DENTONS

What you missed on your summer vacation:
A recap of the Canadian employment matters you may have missed this summer

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Whether you call it a cottage, a camp or a cabin, those summer retreats are closed for another season as kids trade bonfires for classrooms and we all embrace the arrival of fall. As we return to routine this month, it is a good time to take stock of the labour and employment law developments that caught our eye in between beach days and patio nights over the last three months.

BC Court of Appeal endorses "practical, common-sense approach" to interpretation of contractual termination provisions

In British Columbia, the Court of Appeal kicked off the summer by confirming that a "practical, common-sense approach" to contractual interpretation should apply when considering the enforceability of termination provisions.

In *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222, the Court of Appeal considered whether the following termination provision limited the employee's termination entitlements to their minimum statutory rights:

> "*The Harbour Air group 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.*"

The Court concluded that the termination clause was clearly drafted to rebut the presumption for common law reasonable notice. In so doing, the Court ruled that silence on an obligation (in this case, the payment of benefits over the notice period) cannot be presumed to mean the employer was allowed or intended to contract out of its statutory obligations.

Takeaway for employers: In its decision, the Court of Appeal acknowledged the inconsistent treatment of termination provisions that referentially incorporate statutory provisions, describing the issue as being a "matter of some controversy across Canada." However, when it comes to British Columbia, a common-sense focus on the plain language used in the contract has prevailed and properly drafted termination provisions continue to be enforced.

Alberta Court dismisses employee's human rights complaint after employee refuses to follow recommendations of substance abuse professional

In *NOV Enerflow ULC v. Maude*, 2024 ABKB 432,[1] an employee occupying a safety-sensitive position tested positive for cocaine during a random drug and alcohol test. In accordance with the employer's drug and alcohol policy, the employer suspended the employee and referred him to a third-party company for an assessment to be conducted by a substance abuse professional. The employer required the employee to comply with all the substance abuse professional's recommendations, including attendance at a residential treatment program, before allowing the employee to return to work.

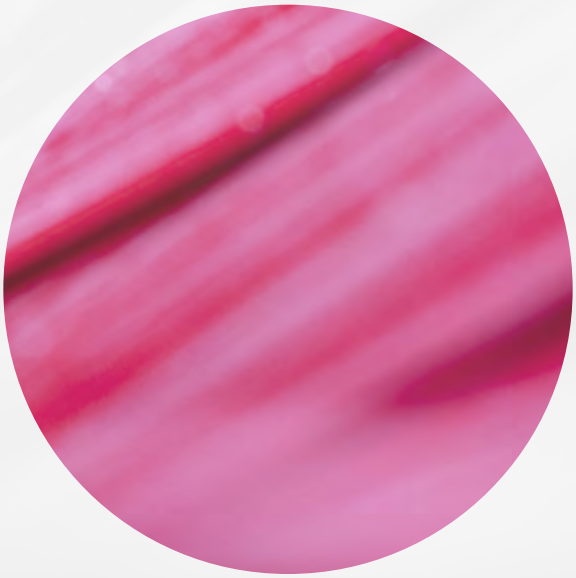
The employee did not want to attend a residential treatment program; rather, the employee proposed to attend an outpatient treatment program (an option proposed by Alberta Health Services (**AHS**) counsellors). The substance abuse professional was willing to engage in further discussions with the employee but required the employee to provide a consent form so they could speak directly with the AHS counsellors on the alternative treatment options that had been proposed. The employee failed to sign the consent form and did not attend any treatment program. The employee ultimately filed a human rights complaint alleging discrimination of the basis of disability.

The Alberta Human Rights Tribunal upheld the employee's complaint, awarding CA$25,000 in damages for injury to the employee's dignity and self-respect, as well as compensation for lost wages plus interest.

1 Dentons represented NOV Enerflow ULC in this case.

On appeal, the Court of King's Bench found that the Tribunal made a palpable and overriding error because there was "no evidence that a day treatment program was an acceptable, effective alternative." The employee had not provided any evidence to the employer at the time, nor to the Tribunal, that a day treatment program was an effective alternative to the residential treatment program recommended by the substance abuse professional. Further, when the employee refused to sign the required consent form, he stymied the employer and substance abuse professional from engaging in any further discussion to assess alternative treatment recommendations. As such, the Court of King's Bench reversed the Tribunal's decision and dismissed the employee's human rights complaint.

Takeaway for employers: Employees have a duty to cooperate during the accommodation process. As such, an employee cannot simply reject the recommendations of an employer's health professional on the basis that the employee has some other preferred treatment plan. Further, where an employee is proposing an alternative treatment plan, the employee must provide medical evidence that the alternative treatment program will satisfy the accommodation process.



Ontario Court upholds just cause dismissal of 15-year employee with clean disciplinary record

In *Arora v. ICICI Bank of Canada*, 2024 ONSC 4115, the Ontario Superior Court of Justice upheld the just cause dismissal of a 15-year employee having no prior disciplinary record. The termination followed an investigation that revealed the employee had shared confidential proprietary information, intended to compete improperly with the employer and lied during the investigation. The Court determined that the cumulative effect of the employee's misconduct fundamentally breached the essential duties of loyalty, honesty and good faith, striking at the core of the employment relationship.

Notably, in his decision the judge cautioned against comparing an employee's just cause dismissal to "capital punishment":

> Parenthetically, I make a note about terminology in the context of the proportionality discussion. I do not minimize the importance or significance of termination of one's employment, particularly after 15 years of strong performance. One's work is often fundamental to one's identity and sense of self-worth. However, I do not find it helpful to equate this loss with "capital punishment". Termination for cause is a significant step, available to an employer in certain circumstances. In no way is it comparable to capital punishment, which is considered in Canada to "engage the underlying values of the prohibition against cruel and unusual punishment." Capital punishment is final and irreversible, and its imposition has been described as arbitrary: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 78. Using the analogy in the employment context sheds more heat than light on the analysis required to determine if summary dismissal is appropriate in any given case.[2]

2 *Arora v. ICICI Bank of Canada*, 2024 ONSC 4115 at para. 124.

Takeaways for employers: This case is a good reminder that, while the just cause standard remains high, it is not insurmountable. Where an employee's misconduct goes to the heart of the employment relationship, engaging basic duties of loyalty and honesty, an employer will be justified in asserting just cause even where the employee has had a long tenure without any prior discipline.

Employees cannot hold company property hostage post-dismissal

In *15909 Canada Inc c.o.b. PARS 2000 v. Moghadam*, 2024 ONSC 3886, the Ontario Superior Court of Justice held that an employee must first prove they were wrongfully dismissed and entitled to common law reasonable notice before the Court will consider a remedy for benefits allegedly owed during the common law notice period. In this case, a former employee who had the benefit of using a company car for their personal use refused to return the car to their former employer upon dismissal. The Court held that the employee may be compensated for the value of any benefit of the company car, but he had no right to its possession, especially since he had not even filed an action for wrongful termination.

Takeaways for employers: Where an employee refuses to return company property post-dismissal, there are legal steps that employers can take to require the employee to act. It is worth noting that in this case, in addition to ordering the immediate return of the company car, the Court also awarded the employer with CA$10,000 in costs payable in 30 days.

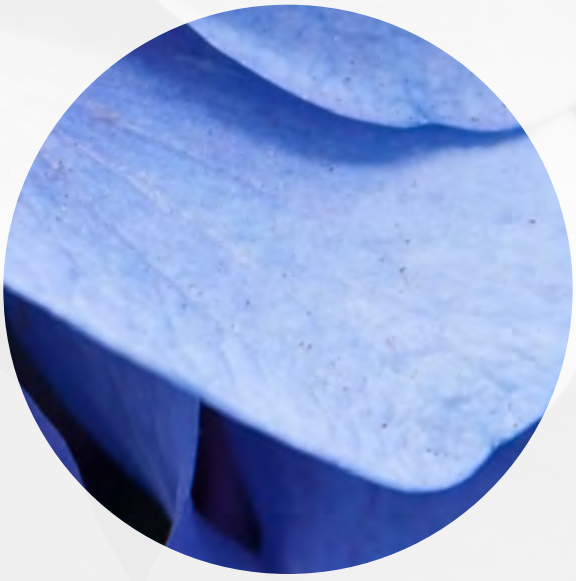
Court orders employee to undergo independent medical exam to prove inability to mitigate

In *Marshall v. Mercantile Exchange Corporation*, 2024 CanLII 71128, the employer terminated the employment of a 58-year-old employee with 25 years of service. At the time of dismissal, the employer provided the employee with 11 weeks of working notice and six months' pay in lieu. The employee commenced a wrongful dismissal claim seeking a 26-month notice period.

In the nine months following the employee's dismissal, he took no steps to find alternate employment, claiming that stress and depression from his termination prevented him from finding new employment. The employee further claimed that his mental condition will continue to prevent him from mitigating his damages until he is cured.

Given the circumstances, the employer brought a motion requiring the employee undergo an independent medical examination. In granting the employer's motion, the Court stated that it would be unfair to allow the employee to assert that his mental health condition prevented him from taking steps to mitigate his damages without permitting the defendant an opportunity to test the assertion.

Takeaways for employers: An independent medical examination may be an attractive tool for employers to use where an employee has asserted an inability to search for alternative employment due to medical reasons. That said, in its decision, the Court cautioned that a balance must be struck "...between giving an employer the right to test allegations of inability to mitigate without allowing employers to abuse independent medical examinations as a tactic to dissuade plaintiffs from legitimately relying on medical issues that prevent them from mitigating damages."[3] In the case at hand, the employee's mental condition had been put into question by their own choice. Moreover, the degree to which the employee's mental condition had been put into question went well beyond the usual adjustment period that courts afford employees to overcome the shock of dismissal before being obliged to mitigate their damages and came at time where there was relatively high employment in the market[4]. Accordingly, there were a number of factors that favoured the Court granting the employer's request for an independent medical examination.



The normal exercise of managerial functions does not constitute a sudden and unforeseen event that can lead to an employment injury

In *Compagnie des chemins de fer nationaux du Canada et Orsucci*, 2024 QCTAT 2267, a worker filed a claim seeking damages for an injury related to events he described as psychological harassment and intimidation. The Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) recognized the injury as an adjustment disorder with depressive and anxiety symptoms. The employer challenged the CNESST's decision, arguing that the events were not unforeseen or sudden, that they fell within the normal exercise of management rights and that the worker's personality played a role in the situations.

The Tribunal concluded that the alleged events were not considered unforeseen and sudden, and accepted the employer's argument. The Tribunal viewed the worker's complaints as falling into three main categories: constant supervision by a supervisor; work methods; and various behavioural or organizational problems. The Tribunal found that the worker's supervision was appropriate, the work methods imposed were justified and that the behavioural incidents, while regrettable, did not constitute an unacceptable violation of the worker's rights.

Takeaways for employers: At a time when employees increasingly complain about valid exercises of performance management, this case is helpful in demonstrating that the threshold for benefits stemming from a psychological employment injury remains high when it arises from the normal exercise of management rights.

For more information on these cases or any questions related to the legal implications of these decisions on your business, please contact the authors, Andy Pushalik, Taylor Holland, Victoria Merritt, Mia Music or Nicolas Seguin.

3 *Marshall v. Mercantile Exchange Corporation*, 2024 CanLII 71128 at para. 15.

4 Ibid., para. 11.

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