Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

The 24 Month Notice "Cap" - *Dawe v. The Equitable Life Insurance Company of Canada*

By: Larry W. Keown

Overview of Today's Discussion

- (1) *Dawe v. Equitable Life Insurance Company* → Superior Court decision
- (2) *Dawe v. Equitable Life Insurance Company* → Court of Appeal decision
- (3) Takeaways for Employers and Employees

(1) *Dawe v. Equitable Life Insurance Company* → Superior Court decision

(1) Facts

- Michael Dawe was a Senior Vice President at The Equitable Life Insurance Company of Canada ("Equitable Life")
- Hired in 1978 and had worked with the company, and its predecessor, Allstate Life Insurance, for 37 years
- Many promotions over the years
- Earning $249,000 plus bonus of $379,000
- Terminated on October 8, 2015 without cause at age 62

Why was Mr. Dawe terminated?

- In sept 2015, had a minor disagreement regarding the purchase of tickets to sporting events that were used to entertain clients
- President, Ron Beettam, audited entertainment and promotion expenses
- Mr. Beettam verbally reprimanded Mr. Dawe, but no other employees, regarding the tickets
- Dispute = September 2015
  - Dispute escalated
  - Mr. Dawe complained to management about harassment by Mr. Beettam
  - Mr Dawes retained a lawyer and tried to negotiate an "exit strategy"
- Board of Directors decided to terminate Mr. Dawe in October 2015
- Upon termination, Mr. Dawe rejected an offer of 24 months' notice

(2) Issue before the Superior Court

(a) What was the appropriate notice period?

- Mr. Dawe's argument = 30 months
- Equitable Life's argument = 24 months
- Court held: 30 months
  - **WHY?**

- *3) Applicable Law*
- *Bardal v. Globe and Mail Ltd.*, [1960] O.W.N. 253
  - The principles applicable to reasonable notice include:
    - (a) age of the employee;
    - (b) the character or nature of the employment;
    - (c) the length of service to the employer; and
    - (d) the availability of similar employment, having regard to the experience, training and qualifications of the employee.

- "24 months has been identified as the maximum notice period in most cases." (para 30)
  - *Lowndes v. Summit Ford Sales Ltd.*, [2006] O.J. No. 13 (Ont. C.A.):
    - "Although it is true that reasonable notice of employment termination must be determined on a case-specific basis and there is no absolute upper limit or 'cap' on what constitutes reasonable notice, generally only exceptional circumstances will support a base notice period in excess of 24 months" (*Lowndes*, para 11)

- *Lin v. Ontario Teachers' Pension Plan Board*, 2016 ONCA 619 (Ont. C.A.)
  - Reasonable notice is often referred to as the period of time it should reasonably take the terminated employee to find comparable employment

(4) Application to Mr. Dawe's Case:

- "Mr. Dawe was a senior vice-president. He was a member of the senior management team. There are no similar employment opportunities. No doubt, Mr. Dawe's age is a significant factor. His mitigation efforts demonstrate the lack of other opportunities." (para 33)
- Mr. Dawe had made no decision as to when retirement would occur. He says he was committed to working at Equitable Life until at least age 65.
- When there is no comparable employment available, termination without cause is tantamount to a forced retirement.
- "Mr. Dawe is at the extreme high end of each of the *Bardal* factors. He should have been allowed to retire on his own terms. With no comparable employment opportunities, in particular, I would have felt this case warranted a minimum 36 month notice period."

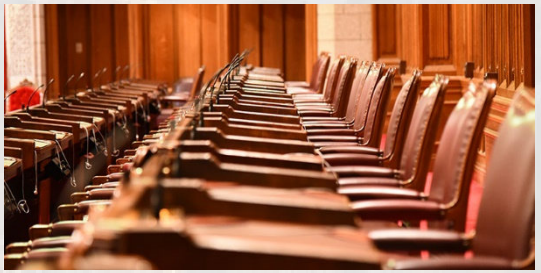
- 30 month notice period is more than reasonable

- Was this an exceptional case? SCJ = Yes.
  - "Whether it is exceptional circumstances or recognizing a change in society's attitude regarding retirement, the particular circumstances of the former employee must be considered. For many years, the usual retirement age was considered to be 65.... [M]andatory retirement was abolished in 2006 in Ontario to protect against age discrimination.... Presumptive standards no longer apply." (para 31)

Dawe v. Equitable Life Insurance Company → Court of Appeal decision

- Appealed by Equitable Life
- "...motion judge's determination of reasonable notice was excessive" (para 4)

(3) Issue: Did the motion judge err in finding that the appropriate notice period was 30 months?



- Court decides the following:
  - Allows the appeal on the issue of notice
  - Reduces notice to 24 months
    - "There were no exceptional circumstances that warranted a longer notice period" (para 5)
    - "Substantial" circumstances, not "exceptional"
      - "Mr. Dawe's circumstances — including his senior position, career-long years of service at the same company, age at the time of termination, and his difficulty in finding new employment — warranted a substantial notice period. However, there was no basis to award Mr. Dawe more than 24 months' notice." (para 42)
    - **WHY?**

(4) Applicable Law

- *Lowndes v. Summit Ford Sales Ltd.* (2006), 206 O.A.C. 55 (Ont. C.A.):
  - ***Lowndes* Approach:**
    - "... the determination of what constitutes reasonable notice is "case-specific" and, while there is "no absolute upper limit or 'cap' on what constitutes reasonable notice, generally only exceptional circumstances will support a base notice period in excess of 24 months" (para 31, *Dawe)*

- Court has followed the *Lowndes* approach over the years
  - endorsed in *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79, 29 C.C.E.L. (4th) 33 (Ont. C.A.):
    - 26 months notice:
      - husband and wife had "exceptional circumstances"
        - » ages at the time of termination (63 and 61 years old),
        - » lengthy service (32 and 25 years),
        - » character of the positions they held.

- *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 (Ont. C.A.):
  - *Lowndes* and *Keenan* affirmed:
    - "reasonable notice is determined on 'a case-specific basis', and while there is no cap, 'generally only exceptional circumstances will support a base notice period in excess of 24 months.'"
  - Court refused to increase a base notice period of 20 months.

(5) Application of the law to Mr. Dawe

- Motion judge's approach to reasonable notice was in error
- There were no exceptional circumstances
- Motion judge took a different approach to established law
  - Motion judge focused on "his perception of broader social factors that led him to conclude that the 'presumptive standards' discussed in Lowndes were inapplicable" (para 34)
    - Motion judge had stated:
      - "Whether it is exceptional circumstances or recognizing a change in society's attitude regarding retirement.... Further, mandatory retirement was abolished in 2006 in Ontario to protect against age discrimination. Many employees have continued past 65. In result, it is important to recognize that each case is unique. Presumptive standards no longer apply." (para 31 of SCJ decision)

- Error for 3 main reasons:
  - (1) Motion judge should have applied the *Lowndes* line of cases instead of relying on his own perceptions of the "change in society's attitude regarding retirement“
    - (a) Changes to mandatory retirement laws were known at the time of *Lowndes* decision
    - (b) Recent cases (decided after the mandatory retirement legislation change) had not altered the approach in *Lowndes*
    - (c) Mr. Dawe's circumstances are similar to those of the employee in *Lowndes:*
      - 59 years old at the time his employment was terminated
      - Worked for the employer 28 years
      - Held a management and director position at the time of termination
      - Finding in *Lowndes:* exceptional circumstances had not been established
        - » “[B]ase notice period of 24 months ‘recognizes’ and ‘rewards’ these factors, and constitutes the ‘high end of the appropriate range of reasonable notice for long-term employees in [Mr. Lowndes'] position’”

- (2) Mr. Dawe's retirement plans were not determinative
  - *Relying on Strudwick:*
    - "absent a fixed term contract, 'an employer does not guarantee employment to retirement'"
    - "in entering the employment relationship, an employer cannot reasonably be seen as having accepted the risk that in dismissing an employee, it would be obligated to pay that employee until their retirement"
- (3) motion judge viewed this case as being "tantamount to forced retirement"
  - No:
    - Mr. Dawe requested an "exit strategy"
      - » "While Mr. Dawe may have soon come to regret his decision, this factor ought to have weighed against a finding that this case involved 'exceptional circumstances' justifying a notice period in excess of 24 months"

- The Court agreed with the motions judge that Mr. Dawes circumstances warranted a substantial notice period, but there was no basis to award more than 24 months.

(3) Takeaways for Employees and Employers

Takeaways

- Although there is no "cap," the reasonable notice period is effectively a maximum of 24 months, unless there are exceptional circumstances
    - Unclear as to what really constitutes "exceptional circumstances"
- An employees expectations regarding retirement at age 65 are not relevant considerations for notice
- Even for employees with 30+ years of service, it will be difficult to obtain a notice period of more than 24 months

Thank you.

Larry W. Keown
larry.keown@devrylaw.ca
(416) 446 5815

Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

The Impact of Technology on Privacy Issues in the Workplace

By: Marty Rabinovitch

Overview

- (1) Technology which can impact on privacy rights of employees:
  - Devices in Vehicles
  - Devices for Entry Control
  - Payment Mechanisms
  - Pre-hiring Screening
- (2) Employer considerations before implementing changes that impact employee privacy rights
- (3) Recommendations for Employers

Technology which can Impact on Privacy Rights of Employees:

Devices in Vehicles

- Global Positioning System (GPS) Tracking
- Photographing and Recording
- Breathalyzers on Ignitions

Devices in Vehicles

GPS Tracking

- Tracks, records and reports the location of the vehicle
- Tracks other information, such as movement, gas usage, distance, and routes taken
- *International Union of Elevator Constructors, Local 50 v. Otis Canada Inc.*, 2013 CanLII 3574 (ON LRB)
  - Company vehicles monitored when the car was on and off, regardless of whether the driver was on duty
  - Union argued that this was an invasion of employees' privacy rights
  - Issue was whether employees were permitted to drive vehicles for personal use
  - Ontario Labour Relations Board ruled in favour of the employer. The OLRB determined that the tracking device was a legitimate way to protect the vehicles which belonged to the employer

Devices in Vehicles

Type 2: Photographing and Recording

- Connecting technology to company vehicles to monitor the use of the vehicle in real time, relaying live videos, or recording events inside or outside the vehicle
- *Brink's Canada Ltd. v. Childs*, 2017 OHSTC 4 (CanLii) (Canada Occupational Health and Safety Tribunal)
  - Employer equipped trucks with a GPS tracking system and internal and external video surveillance
  - Tribunal found that those measures were developed with the purpose of enhancing the protection and security of employees because of the risks associated with driving

Devices in Vehicles

- *Colwell v. Cornerstone Properties Inc.*, [2008] OJ No 5092 (SCJ)
  - Employer's implementation of surveillance cameras on the office ceiling without the employees' knowledge was a breach of the implied term of the employment contract to treat each other fairly and in good faith
  - Violation of employees' privacy without sufficient justification

Devices in Vehicles

Type 3: Breathalyzer on ignitions

- Device which does not permit vehicle to start if driver's blood alcohol concentration is over a pre-set limit

Devices in Vehicles

Type 3: Breathalyzers on ignitions

- Since the device collects health information, employer should exercise caution before implementing
- Constitutes random drug/alcohol testing
  - *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34
    - Employers must provide evidence of a general workplace drug or alcohol problem in order to justify random drug and alcohol testing policies

Devices for Entry Control

- Grants and removes access to each employee to ensure that entry to the workplace is only for current employees
- System could also function as a time tracking system for employee entry, exit, and breaks
- 3 types:
  - Fingerprinting and retinal scans ("Biometric Systems")
  - Signing in and out of workplace computers
  - Voice recognition

Devices for Entry Control

- **Type 1: Fingerprinting and retinal scans ("Biometric Systems")**
  - Sensors record fingerprint-like images to make a digital formula used by computers to unlock doors and devices
  - Biometrics are not the same as storing fingerprints
    - Image is deleted from the system and formula is saved on the computer
  - Presumption that unilaterally imposed rules of an employer must not be unreasonable or inconsistent with the collective agreement
    - *See Re Lumber and Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.*, [1965] OLAA No 2

Devices for Entry Control

- Implementation of biometric systems have been challenged on this basis
  - *Metropolitan Toronto (Municipality) v. CUPE Local 79*, [1998] OLAA No 52
    - Policy grievance filed due to security checks, which used fingerprints as keys for locked doors after hours, for certain employees in janitorial and maintenance positions
    - Union successful – security checks violated collective agreement because employees not given opportunity to voice concerns
    - Employer should inform employees prior to introducing biometric technology

Devices for Entry Control

- *Agropur (Natrel) v. Teamsters Local Union No. 647*, [2008] OLAA No 694
  - Biometrics introduced to eliminate employees from "buddy punching"
  - Arbitrator found that the biometric system was reasonable because eliminating "buddy punching" was a legitimate business reason which outweighed intrusions on employee privacy rights

Devices for Entry Control

- **Type 2: Computer signing in and out**
  - *R. v. Cole*, 2012 SCC 53
    - Presumption is that employees have a lesser, but reasonable, expectation of privacy when they use workplace computers
  - Employers should ensure that employees are aware that signing in and out of the computers are tracked
  - **Policy should state that employees have no expectation of privacy**

Devices for Entry Control

- **Type 3: Voice Recognition**
  - Used to grant security clearance and access to the workplace
  - *Turner v. Telus Communications*, 2007 FCA 21
    - Voice recognition technology allowed employees to use and access the company's internal computer network by speaking commands into telephones
    - If employees refused to enroll/consent, they would be subject to progressive discipline
    - Union objected
    - Federal Court ruled in the employer's favour
    - PIPEDA does not prohibit employer from disciplining employees who do not consent to collection of personal information

Payment Mechanisms

- Bank Information of Employees for Direct Deposit
  - Requires disclosure of banking information to the employer
  - Labour arbitration decisions have accepted employers' decision to require employees to accept payment by direct deposit
  - Legitimate business decisions of the employer outweigh privacy concerns of employees (i.e. disclosing bank account information to employer)
  - *Employment Standards Act, 2000* is silent on this issue
  - S. 11(4) of *ESA*: Agreements can be made to pay an employees wages by direct deposit into an institution that does not have an office or facility within a reasonable distance from where the employee usually works
  - Employees' bank account information is protected by applicable privacy legislation
  - Courts have not yet addressed issue of direct deposits - but would likely be consistent with labour law decisions

Pre-hiring Screening

- 3 types:
  - Credit checks
  - Criminal background checks
  - Social media searches

- Concern is that employer may discover additional irrelevant information and could be accused of discrimination, in contravention of human rights legislation

Pre-hiring Screening

- **Type 1: Credit checks**
  - Alberta
    - Office of the Information and Privacy Commissioner of Alberta (https://www.oipc.ab.ca/news-and-events/news-releases/2010/investigation-report-p2010-ir-001.aspx)
      - Employer conducted pre-employment credit checks of applicants for a retail sales associate position because of concerns about in-store theft
      - Employer breached Alberta's privacy legislation
      - Found that a credit report was not reasonably required to assess someone's ability to perform work duties, nor was it related to the likelihood that someone would commit theft
  - Ontario
    - No case law or statute which prohibits an employer from having a credit check conducted for an employee
    - But employee must consent

Pre-hiring Screening

- **Type 2: Criminal background checks**
  - If reasonable grounds exist to believe that an employee has been convicted of a criminal offence which could materially affect the performance of their duties, the employer may be justified in obtaining consent to disclosure of police or criminal records
  - Regular checks may be justified for employees in certain positions, ex. supervising vulnerable children or individuals with a disability
  - But a general policy could be struck down as an invasion of privacy

Pre-hiring Screening

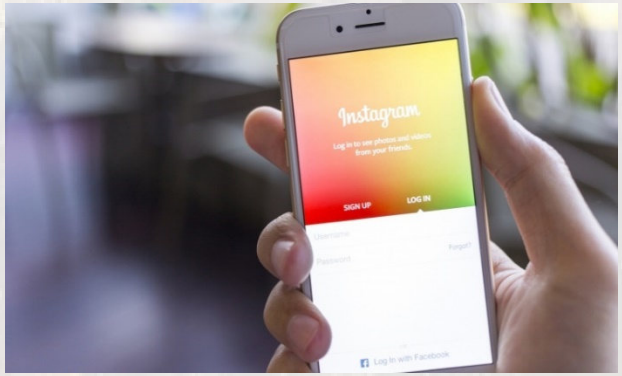
- ss. 5(1)-(2) of the *Human Rights Code*
  - Workplace policies for criminal checks must not discriminate or harass employees with respect to their "record of offences"
  - S. 10(1) *Human Rights Code:*
    - "record of offences" means a conviction for,
      - (a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
      - (b) an offence in respect of any provincial enactment;
- *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Quebec Inc.*, 2003 SCC 68
  - Purpose of anti-discrimination law against those with criminal offences is to protect them against social stigma that excludes those with criminal convictions, but which were served and pardoned, from the workforce

Pre-hiring Screening

- *CAW-Canada, Local 2098 v. Diageo Canada Inc.*, [2010] OLAA No 21
  - Employer was permitted to have criminal background checks conducted because the employer was able to demonstrate:
    - policy applied to sensitive roles only, not all employees
    - policy set out 3 categories of employees that were exempted from background checks
    - there was an appeal system in the collective agreement to protect employees if there was a criminal background check disadvantage for an employee
    - the policy was a corporate-wide initiative
- *Dube v. CTS Canadian Career College*, 2010 HRTO 713
  - Employer found to have discriminated against an employee when it withdrew a job offer to an applicant for the position of Addictions Interventions Instructor once it learned of his criminal history (he had criminal convictions, but had served his time and had received a pardon)

Pre-hiring Screening

- **Type 3: Social media searches**
  - *Jones v. Tsige*, 2012 ONCA 32
    - "Intrusion upon seclusion"
      - Intentionally or recklessly intruding upon another's private affairs can result in employer liability if the invasion would be highly offensive to a reasonable person
  - Google or Facebook searches that show non-restricted or non-password-protected information would likely not constitute "intrusion upon seclusion"
    - See *Rancourt-Cairns v. Saint Croix Printing and Publishing Company Ltd., 2018 NBQB 19 (CanLii)*
    - Employers that demand candidates' social media passwords, or act invasively or deceptively, could be found liable



Employer Considerations before Implementing Changes that Impact Employee Privacy Rights

Employer considerations before implementing changes that impact employee privacy rights:

- inform the employee of the systems when they accept the offer of employment; any conditions of employment (ex. satisfactory criminal record check) to communicated to employee in the offer letter
- Implement policies when new technologies which impact on privacy are introduced and communicate those policies to employees
- Policies should address the business reasons for implementing the technology and address privacy concerns
- Implement the least invasive method to achieve the employer's legitimate business objectives

Recommendations for Employers

Recommendations

- Implement technology and workplace policies that respect privacy rights to maintain employee trust and ensure good relationship with employees
- Surveillance and recording of employees should be avoided, unless can be justified by a legitimate business or security reason, which outweigh employee privacy concerns
- **Consult lawyer if wish to introduce new technology in workplace which will engage privacy concerns of employees**

Recommendations

- When implementing biometric scans, employers should be able to show the following:
  - Not prohibited by employment contract (or collective agreement)
  - legitimate business reasons for implementing the system
  - minimal infringement on privacy rights; and
  - benefits for employer outweigh the infringement on employee's privacy rights
  - It is reasonable to require employees to accept payment by direct deposit

Recommendations

- Employers cannot conduct criminal background checks without sufficient reasoning
  - If there are legitimate security or business reasons for checks before hiring an employee, the employer should have policies that state who is subject to the checks and how they will be conducted
- Employers can view a job applicant's public online profiles can be viewed by employers, but employers must ensure that they are not making its hiring decision based on prohibited grounds of discrimination, but rather, on legitimate job qualifications

Thank you.

Marty Rabinovitch
marty.rabinovitch@devrylaw.ca
(416) 446 5826

Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Legalization of Cannabis – Employer Considerations

By: Michelle Cook

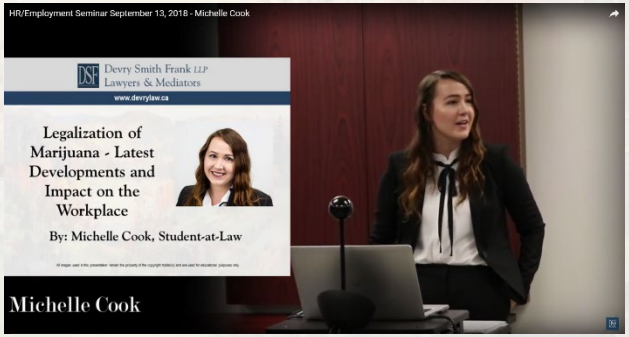
OVERVIEW

1. Drug and Alcohol Policies
2. Accommodation
3. Handling Suspected Impairment
4. Drug Testing
5. Mandatory Disclosure/ Discipline

LEGALIZATION OF MARIJUANA – LATEST DEVELOPMENTS AND IMPACT ON THE WORKPLACE

- Marijuana in the workplace was a topic in the Fall 2018 HR/Employment Seminar

  https://www.youtube.com/watch?v=hfTR2Ypg__s



OVERVIEW OF LEGALIZATION

- Cannabis and its derives, including marijuana, was legalized in Canada on October 17, 2018
- Impacts:
  - Concentration
  - Ability to think and make decisions
  - Decreases reaction times
  - Can impact motor skills and cognitive functioning
  - Can increase anxiety and panic attacks
- Marijuana users have difficulty assessing their own fitness to work and continue to make errors on tasks without awareness for up to 24 hours after consumption
  - Expert in *Re USW Local 9508 and Vale Newfoundlad (Cooney)*, 2019 CarswellNfld 272

Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

DRUG AND ALCOHOL POLICIES

RECAP: THE IMPORTANCE OF A DRUG AND ALCOHOL POLICY

- Employers that do not have a policy are susceptible to:
  - Employees showing up to work impaired as they did not understand their employer's position on legal drug use
  - Employees arguing that there is no ground for drug-based discipline
  - Employees challenging employer conduct as discriminatory under human rights legislation
  - Supervisors not knowing what to do in the event they come across consumption or impairment in the workplace
  - *OHSA* violations and potentially criminal charges

DRUG & ALCOHOL POLICIES SHOULD INCLUDE:

- A clear and express statement that the policy promotes safety and is to deter unsafe behavior at the workplace
- Consistent prohibition on use/possession/intoxication at work or during workplace events
  - Cannot "single out" marijuana
- Encourage/require employees to disclose substance abuse issues without fear of reprisal or discipline
  - Avoid "zero tolerance" based policies that do not offer accommodation
- Provide for and explicitly set out a process for employees to ask for and obtain treatment

Miller Waste Systems Inc v Charlebois, 2019 CarswellOnt 5562

- Employee smoked marijuana (or another substance) in the workplace and was videotaped doing so by a supervisor
- Employer had a clear drug and alcohol policy in place that prohibited smoking in the workplace
- Employee terminated for cause under policy → upheld by OLRB
  - ESA: An employer is required to provide notice of termination or pay in lieu unless the employee engages in wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer
  - Smoking in the workplace is wilful disobedience that is enough to substantiate cause in one occurrence
  - Smoking in the workplace causes a risk of fire and injury to employee and others
  - Smoking in the workplace is a direct contravention of the *Occupational Health and Safety Act*, *Smoke-Free Ontario Act* and the *Fire Code*

Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

ACCOMODATION

WHAT MARIJUANA USE NEEDS TO BE ACCOMODATED?

- Recreational drug use is **not** a human rights issue and does not need to be accommodated
  - Similar to alcohol, employers can limit and/or restrict the recreational use of marijuana and prohibit impairment at work
  - Employers can require disclosure of impairment due to recreational use, similar to over the counter medication
- Addiction from marijuana needs to be accommodated
  - Employer can request disclosure, time away for treatment, return to work only upon medical clearance, and methods to ensure abstinence from future use
- Use of marijuana due to an underlying disability/illness needs to be accommodated
  - Employers can and should require the disclosure of an authorization from a doctor and the underlying medical issue (prognosis, duration of use, form of ingesting, scheduling of use, limitations, accommodation suggested, level of impairment during use and impact on the performance of duties)

WHEN CAN AN EMPLOYER SAY "NO"?

- Considerations to keep in mind
  - Safety
  - *Bona fide* requirements of the position not being met
  - Undue hardship following treatment and failure to remain abstinent
- Medicinal marijuana must be accommodated to the point of undue hardship
  - Potential for several hours of residual impairment after initial use (24 hours)
  - Level of use (amount, timing, duration)
  - Safety sensitive positions or work environments
  - Current limitations on being able to conclusively test impairment

IBEW Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc, 2019 NLSC 48

- Unionized grievance: involved the construction of electricity towers (safety sensitive job)
  - Employee obtained the job conditional on a pre-employment drug test (as per collective agreement)
- The potential employee used medically prescribed cannabis with a limited THC level every night after work to treat the pain from his osteoarthritis and Chrohn's Disease (disability → need for accommodation arises)
  - Once he disclosed he used cannabis, he was refused the job
- On a previous safety-sensitive job with the same union, he was permitted to work and had no incidents

IBEW Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc, 2019 NLSC 48

- It was not disputed that employee was denied job solely due to his cannabis use → *prima facie* discrimination
- The employer had no way of accommodating the employee in the position → denial of position = good faith occupational requirement (i.e. the ability to work unimpaired)
  - All positions with the employer required physical dexterity and mental focus → a deficit in which due to the nature of the work, equipment and worksite created severe hazards for the worker and others
- Under current technology, the employer has no way to readily measure impairment from cannabis
  - there is a severe risk of harm that cannot be effectively managed → Health Canada suggests that impairment may last up to 24 hours
  - Undue hardship arises
- Once the possibility of impairment is raised, the onus is on the employee to demonstrate to the employer to their reasonable satisfaction that they could perform the job safely with accommodation

Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

HANDLING SUSPECTED IMPAIRMENT

LOOK FOR PHYSICAL, MENTAL OR BEHAVIOURAL DIFFERENCES

- Odour
- Physical appearance
- Unsure movement
- Slurring or sleepy
- Memory loss
- Agitation/personality change
- Erratic or uncharacteristic behavior
- Poor coordination
- Extended breaks, particularly alone
- Nearby paraphernalia

WHAT TO DO IF AN EMPLOYEE EXHIBITS SIGNS OF IMPAIRMENT?

- Obtain information regarding the conduct/behavior of the employee
- Interact directly with the employee to determine their behavior, personality and reaction time
- Ask the employee directly if they have recently used alcohol, cannabis, a prescription drug or a narcotic, and if so, why?
- Indicate your concern regarding the employee's behavior or impact of the current condition on the employee's ability to perform their duties
- Provide immediate health assistance if necessary
- Do not let the employee return to work or be alone or operate machinery/a vehicle
- Provide an escort home
- Take notes from everyone who has interacted with the employee
- Confirm any authorized uses of medicinal marijuana or prescription drugs
- Allow the employee to provide an explanation of his/her conduct
- Drug test if necessary*

Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

DRUG TESTING

RECAP: UNIONIZED ENVIRONMENTS

- Unionized environments:
  - All drug testing must explicitly be in the collective agreement

RECAP: NON-UNIONIZED ENVIRONMENTS

- Non-unionized environments:
  - Non-safety sensitive environments
    - **Unlikely that any drug testing, in any circumstances, will be justified**
    - Suspected impairment must be treated like any other performance failure → a warning with progressive discipline or termination with reasonable notice
      - *Toronto Dominion Bank v Canadian Human Rights Commission* (1996), 22 CCEL (2d) 229
      - *Stone v Kerr Beavers Dental*, [2006] OJ No 2532, 2006 CarswellOnt 3831

RECAP: DRUG TESTING IN NON-UNIONIZED ENVIRONMENTS: SAFETY SENSTIVE JOBS

- Reasonable cause or post-incident testing → allowed if part of a larger assessment
  - *Entrop v Imperial Oil Ltd* (2000), 50 OR (3d) 18
- Random testing → uncertain
  - *Entrop v Imperial Oil Ltd* (2000), 50 OR (3d) 18
- Pre-employment → depends
  - *Entrop v Imperial Oil Ltd* (2000), 50 OR (3d) 18
- "Last chance agreements" as part of a return to work after substance abuse treatment → permissible if tailored to the individual's circumstances and includes further accommodation
  - *Entrop v Imperial Oil Ltd* (2000), 50 OR (3d) 18

TIPS FOR DRUG TESTING

- IF an employer is going to engage in drug testing, AT MINIMUM they must:
  - Critically review whether the job is determined to be "safety sensitive"
  - Try other less invasive methods first
  - Use a reputable and reliable form of testing/testing provider
  - Ensure the tests are conducted promptly
  - Ensure the test samples are handled and exchanged properly
  - Ensure that back-up test samples are maintained
  - Ensure that privacy is maintained
  - Remove the employee from the workplace while the test results are being determined
  - Testing must be connected to the purpose of minimizing or deterring impairment at work to ensure job safety

2018 Case to Watch Out for: *ATU Local 113 v TTC*, 2017 ONSC 2078

- TTC won the right to conduct random, unannounced drug tests until an arbitral resolution was reached
- Under the random drug tests, 82 of 4,299 employees tested positive for drugs or refused to test
- 62% of the positive drug and alcohol tests involved cannabis

Devry Smith Frank LLP
Lawyers & Mediators

www.devrylaw.ca

MANDATORY DISCLOSURE/DISCIPLINE

RECAP: SAFETY SENSITIVE: MANDATORY DISCLOSURE OF DRUG DEPENDENCIES

- The courts have upheld some drug policies that require a worker to disclose their current drug use or else be at risk of discipline (or potential termination)
  - Must include that all voluntary disclosures will be accommodated
    - *Stewart v Elk Valley Coal Corp*, 2017 SCC 30

GENERAL DISCIPLINE CONSIDERATIONS

- Was the misconduct connected to impairment, mental illness and/or addiction (i.e. a disability that needs to be accommodated)?
- Should the employer have been aware of the disability?
- Should the employer have made a reasonable inquiry of addiction and/or mental illness?
- Is the employee authorized for the medical use of marijuana?
- Should the employee have disclosed their permitted use?
- Was the employee able to (or should have been able to) disclose the addiction prior to a breach of the policy?

Thank you.

Michelle Cook
michelle.cook@devrylaw.ca
(416) 446-3304

Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Networking

&

Coffee Break

Devry Smith Frank *LLP*
Lawyers & Mediators

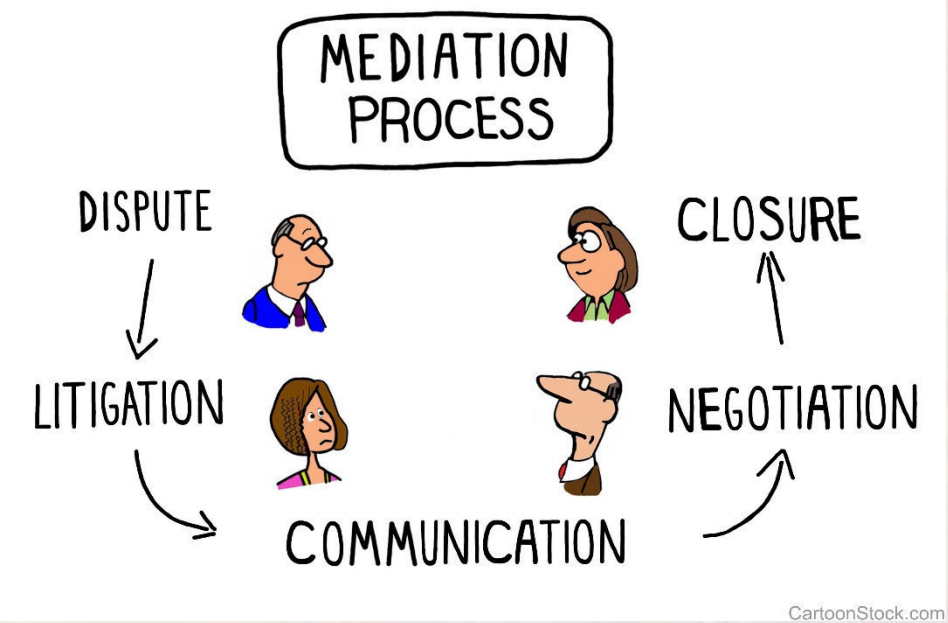
www.devrylaw.ca

Mediating Employment Law Disputes

By: Eric Gossin

WHAT IS IT?

- Mediation is a **confidential** process used to help parties resolve conflicts.



MEDIATION PROCESS

- Different from negotiations only due to the involvement of a third party (the "mediator") who will remain neutral throughout the process.
- Mediation differs from arbitration in that the mediator makes no decisions and cannot impose a resolution on any participant.
- No predetermined rules of methods.

MEDIATION PROCESS (cont'd)

- A mediator's "tool box" is filled with techniques designed to help the participants reach a resolution.
  - Non-evaluative.
  - Evaluative.
  - Mediator recommendations.
- Process designed having regard for the specific case.
- May be mandatory – mandated by statute /rules of practice.

WHEN SHOULD IT BE USED?

- Any time there is a dispute between parties that can't be resolved without help.
- As early as possible and practical.
  - Trend to early mediations, even before court proceedings started.
  - Desire to minimize legal costs.
  - Eliminate impediments to settlement.
  - Allow parties to move on.
  - Addresses the psychological impact of litigation.

WHY IS IT A GOOD IDEA?

- Employment matters are very personal, particularly to the employee.
- Court proceedings cause harm – financial and emotional.
- Litigation can be toxic to the parties.
- Settlement is forward looking.
- Little or no risk due to the confidential nature of the process.

WHY IS IT A GOOD IDEA? (cont'd)

- Where counsel is retained, legal rights protected.
- Allows "out of the box" considerations.
- Allows for "structured settlements" courts can't provide.
- Save money.

HOW DOES IT WORK?

- A dispute arises.
  - Wrongful termination.
  - Claim for damages.
  - Possible Human Rights claim.
- Lawyers are consulted.
- Contact is made between company and employee, or counsel for each.
- Dispute is particularized in letter or claim.
- Counsel agree to proceed to mediation.
- Mediator is selected and time chosen.

WHAT DOES IT LOOK LIKE?

- Generally mediators follow a similar format.
- Location for mediation is determined.
  - Your place, mine or neutral.
  - Meeting room for each party.
  - Break out room if needed.
  - Food service.
- Full day or half day, or multiple days.

WHAT DOES IT LOOK LIKE?

- Steps:
  - Mediator has mediation agreement signed.
  - Joint session – yes or no?
  - Mediator's opening.
  - Separate caucusing.
  - Exchange of proposals.
  - Settlement achieved – signed.
  - Pay the mediator.

Thanks to compromise they were moving closer.

CartoonStock.com

WHO SHOULD DO IT?

- Qualified mediators.
- No conflict of interest.
- Choose the mediator.
  - Mandatory roster (or not).
  - Cost.
  - Subject matter expertise.
  - Experience.
  - Personality.
  - Evaluative or not evaluative.
  - Sensitivity to parties – empathy.
  - Non-Judgemental.
  - Good Communicator.

WHAT IS LAWYER'S ROLE?

- Legal advice.
- Emotional support.
- Encourage resolution.

DO YOU NEED A LAWYER?

- Mediator cannot give legal advice.
- Mediator must remain neutral – cannot fix a party's possible mistake.
- Employment law is complex.
- Creative solutions more likely found.
- Documentation needed likely found.
- Can act as "buffer" between parties.
- Advocates for client.

HOW SHOULD WE PREPARE FOR SUCCESS?

- Mediation briefs – clear, concise and only essential documents.
- Expectations - lawyers should manage.
- Consider settlement range.
- Prepare possible allocation scenarios:
  - Wages, retiring allowance, legal fees, general damages, other.

WHAT IF WE DON'T RESOLVE IT?

- Lost opportunity.
- Conflict continues.
- Nothing said is disclosed in the lawsuit.
- Have had benefit of some disclosure.
- Have better understanding of other position.

WHAT IF WE DO RESOLVE IT?

- The conflict is at an end.
- Move on to other, more constructive things.
- Allow yourself or company to heal.
- While "everyone is unhappy" with settlement, the dispute has ended (value).
- Saved a lot of money.

Thank you.

Eric Gossin

eric.gossin@devrylaw.ca

(416) 446 5828

Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Arbitration Clauses in Employment Contracts - The Current Legal Landscape

By: Nicholas Reinkeluers

AGENDA

- What is the arbitration clause.
- Pros and cons of arbitration.
- The Arbitration Act.
- Enforceability of arbitration clauses in employment contract.
- Suggestions for drafting enforceable arbitration clause.

What is an Arbitration Clause?

- What is arbitration?
  - Arbitration is an alternative dispute resolution process in which parties agree to retain a neutral third party to render a binding decision
  - Arbitration has been used widely in commercial disputes as a private alternative to litigation
  - Arbitration is less common in the employment context but is becoming more popular
- What is an arbitration clause?
  - An arbitration clause is a term in a contract by which the parties agree that any dispute arising out of the contract will be resolved by way of arbitration, not by the courts

Advantages of Arbitration

- Speed
  - Disputes can be resolved faster than traditional litigation since parties can set their own procedure and timelines
- Choice of Arbitrator
  - Parties can choose a third party that has expertise in the subject matter of the dispute
- Cost
  - The cost of the proceedings can be more easily contained as the parties can agree upon a simplified process
- Privacy
  - Arbitrations are private, decisions are not publicly reported

Disadvantages of Arbitration

- No Precedential Value
  - Arbitral awards are not reported, cannot rely upon a helpful decision in future cases
- Cost
  - Parties need to pay for the venue and arbitrator's fees, may be more costly than litigating depending on nature of the dispute
- Simplified Procedure
  - Procedure may be simplified, less opportunity to obtain disclosure from opposing side
- Finality
  - Recourse against an award is very limited, more restrictive than appeal rights

The Arbitration Act, 1991, S.O. 1991, c. 17

- *The Arbitration Act* is the governing legislation for arbitrations conducted in Ontario
- Definition of "Arbitration Agreement"
  - S. 1 "'arbitration agreement' means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them"
- Application of the *Act* s.2:
  - 2 (1) "This Act applies to an arbitration conducted under an arbitration agreement unless,

    (a) the application of this Act is excluded by law; or

    (b) the International Commercial Arbitration Act applies to the arbitration."

The Arbitration Act, 1991, S.O. 1991, c. 17

- Contracting Out:
  - S.3 "The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:
    - 1. In the case of an arbitration agreement other than a family arbitration agreement,
      - i. subsection 5 (4) ('Scott v. Avery' clauses),
      - ii. section 19 (equality and fairness),
      - iii. section 39 (extension of time limits),
      - iv. section 46 (setting aside award),
      - v. section 48 (declaration of invalidity of arbitration),
      - vi. section 50 (enforcement of award)."

The Arbitration Act, 1991, S.O. 1991, c. 17

- Effect of a Stay:
  - 7 (1) "If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding."

Are Arbitration Agreements in Employment Contracts Enforceable?

- The leading case in Ontario is *Heller v. Uber Technologies Inc.*, 2019 ONCA 1
- Facts:
  - Mr. Heller was a driver for UberEATS, providing food delivery services and earning approx. $400-$600/week for 40-50 hours of work while driving his own vehicle
  - Mr. Heller commenced a proposed class action on behalf of "any person, since 2012, who worked or continues to work for Uber in Ontario as a partner and/or independent contractors" aka. the "drivers"
  - The class action sought a declaration that the drivers are employees of Uber, are entitled to the protections set out in the *Employment Standard Act, 2000* ("**ESA**") and that the arbitration clause in the drivers' contracts with Uber are unenforceable

Heller v. Uber Technologies Inc., 2019 ONCA 1

Each driver agreed to a contract with Uber containing the following arbitration clause:

- "…. **this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands**…. Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, **such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce** ("ICC Arbitration Rules")…the dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. **The place of arbitration shall be Amsterdam, the Netherlands**…"
- Under the ICC Rules, up-front cost to commence the arbitration process is USD $14,500

Heller v. Uber Technologies Inc., 2019 ONCA 1

- **Issues:**
  - Whether the arbitration clause amounts to an illegal contracting out of the *ESA*
  - Whether the arbitration clause is unconscionable

Heller v. Uber Technologies Inc., 2019 ONCA 1

- The Court of Appeal held that the arbitration clause was an **illegal contracting out of the *ESA***
  - S. 5 of the *ESA* provides that any agreement to waive an employment standard provided by the *ESA* for the benefit of an employee is void
  - S. 96 of the *ESA* allows any person alleging a contravention of the *ESA* to file a complaint with the Ministry of Labour, which must be investigated by an Employment Standards Officer, who may render a decision ordering the employer to pay wages if the ESA has been contravened
  - The Court held that the right to file a complaint is an employment standard
  - The arbitration clause prevented Uber drivers from filing a complaint
  - Therefore, the arbitration clause was void as an illegal contracting out of the *ESA*
  - Court reached this decision even though the drivers had not actually brought a complaint, but were proceeding by way of a class action

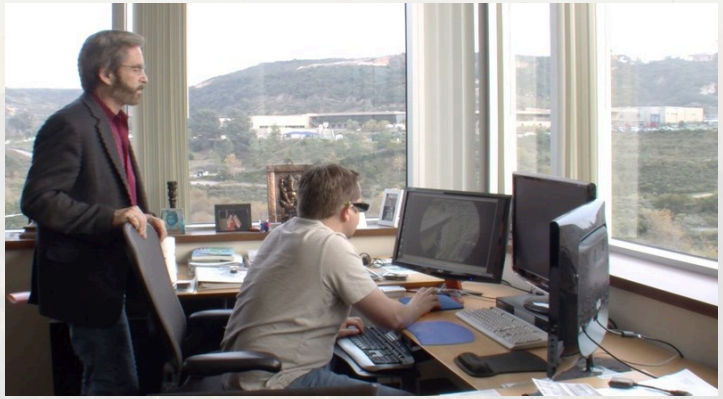
Heller v. Uber Technologies Inc., 2019 ONCA 1

- The Arbitration Clause was also found to be **unconscionable**
  - It is unfair for an individual to incur the large costs up-front to arbitrate the claim especially when it is a small claim
  - The claim is to be determined in accordance with the laws of the Netherlands, not Ontario – no evidence that Dutch laws would ensure the same rights as the *ESA*
  - No evidence that drivers are receiving any legal advice and unrealistic to expect that they could have negotiated any of the terms
  - Inequality of bargaining power
  - Uber chose the Arbitration Clause in order to favour itself and take advantage of its drivers who are clearly vulnerable to their market power

Heller v. Uber Technologies Inc., 2019 ONCA 1

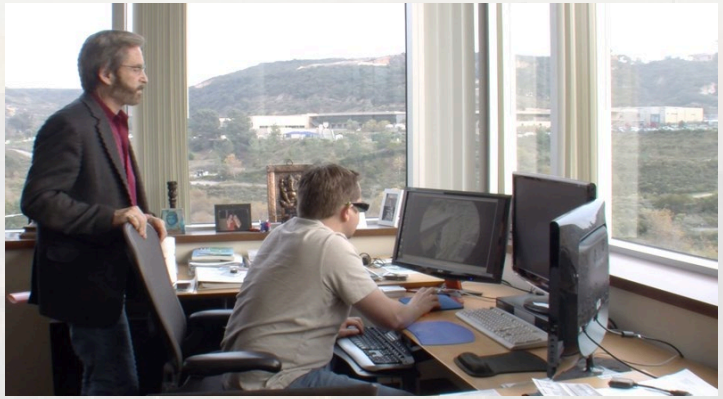
- On May 23, 2019, the Supreme Court of Canada granted leave to appeal from the Court of Appeal's decision
- A number of parties have intervened
- Appeal is currently scheduled to be heard on November 6, 2019

Rhinehart v. Legend 3D Canada Inc., 2019 ONSC 3296



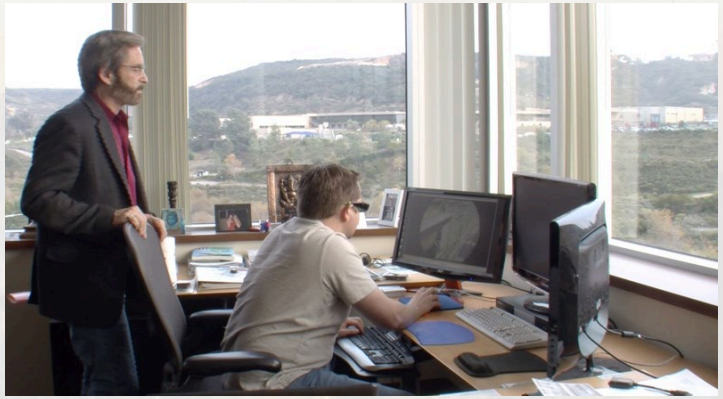
- Facts:
  - Mr. Rhinehart worked for Legend 3D Inc. ("Legend USA") and executed four employment agreements between December 2013 until 2016 which contained arbitration clauses that disputes be determined by arbitration in California
  - Mr. Rhinehart moved to work with a related entity Legend 3D Canada ("Legend Canada"), however no written employment contract or arbitration agreement was signed
  - He was terminated from his employment with Legend Canada and started a wrongful dismissal action
  - Legend USA and Legend Canada brought motion to stay or dismiss action based on the arbitration agreement executed by Mr. Rhinehart while he was employed with Legend USA

Rhinehart v. Legend 3D Canada Inc., 2019 ONSC 3296



- **Arbitration Clause:**
  - "[Legend USA] and I each agree to submit to final and binding arbitration any and all disputes that we could otherwise pursue in court that arise from or relate in any way to my recruitment, hiring, employment, or the termination of my employment, with Legend [USA]. …" (para 12)
  - The clause requires that the arbitration take place in California

Rhinehart v. Legend 3D Canada Inc., 2019 ONSC 3296



- Should Mr. Rhinehart's action be stayed on the basis of the arbitration agreement?

- Court analyzed the matter as follows:
  - Is there an arbitration agreement?
  - What is the subject matter of the dispute?
  - What is the scope of the arbitration agreement?
  - Does the dispute arguably fall within the scope of the arbitration agreement?
  - Are there grounds on which the court should refuse to stay the action?

Rhinehart v. Legend 3D Canada Inc., 2019 ONSC 3296

- **Result:**
  - Court finds arbitration clause unenforceable for multiple reasons
    - No written arbitration agreement between Mr. Rhinehart and Legend Canada
    - There is an arbitration agreement between Mr. Rhinehart and Legend USA, but dispute is outside the scope of that agreement because Mr. Rhinehart's claim relates to his work at Legend Canada
  - In addition, the arbitration clause violates the *ESA*
    - Mr. Rhinehart's claim includes claim for damages for overtime pay, which is a right guaranteed by the *ESA*
    - No clarification of the law that would be applied in the arbitration, no evidence that Ontario law, including the protections of the *ESA*, would be applicable
    - The clause also improperly precludes Mr. Rhinehart from bringing a complaint to the Ministry of Labour

Suggestions for drafting an enforceable arbitration clause

- No guarantees, particularly as *Heller v. Uber* is being appealed to the Supreme Court of Canada, however some suggestions include:
  - Ensure the arbitration clause is fair to the employee
    - If the employee works in Ontario, Ontario law should apply and arbitration should take place in Ontario
    - May be more likely to be enforceable in employment contracts with more senior, higher earning employees, where up-front costs associated with arbitration will not be prohibitive
  - Ensure the arbitration clause is consistent with the rights granted by the *ESA*
    - If an employee is contracting out of or waiving a right provided by the *ESA*, the clause will be unenforceable
    - Consider providing the employee with the option of resolving the dispute by arbitration or bringing a complaint to the Ministry of Labour
    - the Ministry of Labour complaints process cannot award the same remedies as a Court, so precluding court proceedings but not Ministry of Labour complaints will still provide a benefit to the employer

Thank you.

Nicholas Reinkeluers
nicholas.reinkeluers@devrylaw.ca
(416) 446 3328