INTRODUCTION

Many of our clients are asking important questions about legal issues related to the COVID-19 pandemic. This issue of our Newsletter, like the last issue, attempts to addresses many of these issues.

As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter. This is a fluid situation and many issues, such as the response of various levels of government are continuing to evolve.

A special thank you to all of your members who continue to work despite the challenges and risks to themselves and their safety and health.

We wish everyone good health.

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A. QUESTIONS OF THE SECOND WAVE: RETURN TO WORK, STATUTORY LEAVES AND THE END OF CERB

Sukhmani Virdi

The second wave of COVID-19 is fast upon us, and just as the science around the virus is changing, so too are the legal questions and concerns facing our clients and their members.

Return to Work

Some of these questions include whether an employer require an employee to get tested for COVID-19? Or can an employer send home an employee for showing symptoms of COVID-19? If and when a vaccine is available, can an employer compel its workforce to become vaccinated?

Until the provincial or federal government passes legislation that would govern these issues, these questions would likely be considered a human rights issue. For provincially regulated workplaces, the Ontario Human Rights Commission has offered guidance on how these questions may be interpreted. A diagnosis of COVID-19, or a display of COVID-19 symptoms, might be perceived as a disability, which would invoke protection under the *Human Rights Code*.

Generally, the Ontario Human Rights Commission suggests that so long as an employer is acting with concerns reasonable and consistent with Public Health, they may be able to refuse to let an individual employee to come to work or send them home, check an employee's temperature or request that an employee take a COVID-19 test. Any information obtained from these actions should be reasonably protected, and an employer should not pursue disciplinary measures if an employee shows symptoms of COVID-19 or tests positive.

With respect to a COVID-19 vaccine, an employer may be able to require its workforce to become vaccinated. However, if an employee objected to a mandatory vaccine because of a sincerely held religious belief, an employer may be required to accommodate them from the requirement.

Until a vaccine is available, many of your members may be wondering what happens if they contract COVID-19 at work, and whether they can apply for WSIB. The WSIB's approach to COVID-19 is two-fold: they will consider whether the nature of the workplace in creating an elevated risk of contracting COVID-19, and whether the worker's COVID-19 condition has been confirmed. WSIB does not grant benefits for asymptomatic workers, even if they test positive, and are away from work while under quarantine. An asymptomatic worker may be eligible for other benefits, as discussed below.

Statutory Leaves

For provincially regulated employees, the *Employment Standards Act, 2000* ("*ESA*") provides a job-protected emergency leave due to a number of COVID-19 reasons. An employee is entitled to an unpaid leave of absence if they are following public health directives, are receiving treatment for COVID-19, have been directed to stay home by their employer for concerns that they might expose others in the workplace, are directly affected by travel restrictions and cannot reasonably be expected to travel back to the province or if they need to provide care or assistance to a specified individual. Specified individuals include children who require care because of COVID-related school and/or daycare closures. Employees can take this leave until the infectious disease emergency is declared to be over, or if the individual reason for the leave has ended – whichever comes first.

For federally regulated employees, the *Canada Labour Code* ("*CLC*") also provides a job-protected leave of absence. For employees unable to work because they contracted or might have contracted COVID-19, have underlying medical conditions that would make them more suspectable to COVID-19 or are isolating because of reasons related to COVID-19, they are entitled to up to two weeks of job-protected leave. For employees who are unable to work because they have care obligations to a child under the age of 12 or a family member that cannot attend their regular facility because of COVID-19, they are entitled to up to twenty-six (26) weeks of job-protected leave. This will include situations where the child or family member cannot attend their normal facility because it is either closed, or open at select times, have contracted or might contract COVID-19, are isolating for reasons related to COVID-19 or would be at risk of serious health complications if they did contract COVID-19.

Under both the *ESA* and the *CLC,* employees are required to advise their employer that they are taking the statutory leave as soon as possible. Under the *ESA*, an employer may require an employee to provide reasonable proof of the reason for the leave. Under the *CLC*, an employer may require an employee to provide a written declaration as to the reason for the leave.

The End of CERB – A New Suite of Benefits

While employees may be entitled to job-protected leaves under their respective employment standards statutes, there is no requirement on their employer to continue paying their wages while on leave, unless a collective agreement or employment contract provides otherwise. As the Canada Emergency Response Benefit program came to an end on September 26, 2020, many people may be wondering how they can afford to stay at home.

The federal government has announced a number of transition benefit programs as a result. Firstly, there are notable changes to the Employment Insurance (EI) program. All

EI economic regions will now use the 13.1% unemployment rate, which means the eligibility requirements for EI will be uniform across the country. Those eligible for EI will be entitled to a minimum entitlement of 26 weeks of regular benefits, and will be able to use their fourteen (14) best weeks of earnings to calculate their weekly benefit rate. Additionally, EI claimants applying for regular EI benefits now need only 120 insurance hours to qualify, instead of the previous requirement of 480 hours. The minimum benefit rate is now $400 per week, with a maximum of up to $573 a week.

For those who do not qualify for EI because of their employment status, they may be entitled to the Canada Recovery Benefit. This provides a $400 weekly benefit for those who are unable to work *or* have had their income reduced. Workers must apply every two weeks until they are no longer eligible, or meet the twenty-six (26) week maximum. For those who earn more than $38,000 in the year, they will need to repay some of the benefit back.

The Canada Recovery Sickness Benefit is available as of September 27, 2020 for up to one year for sick workers, or workers who need to isolate due to COVID-19. The benefit provides $500 a week, for up to two (2) weeks. No medical certificate is required to access the benefit. In order to qualify, a worker must have missed at least 60% of their scheduled work in the week claimed, and cannot be in receipt of paid leave from their employer. They must reapply after the first week in order to get the benefit for the second week.

Also as of September 27, 2020, workers can access the Canada Recovery Caregiving Benefit, which provides $500 a week, for up to twenty-six (26) weeks. The benefit will be available for up to one year for parents and caregivers who are unable to work at least 60% of their normally scheduled work in a week because they are a caregiver of a child 12 years or younger and must remain home with their child for one of many COVID-19 related reasons (i.e. outbreak at school, child is immunocompromised and high risk, daycare shut down, etc.). Applicants cannot receive paid leave from their employer while receiving this benefit, nor can they receive any other related benefit. Two members of the same household cannot both receive this benefit for the same period.

B. FAIRNESS IN DISPUTE RESOLUTION FOR GIG WORKERS: UBER TECHNOLOGIES INC., V HELLER 2020 SCC 16

Raymond (RJ) Seelen

The rise of ride-sharing and food delivery apps, including Lyft, SkipTheDishes and most notoriously Uber, has been accompanied by numerous discussions regarding the applicability of employment legislation to the workers employed by these companies. These companies rely on the classification of their employees as "independent

contractors", which relieves the company of its obligation to apply minimum standards legislation (including Ontario's *Employment Standards Act* ("*ESA*")) to their workers. These companies have fought tooth and nail to prevent their workers from enforcing their basic employment rights. While the recent Supreme Court decision in *Uber Technologies Inc. v Heller* did not resolve this long-standing dispute, it did thwart an insidious attempt by Uber to prevent this issue from ever being resolved.

In January 2017, Mr. David Heller bravely commenced a class action against Uber. He claims that himself and other Uber drivers in the province of Ontario are employees for the purposes of *ESA* and are entitled, jointly, to $400 million in damages after Uber failed to provide basic benefits like vacation pay, overtime pay and the minimum wage.

All Uber drivers are required to sign a Service Agreement. This is done electronically when the new driver first registers with the application. A pop-up window shows up and the driver has the option to either accept the terms and conditions or close the application. There is no way to engage in negotiation of the terms and conditions of the Agreement.

The Agreement specifies that any employment dispute would be resolved by mandatory mediation and arbitration in the Netherlands. The upfront costs of this process (not including travel, legal fees, accommodation or other expenses) were estimated by the Court at $14,500. Mr. Heller's yearly salary driving 40 – 50 hours each week for Uber was somewhere between $20,800 and $31,000. There was simply no way that Mr. Heller could afford to pursue his claim in the Netherlands. It is crystal clear that the purpose of this clause was not a good faith mechanism to resolve disputes – rather, it was a barrier to having employment issues resolved at all.

Uber raised the Agreement's mandatory arbitration clause in a pre-certification motion. They argued that the class action could not proceed until it had been referred to arbitration under the Agreement and that the arbitrator had sole discretion to decide whether or not the Agreement applied.

Mr. Heller's counsel put forward several bases on which the Agreement might be struck down. One such basis, which was accepted by the Ontario Court of Appeal, was the *ESA* itself. Heller raised section 5 of the *ESA*, which prohibits any person from waiving or contracting out of an *ESA* employment standard.

The *ESA* includes a process whereby workers may complain to the Ministry of Labour if an employment standard is breached. The Court of Appeal held that the Agreement was an improper contracting out because it prevented the Uber drivers from complaining to the Ministry.

This decision advanced the interpretation of section 5 on several grounds. First, it made clear that the *ESA's* enforcement provisions are "employment standards" and that the prohibition on contracting out of employment standards in section 5 applies to these

provisions as well. Moreover, the Court found that a provision which is in breach of section 5 is invalid for all purposes. Heller did not seek to use the Ministry's enforcement mechanisms – he filed a class action. But, notwithstanding this, the Court still held that it would not enforce the Agreement.

Interestingly, when this matter was appealed to the Supreme Court, the Supreme Court pointedly declined to rule on the ESA argument. This leaves the Court of Appeal decision as the leading case on the topic. Instead, the Supreme Court focused on the doctrine of unconscionability. Unconscionability is an equitable doctrine which allows a Court not to enforce a contract that was manifestly unfair. The decision to rely on unconscionability instead of the *ESA* ought to send a clear message. In the decision itself, the majority decision stated (quoting Professor Angela Swan and her colleagues) that the doctrine of unconscionability allows the Court to "focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties". The majority goes on to quote Justice Dickson, saying

> In my view, there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong … There is little value in cloaking the inquiry behind a construct that takes on its own idiosyncratic traits, sometimes at odds with concerns of fairness.

In short, while the majority decision is not direct about it, the reason that it declined to consider the *ESA* argument is because it wanted to focus on what it saw as the overriding issue in this case – the unfairness to Mr. Heller.

The Court ultimately ruled that the agreement was unconscionable. In doing so, it modified the legal test for unconscionability in the province of Ontario. Previously, the Ontario Court of Appeal had held that a bargain would not be unconscionable if the victim had received independent legal advice or if the other party was unaware of the victim's vulnerability. The Supreme Court removed both barriers and held that the Doctrine applied where there was an overwhelming imbalance of bargaining power and where there was a grossly unfair or improvident transaction. Not only does this allow Mr. Heller's argument to succeed, it also broadens the applicability of the doctrine in the province of Ontario and may assist other gig workers in future cases.

This decision should be seen as a resounding recognition of the vulnerabilities that gig workers face. While this decision did not answer the big question at the heart of the dispute – that is, whether Uber drivers are "employees" or not – it is a firm statement that the Courts will not tolerate the abuse of vulnerable employees through mandatory, take it or leave it employment agreements. The abuse suffered by workers in the gig economy is well known and this decision represents one of a growing number of cases (and the first such case determined by the Supreme Court) which recognize this fact.

C. FOODORA SHUTS DOWN CANADIAN OPERATIONS AFTER ONTARIO LABOUR RELATIONS BOARD GRANTS FOODORA COURIERS THE RIGHT TO UNIONIZE, RESULTING IN $3.46-MILLION SETTLEMENT FOR FOODORA COURIERS

Erin Carr

In a decision released on February 25, 2020, the Ontario Labour Relations Board granted Foodora couriers in Toronto and Mississauga the right to unionize. The decision represents the first instance of app-based workers winning the right to join a union in Canada, setting an important precedent for gig economy workers across the province.

Background

The dispute arose after the Canadian Union of Postal Workers (CUPW) launched a union drive in 2019 and subsequently held a certification vote in the hopes of addressing couriers' concerns around low pay and safety risks. Foodora challenged the process, arguing that the drivers were not "employees" and therefore that the Ontario *Labour Relations Act*, which protects employees' rights to unionize, did not apply.

Arguments

Foodora maintained that its couriers were independent contractors, not employees, relying on the fact that couriers could freely work for competitors like Uber Eats (a practice called dual apping). Foodora also relied on the fact that it provided couriers with minimal training and significant flexibility and control in respect of their work by permitting couriers to preview deliveries prior to accepting, indicating economic independence from the company.

CUPW argued that Foodora couriers worked for Foodora, not themselves, and that they fell within a subset of employees known as "dependent contractors" under the *Labour Relations Act*, giving them the right to unionize.

Decision

The Board found in favour of CUPW, ruling that the Foodora couriers were dependent contractors and were therefore eligible to unionize based on the following factors, among others:

- Foodora couriers are not allowed to subcontract the delivery services to substitutes as a way to increase their revenue/profits.

- While couriers provide some tools without input by Foodora (such as bicycles or helmets), the need for the Foodora App, owned by Foodora, is the most important part of the system.

- Foodora couriers cannot increase their compensation through anything other than their labour and skill (i.e. through advertisement or self-promotion).

- Foodora exercises significant control over the couriers through a system of incentives and restrictions which determine when couriers pick up and deliver orders, when they can decline orders, and when they work.

- Foodora couriers have no independent opportunity to vary their rate.

- Foodora couriers are highly integrated into Foodora's business, which depends entirely on the reliable and timely delivery service of the couriers.

- Foodora couriers do not develop independent relationships with the restaurants or clients. Foodora itself determines the nature of the service relationship.

- Foodora unilaterally establishes parameters that the couriers must work within and closely monitors their movements to ensure its service standard is met.

Further, the Board rejected Foodora's argument that its couriers were independent contractors because they were capable of dual apping. The Board reasoned that dual apping is less like an entrepreneurial activity and more akin to working multiple part-time jobs where the employee decides the most desirable place to work at a particular time. Refusing to conflate flexibility with independence, the Board found that the app was a marker of dependence.

In the result, the Board concluded: "[t]he couriers are selected by Foodora and required to deliver food on the terms and conditions determined by Foodora in accordance with Foodora's standards. In a very real sense, the couriers work for Foodora, and not themselves".

Aftermath

On April 27, 2020, only two months after the release of the OLRB decision, Foodora announced that it would be closing down Canadian operations. That same day, Foodora emailed its couriers advising them that the final day of operations would be May 11, 2020. Foodora's press release cited profit reasons for the closure, including Canada's "highly saturated market for online food delivery" and recent "intensified competition."

CUPW responded by filing an unfair labour practice complaint with the Board, alleging that Foodora closed operations to defeat the union's organizing drive in violation of the *Labour Relations Act*. On August 25, 2020, CUPW announced that it reached a settlement of $3.46 million with Foodora for the couriers who abruptly lost their jobs.

Takeaways

The gig economy was able to establish itself as an unregulated market in large part because of the independent contractor classification that gig employers gave their workers. Under the contractor classification, corporations like Uber and Foodora are able to bypass labour and employment laws, leaving workers dispersed and exposed to exploitation. Most gig economy workers continue to be denied training, sick leave, protective gear, insurance, and the right to challenge discipline. Foodora couriers were nevertheless able to organize, opening the doors for similar app-based workers to argue that they also fall under the umbrella of an employee. The decision makes a clear statement that while the gig economy has given rise to novel work arrangements, app-based companies cannot impose conditions that contravene workplace regulations.

D. JUDICIAL REVIEW OF LABOUR BOARD AND LABOUR ARBITRATION DECISIONS: THE POST-VAVILOV WORLD

Douglas Wray

Historically, labour boards and labour arbitrations were created to deal with labour disputes separate from the courts. These specialized, expert tribunals were intended to provide speedy, practical resolutions to labour disputes without the legal formalism of the courts. Decisions of labour boards and labour arbitrations were always supposed to be "final and binding". This has never been completely the case. There has never been a right to appeal labour board and labour arbitration decisions to the courts. However, it has always been possible to seek "judicial review" of such decisions. The issue is exactly what is the scope of review by the Courts. Ultimately, the Supreme Court of Canada determines the scope which the lower courts are supposed to apply. This is the case for judicial review of labour tribunals, as well as decisions of other so-called "administrative tribunals".

For many years, the Supreme Court of Canada recognized the special expertise of labour adjudicators and expressed the view that considerable deference ought to be paid to decisions of these adjudicators. This approach is typified in the 1979 Supreme Court of Canada decision in CUPE v. N.B. Liquor Corporation. The general standard of review of labour decisions was whether they were "patently unreasonable"; if they could not be so

characterized, the attempt to challenge the decision would be dismissed. The result was that the rate of successfully challenging labour decisions was relatively low. This approach acted as a general deterrent to parties filing applications for judicial review of labour decisions.

The Supreme Court reviewed the standard of judicial review of administrative tribunal decisions (including labour decisions) in the 2008 Dunsmuir v. New Brunswick case. In Dunsmuir, the Court did away with the general "patently unreasonable" test and replaced it with a more general "reasonable" test. While the Court stated that this change was not intended to lower the standard, in my view, subsequent experience was that post-Dunsmuir, Courts were more likely to quash and set aside a decision of a labour board or labour arbitrator.

This had the effect of encouraging parties – particularly employers who had lost a case – to seek judicial review.

This brings us to the Supreme Court of Canada decision in Vavilov, released a year ago in December 2019. In Vavilov, the Court in a lengthy 343 paragraph decision, again changed the test or standard of judicial review. The Court kept "reasonableness" as the presumptive standard of review. However, the Court then went to considerable length in explaining what it considered was involved in a "reasonableness" review. The Court offered various examples of what could be considered as *indicia* of unreasonableness.

It has only been one year since the Vavilov decision was issued. The COVID-19 situation has also limited to some extent the judicial decisions which have been issued involving challenges to decisions of labour boards and labour arbitrators. However (again, in my view), I believe the Vavilov case will encourage more applications for judicial review to be brought challenging labour decisions. Most of these applications will be brought by employers, not trade unions. While time will tell, I am concerned that lower courts who do not agree with a particular decision of a labour board or labour arbitrator will find some basis in the lengthy Vavilov reasons for judgement to justify quashing these decisions.

Trade unions need to be aware of this new reality.

E. SUPERIOR COURT RECOGNIZES NEW PRIVACY TORT

Nick Ruhloff-Queiruga

In *Yenovkian v Gulian*, 2019 CanLII ONSC 7279, the Ontario Superior Court of Justice recognized a new privacy tort: publicity placing the plaintiff in a false light.

The decision involved a family law dispute between a mother and father that had taken place over a number of years. The mother claimed $150,000 in damages against her ex-husband for nuisance, harassment, intentional infliction of mental suffering and invasion of privacy. The mother also claimed $300,000 in punitive damages.

The court found that the husband had engaged in a protracted campaign of harassment and cyberbullying against the mother and their children. The father posted and communicated disparaging content on various websites, YouTube videos, online petitions and e-mails over the course of several years. During court-ordered access visits with the children, the father would videotape the children and post videos and photographs of them online. Perhaps most disturbingly, the father would post videos of his daughter, who has a neurological disorder, and blame the mother for his daughter's "broken" mind and delayed development. To add insult to injury, the court also decried the father's attempt "to undermine the administration of justice through an online campaign to 'unseat' a judge of this Honourable Court".

In a strongly worded decision, Kristjanson J. decided that the father's conduct warranted a new tort to be recognized in Ontario law: publicity placing a person in a false light. The court decided that the elements of the tort would mirror its American counterpart:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> > (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> >
> > (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Importantly, the court also reasoned that the tort is available in cases where defamation has not been made out. Kristjanson J. held that "the wrong is publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person's privacy right to control the way they present themselves to the world." Applying the elements of the tort to the facts, the court awarded the mother $100,000 for the privacy torts of both publicity placing a person in a false light and public disclosure of private facts.

Despite being adopted in the context of family law, the new tort of publicity placing the plaintiff in a false light has important implications for labour and employment law. Unions, employers and workers will need to be aware of this new potential source of liability – particularly when employment relationships breakdown.

F. _____

Maeve Biggar

The recent decision of Arbitrator Luborsky in *Levi Strauss Co. & Workers United Canada Council*, [2020] 316 L.A.C. (4th) 91 ("*Levi Strauss Co.*") is a telling example of changing attitudes in the arbitral jurisprudence towards racially charged misconduct in the workplace.

In the *Levi Strauss Co*. case, the grievor was an older white male employee who was terminated for allegedly uttering racial slurs at a Black co-worker. He had 23 years of service and a clean record at the time of his termination. Both employees worked on the production line at the Company's distribution centre in Rexdale, Ontario. The Grievor and his co-worker had a verbal altercation at work one day, in which the Grievor was alleged to have called his co-worker a "Black bastard" and mouthed the n-word at him, among other things. The Grievor admitted to swearing during the confrontation but denied having called his co-worker any racially demeaning names. Following an investigation, the Company terminated the Grievor for making derogatory racial slurs towards another employee contrary to its Violence and Harassment in the Workplace Policy.

After considering all of the witness testimony, Arbitrator Luborsky found that the grievor did in fact utter racially disparaging comments and slurs towards his co-worker. In determining the appropriate penalty for this misconduct, the Arbitrator reviewed the arbitral jurisprudence regarding discipline for racial slurs and noted that termination was typically only imposed where the offensive language was egregious and the employee had a history of past warnings or a poor disciplinary record. The Arbitrator determined that this approach was no longer appropriate, having regard for the societal goal of eliminating all forms of harassment in the workplace, consistent with the recent amendments to the *Occupational Health and Safety Act* with the passage of Bills 168 and 132.

Arbitrator Luborsky unequivocally stated that racial or ethnic slurs can never be dismissed as mere "shop talk" and concluded that they must now fall within the category of very serious workplace offenses, including theft and sexual assault, for which the *prima facie* disciplinary response is termination of employment, even for a first offence by a long-service employee. He reasoned that the termination for racial slurs is presumptively appropriate as this type of misconduct seriously undermines the essential trust in the employment relationship and offends "basic notions of decency" in the workplace. He also noted that racially demeaning language that is not directed at anyone is particular is no less serious as it can contribute to a poisoned work environment if overheard by employees in the workplace.

The Arbitrator considered whether there were any mitigating circumstances in the grievor's case that militated against the *prima facie* penalty of discharge and found that

there were not. The Union argued that discharge was too harsh a punishment for an event that took place over the course of ten minutes, having regard for the grievor's 23 years of service, clean disciplinary record and the likelihood that he would never find work again because of his age. The Arbitrator rejected the Union's argument, finding that the key consideration to the reduction of penalty in cases of this nature was genuine remorse for the misconduct, which he found the grievor failed to demonstrate in the investigation and subsequent arbitration hearing.

While every discipline case will turn on its own facts, the *Levi-Strauss Co.* decision has undoubtedly raised the bar for those cases involving racially demeaning language or actions going forward.

G. COVID-19 Farmworker Reprisal - Robert

Note: *The information contained in this Newsletter is not intended to constitute legal advice. If you have any questions concerning any particular fact situation, we invite you to contact one of our lawyers.*

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