized here, introduce simplified eligibility requirements and a standardized method to calculate holiday pay for federally regulated employees.

March 25: A long-service senior employee terminated without cause had his period of reasonable notice significantly reduced in *Steinebach v Clean Energy Compression Corp.*, 2015 BCSC 460. The court concluded that a 6-week delay in commencing a search for replacement employment and a decision to change careers completely 6 weeks into that search amounted to a failure to mitigate. The employee would have been entitled to

16 months' notice, given his age and the length and nature of his employment. However, that entitlement was reduced to three months because the employee unduly narrowed his search criteria and would likely have obtained employment suited to his skills and experience had he made greater efforts.

April 2015

April 7: An Ontario court held that it was appropriate to consider the season in which a termination occurred when assessing reasonable notice in *Fraser v Canerector Inc.*, 2015 ONSC 2138. The employee had been employed in a senior position. He was terminated in June after 34 months of employment. The court considered that prospective employers were unlikely to be hiring for senior level positions at that time as key decision-makers were likely be away on summer vacation. It indicated that the 4 1/2 months' notice actually awarded might have been reduced by 1 1/2 months if not for the timing of the termination.

April 7: An employee who accepted severance pay and signed an Employee Termination Notice said to be a "full and final settlement of any and all claims for compensation with respect to the termination" of her employment was held entitled to continue a human rights complaint in *Hutton v ARC Business Solutions Inc.*, 2015 AHRC 7. The human rights tribunal found find no language contemplating either an express or implied release or waiver of any potential human rights violation.

Without language supporting a broader interpretation, "compensation" as used in the Employee Termination Notice had its ordinary meaning and did not extend to compensation for any human rights matters that might have arisen in the context of the employer-employee relationship. Accordingly, the compensation paid on termination did not affect the complainant's right to make a complaint of discrimination arising out of her employment or termination nor did it affect the authority of the Commission and the tribunal to deal with such a complaint.

April 7: In *Systemgroup Consulting Inc. v Mcconaghie*, 2015 ONSC 2213, an Ontario court upheld a decision of a human rights tribunal that had 'restored' the applicant to the position she would have been but for the employer's discriminatory conduct by awarding her damages for lost wages that exceeded by some 5 months the amount to which she would have been entitled under the termination provisions in her employment contract.

April 7: In *George v Cowichan Tribes*, 2015 BCSC 513, a BC court found that the employer had wrongfully dismissed a long term employee with an exemplary work record when it made a decision to dismiss her on the recommendation of an independent investigator.

The investigator who had been hired to look into the complaint had concluded that the employee was guilty of abuse of power, breach of trust and dishonesty. He had recommended dismissal without any knowledge of the employee's employment history. The employer relied on the investigator's conclusions and recommendations without seeking the employee's response to the factual conclusions in the report or allegations of lying during the investigation.

The court found that the individual who had filed the complaint about the employee's off-duty conduct was not credible nor were the witnesses who had corroborated her testimony. She had seriously exaggerated the incident in her letter of complaint which was obviously intended to maximize the trouble caused to the employee. The employer had no cause for dismissing the employee based on the claims made against her.

In assessing reasonable notice for the wrongful dismissal, the court held that it was appropriate to exercise its discretion to disregard an interruption in employment resulting from the employee's educational leave of absence. The employer had recognized the employee as a long serving employee in many respects and it would have been unfair to ignore the entirety of her employment. Reasonable notice was determined to be 20 months.

The court also awarded $35,000 in aggravated damages. The employer had acted in a cavalier, reckless and negligent manner and in breach of a duty of good faith owed to the employee. Although the employee provided no medical evidence of

mental distress arising from the manner of dismissal, the court accepted that she had been emotionally devastated, had suffered significant financial consequences and that her relationships within the community had been detrimentally affected.

April 8: An employee who avoided termination for misconduct only because of her 19 years of discipline-free service had her grievance against a 20-day suspension dismissed in *Ontario Public Service Employees Union (Basta) v Ontario (Government and Consumer Services)*, 2015 CanLII 32591. The employee, a call centre employee, had mistreated a fragile caller with mental health issues on the telephone, had recounted the incident to co-workers for several days thereafter without showing any remorse and had never brought it to the attention of management. She had only acknowledged wrongdoing and showed remorse after discipline was imposed. Although the suspension was at the upper range of what was reasonable, it was not outside that range. As such, it was not appropriate for the arbitrator to attempt to fine-tune the discipline imposed by the employer.

April 10: An Alberta Court of Queen's Bench justice overturned a human rights tribunal decision that found discrimination on the basis of disability despite the subjective and medically unsubstantiated nature of the complainant's evidence. In *Saunders v Syncrude Canada Ltd.*, 2015 ABQB 237, the court ruled that the tribunal had erred in refusing to draw an adverse inference against the complainant for failing to call his treating physician to give evidence. The tribunal's suggestion that the employer could have called the complainant's doctor improperly placed the onus on the employer. Medical evidence pertaining to the complainant was not equally available to both the complainant and the employer as the tribunal had suggested. It was for the complainant to adduce evidence to prove a prima facie case. The complainant had failed to do so when he gave vague and conflicting testimony. The tribunal had erred when it failed to adequately address the credibility of that testimony in the context of the onus on the complainant.

The tribunal also erred in concluding that the complainant had established a 'disability' for human rights purposes. His condition did not have the necessary severity, permanence or persistence to amount to a disability. The court allowed the appeal and dismissed the complainant's claim.

April 14: In *K.L. v Calypso Water Park Inc.*, 2015 ONSC 2417, an Ontario court refused to strike out an employee's claim against her employer for a sexual assault committed by her supervisor during an end-of-season staff party. The court held that the circumstances could support an argument that the employer had materially increased the risk that the unauthorized acts of sexual assault and/or assault would occur by the way in which the party was organized.

The employer had allowed employees to bring their own alcohol, thus eliminating the supervisory effect of a bartender and its own ability to control consumption. It had held the event on its own premises, making it difficult to supervise and increasing the potential for employees to become isolated and vulnerable. It had employed a supervisor with a history of domestic violence.

In these circumstances, and if it was proved that the employer knew or ought to have known about the supervisor's criminal past, it could not be said that the employee had no reasonable prospect of proving that the employer was vicariously liable for the actions of the supervisor. The court did strike out the claim against the employer alleging that it was vicariously liable for the tort of sexual harassment, ruling that no such tort existed in the province.

April 14: A BC human rights tribunal refused to dismiss a disability-based discrimination claim summarily in *Old v Ridge Country Contracting*, 2015 BCHRT 63. The employer had terminated the complainant, a heavy equipment operator employed in a safety-sensitive mining environment, when he disclosed that he was using medical marijuana to control a seizure disorder. The tribunal held that the employer had an obligation to follow up on inconclusive medical information that it had

received on the efficacy and potential side effects of medical marijuana and to engage the employee in discussions on possible accommodations. In the absence of evidence of these elements, it was impossible to conclude that the complainant could not prove his complaint.

April 16: An Ontario court required the employer to pay the full 27 months' damages in lieu of reasonable notice in a wrongful dismissal claim, despite the fact that the notice period had not yet expired at the time of the application for summary judgment.

The employee in *Markoulakis v SNC-Lavalin Inc.*, 2015 ONSC 1081 was 65 at the date of termination and had worked for the employer for more than 40 years. It was the court's finding that, of the three available approaches for dealing with the employee's duty to mitigate when awarding damages before the expiry of the period of reasonable notice, the 'trust' approach was more appropriate in the circumstances. Under this approach, the employee was to account for any mitigation earnings and a procedure was designed for a return to court in the event of disputes. The other two approaches, the 'partial summary judgment' approach (where the parties returned at the end of the period to address the adequacy and success of the mitigation efforts) and the 'contingency' approach (where damages were reduced by a contingency reflecting the possibility of re-employment) were rejected.

April 20: An employer who refused the transfer request of an employee working modified duties on a midnight shift was found to have breached its procedural duty to accommodate in *Winners Merchants Intl. LP v Workers United Canada Council, Local 152*, 2015 CanLII 19724. Although the employer could not have accommodated the grievor on the day shift without undue hardship, given the different business demands of that shift, it had made no effort to do so. The grievor had a legal right to have her transfer request considered in a timely fashion on an individual basis and from an accommodation perspective. The remedy was limited to a declaration of breach, with the grievance against the decision itself being dismissed.

April 22: In *Howard v Benson Group*, 2015 ONSC 2638, an employee was terminated 2 years into a 5-year fixed term contract. A term of the contract provided that the employer could terminate the contract at any time during the term. If it did, "any amounts paid shall be in accordance with the *Employment Standards Act* of Ontario." The employee successfully argued that the termination clause was unenforceable, as it was not unambiguously compliant with the employment standards legislation. Despite finding the clause to be unenforceable, the court did rely on it to refuse the employee's claim for damages for the three years remaining of the fixed term. It held that the parties' agreement to the clause revealed that they had contemplated terminating the contract before expiry of its term. As a result, the employee was entitled to common law damages and was subject to a duty to mitigate those damages.

April 27: A Federal Court judge varied an arbitration decision that had refused an award of aggravated damages for mental distress caused by a suspension in *Gatien v Attorney General of Canada*, 2015 FC 543.

The employee was a manager who had a clean 35-year record of service prior to the incident for which she was suspended. She had repeatedly been ordered by her superiors to refrain from disciplining an individual for significant behavioural problems, with no explanation given. When she was eventually assaulted by that individual, she had barricaded the workplace to prevent her from regaining access. Following the attack, the employee had gone on stress leave. On her return to work, a 10-day suspension was imposed for constructing the barricade. The arbitration board that heard the employee's grievance reduced the suspension to a verbal reprimand. However, it declined to award aggravated damages on the basis that excessive discipline was not a "separate actionable course of conduct" capable of attracting such an award. The court ruled that the board had erred in law in adopting an outmoded test for aggravated damages. Discipline short of dismissal could support an award of damages in an appropriate case if the employee could prove that the excessive discipline caused mental distress that was in the contemplation of the parties.

The board had also arrived at an unreasonable decision in relation to facts relevant to the assessment of aggravated damages, i.e. in finding no evidence of mental distress in the face of ample evidence and in accepting an employer explanation for the discipline that was not consistent with uncontroverted evidence. The decision was remitted to the board for redetermination of the issue of damages according to correct principles.

April 27: The BC Court of Appeal held that the trial judge had committed several reviewable errors in finding the employer liable for wrongful dismissal in *Ogden v Canadian Imperial Bank of Commerce*, 2015 BCCA 175. He had erred in characterizing the employer's position as being based on cumulative cause. In fact, the employer had relied on a single incident of the employee accepting a client's wire transfer and commingling the client's funds with her own personal funds as grounds for dismissal. It had argued that the employee's prior discipline created a context for assessment of that incident, i.e. circumstances in which the employee ought to have known that the employer took such breaches very seriously. The trial judge mistook the employer's reliance on the context of the transaction for reliance on prior discipline as going to cause.

The trial judge had also erred in trivializing the nature of the transaction itself. The employer's evidence indicated that the employee's action was a conflict of interest and a clear breach of the employee *Code of Conduct*.

Finally, the factual conclusions as to the employer's motives that the trial judge had made in denying punitive damages conflicted with those that had been used to justify the decision to award aggravated damages.

As these palpable and overriding errors necessitated a new trial, the Court of Appeal did not address whether the employer had been denied procedural fairness by the trial judge having copied virtually all of his judgment from the employee's written submissions.

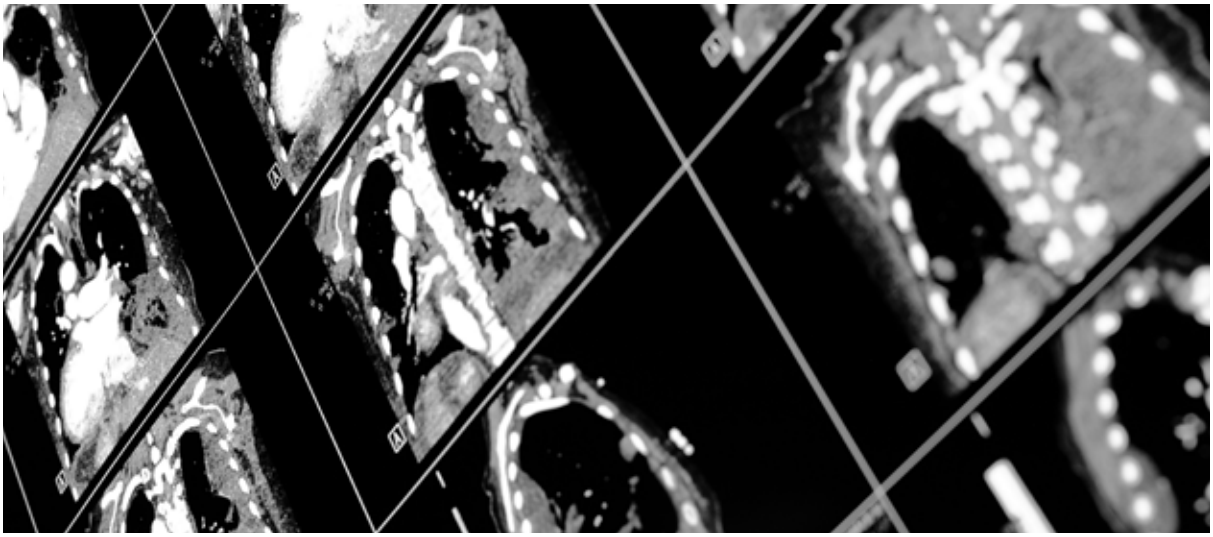
April 30: In *Drimba (Estate) v Dick Engineering Inc.*, 2015 ONSC 2843, an employee was diagnosed with terminal cancer and commenced a leave of absence in June, 2013. A purchaser of his employer's business indicated to him that his position would remain open for him if he recovered. The employee died in September 2013.

Although the estate's action for wrongful dismissal was dismissed, it was held entitled to claim termination and severance pay under the Ontario *Employment Standards Act*. These benefits were payable if the contract of employment had been frustrated by the employee's serious illness and not ended by his death. The trial judge held that it was impossible to say with certainty that the contract was frustrated on a specific date. However, it was clearly frustrated by his inability to return to work some time before the date of his death given the employer's knowledge of the severity of the employee's illness and of the unlikeliness of his ever returning to work.

April 30: The Ontario Court of Appeal upheld a lower court ruling that a demotion amounted to a constructive dismissal in *Morgan v. Vitran Express Canada Inc.*, 2015 ONCA 293. Although the employee's pay remained the same following the transfer, the new position lacked the responsibility and prestige of the employee's former position. The employee, who had over 25 years of service with the employer, was entitled to 18 months' salary in lieu of notice.

May 2015

May 5: A B.C. employer was found to have constructively dismissed an employee in *Rothberger v Concord Excavating & Contracting Ltd.*, 2015 BCSC 729 when it attached a note to his pay cheque indicating that the costs of any further operator fault would be charged to him. When he complained that any such charge would be in breach of employment standards legislation, it brushed off his concerns and then sent him an email implicitly threatening him with adverse legal consequences if he pursued a complaint. The court found that the notation on the employee's pay cheque was a material change to the employment contract and would have been so even if it was not contrary to employment standards legislation. The employment contract entitled the employee to receive an hourly wage for hours



worked. In addition, the employer's manner of communicating with the employee was a breach of implied terms of employment requiring an employer to treat the employee with civility, decency, respect and dignity.

May 11: A BC court remitted a decision for reconsideration by an employment standards tribunal after finding, in *Brandt Tractor Ltd. v Claypool*, 2015 BCSC 759, that the decision was patently unreasonable. The tribunal had found an employment contract to be in breach of employment standards provisions addressing payment of statutory vacation and holiday pay.

The court held that multiple annual employment contracts signed by the employee specified that statutory vacation and holiday pay were included in the employee's commissions and set out the percentages payable. The employer's payment of commissions in accordance with the contracts and with itemized breakdowns of the amounts allocated to each item did not reduce commissions by the amount of vacation/holiday pay as the tribunal had concluded. There was no basis for the tribunal to have found, on the facts, that the employee had reasonable expectations of a greater amount of vacation pay on his commissions.

May 15: A BC employer that terminated its newly hired CAO prior to the commencement of his duties was held liable for 6 months' salary in lieu of notice in *DeGagne v City of Williams Lake*, 2015 BCSC 816.

The city had offered employment to the employee in a letter agreement that provided for one month's notice if termination occurred during an initial 6-month probationary period and 6 months' notice if termination occurred during the first year of employment. It purported to withdraw its offer after it received an anonymous letter criticizing the prospective employee's performance in a prior position. An email written by the employee to a city staffer also factored into its decision. The employee sued for wrongful dismissal and defamation.

The court held that the offer letter governed, as a formal employment contract had not yet been signed. However, the city was not able to take advantage of the 1-month notice period specified in that letter because the probationary period had not yet commenced. In the view of the court, it would have unfair to allow an employer to take advantage of a reduced obligation for severance during a probationary period while relieving it of the corresponding obligation to assess the employee's suitability during that period. The employee was entitled to the 6 months' notice provided for where the contract was terminated "during the first year" and outside of the probationary period. This period also coincided with what would have been reasonable notice of termination, given the

employee's age (57), experience, the nature of the position from which he had been terminated and his relocation to take the job. Claims for damages for defamation and mental distress and punitive damages were dismissed as unwarranted on the facts.

May 16: An arbitrator refused to permit an employer to introduce emails between the grievor and his wife in evidence to support his dismissal in *Saskatchewan Government and General Employees Union v Unifor Local 481, 2015 CanLII 28482*. The arbitrator held that, despite the employer's clear policies on the use of its electronic resources for work purposes, the employee retained a reasonable expectation of privacy with respect to personal emails on the employer's systems. The employer had intruded on the employee's privacy by searching through his emails before attempting to confirm, through less intrusive methods, its suspicions that he had lied about being involved with a biker gang.

May 19: In *Drummond v Community Living Ajax Pickering Whitby*, 2015 HRTO 654, a human rights tribunal imposed sanctions on an employee who attempted to withdraw an application against her employer on the day that the hearing was to commence. The tribunal acknowledged the employer's claim that it had been put to tremendous expense and inconvenience in defending the application and that the applicant had engaged in similar conduct in a grievance arbitration proceeding. It also pointed out that the tribunal itself had devoted considerable resources to the application.

Although it refused to declare the applicant a vexatious litigant, it did prohibit her from bringing any further proceedings in any way arising out or relating to the allegations raised in her application or arising out of or in any way related to her employment or cessation of employment with the employer. It also held that the request to withdraw was, in the circumstances, tantamount to a failure to prove the allegations made in the application and warranted a declaration that those allegations were unsubstantiated.

May 22: An Ontario human rights tribunal awarded damages of $220,000 to two temporary foreign workers in *O.P.T. v Presteve Foods Ltd.*, 2015 HRTO 675. The employees had been subjected to a course of sexual harassment, including sexual touching and sexual assault, over a period of several years. The complainants were limited by the conditions of their entry into Canada to working for the employer and were also dependent on the employer for housing. Accordingly, they were particularly vulnerable to the actions of the personal respondent, who was a principal of the employer. The awards of damages for injury to the complainants' dignity, feelings and self-respect ($150,000 and $50,000) reflected the egregious and unprecedented nature of the respondents' breaches.

May 25: An employer who gave a 26-year employee approximately 4 months' notice of her impending dismissal together with a glowing reference letter had cause to regret that action in *Armstrong v Lendon*, 2015 ONSC 3004. The employee subsequently sued for wrongful dismissal and was found entitled to 21 months' notice and $7500 in aggravated damages. The employer's reference letter referenced her "thorough competence," her ability to deal with difficult clients, her determination to assist clients and her outgoing personality. Its contents seriously undercut both the employer's credibility and the allegations of cause for dismissal made at trial.

May 27: In *Ontario (Community Safety and Correctional Services) v De Lottinville*, 2015 ONSC 3085, the Ontario Divisional Court held that two human rights tribunals had acted reasonably in refusing to dismiss human rights applications under a provision of the Ontario *Human Rights Code* that permits a dismissal where the tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

In one of the applications, the individual had filed a complaint against a doctor under the *Regulated Health Professions Act*. It had resulted in a caution being given to the doctor but no hearing being held. The other application dealt with a racial discrimination complaint that had been filed against OPP officers under the *Police Services Act*. Again, no hearing was

been held; two levels of review bodies found the allegations to be unsubstantiated. In both cases, the respondents to the human rights applications had sought dismissal of those applications on the basis that they had been appropriately dealt with in the proceedings that had occurred. In both cases, the tribunals ruled that the discrimination application should be allowed to continue.

The court agreed, finding that the tribunals had acted reasonably in exercising their discretion. It pointed out that the role of a human rights tribunal in applying and interpreting the statutory provision at issue was to have regard to the principles underlying the common law finality doctrines such as issue estoppel, collateral attack, and abuse of process. Fairness formed an important part of the analysis. The tribunal reasonably decided that a purposive interpretation of the provision did not support dismissal of an application if it would lead to unfairness.

The goals of professional disciplinary proceedings and human rights proceedings were different. Human rights tribunals had as their goal the provision of access to remedies, whether systemic or personal, designed to prevent discriminatory behaviour and to compensate the victims of such behaviour. That goal had not been the focus of the prior proceedings and it could not be said that the substance of the applications had been appropriately resolved in those proceedings.

May 28: The Ontario Labour Relations Board held that an employee's repeated sleeping on the job was not "wilful misconduct" in *Zhang v Crystal Claire Cosmetics Inc.*, 2015 CanLII 32245. The Board acknowledged that the employer could not have been expected to continue to employ the employee in the circumstances it had proved in evidence. However, it had not shown that the employee intended to sleep on the job or had acted consciously and deliberately in falling asleep on the occasions that he had done so. In addition, the employer had not clearly expressing its intention to terminate his employment if he breached the code of employee conduct again. As a result, it could not prove that it had not condoned his misconduct. The employee was entitled to statutory termination pay under Ontario's employment standards legislation.

June 2015

June 1: Amendments to s. 1 of the *Alberta Bill of Rights* made on March 10, 2015 came into force. The amendments expressly protect "gender identity" and "gender expression". No similar changes have yet been made to the Alberta *Human Rights Act*.

June 1: In *Price v Canada (Attorney General)*, 2015 FC 696, a Federal Court justice held that an employee of a federal agency had been denied procedural fairness when he was denied access to a document explaining a performance rating that had detrimentally affected his performance bonus and which was before the adjudicator at a grievance hearing related to that rating. The court held that it was improper for the decision-maker to have decided his grievance on the basis of documents and materials that were not disclosed to the employee. The employee was pursuing a legitimate process, i.e. a grievance concerning a performance rating that had carried significant financial implications for him. It was not to be casually dismissed as a mere "administrative decision". The employee was entitled to a new hearing, together with costs of the application for judicial review.

June 3: An Alberta court upheld the summary dismissal of a 60-year-old senior manager with 32 years of discipline-free service in *Molloy v EPCOR Utilities Inc*, 2015 ABQB 356. The employee was found to have violated the employer's ethics and respectful workplace policies through failing to disclose a conflict of interest arising from a third party supplier's hiring of her husband; improperly taking employer stationery and supplies for personal use; submitting an improper expense claim for a dinner with her husband; directing subordinates to destroy an email that could have impaired the employer's relationship with its business partner; and creating a poisoned work environment by harassing, intimidating and isolating employees of the employer and its business partner.

The court held that the employee's disrespectful conduct had been condoned by the employer in the past and would have been insufficient to justify summary dismissal. Most of the other misconduct alleged would not have justified dismissal when taken in isolation. However, taken together, and combined with the employee's denials and rationalizations

of her behavior during the investigation, misrepresentations made in her EI application and lack of credibility in relation to aspects of her testimony at trial, the employer had succeeded in showing that it had just cause for the dismissal. The evidence revealed character traits that justifiably caused the employer's loss of trust in the employee.

June 3: In *United Steelworkers Local 7175 v Veyance Technologies Canada Inc*, 2015 CanLII 30713, an Ontario arbitrator held that an employer ban on smoking on its property was a legitimate exercise of management rights but its attempt to prevent employees from leaving its property for smoke breaks was not. The fact that the employer paid its employees during their ½ hour lunch breaks did not allow it to dictate how they spent their time. Any failure to return promptly to work would be subject to the ordinary disciplinary process.

The same arbitrator upheld the right of the employer to introduce a "cumbersome and bureaucratic" 2-page medical form to be submitted to an employee's doctor to support an absence of more than three days. The arbitrator held that the employer had a right to the information sought and, given the costs of STD claims of up to $30,000/month, it was reasonable for it to seek additional information that could encourage employees' earlier return to work. There were no repercussions to the employee where the physician refused to fill out all or part of the form.

June 15: The Quebec Court of Appeal superimposed a duty of accommodation to the point of undue hardship on the statutory obligations owed by employers to workers returning to work following a compensable injury in *Commission de la santé et de la sécurité au travail c Caron*, 2015 QCCA 1048. Provisions purporting to limit the rights of a functionally disabled worker to return to the workplace and extinguishing those rights after an absence of specified duration were not decisive but were to be interpreted in light to the duty to accommodate.

June 16: In *Lederhouse v Vermilion Energy Inc*, 2015 ABQB 387, an Alberta court held that a downturn in the economy occuring after a termination was a factor to be considered in determining reasonable notice as the employee could not possibly mitigate her damages to the same extent in such circumstances.

June 16: An employee and her daughter recovered more that $300,000 in a civil action against the employer and a former supervisor following her termination after 1 1/2 years employment. The employee in *Silvera v Olympia Jewellery Corporation*, 2015 ONSC 3760 had been subjected to a protracted course of sexual and racial discrimination and sexual assaults committed by her supervisor. She was in a particularly vulnerable position as a single mother attempting to support a child.

The court found the supervisor liable on a number of bases. The employer was vicariously liable for the supervisor's actions as he was the "operating mind' of the company. The employer was equally liable even if the supervisor was simply an employee empowered by the employer in a way that materially increased the risks of the sexual assault by providing special opportunities for wrongdoing.

The award reflected general damages of $90,000 for battery, breach of fiduciary duty and breach of occupiers' liability together with punitive damages in the amount of $10,000; human rights damages of $30,000; damages for loss of earning capacity in the amount of $33,900; future therapy costs of $42,000; wrongful dismissal damages equal to three months' notice; damages for loss of income in the amount of $57,800 related to her inability to work for some two years after the dismissal because of psychological problems arising from the supervisor's conduct and her termination; aggravated damages of $15,000 for the harsh, unfair, and demeaning manner in which she was dismissed and $10,000 in punitive damages for the wrongful dismissal. The daughter was awarded damages of $15,000 for loss of care, guidance and companionship.

June 23: In *Muggah v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2015 NSCA 63, the NS Court of Appeal dismissed a *Charter* challenge brought by a former spouse of a deceased worker alleging that workers' compensation legislation discriminated against her on the basis of marital status by denying her a right to survivor benefits. The Court of Appeal held that the status of being a former spouse did not trigger the constitutional guarantee of equality. A distinction between a current and a former marital relationship was not an 'enumerated or analogous ground' of distinction for the purposes of equality rights under the *Charter*. A former spouse had access to divorce-related machinery operating outside the workers' compensation legislation.

June 23: Federal omnibus Bill C-59, *Economic Action Plan 2015, No. 1* received Royal Assent. The budget implementation legislation amends the *Canada Labour Code* in relation to unpaid interns and compassionate care leave and benefits. It also permits the Treasury Board to unilaterally impose certain terms and conditions of employment for public service employees, including terms relating to sick leave, group insurance and other benefit programs (ss. 253-69). PSAC has filed a constitutional challenge in Ontario and federal public service unions have filed a complaint with the International Labour Organization in relation to these provisions. They allege that the government has contravened ILO Convention No. 87, *Freedom of Association and Protection of the Right to Organise Convention*, 1948, in giving itself the power to unilaterally amend collective agreements without negotiating with affected unions.

June 25: The Supreme Court of Canada granted leave to appeal (2015 CanLII 36779) the BC Court of Appeal decision in *Fraser Health Authority v Workers' Compensation Appeal Tribunal*, 2014 BCCA 499. A majority of the Court of Appeal had found that the WCAT's limited jurisdiction to reconsider a previous decision allowed it to correct clerical errors or errors of true jurisdiction. It did not allow the appeals tribunal to review a previous decision to determine whether it was patently unreasonable.

June 25: The Supreme Court of Canada dismissed an application for leave to appeal (2015 CanLII 36775) the decision of the BC Court of Appeal in *Flanagan v Canada (Attorney General)*, 2014 BCCA 87. The Court of Appeal had affirmed a lower court finding that a member of the RCMP was not party to a common law contract of employment and could not maintain an action for constructive dismissal. The adequacy of the remedies available to the member was potentially a matter for legislative review but was not a basis for a civil action.

June 26: The BC Court of Appeal overturned an award of 18 months' compensation in lieu of notice in *Hall v Quicksilver Resources Canada Inc.*, 2015 BCCA 291.

The trial judge had made the award after a summary trial, on the basis that the employer who had terminated the employee without notice had impliedly agreed to recognize his 24 years of service with his former employer. In fact, the employer had purchased the site of the former employer's business

and intended to operate a different business from that site. It had not purchased the former employer's business as a going concern. The payment received by the employee upon the sale of his former employer's business was properly characterized as a severance payment and not a retention or completion bonus. This payment fully compensated the employee for his years of service with the former employer in addition to relieving him of the duty to mitigate. The release signed upon receipt of that payment was valid and binding on the employee.

The trial judge had also erred in provisionally assessing notice at 7 months, in the event that it was the months of actual service with the new employer that was to be considered. The Court substituted an award of three months' compensation in lieu of notice for termination of the employee after 8 months' service.

June 26: The British Columbia Teachers' Federation filed an application for leave to appeal the decision of the BC Court of Appeal in *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184. A majority of the Court of Appeal had overturned a finding that legislation limiting the content of collective bargaining with BC teachers was unconstitutional. The majority held that teachers had been granted a meaningful opportunity to act collectively to influence the government through the government's consultation with the teachers on matters dealt with in the legislation prior to its enactment. The Supreme Court has not yet determined whether it will hear the appeal.

June 29: An Ontario court held that a wrongfully dismissed employee had no entitlement to a bonus that was payable during the period of reasonable notice in *Paquette v TeraGo Networks Inc.*, 2015 ONSC 4189. Although the bonus was part of the employee's wage structure and he had worked 11 of the 12 months to which the bonus related, the employee was not "actively employed...on the date of the bonus payout" as required in his employment contract. He was thus ineligible for the bonus under the terms of his employment.

The employee was upper middle-management, had been employed for 14 years, was 49 years of age and working in Calgary when dismissed without cause. His prospects for re-employment were detrimentally affected by the downturn in the oil industry. He was found entitled to 17 months' notice with mitigation to be dealt with in accordance with the 'trust and accounting' method described in the April decision of the Ontario Superior Court *Markoulis v SNC Lavalin*, supra, given that the assessment of damages had preceded the expiry of the notice period.

June 29: The Ontario Labour Relations Board issued reasons in *CUPE v. Council of Trustees Associations*, 2015 CanLII 38116 addressing, for the first time, the principles that the Board will apply in determining the scope of local and central bargaining under the *School Boards Collective Bargaining Act, 2014*.

July 2015

July 8: An employer's zero-tolerance policy relating to workplace drug use was upheld, despite the employer's delay in enforcing it, in *French v Selkin Logging*, 2015 BCHRT 101. The complainant was employed as a heavy-equipment operator in a safety-sensitive logging operation. He filed a complaint after hitting a moose while driving and being advised that he could no longer continue to use marijuana at work. He complained of discrimination based on disability, claiming that his marijuana use was medically approved to manage pain related to cancer. However, he was unable to show that he had a Health Canada authorization to possess medical marijuana or that his physicians had prescribed or recommended its use. The employer was successful in proving that its policy requiring employees to work drug-free was a bona fide occupational requirement, despite its failure to enforce that policy at the earliest opportunity. The tribunal noted that result would likely have been different had the complainant been actually authorized to use marijuana and had he informed his employer of that fact. However, in the circumstances that existed, the complainant was in fundamental breach of his own obligations in the accommodation process. He was in the best position to propose an accommodation but had failed to do so.

July 9: In *Premier Tech Ltd. v Dollo*, 2015 QCCA 1159, the Quebec Court of Appeal held that a term of a stock option plan that compelled an employee to forfeit unexercised stock options upon termination of his or her employment was not inherently abusive since it provided for discretionary relief against the forfeiture. However, the Court held that oppression contrary to s. 241 of the *Canada Business Corporations Act* had occurred on the facts. The employer had made representations to the employee that led him to believe that it would exercise its discretion not to apply the term. This had led the employee to make decisions in relation to his holdings that were contrary to his interests when the employer refused to exercise its discretion in his favour after his termination.

July 16: An Ontario court awarded 8 months' pay in lieu of notice to an individual who had provided services for less than a year in *Tetra Consulting v Continental Bank*, 2015 ONSC 4610. The individual's company was hired as a consultant to assist the bank in obtaining regulatory approval. He was promised employment with the bank when that approval was obtained. Pending approval, he provided his services exclusively to the bank. He was appointed Chief Compliance Officer and Chief Anti Money Laundering Officer and acted as a senior management employee, working from the bank's premises. Shortly after approval was obtained, the bank informed the individual that its plans to proceed with the venture had changed and it would no longer be hiring him.

In his subsequent wrongful dismissal claim, the court found that the individual had become the bank's employee in accordance with its promise when the approval came through. Documentation of that status through a formal employment contract was not necessary. The bank's subsequent refusal to go through with its promise was a wrongful dismissal.

The court also held that, during the period in which approval was being sought, the individual had been at least a dependent contractor and thus was entitled to the same type of reasonable notice as if he had been an employee. The court considered the individual's age (61), the senior nature of the the position, the specialized skills he had brought to the relationship and his correspondingly high salary ($210,000/annum) in awarding damages for the bank's failure to provide reasonable notice of termination.

July 20: In *Alliance de la fonction publique du Canada – Unité des employés administratifs, professionnels et du soutien et Aéroports de Montréal*, 2015 QCTA 679, a Quebec arbitrator held that maternity and its correlatives (pregnancy, birth and nursing) were not comparable to paternity. Advantages or benefits received by employees on paternity leave of absence did not need to be identical to those available to employees on maternity leave. The arbitrator held that fathers on paternity leave did not suffer discrimination when they did not receive the wage replacement benefits received by mothers on maternity leave.

July 23: The Supreme Court of Canada issued reasons in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39. Although the decision did not involve an employment relationship, it did address general human rights issues and questions that could easily arise in an employment context.

The case arose out of a human rights complaint filed against a Quebec company for refusing pilot training to a Canadian pilot of Pakistani descent. The complainant alleged that the company had discriminated against him when it relied on the refusal of the American Department of Justice to issue him a security clearance. The Department of Justice had provided no reasons for its refusal. A human rights tribunal held that the complainant had suffered discrimination, based on evidence that there was a social context of discrimination against the group to which the complainant belonged.

The Supreme Court found the tribunal's decision to be unreasonable. The court pointed out that the concept of a prima facie case of discrimination did not mean that a complainant had a lower burden of proof in relation to the elements of discrimination. The complainant was required to prove each of the three elements of a prima facie case on a balance of probabilities. As the complainant had not shown any connection between his ethnic origin and decision to deny the security clearance, he had not met that burden. Proof of a climate of social profiling for national security purposes was insufficient.

July 23: A New Brunswick court held that an employer did not have cause to dismiss an employee for private communications with a reporter and a co-worker in *MacKinnon v Helpline Inc.*, 2015 NBQB 159. The private communications with the reporter did not reveal the employer's confidential information and no story was being done on a member of the employer's Board as the employer suspected. The communications with the co-worker, in which the employee described the Board as a "sneaky bunch" and threatened to go to the papers with allegations against a Board member, were offensive and inappropriate. However, they were made while the employee was off-duty and through her personal social media accounts. They were not circulated so as to cause any harm or embarrassment to the employer.

The employer's investigation of the allegations against the employee was also flawed; the employee was given no chance to address the allegations against her. As well, the Board member whose conduct was the subject of the employee's communications had participated in the investigation and in the decision to dismiss the employee. The employer had failed to prove that summary dismissal was objectively proportionate, although the employee's misconduct did show very poor judgment and would have warranted disciplinary action short of dismissal.

July 23: An Ontario court refused to relieve an employer of the burden of a settlement agreement relating to a terminated employee's benefits after the employer learned that the employee had been working for a direct competitor in breach of a non-competition clause.

The court in *Wilson v Northwest Value Partners Inc.*, 2015 ONSC 4726 held that the circumstances clearly showed that the parties to a court-ordered mediation had concluded an enforceable settlement. The enforceability of that settlement was not affected by matters unrelated to its terms. The employer had no contractual right to require the former employee to notify it of his post-employment activities and the employee had not misled the employer by failing to do so. Nor was the settlement vitiated by a material mistake of fact on the part of the employer. Neither the employee's entitlement to a bonus nor the settlement itself was conditional upon the employee's compliance with the non-competition clause in his employment contract. As such, the employer's mistake did not relate to a material term of the settlement agreement. Finally, no real risk of injustice would result by the enforcement of the settlement agreement as it did not prevent the employer from pursuing an action against the employee for breach of his non-competition obligations under the employment contract.

August 2015

August 1: Provincial Privacy Commissioners from B.C. and Alberta and the Office of the Privacy Commissioner of Canada issued joint guidelines addressing the pitfalls of 'bring your own device' policies in the workplace. "*Is a Bring Your Own Device (BYOD) Program the Right Choice for Your Organization? Privacy and Security Risks of a BYOD Program*" is intended to assist organizations considering whether and how to implement BYOD.

August 7: A 56-year-old employee who was terminated by her employer after more than 15 years of employment successfully applied for default judgment in *Strudwick v Applied Consumer & Clinical Evaluations Inc.*, 2015 ONSC 3408. She was awarded 24 months' notice, $20,000 in human rights damages and $10,000 in punitive damages.

The employee had become deaf well into her employment, likely as a result of a virus. She sought various accommodations from her employer to allow her to continue in her job and offered to pay personally for several of them. Each of the requested accommodations was refused. Instead, the employer engaged in a deliberate campaign to bring about her resignation. She was belittled, humiliated and isolated. She was forced to reschedule medical appointments on short notice. Suggestions were made to her that she quit. She was ultimately dismissed when she declined to speak at a meeting of the workplace Toastmasters club. The following day, she was called a "goddamned fool" in front of several co-workers and then terminated for insubordination. The employer offered her three months' pay in lieu of notice but withheld the payment when she refused to sign a release. She was ordered off the premises and required to pack up her belongings, again in front of co-workers.

The court awarded 24 months' notice to the employee given the totality of the circumstances. This included the employer's "horrendous" treatment of the employee, the manner in which the dismissal had taken place, the employer's completion of the ROE in a way that made it more difficult for her to obtain employment insurance benefits and the employer's failure to file a response to the employee's claim for 21 months. But for these factors, the court would have awarded 20 months' notice.

Human rights damages for injury to the employee's dignity, feelings and self-respect were awarded in the amount of $20,000, taking into account the employer's refusal to consider the employee's repeated, reasonable and varied requests for accommodation.

Although the court denied the employee's claim for aggravated damages as they would have resulted in double recovery, it did award punitive damages to condemn the discrimination and the harsh and demeaning treatment of the employee.

August 11: The Ontario Labour Relations Board held that an employee who was permanently based in Ontario had the right to invoke provisions of the *Ontario Occupational Health and Safety Act* when he was temporarily assigned to a BC workplace. The provisions at issue required his employer to ensure that every precaution reasonable in the circumstances had been taken to protect him. He also had the right to claim that his termination after raising health and safety violations at the BC workplace constituted an improper reprisal under the Ontario *Act*: *Escudero v Diversified Transportation Ltd./Pacific Western Group of Companies*, 2015 CanLII 50878.

August 11: An Ontario human rights tribunal upheld a complaint of discrimination on the basis of creed brought by two teenage siblings in *H.T. v ES Holdings Inc. o/a Country Herbs*, 2015 HRTO 1067. The applicants were Christian Mennonite siblings who had given their employer two weeks' notice of their inability to work on an upcoming religious holiday in their faith. The holiday fell on a Thursday which was one of the two busiest days at the workplace and a day on which the employer's policy prohibited voluntary absences. A number of other employees who were also Christian Mennonites were also denied time off and had either worked on the holiday or started at midnight. The applicants were both terminated when they did not work on the holiday and did not make up the hours missed by commencing work at midnight.

The employer was found to have breached both its procedural and substantive obligations to accommodate. It had not made any effort to ascertain

the facts or consider whether there was any way that it could alter its attendance policy. The only alternative it had offered was not a reasonable one for the applicants, i.e. that they could commence work at midnight. They were 14 and 16 years old and had no way of getting to the rural location where the work was to be performed at that time. Their mother had previously obtained an agreement from the employer that they would not be expected to work past 10 p.m.

No evidence of undue hardship was presented by the employer. It had not shown that it had tried and failed to obtain replacement workers. The termination left the employer short staffed for weeks, suggesting that a single night of short-staffing could have been tolerated. The employer's 'floodgates' claim that it could not afford to be without 11 of its 23 employees was a non-issue; the applicants were the only members of their faith who did not attend at work and only one of them had been scheduled to work. The tribunal awarded $10,000 to that applicant for discrimination and reprisal; the other applicant was awarded $7500 for discrimination by association with his sister. Both were awarded lost wages as well.

August 12: In *Fredrickson v Newtech Dental Laboratory Inc.*, 2015 BCCA 357, the BC Court of Appeal overturned a trial court's finding that an employee had failed to mitigate her damages when she refused her former employer's offer of 'recall' to her former job.

The employer had issued a notice of layoff for lack of work, an ROE and a reference letter to the employee when she attempted to return to work following a medical leave. The employer claimed that it had not dismissed the employee by its actions and maintained that position until closing arguments at trial. When it finally admitted the dismissal, it argued that the employee had suffered only minor damages because she had rejected its offer of re-employment. The trial court found that the employee had failed to mitigate the damages that she incurred after the offer was extended.

The appellate court disagreed. It held that it was only in an infrequent case that a dismissed employee was required to accept re-employment in fulfilling a duty to mitigate. The trial judge had erred in finding that a reasonable person in the employee's position would have accepted the offer in this case.

The full nature of the employment relationship was to be considered in assessing reasonableness. This included the obligations of mutual trust that flowed "like a current in the employment relationship". Obligations of good faith or fidelity were owed by both employer and employee. Here, the trust had been eroded by the employer's actions in recording private conversations between the employee and the employer on two occasions, his subsequent use of those recordings and his breach of confidentiality in discussing the employee's circumstances with one of her co-workers. This erosion of trust justified the employee's refusal to return to the small office where she had been employed for 8.5 years. In the circumstances, there was no chance of repairing the employment relationship.

Furthermore, the employer's initial offers of re-employment were not 'make-whole' offers as they did not fully encompass the employee's lost income. The inherent incompatibility of the parties' positions (the employee's that she had been wrongfully dismissed and the employer's that she had been properly laid off for lack of work and later recalled) made it unreasonable for the employee to return.

The case was remitted to the trial judge to determine reasonable notice.

August 14: An Ontario court held that two companies were common employers and that a dismissed employee's length of service was determined based on his total time with both companies in *Dear v Glamour Designs Ltd.*, 2015 ONSC 5094. The employee's title, responsibilities and remuneration had remained unchanged when the first company ceased operations and the second company took over as his employer and the two companies were branches of the same family business.

August 19: The Ontario Court of Appeal reached the same result as the trial court in *Remedy Drug Store Co. Inc. v Farnham*, 2015 ONCA 576 despite finding that the lower court had applied the wrong test in

determining whether an employer had repudiated a settlement agreement with a terminated employee.

The employer sued for breach of confidentiality, breach of fiduciary duties and breach of contract when it became clear that a former employee had taken company emails and documents with her when she left the company. The parties reached a settlement of the action and the employee's counterclaim for wrongful dismissal. The settlement included a provision for an independent IT consultant to clear the employee's personal devices of any remaining information belonging to the employer. However, the employer insisted that the agreement allowed it to conduct a full forensic sweep of the employee's equipment. It applied to enforce the settlement when the employee resisted such a sweep. The employee's contention that the employer's action constituted an anticipatory repudiation of the settlement agreement was rejected by the trial court. It held that the employer was not entitled to conduct a forensic sweep but that its interpretation of the parties' agreement was not so patently unreasonable as to amount to a repudiation. The employee appealed.

The Court of Appeal also rejected the employee's contention that a repudiation had occurred. However, it held that the lower court had erred in addressing that question; the employer's conduct was not to be assessed by reference to its reasonableness. The employer's words and conduct were to be assessed objectively and in the light of the surrounding circumstances to determine whether its conduct showed an intention to no longer be bound by the settlement agreement.

While the employer taken a hard line in insisting on a forensic sweep to which it was not entitled, that term of the agreement was not an essential one going to the root of the settlement agreement. A threatened breach of that aspect of the agreement did not deprive the employee of the primary benefit of her bargain, i.e. a full and final release from all claims arising out of her misuse of the employer's confidential information. As the employer's conduct did not show an intention not to be bound, it had not committed an anticipatory repudiation of the settlement agreement.

August 19: In *Langford v Carson Air Ltd.*, 2015 BCSC 1458, a BC court held that an employee was not entitled to reasonable notice of her termination during the 6-month probationary period "to assess suitability and performance to ensure we are (you and us) comfortable with your progression in our operations". An employer's conclusion that the employee was unsuitable for the job, when reasonable, properly motivated and reached only after the employee had been given a fair opportunity to demonstrate his or her suitability, did not support an action for wrongful dismissal. On the facts, the employer's decision that the employee did not fit into its operations and did not take responsibility for her errors in judgment was a reasonable business decision.

August 25: An Ontario court agreed that an employee alleging wrongful dismissal had actually abandoned his employment in *Betts v IBM Canada Ltd.*, 2015 ONSC 5298. The employer relied on the employee's failure to report to work for over 8 months; failure to follow policies and procedures for seeking short term disability benefits; failure to heed the various warnings in five letters outlining the employee's options in the face of his non-compliance; and failure to seek consent before relocating from New Brunswick to Ontario, coupled with his lack of intention to return to New Brunswick and resume his employment.

The employee's medical issues did not immunize him from being found to have abandoned his employment. There was no medical evidence that his condition precluded him from complying with the requirements of the short term disability plan. Despite suffering from depression and anxiety disorders, the employee was well aware of what was required of him. Communications from the employer were clear, helpful and straightforward.

The court rejected the employee's contention that the employer had a duty to accommodate his disability outside the context of the STD plan. There was no obligation on the employer to grant the employee a leave of absence due to health reasons and to independently assess his claims by retaining its own physician. The employee's failure to provide an adequate physician's note did not give rise to an onus on the employer to confirm or negate the employee's position.

September 2015

September 8: The Alberta Court of Appeal considered the provisions of the Alberta *Employment Standards Code* preserving greater benefits than the minimums provided for in the legislation in *Canadian Union of Public Employees, Local 38 v Calgary (City)*, 2015 ABCA 280. It confirmed that the provision of greater vacation benefits in a collective agreement did not extinguish the minimum employment standards related to vacation in the *Code*. An arbitration decision that had upheld an application of the employer's vacation policy that breached the *Code* vacation obligations was unreasonable. However, the policy could be applied to employees in a manner that was reasonable, neither arbitrary nor discriminatory and compliant with the collective agreement and the *Code*. The policy was valid as long as its application to an individual employee conformed with the applicable Code provisions.

September 8: The Quebec labour relations commission ordered the Quebec government, as employer of the employees represented by the complainant union, to stop prohibiting the employees from adding a union-related message to their email signatures. In *Association professionnelle des ingénieurs du gouvernement du Québec c Québec*, 2015 QCCRT 460, the employer and the union were engaged in negotiations for a renewal collective agreement. Some employees included in their email signatures an 'important message' advocating for the payment of competitive wage. The employer responded by prohibiting the messages, pointing to the employees' duty of fidelity and their obligation to avoid damaging their employer's reputation as the basis for its directive. Employees who disobeyed the directive were issued written warnings. The union filed a complaint. The commission agreed with the union that the employer's action interfered with the employees' freedoms of expression and association. The employer's entitlement to control the use of its own equipment was not absolute and could not prevail over the employees' freedom of expression in the circumstances.

September 8: An Ontario grievance arbitrator held that an employer's unilateral 'vaccinate or mask' policy was unreasonable and in breach of the collective agreement in *Sault Area Hospital v Ontario Nurses' Association*, 2015 CanLII 55643. The policy was implemented despite concerns raised by senior medical staff and despite the fact that there was little reliable evidence showing that unvaccinated health care workers transmitted influenza or that masking would stop such transmission. What scant evidence there was, was insufficient to explain why vaccinated workers should not also wear masks, given the limited efficacy of the vaccine even in relatively 'good' years. It was also insufficient to justify the policy's negative effects.

Wearing a mask for an entire working shift was very unpleasant. To require health care workers to endure that unpleasantness for up to six months at a time was unacceptable, given that the only justifiable basis of the policy was to increase vaccination rates. The policy cast masks as the "consequence" of failing to vaccinate, rather than as useful instruments for patients. This was tantamount to imposing an impermissible penalty on a nurse choosing to exercise his or her negotiated right to refuse any required vaccination. The policy was inconsistent with the collective agreement and the detailed influenza outbreak protocol.

September 11: An Ontario court awarded an employee $100,000 in punitive damages in a wrongful dismissal action after finding that the employer had manufactured cause to avoid paying the employee's negotiated severance entitlements.

In *Gordon v Altus Group Limited*, 2015 ONSC 5663, the employee was hired by the purchaser of the assets of the employee's company under a written employment contract for a 3-year term. The contract provided that it could be terminated without cause on payment of the specified severance. The asset purchase agreement contemplated that adjustments could be made to the purchase price depending on the performance of the business after the sale. It also contained an arbitration clause in the event of a dispute as to the adjustments to be made. When the time for adjustment neared and the parties were not in agreement, the employee invoked the arbitration clause. Both he and his wife were terminated shortly thereafter. The employee sued for wrongful dismissal and the employer raised a number of allegations of cause. It also counterclaimed for $1,000,000

compensatory damages and $100,000 in punitive damages for breach of fiduciary duty, breach of a duty of fidelity and conflict of interest.

The trial judge found that the employer's allegations of cause were either non-existent or significantly exaggerated. The performance deficiencies that the employer relied on would have been appropriately addressed through progressive discipline; they did not constitute grounds for summary dismissal. The employer was awarded his contractual severance payments and punitive damages to demonstrate the court's disapproval of the employer's "outrageous behaviour". The independent actionable wrong justifying the punitive damages award arose from the employer's failure to honestly perform the contract.

September 28: A Quebec adjudicator addressed the nature of an "unjust dismissal" under s. 240 of the *Canada Labour Code* in *Bernier c Traversiers Bourbonnais inc.*, 2015 QCTA 798. In this case, a passenger complained that he was verbally abused by a ferry worker who had also dropped the passenger's change on the ferry deck and blocked his exit until all other passengers had left the ferry. The responsible employee filed an unjust dismissal complaint when he was terminated unceremoniously. He claimed that the employer's failure to follow progressive discipline principles and to get his version of the incident made the termination unjust. The adjudicator disagreed. He held that the employer had demonstrated objective, real and serious grounds related to customer service. The employee's dismissal was not unjust in the circumstances.

October 2015

October 5: In *Styles v Alberta Investment Management Corporation*, 2015 ABQB 621, an Alberta court applied the new common law duty of honesty in contractual performance, recognized in *Bhasin v Hrynew*, 2014 SCC 71, to determine an terminated employee's entitlement to Long Term Incentive Plan benefits. The court found that the employee was entitled to the benefits despite an 'entire agreement' provision, a provision giving the employer the right to terminate the plan at its discretion, and a provision limiting eligibility to employees actively employed at the time of vesting. The court concluded that the employer's right to terminate the employee without cause was subject to a duty to exercise its discretionary contractual powers reasonably. It had not done so when it exercised its discretion to deny earned, awarded, and approved grants.

October 6: Occupational health and safety charges against a resort operator were dismissed after the Ministry of Labour failed to prove its case on either charge in *R. v. Ash Rapids Camps Inc.*, 2015 ONCJ 648. After a boating accident killed two guests

of resort, the employer of the boat driver was charged with failing to ensure that the equipment and protective devices it provided at a workplace were maintained in good condition and used as prescribed. On the first charge, there was no evidence to support a conviction. The investigator had not determined that maintenance was poor and there was no proof that the steering problem was caused by inadequate maintenance. On the second charge, the use of a tether shut-off strap to cut power when the driver moved a certain distance from the motor was not "prescribed".

A "prescribed" use was one prescribed by regulation, not in the user manual or instructions issued by the manufacturer. The regulations did not prescribe use of a tether strap.

October 15: In *Oudin v. Le Centre Francophone de Toronto*, 2015 ONSC 6494, an Ontario court rejected the notion that contractual termination provisions were invalid if there was any potential interpretation of the provisions that might, in hypothetical circumstances, lead to a violation of the *Employment Standards Act* however absurd or implausible the interpretation might be. Although a provision of an employment agreement that purported to authorize termination without notice in the event of permanent disability was clearly contrary to the ESA, it was severable according to the terms of the agreement itself. The entire provision was not void because one of its parts would have contravened the ESA if that provision had been invoked.

Similarly, where the only reasonable interpretation of the contract language on notice was that the greater of 2 notice periods was to apply, the court was not required to strive for the least plausible interpretation to find a breach of employment standards legislation that would vitiate the contract. There was nothing unconscionable or contrary to public policy in permitting the parties to an employment agreement to contract out of the common law "reasonable notice" standard and to incorporate ESA standards by reference. Here, the parties had done so effectively.

November 2015

November 10: An employee who commenced work under an offer of employment that expressly contemplated execution of a written employment contract was not bound by a notice provision in the contract signed 9 months later. In *Holland v. Hostopia.com Inc.*, 2015 ONCA 762, the Ontario Court of Appeal overturned a ruling limiting the employee to notice in accordance with the *Employment Standards Act* on the basis that the offer and the employment contract together constituted a single closely-related and consistent contract of employment. The Court noted that the documents were not consistent; the offer letter effectively contained an implied term granting the employee reasonable notice of termination. The substitution of notice limited to the statutory minimum under the *Employment Standards Act* rendered the two documents inconsistent on the matter of entitlement to notice. This was a very material new term and was not enforceable without fresh consideration. The trial judge also erred in considering the speed with which the employee found new employment in making a provisional assessment of reasonable notice. Notice was to be determined by the circumstances at the time of termination; the amount of time taken to find new employment was an issue of mitigation. It did uphold the assessment of notice at 8 months after 7 years' employment, despite finding that it was at the very low end of the range.

November 23: The Ontario Court of Appeal held, in *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801, that the trial judge had erred in reducing the notice period awarded for wrongful dismissal from 12 months (the amount to which the employees were entitled based on applicable principles for determining reasonable notice) to 6 months, based on the shaky financial circumstances of the employer. Even assuming that the employer was suffering financial difficulties when it dismissed the employees, a reduction of the period of notice to which the employees were entitled was neither required by the case law nor consistent with the nature and purpose of an employee's right to notice.

November 27: The Ontario Labour Relations Board overturned an employment standards officer's denial of termination pay to a former employee in *Harriott v. 1145365 Ontario Ltd.*, 2015 CanLII 79586. The Board held that the employee had not been guilty of "wilful misconduct, disobedience or wilful neglect of duty" justifying his termination when he jokingly told a co-worker "I guess I'd have to kill you" during a confrontation between the two. He had been provoked by the co-worker who had refused to return a tool and sworn at him and the co-worker could not reasonably have interpreted the comment as a viable threat. Although it was important to consider the employer's occupational health and safety obligations and the need to prevent workplace violence, the employee's conduct was spur-of-the-moment. It was not part of a pattern of threatening or violent behaviour and did not justify his employment termination without notice of termination or pay in lieu.

December 2015

December 2: Following the enactment of the *Ontario Retirement Pension Plan Act, 2015*, in May of this year, the Ontario government released details of the plan in August and again in December. The ORPP is to be run by Ontario Retirement Pension Plan Administration Corporation and is expected to be phased in over a 3-year period starting in 2017.

December 3: Ontario Bill 113, the *Police Record Checks Reform Act, 2015* was given Royal Assent. The *Act*, which has not yet been proclaimed in force, governs checks required for screening for employment and volunteer work. It places limits on the type of information that may be disclosed in relation to 3 available types of checks (criminal record; criminal record and judicial matters; and vulnerable sector checks). It also defines the procedure for making requests and releasing information.

December 3: Damages of 12 months' pay in lieu of notice of dismissal and $20,000 for discrimination on the basis of family status were upheld in *Partridge v. Botony Dental Corporation*, 2015 ONCA 836. The employer had refused to reinstate an employee to her position of office manager following her return from maternity leave. Instead, it had offered the employee a position as a dental hygienist with hours that it knew conflicted with the employee's childcare arrangements. The employee was fired, allegedly for cause, when she protested.

The trial judge had found that none of the employer's allegations of cause were established and that the employee had been wrongfully dismissed. The appellate court found no basis to interfere with these findings.

The trial judge had also found that the employee had been subjected to family status discrimination based on the 4-part test articulated by the Federal Court of Appeal in *Johnstone v. Canada (Border Services)*, 2014 FCA 110. The discrimination resulted from the employer's wilful and reckless disregard for its legal obligations as an employer. The Court of Appeal did not address the appropriate legal analysis to be applied in determining family status discrimination, holding that the specific, fact-driven analysis of the trial judge could not be faulted under either analytical approach. Although the $20,000 damages for breach of the *Human Rights Code* was on the high end of the scale, it was not so high as to justify the court's intervention.

December 9: The Ontario government referred Bill 132, the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2015* to the Standing Committee on Social Policy after giving it second reading on December 2. The Bill addresses sexual violence, sexual harassment, domestic violence and related matters. It amends Ontario occupational health and safety legislation to define workplace sexual harassment, to add it to the definition of workplace harassment, and to place new obligations on employers. Employers will have 6 months to implement the new requirements once the Bill is passed.

December 10: The Ontario government passed Bill 109, the *Employment and Labour Statute Law Amendment Act, 2015*. The legislation amends

the *Workplace Safety and Insurance Act*, the *Fire Prevention and Protection Act* governing employment and labour relations for firefighters, and the *Public Sector Labour Relations Transition Act*. The amendments are said to strengthen protection for workers in a variety of respects.

December 10: An Ontario court rejected an employee's claim to an annual Short-Term Incentive Plan payment in *Lalani v Canadian Standards Association*, 2015 ONSC 7634. The court held that, while the employee was notionally an employee during his 24- month reasonable notice period, he was no longer an "active employee" within the meaning of terms entitling employees to the STIP payment. The employee had been provided with a pro-rated STIP payment up to the end of the statutory 34-week notice period. The provisions of the STIP plan excluding entitlement thereafter were clear, unambiguous, and enforceable.

December 11: Alberta Bill 6: *Enhanced Protection for Farm and Ranch Workers Act* was given Royal Assent, following amendments to exclude from its scope family members and unpaid workers and to refine the scope of exclusions for 'farming and ranching operations'. The legislation amends the *Employment Standards Code*, the *Labour Relations Code*, the *Occupational Health and Safety Act* and the *Workers' Compensation Act* to remove provisions that had excluded farm and ranch workers from the protection provided to other Alberta workers under this legislation. Regulations that will clarify the application of the legislation have not yet been drafted.

Upcoming in the new year

January 2016

January 1: Changes in employer obligations under the *Accessibility for Ontarians with Disabilities Act* come into effect pursuant to the Integrated Accessibility Standards.

January 19: The Supreme Court of Canada is scheduled to hear argument in *Wilson v. Atomic Energy of Canada Limited*, involving the right of federally-regulated employers to dismiss without cause. See Cases We're Following.

NORTON ROSE FULBRIGHT

Contacts

If you would like further information please contact:

Montréal
Marie-Hélène Jetté
Partner
Norton Rose Fulbright Canada
+1 514.847.4650
marie-helene.jette@nortonrosefulbright.com

Ottawa
Karen Jensen
Partner
Norton Rose Fulbright Canada
+1 613.780.8673
karen.jensen@nortonrosefulbright.com

Québec City
Gilles Rancourt
Partner
Norton Rose Fulbright Canada
+1 418.640.5036
gilles.rancourt@nortonrosefulbright.com

Toronto
John Mastoras
Senior Partner
Norton Rose Fulbright Canada
+1 416.216.3905
john.mastoras@nortonrosefulbright.com

Calgary
Bill Armstrong
Senior Partner
Norton Rose Fulbright Canada
+1 403.267.8255
bill.armstrong@nortonrosefulbright.com

Norton Rose Fulbright

Norton Rose Fulbright is a global legal practice. We provide the world's pre-eminent corporations and financial institutions with a full business law service. We have more than 3800 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

Norton Rose Fulbright US LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright Canada LLP and Norton Rose Fulbright South Africa Inc are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.