DSF Devry Smith Frank *LLP*
Lawyers & Mediators

HR/EMPLOYMENT SEMINAR

April 25, 2018

DAMAGES AWARDS UPDATE

Case Study: Galea v Wal-Mart Canada Corp

- Dec 7, 2017
- Presented by: Larry Keown

***Galea*: an update on aggravated and punitive damages**

- Aggravated Damages (pain and suffering) – infrequently awarded
- Punitive Damages (non-compensatory) – rare
- *Galea* provides some additional guidance on both heads of damages

The Facts

- Case Name: Galea v Wal-Mart Canada Corp, 2017 ONSC 245.
- Decision released on December 7, 2017

The Facts

- Gail Galea began working at Wal-mart in 2002 as a District Manager – in training.
- Consistently praised for her work, and nominated for future leadership positions.
- Her performance led to admission into Wal-Mart's elite training programs which primed future senior executives and she was recognized by Wal-Mart International.
- Over 7 years, she rose through the ranks quickly:
  - District Mgr, Regional Mgr, Regional Vice President, General Merchandice Manager, Vice President of General Merchandising

The Facts

- Performance appraisals of Galea's work consistently returned high scores and that she 'exceeded expectations'
- Galea gained access to a wide variety of management incentive programs, her salary rose from $120k to a total compensation potential of between $400k and $600k by 2010

The Termination

- On January 29, 2010, Galea met with her supervisor, David Cheesewright, President and CEO of Wal-Mart Canada
- Cheesewright told her that role was to be eliminated and that he 'didn't know what to do with her'
- Galea subsequently was told that she was 'not ready' for the role of Chief Merchandising Officer, and that she had the option of taking employment with Walmart outside of Canada

The Termination

- Galea was eventually assigned to a position with no duties or management expectations, but she was continuously told by her superiors that she was a valued asset to Wal-Mart and had a bright future
- After floundering for several months, Galea was informed in writing in November 2010 that her employment was terminated, effective immediately

The Aftermath

- Wal-Mart continued to pay Galea's salary for the next 11.5 months, but then stopped (in violation of Galea's employment agreement)
- Wal-Mart also cancelled all of her health and dental benefits without informing her
- Galea then commenced an action against Walmart for damages arising out of her employment contract, including punitive and aggravated damages

The Result

- The court found that Galea was entitled to damages for breach of contract, aggravated damages, and punitive damages.
- Court found a 2 year fixed term existed. Therefore no mitigation obligation.
- **$915,897.46** for lost wages, benefits, and bonus entitlements
- **$250,000.00** in aggravated damages
- **$500,000.00** in punitive damages

Aggravated Damages

- *Hadley* test for aggravated damages is:
  - Whether the damages were reasonably foreseeable on the breach of the contract; and
  - The conduct of the employer is such that it causes the employee mental distress beyond the understandable distress and hurt feelings that normally accompany termination
- These damages are compensable, and are meant to compensate the employee for hurt feelings, and their loss of dignity and respect

Moral Damages

- Courts have long recognized an employer's duty to act in good faith and fair dealing when dismissing an employee; Employers must be candid, reasonable, honest, and forthright with employees
- *Wallace v. UGG 1997 SCC* – extended the notice period
- *Keays v. Honda 2008 SCC*– moral damages are simply aggravated damages which are to be awarded under the *Hadley* principles: ie if it is reasonably contemplated that the actions (manner of dismissal) would cause mental distress – it is compensable. Eg: Attacking an employee's reputation, or misrepresentation regarding the reason for termination

Some interesting considerations:

- The court considered:
  - Pre-termination conduct; ie "floundering" Jan to Nov 2010
  - Post termination conduct; ie stopping payments before 2 year mark
  - Litigation Conduct; ie delays in answering undertakings and producing documents

Aggravated Damages

- The court found that the decision to keep Galea in ‘suspended animation’ for 10 months was unduly insensitive—she was left to ‘twist in the wind’
- This merited an award of $200,000.00
- The court found that the conduct of Wal-Mart during the litigation was relevant, where they severely delayed proceedings and were not respectful or responsive to Galea or her lawyers
- This merited an additional award of $50,000.00

Punitive Damages

- Punitive damages are awarded ‘against’ a defendant rather than ‘for’ a plaintiff
- They are meant to punish, and to demonstrate the court’s disapproval of the defendant’s actions
- They are only awarded in the exceptional cases where the defendant is ‘malicious, oppressive and highhanded’ such that if ‘offends the court’s sense of decency’

Punitive Damages

- The award also has to be ‘proportional’
- Proportional, in this sense, means that the amount awarded scales with the blameworthiness of the defendant
- It also means that the amount awarded must be appropriate to effectively denounce and deter the behaviour

Punitive Damages

- The court found that Wal-Mart's behaviour was particularly heinous
- In order to effectively deter the behaviour of Wal-Mart, the award needed to be larger
- The court reasoned that the conduct of Wal-Mart was worse than the conduct of the employer in a previous case (*McNeil v Brewers Retain Inc.*) where the court there awarded $450,000.00 in punitive damages
- The court referred to the *Boucher v. Wal-Mart (*2014) Ont CA decision where a punitive damages award was reduced from $1 million to $100,000.
- Based on that, the court awarded $500,000.00

Conclusions

- **Aggravated and punitive damages are alive and well (and becoming more common) in employment law;**
- **Understand your duty of good faith to employees**, just because their employment is over does not mean that your obligations or risks end;
- **Obey contractual terms and entitlements**, Wal-Mart had no excuse for cutting off Galea's post-employment salary and benefits which she was entitled to—all of this was avoidable.

DSF Devry Smith Frank *LLP*
Lawyers & Mediators

BILL 148 - FAIR WORKPLACES, BETTER JOBS ACT UPDATE

Is your Company Compliant?

April 25, 2018

Presented by: Marty Rabinovitch

Structure for Presentation

1. Background
2. Equal Pay for Equal Work (April 1, 2018)
3. Scheduling (January 1, 2019)
4. New forms of Leave (Already in Effect)
5. Conclusions

Background

- Bill 148 (as it was then known) was passed into law in November 2017
- It is now called the *Fair Workplaces, Better Jobs Act*, SO 2017, c 22.
- Amends the *Employment Standards Act, 2000*
- Most notably, the Act changes the province's minimum wage rules (currently $14/hour, increase to $15/hour on January 1, 2019)
- But it also makes specific, far-reaching changes for employers related to employee entitlements

Equal Pay for Equal Work (as of April 1st, 2018)

(ESA Section 42)

- The Act prohibits employers from paying different rates to employees because of a difference in their employment status if those employees perform substantially the same skill

Equal Pay for Equal Work

- For example, a part-time bookkeeper and a full-time bookkeeper will now have to be paid the same hourly wage if their duties are ‘substantially similar’
- An employee who believes their rate of pay does not comply with the Act can now request the employer to review the rate and either;
  - Adjust the pay; or
  - Provide a written response to the employee disagreeing with the employee

Equal Pay for Equal Work

- The equal pay provisions do not apply where the difference in the rate of pay is based on:
  - A seniority system;
  - A merit system;
  - A system that measures earnings by quantity or quality of production; or
  - Any other factor other than sex or employment status

Equal Pay for Equal Work

- If an employment standards officer determines that an employer has breached the section, they can order that employee be paid the amount owing to the employee
- That amount is treated as unpaid wages for the purposes of collection by the employee
- The Act also puts similar provisions in place for temporary workers who work for a client
- Collective agreements which contravene the section if they are in force prior to April 1, continue to be valid (i.e. the collective agreement will take precedence)

Equal Pay for Equal Work

(ESA s. 74)

- An employer or person acting on behalf of an employer is also prohibited from intimidating, dismissing, or otherwise penalizing an employee because:
  - The employee makes inquiries about the rate paid to another employee for the purpose of determining whether the employer is obeying the Equal Pay for Equal Work provisions
  - The employee discloses their rate of pay to another employee for the purposes of Equal Pay for Equal Work

Scheduling (Effective January 1, 2019)

(ESA s. 21.2-21.7)

- An employee who has been employed for at least 3 months may send a written request to the employer to change their schedule or work location
- Employer must discuss the request within a reasonable time with the employee
- If the request is granted, the employer must provide the effective date of the changes
- If denied, the employer must provide written reasons for the denial

Scheduling (3 Hour Rule)

- Additionally, where an employee who regularly works more than 3 hours per day is required to present themselves to work, but works less than 3 hours, that employee is entitled to the greater of:
  - 3 hours at the employee's regular rate
  - The sum of the employee's rate while working plus the remaining time calculated at the regular rate
- Example: an employee two works 2 hours overtime and then is sent home would be entitled to overtime pay for 2 hours plus an hour at the base rate

Scheduling (Right to Refuse Work)

- Employees have the right to refuse a request or demand to work or be on call on a day that they are not scheduled if the request is made less than 96 hours before the start of the work
- Employer cannot sanction the employee for the refusal
- The rule does not apply if the work is to deal with an ‘emergency’, to reduce a threat to public safety, or to ensure the delivery of essential public services

Scheduling (Right to Refuse Work)

- Emergencies are not work emergencies, the provision is meant to deal with natural and public disasters
- They are situations or impending situations that constitute a danger of major proportions that could result in serious harm to persons or substantial damage to property that is caused by the forces of nature, disease, an accident or an act whether intentional or otherwise

Scheduling (Minimum Cancellation Pay)

- Employers who cancel an employee's entire schedule day of work or scheduled on-call period within 48 hours before the work or on-call period was to begin will now have to pay that employee 3 hours worth of their regular wages
- This does not apply to weather-dependent work where the reason the employer cannot provide work is because of the weather or causes outside the employer's control (fire, natural disasters, power failures)

Scheduling (Minimum Cancellation Pay)

- "Regular Wages" are the usual, non-overtime wage of the employee
- However, if the employer is forced to pay an employee regular wages under the 3-hour Rule or the Minimum Cancellation Pay Rule, and those 3 hours would entitle the employee to overtime pay—
- The employee is owed overtime pay
- **Case in point: the 3 hours count towards that employee's overtime entitlement**

DSF

Changes to Leave

Family Medical Leave	8 weeks	28 weeks
Parental Leave	Up to 37 weeks	Up to 63 weeks (61 weeks if pregnancy leave taken; 63 weeks if pregnancy leave not taken)
Pregnancy Leave (miscarriage or stillbirth)	6 weeks	12 weeks
Personal Emergency Leave	10 days if 50+ employees	10 days (first 2 are paid) for all employees, employer cannot request a medical note
Crime-Related Child Disappearance Leave	52 weeks	104 weeks
Domestic or Sexual Violence Leave	N/A	Up to 10 days, Up to 15 weeks, first 5 days are paid
Child Death Leave	N/A	104 weeks

Changes to Leave (Domestic Violence)

- The 10 days can be taken a day (or part of a day) at a time (e.g., to attend medical appointments). The employer can deem a partial day of leave to be a full day of leave.
- The employee can also take up to 15 weeks (or partial weeks) of leave for reasons that require more time. The 15 weeks do not have to be taken continuously. The employer can deem a partial week of leave to be a full week of leave.

Conclusions

- **Audit your workplace**, employers are responsible for being in compliance with the Employment Standards Act, early preparation can pre-emptively deal with these issues
- **Update your employee manual**, information on the rights of employees and their responsibilities to their employer needs to be readily accessible

DSF Devry Smith Frank *LLP*
Lawyers & Mediators

DRUGS, ALCOHOL AND MARIJUANA IN THE WORKPLACE

Best Practices for Employers

April 25, 2018

Presented by: Marty Rabinovitch

Background

- Marijuana is likely to be legalized in Canada for personal use by July 1st, 2018 (or later this year)
- This will enable employees to legally consume the drug recreationally
- Legalization is a sizable impact on employer's ability regulate the behaviour
- Regulation of marijuana will be similar to the way alcohol is regulated

Measuring Impairment

- The court has recently found that an oral fluid test in which a subject tests for 10 nanograms per milliliter (10 ng/ml) of marijuana is considered impaired was reasonably tailored to its health and safety purpose
- This was, in part, because the concentration was greater than the Drug Testing Guidelines for the US Substance Abuse and Mental Health Administration (SAMHSA Guidelines) and extensive privacy controls

Source: *ATU, Local 113 v Toronto Transit Commission*, 2017 ONSC 2078

Random Testing (Unifor)

- High-impact case: *Unifor, Local 707A v Suncor Energy Inc*, 2017 ABCA 313 is winding its way through the courts, and may end up at the Supreme Court of Canada
- Case involves Suncor's attempts to implement random drug and alcohol testing, which Suncor attempted to introduce in 2012
- Court of Appeal upheld Suncor's policy for workers in safety-sensitive positions

Random Testing

- Unifor has asked the Supreme Court of Canada to hear its appeal
- Random drug and alcohol testing policies are only permitted in Canada in certain circumstances

Random Testing

- Employer must show:
  - The workplace (where testing is to be implemented) is highly safety-sensitive or inherently dangerous
  - There is evidence of a general substance abuse problem

Source: *Irving Pulp & Paper Ltd v CEP*, Local 30, 2013 SCC 34

Random Testing

- Suncor was initially unsuccessful at arbitration because it failed to show an evidentiary link between workplace safety issues at its sites and the use of drugs and alcohol
- The Court of Appeal decided in favour of Suncor and overturned the arbitrator's decision because they placed an inappropriately high standard on Suncor to demonstrate a drug & alcohol problem in their workplace

Random Testing

- What evidence did Suncor show?
- Records of positive drug and alcohol tests that took place after safety incidents and ‘near misses’
- Records did not distinguish between unionized and non-unionized employees
- Arbitrators said that this was not specific enough to show a substance abuse problem for unionized employees at the workplace

Random Testing

- Court disagreed, there was no reason why the incidents involving non-unionized employees were not relevant to an assessment of the substance abuse problem in Suncor's workplace
- Suncor's site had both unionized and non-unionized employees performing safety-sensitive work
- Nothing to suggest that alcohol and drug use within the bargaining unit differed in some meaningful way from that in the broader Suncor workforce

Random Testing (TTC)

- Another case has garnered great interest surrounding drug testing in the workplace (*ATU, Local 113 v Toronto Transit Commission*, 2017 ONSC 2078)
- There, the TTC union grieved the TTC's drug and alcohol testing policy and requested a court order (injunction) to stop random testing while awaiting a full hearing before an arbitration on the issue
- After considering the evidence, the court refused to grant the injunction; random testing permitted to continue

Random Testing

- Policy was introduced as the 'Fitness for Duty Policy', which required drug and alcohol testing in the following conditions:
  - Where there is reasonable cause to believe alcohol or drug use resulted in the employee being unfit for duty;
  - As part of a full investigation into a significant work-related accident or incident;
  - Where an employee is returning to duty after violating the policy…

Random Testing (policy continued)

  - Where an employee is returning to duty after treatment for drug or alcohol use, and
  - As a final condition of appointment to a safety-sensitive position

- The union launched their grievance (which is still underway) when the policy was implemented in 2010
- Initially, the policy did not allow for random testing, but this changed when the TTC amended it in 2011 to allow for random checks

Random Testing

- In denying the injunction, the court found that the balance of convenience favoured the TTC because the court was satisfied that
  - the testing measures would detect impaired employees in safety-sensitive positions, and
  - that this would increase public safety
- The union appealed, but leave to appeal has been denied by the Ontario Divisional Court

Selective Testing

- In order to selectively test employees to build an evidentiary record required to properly implement a random testing policy, the employer must have 'reasonable cause'
- 'Reasonable Cause' exists where the employee was involved in a workplace accident or incident ("near-miss")
- Again limited to dangerous, safety-sensitive positions

Best Practices

- Random testing can only be implemented for ‘dangerous’ workplaces and for workers performing the ‘dangerous’ work
- Before implementing random testing ensure there is ample evidence of a substance abuse problem specific to safety-sensitive workplace
- Implement a post-incident or near-incident testing regime at that workplace
- Limit the scope of policy to only that workplace

Implementing Policy

- Employers should have a clear policy on non-prescription drug (including marijuana) and alcohol use that lays out the circumstances for testing, proof of prescription for medical use, and consequences for failure and **that is reviewed regularly for compliance with the law**
- The Canadian Centre on Substance Abuse and Addiction report: *A Review of Substance Use Policies in Canada*, April 2018, found that less than half of participating employers had evaluated their policies on substance and even fewer did so on a regular basis

Implementing Policy

- Remember, employers have a duty to accommodate employees on the basis of disability (which includes an addiction to non-prescription drugs and alcohol)
- Ontario's Human Rights Commission has indicated that drug and alcohol testing can be justified where:
  - There is a rational connection between the purpose of testing and job performance
  - The testing is necessary to achieve workplace safety…

Implementing Policy

- It is put into place after alternative, less intrusive methods for detecting impairment have been explored
- It is used only in limited circumstances, like for-cause or post-incident situations
- It does not automatically apply consequences following positive tests
- The testing methods are highly accurate and are able to measure current impairment
- Ensures confidentiality of medical information and dignity of participants

Conclusions

- **Consult a Lawyer**, this area of law is highly technical, there are risks to attempting to implement a policy on your own without the proper research beforehand
- **Update your employee manual**, recreational marijuana is likely here to stay, employers need to have policies that deal with impairment in the workplace
- **Proper Training**, train supervisors and employees on how to recognize impairment to begin collecting data

Thank you!

DSF Devry Smith Frank *LLP*
Lawyers & Mediators

THANK YOU!

Larry Keown
416-446-5815
larry.keown@devrylaw.ca

Marty Rabinovitch
416-446-5826
marty.rabinovitch@devrylaw.ca