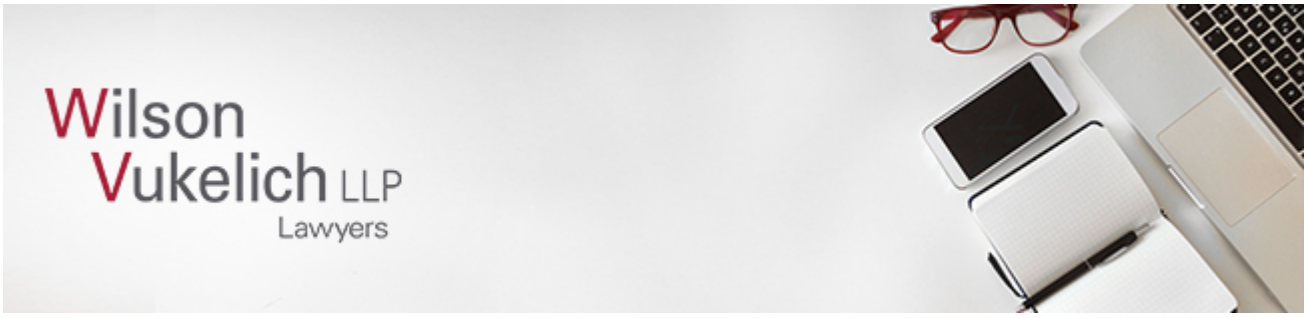

Top 2021 Cases of Importance for Employers

January 2022 Employer Alert

In light of the ongoing pandemic, it is no surprise that many employers continue to face new and complex issues related to COVID-19 and the workplace. In turn, we continue to see new caselaw addressing matters such as COVID-19 remote work, COVID-19 vaccinations, COVID-19 related layoffs, and terminations during COVID-19. Of course, there also are important decisions for employers that are unrelated to the pandemic. Below is a review of some of the top decisions of importance for employers in 2021.

I. COVID-19 and Remote Work

As result of the ongoing pandemic, many employees are currently working remotely. This, in turn, has triggered questions regarding the extent to which employer obligations and liability apply to the remote office.

In the matter of *Air Canada v. Gentile-Patti*, the Quebec Administrative Labour Tribunal addressed whether an employee's injury, which occurred while she was working from home, was covered under the province's injured workers compensation regime. The employer argued that coverage should not extend as the employee fell on a lunch break and as the employer had no control over the alleged hazard. The Tribunal nonetheless held that the employee was entitled to coverage as the fall represented an injury that occurred during work (albeit at the outset of a lunch break).

Although this decision is not binding beyond Quebec, employers

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should be mindful that other jurisdictions will similarly extend coverage for remote employees in regards to at home injuries. As such, employers should ensure they are addressing health and safety concerns in regards to remote workplaces. Further, employers should ensure that employees are properly reporting any injuries or illnesses that arises while working remotely.

II. COVID-19 Testing and Vaccinations

As we have covered in past employer e-mailers, currently only some employers are required to have a COVID-19 vaccination policy or required to mandate worker vaccinations (with certain opt-outs allowed). For employers that are not required to mandate worker vaccination, there remains some questions of whether they could, further to the *Occupational Health and Safety Act* or otherwise.

Based on the decisions to date, it appears that employers are safe, to a large extent, in regards to mandating COVID-19 testing and vaccinations. These decisions include an arbitration decision dismissing a union's challenge of a mandatory worker vaccination policy (*UFCW v. Paragon Protection Ltd.),* a Court decision dissolving an interim injunction regarding a mandatory vaccination policy (*Blake v. University Health Network*), and an arbitration decision allowing COVID-19 testing and layoffs for those who refuse (*Ellison Construction Ltd. v. LIUNA, Local 183*). However, employers must remain mindful of respecting obligations under the *Human Rights Code*. Further, employers should be cautious about dismissing a non-vaccinated employee for cause.

III. COVID-19 Layoffs

As we have covered in several employer e-mailers, currently employers are able to place non-unionized employees on an unpaid temporary layoff related to the pandemic. This temporary layoff is known as an Infectious Disease Emergency Leave (an "IDEL"). While employees cannot claim that an IDEL constitutes a termination for statutory purposes, employees may be able to claim that the IDEL constitutes a termination for common law

purposes. In particular, an employee can commence litigation and claim that the IDEL constituted a constructive dismissal at common law (i.e. an effective firing). Generally speaking, an employer can only defeat a constructive dismissal claim regarding a layoff if the employer has confirmed the right to temporarily layoff by way of the employment agreement, an employee handbook, or through past practices. However, some employers are attempting to argue that the IDEL provisions established through regulation by the Ontario Government, bans any constructive dismissal litigation.

In three Court decisions in 2021, the Court was split as to whether employees can claim they have been constructively dismissed as a result of an IDEL. In particular, in two decisions the Court held an employee is not precluded from claiming that they have been constructively dismissed by way of the IDEL Regulation (*Coutinho v. Ocular Health Centre Ltd* and *Fogleman v. IFG)* and in one decision the Court held the employee is precluded from claiming they were constructively dismissed, as the pandemic called for exceptional measures (*Taylor v. Hanley Hospitality Inc*).

Given the above, until the Ontario Court of Appeal decides this matter, it remains uncertain whether an employee can successfully claim that an IDEL constituted a constructive dismissal. To avoid unintentionally dismissing employees, employers should be careful in handling layoffs, including confirming the right to layoff in the employee handbook and including in any layoff notice confirmation that it is an IDEL.

IV. COVID-19 – Termination Notice Periods

In Canada, if an employee is dismissed, they are normally entitled to statutory termination entitlements and common law termination entitlements. Common law entitlements are normally more substantial than statutory termination entitlements. However, employers may restrict an employee's termination entitlements by using an enforceable written employment agreement.

Common law termination entitlements are based on a review of various factors, including age, length of service, position, compensation package, and ability to find similar work elsewhere. As a result of the pandemic and its triggering massive layoffs, some speculated that employees would be entitled to additional common law notice. However, the cases that have come out to date, have shown that the Court has not increased the notice period based on the pandemic or only marginally increased it. In particular, in the decision of *Yee v. Hudson's Bay Company*, the Court did not awarded any extension to the common law notice period as a result of the pandemic. In contrast, in the matter of *Kraft v. Firepower Financial Corp.*, the Court extended the common law notice period by one month as a result of the impact of the COVID-19 pandemic.

Given the above, aside from employers in particularly hard-hit sectors, most employers should anticipate traditional termination obligations.

V. Limiting Termination Entitlements

As noted above, employers may restrict an employee's termination entitlements by using an enforceable written employment agreement. As a result, instead of being entitled to upwards of two years' compensation as a result of a dismissal, an employee may only be entitled to eight weeks' compensation.

The enforceability of a termination provision in an employment agreement remains the most popular topic of employment law litigation. In 2021, as with previous years, there were several decisions on whether certain termination provisions were enforceable. One briefly helpful decision for employers was the Court decision of *Rahman v. Cannon Design Architecture Inc.*, which held that an employee's sophistication and access to legal counsel should be considered when determining whether a contractual termination provision is enforceable. However, just a few weeks after this decision was released, the Court in

Campbell-Givons v. Humber River Hospital and *Livshin v. The Clinic Network Canada Inc.*, rejected the approach in *Rahman* and held an unenforceable termination provision is unenforceable, and the party's sophistication does not matter.

Given the above, it remains all important that employers ensure that their employment agreements have carefully drafted termination provisions.

VI. Calculating Statutory Termination Entitlements

In Ontario, statutory termination entitlements are made up of termination entitlements (capped at 8 weeks' pay, plus vacation pay and benefits continuance) and severance entitlements (capped at 26 weeks' pay). However, the severance entitlements do not kick in unless the employment relationship is beyond five years and the employer's payroll is over $2.5 million per annum.

In *Hawkes v. Max Aicher*, the Court considered how to calculate if the company's payroll is over $2.5 million for the payment of statutory severance. Previously, the Court has held, on multiple occasions, that the calculation is based on the employer's Ontario payroll. However, in this decision, the Court concluded that the $2.5 million threshold should be calculated based on an employer's global payroll. As a result, this decision can have substantial implications for employers with operations both within and beyond Ontario.

VII. WSIB Coverage Blocking Lawsuits

When an injury suffered by an employee is covered by the *Workplace Safety and Insurance Act,* the employee cannot litigate the matter. As a result of amendments to the WSIA to also include coverage in regards to chronic mental stress, a question has arisen as to whether employees can commence litigation in regards to workplace harassment.

In the matter of *Morningstar v. WSIAT*, the employer had brought an application to the WSIAT to block an employee's civil action, alleging she had been constructively dismissed as a result of workplace harassment. The WSIAT agreed with the employer and held that the civil action was barred by the WSIA. On appeal, the

Divisional Court held that the WSIAT was wrong. In particular, the Court held that, although the employee's harassment claim was barred by the WSIA, the employee could still proceed with a civil action for constructive dismissal and certain categories of damages in court. In light of this decision, employers who face litigation in regard to harassment may wish to consider whether at least part of the claim is statute barred by the WISA.

In review of the above cases, employers must ensure that their HR practices and documents are strategic and in accordance with current employment law. For further information, including how best to update your current HR practices and documents, please contact our firm.

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