Cox & Palmer's Regional Employment & Labour Group Webinar

Top Employment & Labour Law Developments in 2024

February 13, 2025

Our presentation will begin shortly.

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Housekeeping Items

- For optimal viewing we highly recommend disconnecting from your VPN to ensure strong connectivity throughout the presentation.

- If you have any questions during the webinar, you can submit them through the Q&A button at the bottom, and our panel will respond to as many questions as possible at the end of the session.

- Following the webinar, all registrants will receive a link to the presentation slides.

Top Employment & Labour Law Developments in 2024

February 13, 2025

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Agenda

- Welcome & Introduction: Jamie Eddy, KC
- Michelle Willette, KC
  - Obligation to investigate harassment complaints
  - Procedural fairness in workplace investigations
- Maggie Hughes
  - The employer's duty of good faith and aggravated damages
  - Rebutting the common law presumption of reasonable notice with termination clauses
- Dawson Harrison
  - Criminal negligence exposure for supervisors
  - Termination for OHSA breach
- Geoff Breen
  - Another blow to termination clauses
  - Demanding a release for contract termination rights repudiates the contract
- Q&A
- Closing remarks

Michelle Willette, KC

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Case Law Review

Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900

- Obligation to Investigate Harassment Complaints

Marentette v. Canada (Attorney General), 2024 FC 676

- Procedural Fairness in Workplace Investigations

Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900

- While investigating unrelated matter, employer found WhatsApp messages among 5 GO Transit bus drivers containing negative, derogatory and sexist comments about a female co-worker.
- Female co-worker was made aware of messages but did not proceed with filing a formal complaint.
- Employer proceeded with investigation of subject messages, eventually terminating the 5 bus drivers for workplace harassment.
- Bus drivers grieved the termination and arbitrator upheld the grievance and reinstated the 5 employees to the workplace.

Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900

Arbitrator found:

- Texts were shameful and reflected poorly on drivers' character
- Occurred outside the workplace on own time and on own cell phones
- Drivers had a reasonable expectation of privacy using their WhatsApp chat
- Because inaccessible to public generally – could not constitute sexual harassment
- Employer could not act as "complainant" and investigator
- ...no evidence before the Investigator establishing a negative impact of the vexatious words 'being manifested in the workplace'

- Was critical of Employer for conducting an investigation in the absence of a complaint.
- Ordered the grievors be reinstated without loss of seniority and be compensated for all monetary losses.

Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900

Finding on Judicial Review:

- Employer's application for judicial review granted and matter remitted back to different arbitrator for reconsideration.

- The Court held that the Arbitrator's decision was **unreasonable** (and thus could not stand) on 2 bases:
  - The victim's hesitance to file a formal complaint did not preclude the employer from investigating an occurrence of workplace harassment; and
  - The employer was in fact **statutorily required** to conduct an investigation upon becoming aware of an incident of workplace harassment.

Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900

- *Occupational Health and Safety Act,* section 32:

> **Duties re harassment**
>
> 32.0.7 (1) To protect a worker from workplace harassment, an employer shall ensure that,
>
> (a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances; […]

- Requires employers to investigate incidents and complaints.

Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900

46 In the present case, the Arbitrator's reasons, read as a whole, fail to recognize that while some victims of workplace harassment are reluctant to report harassment or participate in the resulting investigation, their employer remains obligated to investigate such behaviour and to protect the workplace from a hostile or demeaning work environment.

47 The Arbitrator's conclusion that "When Ms. A declined to file a complaint of sexual harassment ... and no other active employee would, that also should have been the end of the matter", is wrong in law, and indicative of his approach to the issue before him. It is not an isolated misstep, but permeates his reasoning throughout.

60 A victim's reluctance to report or complain... cannot relieve an employer of its statutory duty to conduct an investigation if an incident of sexual harassment comes to its attention.

OHS Requirements in Atlantic Canada

Jurisdiction	Enabling Legislation	Requirement
Newfoundland and Labrador	*Occupational Health and Safety Regulations, 2012*, s. 24.1(4) under the OHS Act	Employers shall investigate **complaints** of workplace harassment
Nova Scotia	*Violence in the Workplace Regulations*, s. 13(1) under the OHS Act	Employers "must ensure that **incidents** of violence in a workplace are documented and promptly investigated…"
New Brunswick	*General Regulation*, s. 374.4(2)(d) under the OHS Act	Code of Practice must set out certain procedures which employer "shall follow to investigate and document **any incident of harassment of which the employer is aware**"
Prince Edward Island	*Workplace Harassment Regulations*, s. 6 under OHS Act	Employers "shall ensure that an investigation appropriate to the circumstances is conducted into a **complaint** of harassment in the workplace."
Federal	*Work Place Harassment and Violence Prevention Regulations*, s. 25(1) Under the Canada Labour Code	Employer shall investigate **occurrences** of workplace harassment where the occurrence is (a) not resolved via "negotiated resolution"; and (b) the complainant requests it

Marentette v. Canada (Attorney General), 2024 FC 676

- 27-year employee of the Canadian Border Services Agency ("**CBSA**") filed a Notice of Occurrence (*complaint*) alleging 7 incidents of workplace harassment/violence.
- Investigation conducted, but:
  - **CBSA did not follow its own "Workplace Harassment and Violence Prevention Checklist"**
    - Complainant not provided opportunity to reply to Respondent's prejudicial statements; and
    - Complainant not provided opportunity to review Investigator's Preliminary Report, as required under checklist, before it was finalized.

Marentette v. Canada (Attorney General), 2024 FC 676

- The Investigation resulted in the Notice of Occurrence being dismissed on basis of the investigator's finding that the content of complaints did not, on their face, meet the definition(s) of workplace harassment and/or violence.

- Complainant applied for judicial review on basis that his right to procedural fairness had been breached.

Marentette v. Canada (Attorney General), 2024 FC 676

Finding on Judicial Review:

- Federal Court granted judicial review and referred matter back for **new investigation** with **different investigator**:
  - Complaints of workplace harassment and/or violence demand a **high degree of procedural fairness.**
  - Employers are specifically required to comply with certain legislative requirements when conducting investigations into workplace harassment and/or violence and are also required to adhere to their workplace policy/procedure where not contrary to statute.
  - Employees have a right to be informed of prejudicial statements and respond to them in the course of workplace investigations.

Implications for Employers

- Employers are required to comply with **legislation and/or policies** which provide for the investigation of workplace harassment and/or violence.
  - Federally regulated employers are bound by the process contained within the *Canada Labour Code* and develop a Harassment Prevention Plan.
    - Federal work, undertaking or business – includes: banking, airlines, interprovincial travel/armoured security, port authorities and first nations.
  - Provincially regulated employers are required by law to enact their own Harassment Prevention Plan/Code of Procedure and review it periodically…

Implications for Employers

- Employers' obligations to strictly comply with legislative and policy contents in respect of workplace harassment and/or violence investigations under *Marentette* also extends to requirements to **review and revise internal Harassment Prevention Plans/Codes of Practice periodically**…
  - Do you have a Harassment Prevention Plan/Code of Practice?
  - When did you last review it?
- Review and any revision must be done in consultation with OHS Committee/Representative.

OHS Requirements in Atlantic Canada

Jurisdiction	Enabling Legislation	Requirement	Effective Date
Newfoundland and Labrador	*Occupational Health and Safety Regulations, 2012* under the OHS Act	Harassment Prevention Plan shall be reviewed and revised as necessary, but **at least annually**	Came into force January 1, 2020
Nova Scotia	*Violence in the Workplace Regulations* under the OHS Act	Workplace Violence Prevention Plan shall be reviewed and revised **at least every 5 years** *****Nova Scotia has passed amendments to its OHS Act which will require employers to establish a policy respective the prevention of harassment in the workplace***	Came into force April 1, 2008 Coming into force September 1, 2025
New Brunswick	*General Regulation* under the OHS Act	Code of Practice for Harassment shall be reviewed and revised as necessary, but **at least annually**	Came into force April 1, 2019
Prince Edward Island	*Workplace Harassment Regulations* under the OHS Act	No requirement to review and revise	Came into force July 1, 2020
Federal	*Work Place Harassment and Violence Prevention Regulations* under the *Canada Labour Code*	Work Place Harassment and Violence Prevention Policy shall be reviewed and, if necessary, updated **at least every 3 years or following changes thereto**	Came into force January 1, 2021

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Case Law Review

Krmpotic v Thunder Bay Electronics Limited, 2024 ONCA 332

- Reasonable Efforts to Mitigate, Aggravated Damages and the Employer's Duty of Good Faith

Egan v Harbor Air Seaplanes, 2024 BCCA 222

- Termination Clauses, Rebutting the Common Law Presumption of Reasonable Notice and Referencing Legislation

Krmpotic v Thunder Bay Electronics Limited,
2024 ONCA 332

The Facts

- Krmpotic worked full-time for Thunder Bay Electronics Limited for nearly 30 years and was terminated without notice or cause at the age of 59.
- At the time of his termination, Krmpotic had just returned from a two-month medical leave following a back surgery.
- He was offered a severance package of 16 months' salary and asked to sign a release. Instead, he commenced an action for wrongful dismissal claiming mental distress and seeking aggravated damages.
- After his termination, Krmpotic found new work with a company owned by his son, but lost the job opportunity as he could not meet the physical demands.

Findings of the Trial Judge

The employee was awarded:

Twenty-four months' salary; and,

- the employee was entitled to reasonable notice.
- the employee did not fail to make reasonable efforts to mitigate as he was terminated while recovering from surgery that limited his ability to perform physical labour during the notice period.

Aggravated damages in the amount of $50,000.00.

- the employer claimed that the termination was for financial reasons however, the Court found that the employee was terminated due to physical limitations preventing him from performing the job. Employer must be candid, reasonable, and honest in the manner of dismissal.

Reasonable Efforts to Mitigate

- The Trial Judge held that the employee did not fail to make reasonable efforts to mitigate during the notice period because, at that time, he was (1) 59 years old, (2) recovering from back surgery, and (3) "*significantly limited in his ability to perform the physical labour which his occupation demands on a daily basis*" as was supported by the employee, his wife and son.

- **expert medical evidence was <u>not</u> required to establish the employee's physical incapacity.**

Aggravated Damages

The fact that the employee did not establish a diagnosable psychological injury through medical evidence did not bar him from a claim of mental distress damages. The Court must determine whether:

(1) the employer's conduct, during the course of termination amounted to a breach of their duty of honest performance; and,

(2) if so, whether the employee suffered harm – beyond the normal distress and hurt feelings arising from dismissal – due to the breach.

Expert medical evidence was <u>not</u> required to establish damages for mental distress.

Court of Appeal Decision

- The employer's appeal was dismissed.

- The employer engaged in conduct that amounted to bad faith during dismissal and the employee dealt with harm going beyond the normal distress because of the dismissal (anxiety, depression, fear, poor sleep, frustration, etc.).

Key Takeaways

- Affirmed that an employer has a duty to act in good faith throughout the process of terminating an employee.

- Expert medical evidence not necessarily required to determine an employee's physical incapacity, mental distress and to award aggravated damages.

- This case is a departure from the long-held understanding that to be successful in a claim for aggravated damages, evidence of a confirmable illness must be demonstrated.

Egan v Harbor Air Seaplanes, 2024 BCCA 222

The Facts

- This case involved a federally regulated Employer governed by the *Canada Labour Code* and an Employee that was terminated without cause after roughly three years of employment.

- Upon termination, the Employer paid the Employee two weeks of salary in lieu of notice and five days of severance pay in accordance with the *Canada Labour Code*, as stipulated by a provision in the employment agreement.

The Employment Agreement Provision

“The [employer] may terminate your employment at any time without cause so long as it provides appropriate notice and severance in accordance with the requirements of the Canada Labour Code.”

Findings at Summary Trial

- The Employee brought an action for wrongful dismissal, claiming reasonable notice at common law.
- Harbour Air applied for judgment by way of summary trial seeking a dismissal of the action on the basis that the termination clause *precluded* a claim for common law damages.
- The Summary Trial Judge found that the termination clause was not ambiguous and sufficiently rebutted the application of common law reasonable notice. The Employee's action was dismissed.

The Court of Appeal

- The Employee appealed the decision asserting error in the Judge's conclusion on the basis that the termination clause is either ambiguous or excludes benefits that are required to be paid to him pursuant to the *Code*.

- The appeal was dismissed:
  - no ambiguity in the parties intention*;*
  - the clause is sufficiently clear; and,
  - the clause is <u>not</u> statutorily non-compliant.

The Intention of the Parties

A termination clause that clearly shows an intention to incorporate notice provisions of the applicable employment standards legislation, is sufficient to rebut the presumption of reasonable notice.

Egan v. Harbour Air Seaplanes LLP, 2024 BCCA 222 at para 60.

Ambiguity

- The Court held that at the time the employment agreement was formed, the parties clearly intended, and the employee knew, that his termination entitlements would be governed by the *Code*.

- Contractual interpretation is “not accomplished by disaggregating the words in a termination clause looking for ambiguity as a means to find the clause unenforceable” – it must consider the true intentions of the parties [para 47].

Non-Compliance

Where an employer fails to comply with a termination provision, the provision itself is not made void such that there is a duty to pay common law notice; instead, it constitutes a breach of contract and thus creates a right to damages to be restored to a position they would have been in had the contract been completed.

Key Takeaways

- Incorporating employment standards legislation by reference can be sufficient to rebut the presumption of common law reasonable notice.

- Consider whether the legislation you are working within has prescriptive language while drafting to sufficiently rebut the application of common law reasonable notice.

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Case Law Review

Service Employees International Union, *Local 2 v. Labatt Breweries Ontario Canada*, 2024 ONSC 3881

- Termination for Occupational Health and Safety Breach in a unionized workplace

R v King, 2025 NBCA 12

- Criminal negligence exposure for supervisors

Service Employees International Union, Local 2 v. Labatt Breweries Ontario Canada, 2024 ONSC 3881

Facts

- A senior unionized employee was terminated for cause following a safety violation which occurred at the brewery in London, ON.

- The employee was operating a “palletizer”, which is used to stack cases of beer from the production line at the brewery.

- One of the cases of beer had become lodged in the hoist of the palletizer several feet above ground level.

- The employee climbed to the upper level of the palletizer to remove the case of beer:
  - without making a required risk assessment,
  - without locking out all energy sources, and
  - without any fall protection equipment

- The employee let the case of beer drop to the ground below which caused the bottles of beer inside to shatter, creating a safety risk for workers below.

Issue

- Was the termination appropriate or justified given the discipline guideline pursuant to the Collective Agreement?

Position of the Parties at Arbitration

- Labatt took the position that the termination was justified and in compliance with the discipline guideline.

- The union argued that pursuant to the discipline guideline the appropriate discipline in the circumstances was a suspension and the employee should be reinstated, especially in light of employee's seniority and discipline free record.

The Decision

- The arbitrator upheld the termination.
- The arbitrator found that the employee's safety violation was egregious, and as such, Labatt was justified in skipping steps of the discipline guideline.
- The Union sought judicial review of the arbitrator's decision by the Ontario Superior Court.

Judicial Review

- The Union argued that:
  - the Arbitrator's decision was unreasonable,
  - the Arbitrator did not consider the employee's seniority, and
  - the matter should be sent back to a different arbitrator for determination.

- The Ontario Superior Court upheld the Arbitrator's decision and found:
  - the decision was reasonable, and
  - the Arbitrator did not ignore the employee's seniority.

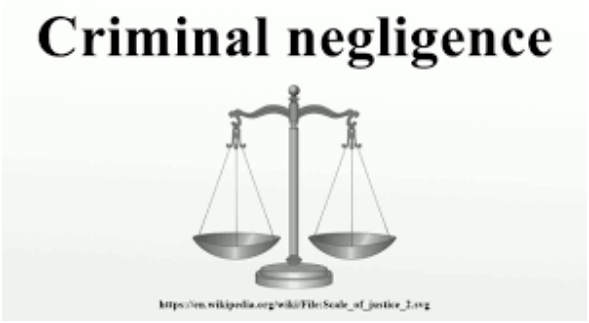
Key Takeaway

- This decision reinforces a unionized employer's ability to prioritize workplace safety in the face of serious safety incidents, regardless of mitigating factors like seniority and performance/discipline record.

R v King, 2025 NBCA 12

Facts

- This case involved the appeal of a supervisor following his criminal conviction for criminal negligence causing death.
- The supervisor instructed an employee to clean the bottom of a concrete clarifier.
- At the bottom of the hole was a horizontal pipe that led to a nearby manhole.



- The same day, the supervisor also decided to conduct a leak test of the horizontal pipe at the bottom of the clarifier.
- This involved plugging the horizontal pipe with an inflatable plug and filling the pipe with water.
- The supervisor did not inform the employee that the test would be run.

- As the horizontal pipe was filled with water, the employee was cleaning the bottom of the clarifier.

- The plug suddenly slipped, pinning the employee to the wall of the bottom of the clarifier as the water rushed in from the horizontal pipe and the employee was trapped under the water.

- The employee died by drowning.

The Charge

- The supervisor was charged with one count of causing death by criminal negligence.

The Test

- The Trial Judge held that there are three basic elements of the minimally acceptable standard of conduct for a reasonable site supervisor on a construction site.

A supervisor must familiarize themselves with:

1. The legislated duties that were binding upon them as set out in the *Occupational Health and Safety Act* and its *Regulations*, and any other applicable legislation,

2. Any site-specific safety plans, especially where there is work in a confined space or where dangerous machinery or tasks are used or performed, and

3. Basic manufacturer's instructions regarding safe use of equipment.

The Trial Decision

- The Trial Judge found that the supervisor departed from the minimally acceptable standard of conduct.
- Specifically, he failed to act in accordance with the minimally acceptable standard of conduct for a reasonable site supervisor on a construction site.
- His actions in running water into the manhole while an employee was present in the hole and his many omissions in managing the safety of the project were a departure from the minimally acceptable standard of conduct.

The Appeal:

- The New Brunswick Court of Appeal upheld the decision of the Trial Judge and confirmed that the Trial Judge applied the correct test with respect to the “minimally acceptable standard of conduct for a reasonable supervisor”.

Key Takeaways:

- Safety at the place of employment is a vital issue which carries potential liability for the employer pursuant to the *Occupation Health and Safety Act,* as well as personal liability for individual supervisors.
- Training in occupational health and safety should be provided to all employees and supervisors and they should be required to review all applicable safety materials and be familiarized with any health and safety risks in the worksite.

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Case Law Review

Dufault v. Ignace (Township), 2024 ONCA 915

- Another blow to termination clauses

Timmins v. Artisan Cells, 2024 ONSC 7123 (2025 CanLII 2387)

- Demanding a release for contract termination rights repudiates the contract

Continuing Evolution of Termination Pitfalls

- Over the last 10+ years, Ontario decisions in particular have continued to push the specific requirements for employers to rely on termination clauses.

- Though not binding in Atlantic Canada, there is a real possibility these decisions will be followed in our Courts.

- Two recent Ontario decisions that need to be noted…

Dufault v. Ignace (Township), 2024 ONCA 915

- Employee was terminated without cause and provided with statutory minimum of 2 weeks' notice per employment contract.

- Issue centered on "for cause" termination clause – seeking reconsideration of *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 which held termination clauses are read as whole.

Dufault v. Ignace (Township), 2024 ONCA 915

- Employment Agreement provided that:
  - "cause" shall include but is not limited to the following:
  - (i) upon the failure of the Employee to perform the services as hereinbefore specified without written approval of Municipal Council and such failure shall be considered cause and this Agreement and the Employee's employment terminates immediately;
  - (ii) in the event of acts of wilful negligence or disobedience by the Employee not condoned by the Township or resulting in injury or damages to the Township, such acts shall be considered cause and this Agreement and the Employee's employment terminates immediately without further notice.

    [*Emphasis added*]

Dufault v. Ignace (Township), 2024 ONCA 915

- Problem: Ontario *Employment Standards Act* does not say just cause.

- To be relieved of the requirement to provide notice of termination, the employer must meet a higher standard that common law "just cause":

  "Any employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that it not trivial and has not been condoned by the employer."

- Just cause provision invalid = all termination clauses invalid.

Dufault v. Ignace (Township), 2024 ONCA 915

- Gets better: Employee was on a fixed-term contract with almost 2 years remaining.

- No implied duty to mitigate. Employee entitled to full value remaining on fixed-term agreement.

- Instead of 2 weeks notice, damages are 101 weeks notice - $157,000.

Timmins v. Artisan Cells, 2024 ONSC 7123 (2025 CanLII 2387)

- Employee of 3.5 years terminated without cause.

- Employment agreement set out that he was entitled to the greater of:
  - The minimum notice (or pay lieu) required by the *Employment Standards Act;* and
  - 3 months notice (or pay in lieu).

Timmins v. Artisan Cells, 2024 ONSC 7123 (2025 CanLII 2387)

- On termination, employer agreed to provide statutory pay in lieu of notice, sought release in exchange for the balance of the three (3) months.

- Uh oh - Requesting a release to honor contractual amount amounts to repudiation:

> *"I am satisfied that a reasonable person would conclude that the Defendants did not intend to be bound by the severance provisions in the Employment Agreement"*

Timmins v. Artisan Cells, 2024 ONSC 7123 (2025 CanLII 2387)

- Employee entitled to reasonable notice at common law as a result

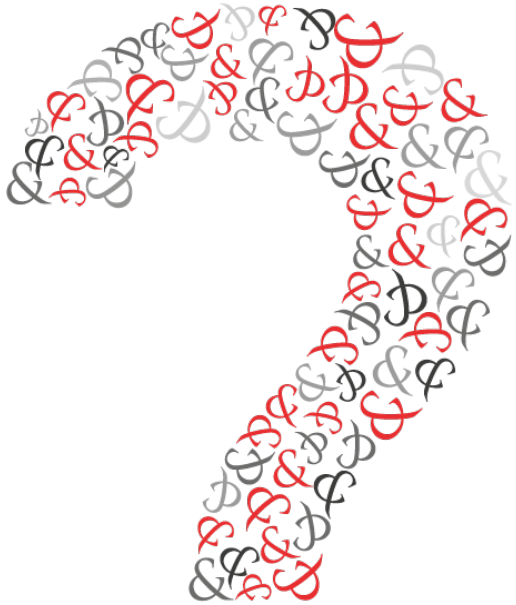
- Instead of 3 months, he gets 9 months notice at common law. **$456,908.82**

Termination Pitfalls -Take aways

- Revisit employment contracts – Entire termination section must be compliant. Make sure the just cause provision does not violate applicable employment/labour standards legislation.

- Be wary of fixed-term contracts – While risks can be mitigated through careful drafting, is it even worth the risk?

- Asking for a release? Offer something more. You can’t make that an after-the-fact condition of contractual severance.



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