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WORKPLACE NEWS COAST TO COAST

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INSIDE:

Ontario Court of Appeal Delivers Harsh Rebuke of Uber's Arbitration Clause

On January 2, 2019, the Ontario Court of Appeal provided important new considerations for employers who wish to utilize arbitration clauses in contracts with employees and independent contractors. In *Heller v. Uber Technologies Inc.* the Court held that the arbitration clause imposed on Uber drivers and UberEATS delivery persons constituted an illegal contracting out of the Ontario *Employment Standards Act, 2000* (the "*ESA*"), and was unconscionable.

As a result, the Court of Appeal overturned the decision of the lower Court to stay a class action proceeding, which can now proceed to the next stage, on behalf of all Uber and UberEATS drivers and delivery persons.

In its analysis, the Court of Appeal reviewed the arbitration clauses found in both the Driver Services Agreement and an UberEATS Services Agreement, which all Uber and UberEATS drivers and delivery persons were required to review and click "yes, I agree" prior to being allowed to provide their services to Uber.

Both of the agreements contained the same arbitration clause, which set out that any dispute between the parties, that could not be resolved between them, would be decided by an Arbitrator appointed in accordance with International Chamber of Commerce ("ICC") rules, and that the arbitration would take place in the Netherlands based on the laws of the Netherlands.

The Court determined that these requirements amounted to an illegal contracting out of the *ESA* and that they were unconscionable.

Contracting Out of the *Employment Standards Act*

In determining that the arbitration clauses constituted an illegal contracting out of the *ESA*, the Court held that the clauses eliminated the right of the Plaintiff, and any other Uber driver or delivery person in Ontario, to make a complaint to the Ministry of Labour regarding the actions of Uber and possible violations of the *ESA*. The Court explicitly stated that the right to make a complaint to the Ministry of Labour is an "employment standard" which is protected by the *ESA* and cannot be contracted out of. We note that a similar conclusion would likely apply to comparable provisions contained in other employment-related legislation such as the Ontario *Human Rights Code* and the Ontario *Occupational Health and Safety Act*.

The Court also concluded that an arbitration clause does not (and will not) preclude an employee in Ontario from lodging a complaint under the *ESA*. Furthermore, the illegality of the clause also meant that it did not preclude an individual from (as was the case in *Uber*) choosing to file a civil claim rather than an *ESA* complaint to the Ministry of Labour.

Unconscionability

In addition to the concerns noted above, the Court also ruled that the arbitration clauses were unconscionable.

In reaching this conclusion, the Court of Appeal considered that if a driver or delivery person wanted to pursue a dispute through the arbitration clauses, they would have to undertake an arbitration in the Netherlands and would have to incur up-front costs of at least $14,500 USD before accounting for travel or obtaining counsel – even in the case of claims relating to substantially smaller dollar amounts.

The Court took particular umbrage with the effective obligation upon drivers and delivery persons to pay these fees up front, particularly when contrasted with the evidence that the Plaintiff, an average UberEATS delivery person, earned approximately $400 to $600 per week before taxes and other work-related expenses.

The Court concluded that the arbitration clauses were unconscionable because they represented a substantially unfair bargain, because there was no evidence that the Plaintiff or any other driver or deliver person obtained any legal or other advice prior to entering into the agreements (nor was it a realistic to expect them to do so) and because there was a significant inequality in bargaining power between the parties. The Court determined that the arbitration clauses were included in the agreements to favour Uber and to take advantage of the drivers and delivery persons who were vulnerable to Uber's market strength.

Considerations for Employers

While the Court's decision was based heavily on the specific factual circumstances in *Heller v. Uber Technologies Inc.* employers who include arbitration clauses in their contracts with employees and independent contractors should assess whether updating the clause is necessary.

In particular, employers should seek to ensure that their particular arbitration clause does not purport to contract out of any employment-related legislation and does not effectively require independent contractors or employees (especially lower-level employees) to incur undue costs associated with pursing a complaint. In addition, as with any employment-related documents it is important for employers to provide an opportunity for employees and independent contractors to seek legal advice – and to make clear, where applicable, that this opportunity has been provided and been refused.

Workplace Monitoring: Key Principles and Best Practices for Employers

The ability to use technology to monitor and track workplace activity is a valuable and constantly evolving management tool. Some common examples include video surveillance, computer and phone use monitoring, GPS tracking, and biometric timekeeping. Each of these technologies can assist employers with maintaining a safe, secure, and productive workplace.

Deciding to implement such monitoring requires employers to balance their business interests in collecting information through monitoring and the privacy interests of those individuals, particularly employees, whose personal information may be collected. In this article, we summarize the various privacy laws existing across Canada as related to the collection of employee personal information. We also provide practical guidelines for employers to consider when implementing monitoring measures.

Privacy Laws in Canada

Canada has a number of laws related to privacy that may apply to workplace monitoring, depending on the jurisdiction (federal or provincial/territorial), sector (public or private), the type of information being collected (health information or other personal information), and whether the workplace is unionized or not.

In the private sector, in particular, the various privacy laws have been described as a "patchwork". Three provinces (Quebec, British Columbia and Alberta) have legislation governing the collection, use and disclosure of personal information in the private sector, while some other provinces (such as Ontario) have legislation only addressing personal *health* information in the private sector. Where no legislation exists to protect personal information, privacy protections must arise from the common law or from a collective agreement.

A common law right to privacy is now recognized in most jurisdictions in Canada. The right protects "a biographical core" of personal information that individuals would wish to maintain and control from disclosure. The issue of what information falls within the "biographical core" is still evolving. The Saskatchewan Court of Appeal has held that information "tending to reveal intimate details of the lifestyle and personal choices of the individual" falls within this core (*R. v. Trapp*, 2011 SKCA 143). A workplace computer or mobile phone that an employee uses for incidental personal use may well contain such information.

In the unionized context, workplace privacy rights have been recognized by some labour arbitrators, particularly in relation to workplace monitoring, drug and alcohol testing, medical testing and searches of employees and their property. Such rights are generally assessed with reference to the applicable collective agreement.

Finally, several jurisdictions in Canada recognize torts for invasion of privacy, either under statute or common law. These claims arise less frequently in the context of workplace

monitoring (perhaps due in part to the time and expense required for pursuing litigation), but the potential for high damages to be awarded against an employer is much greater.

Best Practices in Workplace Monitoring

Due to the "patchwork" of laws governing privacy, particularly in the private sector, the risks and liabilities for employers may differ depending on the particular legal regime that applies. The following are best practices for all employers seeking to implement monitoring in their workplace:

1. Establish Reasonable Grounds

Privacy laws in Canada are grounded on a standard of reasonableness, with consideration given to the nature of the monitoring and the expectation of privacy in the circumstances. Before commencing any monitoring activity, employers should consider what their rationale is for engaging in the monitoring and whether that rationale justifies the type of monitoring that will take place.

Genuine concerns regarding safety, security, and property damage are generally considered reasonable bases upon which an employer may justify the use of some forms of workplace monitoring. Using monitoring as a measure of performance and productivity of employees is typically harder to justify, but may be considered reasonable in the circumstances depending on the nature of the monitoring being used. The more "invasive" the monitoring, the stronger the employer's rationale should be for using it.

2. Disclose the Monitoring Activity

It is a good practice for employers to disclose monitoring activity to employees and others who may be affected, notwithstanding that disclosure may not be strictly required in all circumstances. Include a statement of the purposes for which the information is being collected or used.

3. Create a Policy

Many employers choose to implement clear policies that outline their practices regarding the collection, use, and disclosure of employee information. While the enforceability of such policies will depend on a number of factors (including the extent to which the policy is consistently applied, the employees' knowledge of the policy, and the compliance of the policy with any applicable laws), it is a good practice for employers to set out expectations in advance, before a dispute or complaint arises.

4. Obtain Consent

Finally, employers seeking to implement monitoring should consider obtaining consent, preferably in writing, for the collection of the information. Obtaining consent will not guarantee the workplace monitoring complies with all privacy laws, but it can be a key factor in determining whether the collection of information was "reasonable" or not.

Tough Pill for Employers to Swallow: Arbitrator Reinstates Nurse Who Stole Narcotics and Falsified Medical Records

In the recent case of *Regional Municipality of Waterloo (Sunnyside Home) v Ontario Nurses' Association*, an arbitrator reinstated a nurse battling with drug addiction after she had been terminated for theft of narcotics and for falsifying medical records. This decision emphasizes an employer's duty to inquire and meaningfully consider accommodation options when faced with employee addiction—even in situations of serious misconduct.

The Context

The Ontario *Human Rights Code* (the "*Code*") prohibits discrimination on the basis of disability — including adverse treatment linked to substance addiction. The *Code* imposes a substantive duty on employers to take all reasonable steps to accommodate an employee's disability to the point of undue hardship. Employers also have a "procedural" duty to accommodate under the *Code*. Among other things, this includes a procedural requirement to inquire into whether an employee (who has not self-disclosed) is suffering from a disability where there are reasonable grounds to believe that to be the case and to duly consider whether and how a disabled employee may be accommodated.

Background Facts

In the summer of 2016, the employer learned that the nurse in question had been consuming narcotics at work and pocketing medications rather than administering them to patients. Additionally, after stealing the drugs, the nurse would then falsely report that the medications had been dispensed to the residents.

The nurse was suspended pending investigation. During the course of this suspension, the nurse informed her employer that she had a substance abuse problem and that she was being admitted to the hospital for withdrawal from narcotics. At this time, the nurse also admitted that she had been misappropriating narcotics meant for her patients, and falsifying medical records to conceal the theft, for approximately two years.

Following its investigation, the employer terminated the nurse in September 2016. As it was obligated to do, the employer also

reported the events to the College of Nurses of Ontario (the "CNO"). The CNO prohibited the nurse from practicing nursing until June 2017.

After being terminated, the nurse entered an inpatient program and was diagnosed with severe substance abuse disorders. Upon successful completion of a rehabilitation program, the nurse entered into an undertaking with the CNO that set out the conditions under which she could return to practicing. Those conditions included: continuing to undergo treatment for her addictions; not administering or having access to controlled substances; and only working in settings where her work could be directly monitored at any given time.

The Union grieved the termination of the nurse's employment and requested that she be reinstated. The Union argued that the nurse's misconduct, including the theft of narcotics and the falsification of patient records, were symptoms of her addiction which therefore gave rise to the duty to accommodate. The Union asserted the employer breached its duty to accommodate by failing to inquire into whether the nurse had a disability, failing to consider accommodation options and failing to prove that it could not accommodate the nurse's restrictions short of undue hardship.

The Decision

The arbitrator found that the nurse's "compulsive behaviour and impaired judgment are symptoms of the mental illness of substance use disorder." Therefore, the employer had a duty under the *Code* to accommodate the nurse's drug addiction to the point of undue hardship.

The arbitrator further ruled that the employer had violated its procedural duty to accommodate because the employer had terminated the nurse without giving any consideration to accommodation issues, and because the employer had initially failed to in inquire into whether the nurse was experiencing some kind of disability despite troubling reports about the nurse's appearance and behaviour.

In what is perhaps the most concerning aspect of the decision for employers, the arbitrator rejected the employer's argument that it would amount to undue hardship to reinstate the nurse into the workplace in accordance with a "no administration / no access" to medications restriction.

Accordingly, the arbitrator ordered the employer to reinstate the nurse and to pay her certain monetary compensation.

What Does this Mean for Employers?

This is a troubling decision for employers, especially those operating in industries servicing vulnerable persons such as residents of long-term care homes or hospital patients. In essence, the decision suggests that it will not necessarily constitute undue hardship for an employer to continue to employ someone who has a history of stealing and using narcotics and falsifying records to cover her tracks – even in facilities where the presence of those narcotics is widespread. This reasoning arguably fails to adequately account for, among other things, the legitimate interests of the residents who live and are cared for in the facility

Employers' duty to accommodate employees with substance addictions continues to be one of the most pressing and evolving issues in labour law. If employers hope to avoid a result like the one that occurred in the *Sunnyside Home*, they must be extremely careful in how they approach and address workplace issues involving such employees.

About Mathews Dinsdale

Mathews Dinsdale is Canada's only national boutique labour and employment law firm. With six offices across Canada, and connections to the Ius Laboris global network of HR law firms, we are uniquely positioned to assist employers with all their local, national or international workplace law needs

If you have questions about any of these topics or any other questions relating to workplace law, please do not hesitate to contact a Mathews Dinsdale lawyer.