

Infrastructure Law: Employment and Labour Considerations

Presented By

Stephen Shaddock
Senior Associate
Borden Ladner Gervais LLP

September 20, 2018

BLG
Borden Ladner Gervais

Agenda

- **Independent contractors vs. employees**
- **Workplace harassment**
- **Cannabis in the workplace**

Independent contractor vs. Employee

- Common practice in the construction industry to structure working relationships on the basis of an independent contractor rather than employer-employee.
- Significant operational and cost consequences: applicable labour standards (i.e. vacation pay, leaves, etc.), workers' compensation coverage, benefits, reasonable notice on termination, etc.
- In Nunavut, employees in the construction industry are not entitled to notice of termination (i.e. *Notice of Termination Exemption Regulations*). However, construction employees may be entitled to common law reasonable notice.

Independent contractor vs. Employee

- Determination of an independent contractor vs. employer-employee relationship is very contextual.
- Courts don't focus on labels or even in the intention of the parties, but the substance of the working relationship and how the work is actually performed.
- Factors considered (non-exhaustive):
 1. Control over the performance of the individual's work (e.g. the individual hires his own employees and determines the timing and manner in which services are rendered);
 2. Ownership of the tools or equipment required to perform the work;
 3. Economic dependency of the individual on the company;
 4. Meaningful chance of profit or risk of loss for the individual (e.g. distinct from a fixed commission); and
 5. Operational integration between the individual and the company (e.g. is individual incorporated).

Independent contractor vs. Employee

- Notable trends:
 - “Dependent contractor” – Ontario continues to recognize the category of “dependent contractor” where an individual may be entitled to reasonable notice due to exclusivity and/or a very high degree of dependency. (*Thurston v. Ontario (Children’s Lawyer)*, 2018 ONSC 2137 – the court refused to grant summary judgement to a panel lawyer contracted to take on Children’s Lawyer cases from time to time).
 - Statutory developments – Ontario Bill 148 (passed November 2017) amended the *Employment Standards Act* to create a new onus requiring the employer to prove the individual is *not* an employee.

Workplace Harassment

- Harassment and sexual harassment in the workplace are not new, nor are they particular to construction or certain industries.
- Increased public awareness in harassment and sexual harassment (e.g. #METOO movement, etc.).
- As a result, employers are becoming more conscious of the issues, i.e. liability concerns, effect on productivity, recruitment, retention, etc.

Workplace Harassment

- Notable trends:
 - Increasing general damage awards for harassment:
 - *Until 2015 the high water mark for damages for injury to dignity, self-respect, etc. was around \$50k.*
 - *OPT v. Presteve Foods (HRT0, 2015) – Tribunal awarded \$150k; fact scenario particularly egregious; outlier or beginning of trend*
 - *GM v. X Tattoo Parlour (HRT0, 2018) – 15 year old intern, over a couple of weeks sexual conversations, inappropriate touching, solicitation for sex in exchange for money and tattoo; Tribunal awarded \$75k.*
 - *AB v. Joe Singer Shoes (HRT0, 2018) – Single mother, ESL, lived above store, over several years, inappropriate comments, sexually assaulted and harassed; Tribunal awarded \$200k.*

Workplace Harassment

- Workplace investigations
 - *Employers need to appropriately address the situation. Usually the first step is ensuring a complaint is investigated appropriately.*
 - *Case law on workplace investigations is still emerging.*
 - *Employers have the responsibility to conduct a thorough investigation and a fair investigation into the allegations.*
- *Joshi v. National Bank* (ONSC, 2016) – Failure to provide an employee with an opportunity to respond to allegations made against him could amount to a breach of employer’s duty of good faith.
- *Smith v. Vauxhall Co-Op Petroleum* (ABQB, 2017) – An employee dismissed for just cause following complaints of sexual harassment, which led to a wrongful dismissal claim. The Court found that termination for cause was justified, but was highly critical of investigation; reliance on the poor investigation at trial resulted in adverse costs consequences.
- *Shoan v. Canada (Attorney General)* (2016 FC 1003) – CRTC investigation of the Commissioner failed to provide for natural justice and procedural fairness

Workplace Harassment

- Statutory changes
 - *Some jurisdictions are addressing workplace investigations and other harassment issues through legislation.*
 - *Ontario Bill 132 (passed in 2016) amended the Occupational Health and Safety Act, to place numerous positive duties on employers to investigate, create policies, and train employee on procedures in the event of a harassment complaint. Failure to investigate can now result in a Ministry of Labour-ordered investigation, at the employer's expense, or a hefty fine.*
- Takeaways:
 - General damages for sexual harassment appear to be increasing.
 - Ensure employers are conducting thorough investigations.
 - Employers should be encouraged to try to alter workplace culture where necessary (e.g. up to date policies, education, bystander training, etc.)
 - Stay current with legislative and policy developments.

Cannabis in the Workplace

- Recreational cannabis will become legal in Canada on October 17.
- Drug use in the workplace is not a new issue.
- In general, employers are entitled to prohibit recreational cannabis (and other drugs) from the workplace, including prohibiting employees from being intoxicated at work.
- Employers actually have a duties under legislation and common law to take steps to maintain a safe and healthy workplace:
 - E.g. Nunavut *Safety Act*, section 4(1)(b), employers must take all reasonable precautions and adopt and carry out all reasonable techniques and procedures to ensure the health and safety of every person in his or her establishment. This includes due diligence to protect workers and provide a safe working environment from risks due to impairment, including from cannabis.
- Three main issues: Addiction, Medical Cannabis, and Drug Testing

Cannabis in the Workplace

- Addiction
 - Recognized as mental disability under human rights law.
 - Delicate balance to ensure employee privacy and human rights are respected while fulfilling an employer's duties to maintain a safe workplace.
 - If an employee has an addiction, the employer must accommodate the employee unless they will suffer undue hardship.
 - *Stewart v. Elk Valley Coal Corporation* (SCC 2017) – The SCC upheld employer's Policy requiring employees to disclose any dependency or addictions and that they would receive accommodation, but if an employee did not disclose dependency/addiction issues was involved in an incident and tested positive for drugs, their employment could be terminated.

Cannabis in the Workplace

○ Medical Cannabis Use

- An authorization/prescription to use medical cannabis does not automatically trigger the duty to accommodate. Employers have to accommodate the underlying disability, not the medical cannabis use. Employees must demonstrate an actual disability requiring medical cannabis.
- Recent decisions suggesting that employees must disclose their medical cannabis use to obtain accommodation from a “zero tolerance” policy:
 - *Lower Churchill 1 (Uprichard, 2017)* – NFLD arbitration; a truck driver and equipment operator was terminated for consuming medical cannabis at work as he had failed to disclose it. The employee was not able to prove a specific disability.
 - *Aitchison v. L & L Painting and Decorating Ltd. (2018 HRTO 238)* – A painter used medical cannabis on a job site and failed to disclose it to the employer; he was terminated in violation of a zero tolerance policy. Tribunal found the termination was not discriminatory because the employee did not disclose that he needed accommodation prior to violating the policy.

Cannabis in the Workplace

○ Drug Testing

- Drug testing workers is invasive. It is restricted to specific circumstances, e.g. post-incident drug testing where there is a serious safety incident or near miss has occurred, or pre-employment drug testing if the position is safety-sensitive (e.g. oil and gas, major construction).
- *Lower Churchill 2* (Tizzard, 2018) – NFLD arbitration; the employee failed pre-employment testing for a safety sensitive labourer position due to his nightly medical cannabis use. He used it to treat pain relating to osteoarthritis and Crohn's disease. The arbitrator held that accommodating the employee would constitute undue hardship because: no scientific consensus on a safe interval between use and performance of safety sensitive duties, and current testing methods could not accurately determine if the subject was impaired.
- Random drug testing is even more restricted and most authority holds it is unreasonable even in safety sensitive positions. (*Suncor Energy* (2018 ABCA 75))
- Law on drug testing will continue to evolve with developments in technology and our understanding of impairment from the effects. Workplace policies will have to evolve with it.



Questions?