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# The Employment Law Roundup

January 21, 2011

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Christine Thomlinson and Sarah Vokey

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## The Employment Law Roundup

### *Introduction*

Each year brings interesting developments in employment case law and 2010 was no different. There were so many developments in the law that it was challenging to choose which cases to highlight. We chose the cases and trends in the law that we felt provided the best snapshot of how judges are currently viewing the workplace and what workplace situations should be of most concern to employers. Six groups of cases really stood out to us as particularly compelling. The law with respect to the frustration of an employment contract continues to evolve. In fact, recently we have seen two cases where employers successfully argued that an employee's contract had been frustrated.

The Supreme Court of Canada's decision in *Honda v. Keays* in 2008 drastically changed the law of damages with respect to awards for bad faith in the manner of termination and punitive damages. This year we have seen the courts grappling with the award of damages in employment law cases and there remains some confusion in this area. We have highlighted three cases that illustrate how damages for the manner of termination and punitive damages are being awarded post-*Honda*.

Although family status has been a prohibited ground of discrimination under human rights legislation for some time, in 2010 we saw a dramatic increase in the number of cases that were decided in this area. The recent case law has provided some guidance on navigating this ground of discrimination in the workplace and has also provided insight into the kind of accommodation that employers will be required to provide.

Technology has evolved to facilitate increased speed and efficiency not only in the workplace but also in the social sphere. One of the major tools to facilitate this new form of socializing are social networking sites such as Facebook and Twitter. The challenge for employers is to be aware of the inherent risks posed by online communication tools such as Facebook and to respond appropriately. The cases from 2010 make it clear that there are circumstances where employers have the right to discipline and/or terminate an employee for their inappropriate online activity, even if the activity occurs while the employee is off duty.

In the past few years, we have seen an increase in the number of unpaid overtime class action lawsuits. In 2010, three notable cases in this area were decided which give employers an additional reason to turn their minds to overtime policies and practices in the workplace.

Several cases from 2010 highlight the importance of a properly conducted workplace investigation and remind us of the elements of a fair and objective investigation. The manner in which an investigation into employee misconduct is handled can be a significant factor in determining whether the employee was wrongfully dismissed in the circumstances. The case law from 2010 provides us with key reminders about properly conducted investigations including approaching the investigation from an unbiased perspective and with an open mind, as well as providing particulars to an accused employee prior to an interview and ensuring that the accused employee has an opportunity to respond to allegations.

We hope that this paper and our presentation will be both useful in bringing you up to date on the case law and also provide you with practical information to manage your workplace effectively.

### *Frustration of the Employment Contract*

Managing employees who are on a disability leave, especially a long term disability leave, can be challenging. Traditionally, when an employee has been too sick to perform his or her work duties, the employer has been able to pronounce that the contract has been frustrated. However, in the last few years, we have not seen many occasions where employers have successfully argued frustration of contract. In 2010, two cases provide examples of employers successfully arguing frustration of contract.

The term “frustration of contract” refers to the point in time when the employment relationship becomes impossible to continue or would be radically different than what the parties originally intended. In such cases, the employer may be in a position to bring the relationship to an end and pay only minimum severance, if any at all. However, the challenge in these cases is determining the exact point at which the contract becomes frustrated.

In **Duong v. Linamar Corp. (c.o.b. Eston Manufacturing)**<sup>1</sup>, Mr. Duong’s contract of employment was terminated due to frustration as a result of a back injury that caused him to be absent from work for approximately three and a half years. He claimed wrongful dismissal, breach of fiduciary duty and breach of faith amounting to a breach of contract. Eston Manufacturing (“Eston”) brought a motion for summary judgment. The main issue to be determined by the Court on the motion was whether Mr. Duong’s contract had been frustrated.

Mr. Duong, an employee who had worked for Eston for seven years, had a history of back pain and further injured his back at work on October 7, 2005. He was not

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<sup>1</sup> 2010 ONSC 3159 (Ontario Superior Court of Justice) (CanLII).

able to immediately return to work, but agreed he would return with reduced hours and modified duties and gradually return to working normal hours. His attempts to return to work were unsuccessful due to the continuing pain and he did not return until after December 15, 2005. Mr. Duong was approved to receive Long Term Disability (LTD) benefits based on the conclusion that he was not able to perform his occupation as a result of his disability. Approximately two years into receiving LTD benefits, it was determined that he would not be in a position to perform any occupation and therefore his benefits would continue until October 2029 or until he reached 65 years of age as long as he continued to comply with treatment and as long as medical evidence continued to confirm his disability.

On February 25, 2009, Eston terminated Mr. Duong's employment due to frustration of contract. Justice Newbould held that Mr. Duong's contract of employment was frustrated by the time that Eston terminated Mr. Duong's employment and the summary judgment motion was allowed. Mr. Duong refused to participate in the treatment program assigned to him by the insurance company despite the fact that there was a good likelihood that he would return to work following treatment. As a result, his LTD benefits were discontinued and Mr. Duong did not appeal this decision. Justice Newbould took his failure to appeal the decision as evidence that Mr. Duong had not properly participated in treatment and also as evidence that there was no foreseeable date that he would return to work. Furthermore, Mr. Duong pleaded in his Statement of Claim that he continued to be totally disabled and produced no evidence that he would be returning to work in the future even if he participated in the rehabilitation program. Finally, Mr. Duong's doctor was of the opinion that his medical condition was not improving.

Mr. Duong's lawyer argued that as long as there was an LTD policy in place, the employer could not argue frustration of contract. The Court disagreed, noting that the policy itself contemplated employees receiving LTD benefits after severance.

In addition, there was nothing in the policy which stated that employment would continue throughout a period of long term disability, nor could it, as the policy was between Mr. Duong and the insurance company – not the employer.

The Court found in favour of the employer and agreed that Mr. Duong’s employment contract had become frustrated. One of the key reasons supporting this finding was the fact that Mr. Duong had not worked in more than three years. Reference was made to the 2006 B.C. Court of Appeal decision in *Wightman Estate v. 2774046 Canada Inc.* (2006), 276 D.L.R. (4<sup>th</sup>) 492 in which it was held that,

“Sickness will not frustrate an employment contract when the employee appears likely to return to work, but the longer the sickness persists, the more likely the employment relationship has been destroyed.”

Justice Newbould stated that

“to have required Eston to continue to employ Mr. Duong in all of the circumstances would...have required Eston to do something radically different from that which was undertaken by the contract of employment. Eston was entitled to terminate the plaintiff’s employment when it did by reason of the frustration of his contract of employment.”

**Gielen v. The Town of Ste. Anne**<sup>2</sup> provides another recent example of a case where an employer successfully argued that an employment contract was frustrated. Mr. Gielen was a police officer with the town of Ste. Anne. The Ste. Anne Police Department was a small detachment with very few police officers. Mr. Gielen began having shoulder problems in 2004 and had physiotherapy in an attempt to resolve the problems. However, the problems became worse and in 2005

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<sup>2</sup> 2009 MBQB 292 (Court of Queen’s Bench of Manitoba) (CanLII).

he required shoulder surgery. After speaking with Mr. Gielen approximately 3.5 months after his surgery, the Chief of Police, Mr. Saindon, sent a message to the mayor and Chief Administrative Officer stating that Mr. Gielen's physician had advised him that his shoulder problems would never get better and that he was a liability to himself and other members of the police detachment. A few days after this, Mr. Gielen sent a letter to the mayor, council and Mr. Saindon which stated that he was not able to return to his regular duties and fulfill his responsibilities due to the shoulder problems and although the doctors had indicated that there may be some improvement in his condition in the next 6-12 months, it was uncertain. Mr. Gielen requested that the council consider temporarily filling his position with a part-time officer so that he could return to his position if his shoulder condition improved.

The mayor replied to Mr. Gielen's letter by stating that, although there was an officer who was willing to replace him while he was on leave, it would be difficult to hire an officer for a temporary position because the detachment required three full-time officers. The mayor requested that Mr. Gielen inform them as to whether he would be returning as an officer and if he could guarantee a full recovery by a certain date. Mr. Gielen replied, stating that he could not provide a definite date of return but that he was continuing treatment and requested another 12-16 weeks in order to gain a better idea of whether he would be able to return to work.

Approximately 2.5 months later, Mr. Saindon phoned Mr. Gielen and reported that Mr. Gielen's physician was now of the opinion that his shoulder would not get better and that he could not perform the job of a police officer. The next day, Mr. Gielen wrote to Mr. Saindon and stated that his shoulder injury could still not permit him to perform the duties of an officer and that he could not provide a definite date for his return. He also stated that although his shoulder injury might improve over time, he did not know when or if it would improve or when he could

return to work. Mr. Gielen denied that he told Mr. Saindon that his physician's assessment was that he would never get better. However, the Court found that Mr. Saindon's version of events was more credible and held that Mr. Gielen was told by his doctor that he would never return to work as a police officer.

Mr. Gielen argued that the town of Ste. Anne had a duty to accommodate his disability and they did not do so. However, the Court held that Mr. Gielen was not able to fulfill his job responsibilities for the foreseeable future, that the town of Ste. Anne had tried to accommodate Mr. Gielen by allowing him to take leave for his shoulder to improve, that it was not possible for the town of Ste. Anne to make arrangements in the workplace or duties to allow him to work with his shoulder problems and that, although the town of Ste. Anne considered other positions it could offer to Mr. Gielen, there were none available. The Court held that the employment contract had been frustrated when Mr. Gielen became disabled by his shoulder injury and was given the prognosis by his physician that it would never get better. Mr. Gielen's wrongful dismissal claim was dismissed.

In **Naccarato v. Costco**<sup>3</sup>, the plaintiff, Mr. Naccarato, claimed that he was wrongfully dismissed from his employment with Costco after approximately 16.5 years of service. Mr. Naccarato's absences from work due to illness/injury began about five years prior to his termination from Costco. He initially received short term disability benefits but had been receiving long term disability benefits for the majority of the five year period. After Mr. Naccarato had been on long term disability for approximately 4.5 years, Costco requested information from his doctor about his medical condition. The doctor stated that he could not predict when Mr. Naccarato would be able to return to his job and indicated that he would be seeking further treatment for his medical condition. Costco terminated Mr.

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<sup>3</sup> 2010 ONSC 2651 (Ontario Superior Court of Justice) (CanLII).

Naccarato due to frustration of contract as a result of his lengthy absence from work and his inability to return to work due to his illness.

The Court ultimately found that Costco did not prove that the contract had been frustrated and held that Mr. Naccarato had been wrongfully dismissed. He was awarded 10 months' reasonable notice. Although the five year period that Mr. Naccarato had been away from work on account of his medical condition was significant, Costco did not provide the necessary medical evidence to support the conclusion that there was no reasonable likelihood of Mr. Naccarato returning to work in the reasonably foreseeable future. Costco could have followed-up with the doctor in order to gain more information with respect to Mr. Naccarato's return to work but they did not. In addition, there was no evidence of any hardship or disruption to Costco's business interests from keeping Mr. Naccarato as an employee of the company.

*What does this mean for employers?*

1. **Review current or request up-to-date medical documentation** – In the **Duong** case, the most current medical documentation and evidence was given careful consideration. The burden lies with the employer to prove that an employment contract has become frustrated. Employers are wise to not even consider taking the position that an employment contract has been frustrated unless they have made effort to seek and obtain updated medical information from the employee on leave.
2. **A long disability leave is not enough to frustrate the employment contract** - There is no magic time after which an employment contract is considered frustrated. The determination of whether an employment contract has been frustrated goes beyond an assessment of how long an employee has been on disability leave. Rather, the employer should focus

on the employee's prospect of recovery and ability to return to work in the reasonably foreseeable future. Ideally, the updated medical information will provide that there is no reasonable prospect of the employee ever returning to work, or at least in the near future. A lengthy absence coupled with an uncertain prognosis for return to work may also persuade a court that the employment contract has become frustrated.

- 3. Pay particular attention to disability policies and other written contracts in place** – Counsel acting for employees will be looking closely for any written documentation which seems to imply that an employment relationship should not be discontinued at any point during a period of disability. A careful review of any and all disability policies should be undertaken, along with any other documents that govern the employment relationship, such as employment contracts, shareholder agreements, etc. Language in these policies which suggests that the employment relationship should continue during any period of disability may hinder an employer's claim of frustration of contract.

### ***Damages in Employment Law***

#### ***(a) Moral Damages and Aggravated Damages/Damages for Mental Distress***

An employer has a duty to act in good faith in the manner of termination of an employee. When an employer breaches this obligation and engages in bad faith conduct in the manner of dismissal, a terminated employee may seek moral damages. Moral damages were formerly known as “Wallace damages” and awarded through an extension of the notice period. Since the Supreme Court's ruling in *Honda v. Keays*<sup>4</sup>, damages resulting from an employer's bad faith conduct in the manner of termination (i.e. moral damages) and aggravated damages are now

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<sup>4</sup> [2008] 2 S.C.R. 362 (Supreme Court of Canada) (QL).

dealt with in the same way. In *Honda*, the Court held that the award of these damages is compensatory in nature and should reflect the actual damage suffered by the employee. This means that employees will now only recover these additional damages if they truly suffer some provable mental effect as a consequence of the way in which they were terminated, and if that effect was reasonably foreseeable at the time that the contract was entered into. However, the “normal distress and hurt feelings resulting from dismissal are not compensable”. The mental distress must arise from the manner in which the employee was terminated.

There continues to be much confusion arising out of the Supreme Court’s decision in *Honda* dealing with these additional damages. Much of this confusion arises from the fact that, for years in employment law cases, there have been separate claims for aggravated damages, moral damages, and damages for mental distress, and the parties making the claims never seemed to fully understand whether these damages were actually the same or different, and whether there was any difference in their respective tests. The cases below provide examples of how moral damages are being awarded by the Courts post-*Honda*.

**Piresferreira v. Ayotte**<sup>5</sup>, was an appeal from a lower court decision which had granted a range of damages to an employee who suffered harassment at work. The employee, Marta Piresferreira, was a 60-year-old employee who had worked for Bell Mobility for approximately 10 years as an account manager. Ms. Piresferreira had consistently received positive performance reviews throughout her career at Bell Mobility. Beginning in 2004, her manager, Richard Ayotte, began to display a range of aggressive behaviour against her. In addition to providing Ms. Piresferreira with a negative performance review, he also criticized her harshly for

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<sup>5</sup> 2010 ONCA 384 (Ontario Court of Appeal) (QL).

failing to arrange a client meeting and physically pushed her when she tried to show him an email she had drafted. Mr. Ayotte then refused to apologize for his actions and instead proceeded to provide Ms. Piresferreira with a performance improvement plan. Ms. Piresferreira eventually left work and was diagnosed with post-traumatic stress disorder and a major depressive disorder. She subsequently sued both Bell Mobility and Mr. Ayotte with respect to her treatment at work. The trial judge subsequently found Mr. Ayotte liable for the torts of battery and intentional and negligent infliction of mental suffering. The trial judge also found Bell Mobility vicariously liable for these torts and directly liable for negligence and constructive dismissal. At trial, Ms. Piresferreira was ultimately awarded damages totalling approximately \$500,000.

On appeal, the Ontario Court of Appeal held that the trial judge erred in finding that the tort of negligence was available against the employer and supervisor for conduct that occurred at work. Rather, the Court held that, for policy reasons, the tort of negligent infliction of mental suffering was not appropriate in the employment context. Specifically, the Court refused to place a responsibility on employers to shield all employees from acts of other employees that might cause mental suffering. According to the Court, holding employers responsible for such acts would be overly intrusive and inconsistent with established employment law principles. The Court of Appeal also pointed to the fact that mental distress damages were already available to employees and that this fact negated the need to enforce the tort of negligent infliction of mental suffering.

The Court of Appeal also overturned the trial judge's finding of intentional infliction of mental suffering on the basis that the necessary elements did not exist in this case. The Court specifically held that, to succeed at such a claim, an employee must demonstrate that the employer not only engaged in flagrant and outrageous conduct, but also that the actions were carried out in a manner which

were either intended to produce harm or, alternatively, that an individual would have reasonably known that it was likely to result in harm. The Court subsequently overturned the trial judge's finding that Mr. Ayotte was guilty of the tort of intentional infliction of mental suffering on the basis that his actions did not reflect either an intention to cause mental suffering or knowledge that his actions would result in the damage which resulted. Based on these findings, the Court of Appeal ultimately reduced the award portion representing tort damages, but did maintain the award of \$45,000 for mental distress damages, in addition to damages in connection to constructive dismissal and battery. In August 2010, an application for leave to appeal was filed with the Supreme Court of Canada and it was submitted to the Court in November 2010.

Although many of the cases that have considered granting moral damages for the manner of termination have insisted on proof of mental distress, such as medical treatment, a recent case of the Alberta Court of Queen's Bench, **Chapell v. Canadian Pacific Railway Co.**<sup>6</sup>, suggests that such proof may not always be necessary for an employee to recover moral damages.

Mr. Chapell had spent his entire 27-year career working for Canadian Pacific Railway ("CPR"). He was dismissed for cause because he submitted expense reports which contained duplicate line items. Mr. Chapell had an excellent record of work performance and had received many promotions throughout his career. In 1997, Mr. Chapell joined a CPR project called "Service Excellence" which required him to travel extensively. As well as his project responsibilities, he was also responsible for the administration of the project including tracking and submitting expenses for himself and the entire team. The administrative and accounting part of his job were challenging for Mr. Chapell and, given his many

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<sup>6</sup> 2010 ABQB 441 (Alberta Court of Queen's Bench) (CanLII).

project responsibilities, he had very little time for preparing expense reports. As a result, the receipts would pile up and he would face the task of sorting them out well past the time when the expenses were incurred. There were additional issues with hotel billings for times when the team was not on location and this made the task of reconciling transaction dates and receipts even more difficult. Despite his requests, Mr. Chapell was not provided with any administrative support. Mr. Chapell's request for a corporate credit card was also refused. In 1999, the project ended and Mr. Chapell returned to work in the yards and terminals.

During the project, Mr. Chapell submitted 2,200 line items in expense claims which amounted to more than \$200,000. In 2009, an internal auditor found six irregularities in the last two expense reports that Mr. Chapell had submitted during the project in 1999. As a result, an audit was conducted of all the expenses for the Service Excellence project. The audit revealed 37 irregular line items valued at approximately \$9,000. However, the audit also revealed that Mr. Chapell had failed to submit expenses for reimbursement totalling \$2,871.22. After the irregularities were detected, Mr. Chapell was asked to check his records and when he reported back, he indicated that he had found three more mistakes. An investigation was conducted by Ms. Mittleman, CPR's Director of Human Resources, into the expense report irregularities. Prior to meeting with Mr. Chapell, Ms. Mittleman did not advise him of all of the irregularities that had been discovered and therefore he was not prepared to properly discuss them. She allowed a previous incident in which Mr. Chapell was involved to prevent her from carrying out her objective investigative role properly. She attempted to access Mr. Chapell's personal, confidential information from an employee program in an attempt to build a case against him. She requested that a security guard be positioned outside the door during her meeting with Mr. Chapell which had the potential to cause great embarrassment.

The Court held that CPR had not proven that Mr. Chapell intended to defraud the company and that the irregularities in the expense reports were merely errors by someone who was not paying attention. Mr. Chapell was awarded 24 months' pay in lieu of notice.

Mr. Chapell also claimed for bad faith damages due to the insensitive manner in which he was dismissed. The Court held that, based on the manner in which the investigation was conducted, as well as the fact that CPR had imposed unrealistic expectations on Mr. Chapell, which bordered on abusive, it should have been in the contemplation of CPR that the manner in which Mr. Chapell was dismissed would cause mental distress. Mr. Chapell stated at trial that he was so depressed following his dismissal that he did not get out of bed for about three weeks. The Court found that Mr. Chapell was a credible witness and held that his statement was indicative of mental distress. CPR argued that in order to receive damages for bad faith in the manner of termination, Mr. Chapell was required to provide evidence beyond his own testimony that the mental distress went beyond that of hurt feelings. The Court agreed that further evidence, such as medical reports, would be a factor to consider in a case such as this, however the Court concluded that it was not required. Mr. Chapell was awarded \$20,000 in bad faith damages.

***What does this mean for employers?***

1. **Evidence of mental distress** – Although evidence of mental distress remains a requirement to recover damages for bad faith in the manner of dismissal, if an employer behaves in a way that is egregious in the manner of dismissal, the requirement for evidence of mental distress may be waived. Employers must take care in the manner of dismissal and continue to treat employees with respect in order to avoid liability for mental distress damages.

2. **Maintaining vigilance** - While the **Piresferreira** decision is encouraging for employers for its refusal to hold employers responsible for negligent infliction of mental suffering in the workplace, the case still makes clear that employees can be awarded a range of other tort damages to compensate for the manner in which they are treated at work. Employers that are not already doing so would therefore be wise to foster the development of a workplace which is free from harassment. This includes not just an adequate response to incidents of violence and/or harassment, but also a range of preventative measures to maintain a respectful workplace.

(b) *Punitive Damages*

Following the 2008 Supreme Court decision in *Honda v. Keays*, the law seems relatively settled as to those circumstances where punitive damages are available in a wrongful dismissal case. In *Honda*, the Supreme Court of Canada reiterated the principles underlying the award of punitive damages and emphasized that punitive damages are only awarded in exceptional circumstances. The Court stated that “punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.” Also, “when allocating punitive damages, [the courts] must focus on the defendant’s misconduct, not on the plaintiff’s loss.”

In **MacDonald-Ross v. Connect North America Corp.**<sup>7</sup>, Ms. MacDonald had worked for Connect North America Corp. (“Connect”) for 5.5 years and in that time had been promoted from telephone operator up to Director of Marketing. She was terminated without cause in September of 2007 and, shortly after, she commenced an action for wrongful dismissal against Connect. After learning that

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<sup>7</sup> 2010 NBQB 250 (Court of Queen’s Bench of New Brunswick) (CanLII).

Ms. MacDonald had commenced a claim against them, Connect contacted the police department alleging that she may have been involved in the fraudulent use of corporate funds. Connect then contacted Ms. MacDonald and told her that they would require an audit of the electronic equipment in her possession to determine if she had violated any company policies. In mid-October, Ms. MacDonald received a letter from Connect stating that, following a review of her work, they had discovered that she had engaged in unauthorized use of company funds and therefore her employment was now terminated for cause. This was the first time that cause was alleged. Also, the letter was delivered personally to Ms. MacDonald even though Connect knew that she was represented by legal counsel.

The first time Ms. MacDonald became aware of the police complaint was in March of 2008 when she received a call from a police officer who told her that, even though the complaint from Connect was not being pursued by the police, she would be on a police “watch list”. This news was very upsetting to her. Connect also posted a note on its website stating that an investigation had revealed a significant misappropriation of funds and that the company’s management was responsible for the activity.

The Court held that Ms. MacDonald did not engage in the unauthorized use of funds nor did she misappropriate funds from Connect. As a result, there were no grounds for just cause dismissal and the Court held that Ms. MacDonald had been wrongfully dismissed. She was awarded eight months’ pay in lieu of notice.

With respect to Connect’s actions following the commencement of Ms. MacDonald’s claim, the Court found that the letter sent to her requiring an audit of her electronic equipment was a response to the lawsuit and an attempt to find just cause for her dismissal. In addition, the Court found that it was Ms. MacDonald’s commencement of legal action that prompted Connect to look into the unauthorized

use of funds and the misappropriation of funds. With respect to contacting the police, Connect admitted that they did not have information at the time that they made the complaint to police to justify the allegations of fraud and misappropriation – they were counting on the police to find the evidence. The Court concluded that the purpose of the posting on Connect’s website about the misappropriation of money was intended to disparage Ms. MacDonald and intimidate her. In the end, the Court concluded that, because Ms. MacDonald had commenced a wrongful dismissal claim against Connect, they undertook a series of actions that showed extreme bad faith in the manner of her termination. Ms. MacDonald however, was not awarded bad faith, or moral damages. The Court stated that although the mental distress suffered by Ms. MacDonald was reasonably foreseeable, she did not provide any evidence, medical or otherwise, to prove the damages.

The Court awarded Ms. MacDonald \$50,000 in punitive damages stating that Connect’s behaviour was “reprehensible and egregious” and that punitive damages in this case were required for deterrence, denunciation and retribution.

*What does this mean for employers?*

**1. Punitive damages are alive and well in employment law cases –**

Although an award of punitive damages is rarely seen, when the circumstances of a case are particularly reprehensible, courts will continue to award punitive damages.

### *Family Status*

Family status has long been recognized as a prohibited ground of discrimination under human rights legislation. However, this area of human rights law received much judicial attention in 2010. The case law confirms that the parent-child relationship is included in the definition of family status and also that this ground of discrimination requires the same duty to accommodate as other grounds of discrimination.

In **Johnstone v. Canada Border Services**<sup>8</sup>, Ms. Johnstone worked on a rotating shift with Canada Border Services. She was unable to arrange child care to cover the rotating shift pattern, so she made a request of her employer that she work on a static shift. Canada Border Services, however, had an unwritten policy against static shifts for family-related needs and therefore would not give her the requested shift. Instead, it was the employer's policy that employees who require a static shift were required to work part-time.

Ms. Johnstone then requested a three-day part-time static shift of 12 hours per day. That request was denied because it did not work with the employer's shift schedule arrangement. The employer had a shift schedule arrangement available which offered a static full-time midnight shift. However, Ms. Johnstone was not eligible for the shift because of the employer's policy with respect to family-related needs. Ms. Johnstone launched a human rights complaint with the Canadian Human Rights Tribunal.

The Tribunal found that in order to establish a *prima facie* case of discrimination, Ms. Johnstone "need only demonstrate that a policy has some differential impact

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<sup>8</sup> 2010 CHRT 20 (Canadian Human Rights Tribunal) (CanLII).

on her due to a personal characteristic which is recognized as a prohibited ground of discrimination.” The Tribunal found that “family status” includes obligations arising as a result of becoming a parent. Therefore, simply because of the effect of the shift schedule on her family care obligations, Ms. Johnstone had established a *prima facie* case of discrimination.

The Tribunal found that the policy of refusing full-time static hours to employees requesting accommodation due to family status was discriminatory. The employer was unable to show that they had reached the level of undue hardship with respect to accommodating Ms. Johnstone’s requests or that there was a *bona fide* occupational requirement for doing so. The Tribunal rejected the employer’s argument that if they accommodated these types of requests that the floodgates would open for all employees with children to request better shift schedules. The employer was ordered to cease its discriminatory practices and was given six months to establish written policies to address family status accommodation requests. Ms. Johnstone was awarded lost wages and benefits, \$15,000 in general damages and \$20,000 in special compensation for the employer’s “willful and reckless” conduct.

The case of **Government of Alberta v. Alberta Union of Provincial Employees**<sup>9</sup>, provides us with an example of a situation where, although the grievor’s work obligations put her in a difficult situation with respect to her family obligations, the circumstances did not amount to discrimination on the basis of family status. Ms. Jungwirth grieved a change in her shift schedule, alleging that the change resulted in discrimination against her on the basis of family status and that her employer, the Government of Alberta, refused to accommodate her. Ms. Jungwirth was a single mother with an eleven-year-old son. She had been separated from her

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<sup>9</sup> (2010), 101 C.L.A.S. 8 (Alberta Grievance Arbitration) (QL).

ex-husband for nine years. They had joint custody, but her son lived with her 80% of the time.

Ms. Jungwirth explained her efforts in trying to obtain childcare while she was on the night shift. Her ex-husband and her mother were available for some of the nights, and there was the option of her son staying with relatives. However, Ms. Jungwirth explained that making adequate arrangements was difficult and when her son was being cared for by other people, she worried about him and had trouble focusing.

The Arbitration Board examined whether the employee had established a *prima facie* case of discrimination. The Board explained that a part of any examination of whether a *prima facie* case has been established for family status discrimination must include an analysis of the steps taken by the employee him or herself to balance their family and work life responsibilities. The Board stated that “family status discrimination claims based on parental obligations involve a careful assessment both of the parental obligation and the degree of interference with this obligation as a result of a bona fide work requirement.” Recognizing that work requirements always have some degree of interference with parental obligations, the Board explained that “all parents must take some steps on their own to ensure that they can fulfill both their parental obligations and their work commitments.”

With respect to Ms. Jungwirth’s efforts, the Board stated that,

“... in order for the Board to conclude that there was a serious interference with the Grievor’s parental obligations, the Board needed to be satisfied that reasonable alternatives for caring for her son at night were not available to the Grievor. In this sense, we view the evidentiary burden for establishing a *prima facie* case for family status discrimination as analogous to the burden on employees asking for accommodation on

the basis of disability... In the case of family status, an employee also bears the onus of providing sufficient evidence of the absence of reasonable alternatives for care.”

The Board found that Ms. Jungwirth had not established that reasonable alternatives for night time care for her son were unavailable. While she did not like the options available, the Board did not find that they were unreasonable options. Therefore, the Board found that she had not established a *prima facie* case for family status discrimination.

In September of 2010, the Canadian Human Rights Tribunal released three decisions at the same time where **Canadian National Railway (“CNR”)** was the employer. All of the cases dealt with female employees who had young children. CNR’s collective agreement allowed them to transfer certain employees in order to ensure adequate coverage. All three women were asked to transfer to cities and, when they refused on the basis that the jobs in the new location were difficult for anyone with childcare and/or family obligations, they were fired. The women all commenced individual claims alleging that their terminations amounted to discrimination on the basis of family status.

The Tribunal found that the complainants had established a *prima facie* case of discrimination. As a result of the complainant’s family and parental responsibilities, the complainants were not able to be employed by CNR in a manner equal to people without family responsibilities. CNR was found to be under a duty to accommodate the complainants to the point of undue hardship and they had not fulfilled this duty.

The complainants were reinstated, received damages for lost earnings, damages for pain and suffering (\$15,000) and damages for CNR's willful and reckless conduct (\$20,000).

*What does this mean for employers?*

1. **Definition of family status** – The definition of family status includes being in a parent-child relationship and includes responsibilities that go along with being a parent, such as childcare.
2. **Accommodation for family status is treated as seriously as accommodation for other prohibited grounds of discrimination** – Employers must give the same attention to an accommodation request based on family status as they would to any other request for accommodation based on a prohibited ground of discrimination. Employers would be wise to use particular caution in managing claims with respect to family status. Employers should specifically avoid a blanket approach to such claims and rather talk to the employee about their particular situation. A case-by-case analysis should be used in order to respond appropriately and reduce the risk of liability associated with these claims.
3. **Not every issue regarding the balance between work and family will attract the duty to accommodate** – Employers should work with employees to attempt to accommodate an employee's family obligations, however employees may have some responsibility to self-accommodate a conflict where it is reasonable. Employees may have to try and resolve a conflict through other options, which may not be the most ideal for them or their family.
4. **Assess unwritten policies** - In the **Johnstone** case, the policy that resulted in discrimination on the basis of family status was unwritten. Employers should ensure that both their written and unwritten policies are applied

consistently and do not result in discrimination based on an enumerated ground.

### *Social Networking*

Employers have traditionally restricted concern regarding employee behaviour to the workplace. However, the potential harm that employee activity on social networking sites can cause has made it necessary for employers to be more vigilant about employee activity outside of the traditional work environment. Employers are increasingly responding to inappropriate employee online activity through discipline and/or discharge. Correspondingly, courts have demonstrated a willingness to enforce employer reactions through holding employees responsible for inappropriate online activity.

Significantly, an increasing number of Canadian boards and courts have upheld terminations for cause where an employee's activity outside of the workplace is sufficiently injurious to the interests and/or reputation of an employer. These decisions appear to reflect recognition from the judiciary that employee activity outside the workplace can have serious and damaging consequences both to a work environment and to an organization as a whole.

Very recently, the British Columbia Labour Relations Board (the "Board") upheld the just cause termination of two employees for content that they posted on Facebook. In **Lougheed Imports Ltd. v. United Food and Commercial Workers International Union, Local 1518**<sup>10</sup>, two employees of an automotive detailing and accessory shop posted inappropriate work-related comments and comments that were rude and threatening about other employees of the shop on

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<sup>10</sup> 2010 CanLII 62482 (British Columbia Labour Relations Board) (CanLII).

their Facebook profiles. The comments included remarks about the sexual orientation of other employees, degrading and disrespectful remarks about supervisors, negative comments about the business and quality of products sold at the shop and comments about the employees' general dissatisfaction with their employment. The Board held that there was no reasonable expectation of privacy when comments are published on Facebook and therefore the comments made were damaging to the employer's business and reputation. The Board further found that the comments made about the supervisors amounted to insubordination and that the comments led to a hostile work environment. The Board rejected the Union's argument that the employees were fired because management was anti-union. This case is the first known one in Canada where an employee has been fired for his or her activity on Facebook and there will certainly be more to follow.

In another case this year, **Wasaya Airways LP v. Air Line Pilots Assn., International (Wyndels Grievance)**<sup>11</sup>, a pilot with Wasaya Airways ("Wasaya") was terminated for cause when he posted a note on his Facebook wall which stated "You know you fly in the north when ..." and listed 10 items which had racial overtones about First Nations people. Wasaya serviced many First Nations communities in Northern Ontario and many of the people who used the airline were of First Nations background. Furthermore, nine of the twenty-seven communities serviced by the airline had ownership interest in the company. First Nations values and culture were considered integral to Wasaya and were included in the company's policies and business practices. The grievor's Facebook note did not reflect the company values and showed a lack of respect for the company's clients.

As a result, the airline had valid concerns that if the grievor's post became public it could destroy the relationship with First Nations communities and First Nations

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<sup>11</sup> [2010] C.L.A.D. No. 297 (Canada Labour Arbitration) (QL).

people and the company would suffer. As a result, the decision to terminate the pilot for his online conduct was made. The Arbitrator ultimately held that the risk of potential harm to the company's reputation was significant and that reinstatement was not appropriate in the circumstances. The grievor was suspended for four months with full compensation and then ordered to resign from the company following the suspension. Although the Arbitrator imposed a lesser degree of discipline in an effort to be less punitive, the finding nonetheless sends a clear message that posting remarks on a social networking site which have the potential to damage an employer's reputation or business is behaviour which is inconsistent with a continuing employment relationship.

*What does this mean for employers?*

1. **There are circumstances in which employers have the right to discipline and/or discharge employees in relation to inappropriate online activity** - Previous case law in the area of employee online activity has described a subjective test for determining the threshold beyond which an employer has the right to intervene. This threshold is triggered when it can be demonstrated that there is a sufficient connection between the activities of the employee and the legitimate business interests of the employer. Analysis of the threshold can be assisted through questions such as whether an employee's conduct is sufficiently injurious to the interest of the employer, whether an employee has acted in a manner incompatible with the faithful discharge of his/her duties, and finally, whether the employee has done anything prejudicial or likely to be prejudicial to the reputation of the employer.
2. **Examine each situation on a case-by-case basis** - Employers should however carefully analyze an employee's activities on a case-by-case basis in order to accurately assess the appropriateness of any response and would

be well advised to conduct an investigation into the matter before taking any disciplinary steps.

3. **No expectation of privacy on Facebook** - The case law should also serve as a warning to Facebook users that there is no expectation of privacy on Facebook and presumably other forms of social media.

### *Overtime Class Actions*

In last year's Employment Law Roundup, we discussed the **Fresco v. Canadian Imperial Bank of Commerce**<sup>12</sup> ("CIBC"), case where certification was denied to a class consisting of approximately 31,000 CIBC teller and customer service employees who wished to bring a class action against their employer for unpaid overtime. The plaintiff class alleged that CIBC's overtime policy was illegal because it required employees to obtain prior approval for overtime worked and the policy gave the option of time off at a rate of time and a half in lieu of pay. The plaintiff class argued that, pursuant to the policy, CIBC failed to pay otherwise eligible overtime.

In denying certification, the Court held that the policy was not illegal and that there was no evidence to conclude that CIBC's policy resulted in a systemic practice of unpaid overtime. The Court found that the claim did not raise any common issues and therefore a class action was not the preferable procedure to resolve the claim. A claim of systemic wrongdoing, such as unpaid overtime, was not well suited to a class action lawsuit because such a claim would require an examination of individual claims and this would defeat the purpose of a class action. As a result, a class action lawsuit was not the preferable procedure to deal with the issues and certification under the *Class Proceeding Act* was denied.

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<sup>12</sup> 2009 O.J. No. 2531 (Ontario Superior Court of Justice) (QL).

In 2010, the **Fresco** decision to deny certification was upheld on appeal<sup>13</sup>. The Court held that the trial judge had not made any errors in determining that the overtime policy was lawful nor did she make an error in determining that there were no common issues that would advance the litigation as a class action. This is a case that we will continue to watch to see if a further appeal to the Ontario Court of Appeal will be sought and granted.

However, in 2010, certification of a class action was granted in the **Fulawka v. Bank of Nova Scotia**<sup>14</sup>, case which also dealt with unpaid overtime. The class of plaintiffs consisted of Bank of Nova Scotia (“Scotiabank”) sales staff who claimed that they were regularly required to work, without pay, outside of their scheduled hours in order to complete their jobs. Scotiabank’s policy required that requests to work overtime had to be approved in advance; however, due to the unpredictable nature of the job, this was not always possible.

In this case, Justice Strathy concluded that, unlike the **Fresco** case, there was enough evidence of systemic wrongdoings to give rise to common issues which could be decided through a class action proceeding. More specifically, Justice Strathy found that the systemic wrongs that resulted from the policy to obtain approval before overtime was worked did not reflect the reality of the workplace because the onus was on the employee to obtain approval for overtime rather than putting the onus on the employer to ensure that employees were paid for overtime hours that they were required or permitted to work. The Court identified the

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<sup>13</sup> *Fresco v. Canadian Imperial Bank of Commerce*, [2010] O.J. No. 3762 (Ontario Superior Court of Justice – Divisional Court) (QL).

<sup>14</sup> [2010] O.J. No. 716 (Ontario Superior Court of Justice) (QL).

systemic wrongs which included Scotiabank’s failure to have a procedure to record overtime which made it more difficult for employees to be properly compensated.

Justice Strathy also addressed the fact that the decision in this case differed from that in **Fresco** and reconciled the decisions by stating that unlike the **Fresco** case, there was evidence in this case that the failure to pay overtime happened because of the policy and not independent of it. In addition, there was also evidence that the failure to pay overtime was due to systemic reasons and not purely individual circumstances. Leave to appeal this decision was sought and granted based on the fact that the decision in this case conflicted with the decision in the **Fresco** case despite the fact that the issues and circumstances of the case were similar. We will await the decision in this appeal to see if the Court will continue to distinguish the circumstances in this case from those in *Fresco* or if the appeal will overturn the motion judge’s decision.

In another unpaid overtime case, **McCracken v. Canadian National Railway Co.**<sup>15</sup>, certification was granted. On behalf of approximately 1,550 current and former front line supervisor employees of Canadian National Railway (“CNR”), the plaintiff alleged that CNR had wrongfully classified its first line supervisors as managers and, as a result, denied them overtime and holiday pay which they were entitled to under the *Canada Labour Code*. The Court dismissed the plaintiff’s claim for unpaid holiday pay on its merits but continued on to consider whether the issue of unpaid overtime should be certified as a class action. The Court held that all of the requirements for certification were met. More specifically, the plaintiffs had causes of action for unjust enrichment and breach of contract based on breach of express terms, implied terms, and terms implied by statute. There was an identifiable class that was composed of people who CNR classified as first line

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<sup>15</sup> [2010] O.J. No. 3466 (Ontario Superior Court of Justice) (QL).

supervisors and were not paid overtime based on their classification and not their job descriptions.

With respect to common issues, the Court found that there were six issues that were common to the resolution of all of the class member's claims. Among the common issues to be determined were whether the class members received overtime pay, the terms of the class members' contracts that were forced by statute, a determination of what the minimum requirements were for someone to be considered a managerial employee, whether CNR was unjustly enriched by not providing overtime pay to the class members and the damages the class members were entitled to. Although there was another procedure available to the class members to pursue the claims through an administrative process under the *Canada Labour Code*, Justice Perell found that a class action was the preferable procedure. Despite the fact that Mr. McCracken had behaved rudely and unprofessionally toward some of the class members and had personality conflicts with some of them, the Court found that he was a suitable representative plaintiff.

***What does this mean for employers?***

1. **Unpaid overtime remains a significant legal issue for employers** – Employers that breathed a sigh of relief after **Fresco** must still be vigilant about tracking and paying overtime to eligible employees. The more recent cases suggest that class actions may still be a suitable means by which to litigate these cases, which should encourage employers to take extra care to ensure their overtime systems are legally compliant. Employers that have policies or practices of not paying overtime to eligible employees will be particularly vulnerable.
2. **Beware misclassifications of employees** – Employers that are not aware of the proper classification of employees who are exempt from overtime

entitlements are similarly vulnerable. This misunderstanding often centers around employees who are paid a salary and/or perform some managerial functions. Employers should be sure to get solid legal advice on whether their employees are exempt from overtime entitlements.

### *Workplace Investigations*

Several cases from 2010 highlight the importance of a properly conducted workplace investigation and remind us of the elements of a fair and objective investigative process.

The manner in which an investigation into employee misconduct is conducted can be a significant factor in determining whether the employee was wrongfully dismissed in the circumstances. In **Poulos v. Toronto and Region Conservation for the Living City**<sup>16</sup>, Mr. Poulos, a full-time cook, claimed that he was wrongfully dismissed by the Toronto and Region Conservation for the Living City (“TRCA”). On December 23, 2007, Mr. Poulos was put in charge of preparing a total of 255 Christmas meals at the Halfway House, a restaurant operated by TRCA. The two kitchen assistants who were assigned to help him with this task were of very little assistance to Mr. Poulos. Overwhelmed with the daunting task of preparing 255 meals with such little help, Mr. Poulos became angry with the two kitchen assistants and shouted at them, used harsh language, including swearing, and threw metal plates into the sink. One member of staff claimed that she went into the kitchen to tell Mr. Poulos that he was finished for the day and, when she saw that he had a knife in his hand, she felt uneasy.

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<sup>16</sup> [2009] O.J. No. 6066 (Ontario Superior Court of Justice – Small Claims Court) (QL).

After Mr. Poulos had prepared all of the meals, he was asked to leave the premises as a result of his earlier behaviour toward the kitchen assistants. An investigation into the incident was conducted by TRCA's internal human resources department where members of staff who witnessed Mr. Poulos's behaviour were questioned. However, Mr. Poulos was never asked for his version of events. Mr. Poulos was ultimately terminated for cause for violating TRCA's Harassment Policy and for disregarding the health and safety of other employees.

Deputy Justice Mungovan held that Mr. Poulos was wrongfully dismissed because the workplace environment contributed to the incident that occurred on December 23<sup>rd</sup>. More specifically, management did not provide Mr. Poulos with competent staff to assist with the preparation of meals and, furthermore, were not available to Mr. Poulos to deal with the staff issues.

In addition, Deputy Justice Mungovan held that TRCA did not have just cause to terminate Mr. Poulos's employment because it was unfair for TRCA to avoid interviewing Mr. Poulos during the investigation to obtain his version of events. TRCA interviewed eyewitnesses during the investigation but no one spoke to Mr. Poulos to understand his perspective about the incident, despite the fact that the Employee Code of Conduct required TRCA to speak to him. Deputy Justice Mungovan called this "a most serious flaw in the investigative process" and held that the investigation fell short of being full and fair when Mr. Poulos was not asked for his version of events. A full and fair investigation requires that an employer hear from the accused about the incident in question. When an employer is in possession of all the facts provided by both an accuser and the accused, the employer will then be more likely to arrive at a decision based on what truly happened. As a result, TRCA had seriously breached the Employee Code of Conduct portion of Mr. Poulos's contract. The Court found that Mr. Poulos had

been wrongfully dismissed and awarded him one month's notice as well as damages for mental distress.

A recent arbitration decision also serves as a reminder of some of the elements of a fair and objective investigation. The case, **Greater Toronto Airports Authority (“GTAA”) v. Public Service Alliance Canada, Local 0004**<sup>17</sup>, involved an employee with 23 years of seniority, C.B., who was terminated from GTAA after she was viewed on surveillance during a four week leave of absence to recover from a surgery resulting from a work-related knee injury.

C.B. had a relationship with another GTAA employee, T.T., who was in GTAA's “bad books” after he was terminated and reinstated with a \$100,000 award. During C.B.'s doctor-prescribed four week recovery period, GTAA had put T.T. on surveillance. During this time, they became aware of the relationship between C.B. and T.T. Upon this realization, GTAA decided to conduct surveillance on C.B. as well.

During her time off work, C.B. was seen on surveillance driving for long distances and walking and standing with no apparent discomfort. In GTAA's position, this was evidence that C.B. was no longer injured and was capable of returning to work. GTAA questioned C.B.'s doctor's and physiotherapist's instructions that she should stay off work. Instead of requesting an independent medical exam or engaging the services of the WSIB (as it was a work-related injury), GTAA was found to have overseen a medical assessment of C.B.'s condition which was both superficial and lacking in any basic medical understanding of the healing process. It was further held that they jumped to conclusions which were unwarranted and unreasonable.

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<sup>17</sup> [2010] C.L.A.D. No. 127 (Canada Labour Arbitration) (QL).

GTAA scheduled a meeting with C.B., explaining that the purpose of the meeting was to go over her modified duties and to contact her union representative. Neither C.B. nor anyone from her union were aware of or had seen the surveillance tapes prior to the meeting.

When she attended the meeting, C.B. was asked a number of questions with respect to her surgery, her abilities and potential sick leave abuse and described the experience as “like an interrogation session”. Answers given by C.B. that were favourable to her were not interpreted to her benefit as they should have been. Instead GTAA drew negative and unwarranted inferences from reasonable explanations provided.

The Arbitrator found that C.B. was of the view that the meeting was to discuss modified duties. As such, she had not anticipated that she was to account for her daily activities. She was unprepared for such specific questioning.

The Arbitrator concluded

“that the investigative meeting was superficial, that unwarranted conclusions were drawn, that the GTAA entered into the meeting with preconceived notions [that C.B. was dishonest], and that the meeting... was an *interrogation* and not a genuine or reasonable attempt to discover the truth about the Greivor’s condition”. (our emphasis)

C.B. was suspended after this meeting. Her suspension took place three days after her partner, T.T. was terminated (for the second time) from GTAA. C.B. was subsequently terminated within a week of being suspended, notwithstanding that she had returned to work with a valid doctor’s note and physiotherapist’s note. The termination was for just cause.

The Arbitrator found that there was a clear link between C.B.’s termination and T.T.’s termination. In addition, GTAA did not take into consideration C.B.’s 23 years of service and/or her exemplary record at GTAA when they made the decision to terminate her. The Arbitrator found that,

“[t]he GTAA failed to review all of the facts in a reasonable manner and failed to verify its view of [C.B.] by obtaining medical corroboration which was available to it. The GTAA was motivated by an arrogant presumption about the Grievor’s medical condition notwithstanding that none of the managers had any medical training.”

The Arbitrator further stated,

“Employees are not like tissues to be used up and then thrown out at a whim into the bin of low level employment or unemployment. Employees... are entitled to... a reasonable investigation of their conduct before being discharged and accused of dishonesty.”

The Arbitrator found that the employer’s behaviour was “so high handed, arbitrary, and capricious” that he refused to reinstate her. Instead he awarded back wages for over five years (minus mitigation), damages for mental distress in the amount of \$50,000 and loss of future income and benefits including seniority, pension benefits, vacation, etc. (precise dollar value was undisclosed in the decision). In addition to the above, punitive damages in the amount of \$50,000 were awarded against the employer for their conduct in the investigation.

*What does this mean for employers?*

1. **Ensure policies are followed** – In the **Poulos** case, the employer had a workplace policy, which was integrated into the employment contract,

which outlined how investigations into misconduct would be conducted. If a workplace has a policy which speaks to the way that investigations should be conducted, employers should ensure that these policies are followed. Furthermore, if the policy is integrated into the employment contract in any way, employers should ensure that the policies are followed in order to avoid liability for breach of contract.

2. **Who should conduct the investigation?** - Workplace investigations should always be conducted by unbiased and uninterested parties, with an eye toward finding facts and discovering the truth. Investigation interviews should be conducted in this spirit; they are not interrogations.
3. **The accused must be given an opportunity to respond** – An essential part of a full and fair investigation is that an accused employee must be given an opportunity to respond to any allegations made against them before a determination is made in the investigation. Failure to provide an accused employee with this opportunity may have an impact on the determination of whether the employee was wrongfully dismissed.
4. **Provide employees with particulars about the interview** - Employees are entitled to particulars in advance of questioning and they should know the purpose of the investigation interview before they get there. It should not come as a surprise.
5. **Keep an open mind** - The employer should not make assumptions about the employee's conduct in advance of questioning and should keep an open mind to consider explanations provided by the employee.
6. **Properly trained investigators** - Errors made in the investigation process can contribute to an employer's overall liability in a termination situation. It is therefore essential that employers ensure that the investigators they



engage are properly trained and have appropriate experience with respect to workplace issues.

### ***Conclusion***

As you can see, the case law continues to evolve and we hope that our practical summary of the latest developments will assist you in dealing with the employment law issues that arise in your workplace. 2011 is sure to bring about more noteworthy employment law decisions. Particularly interesting will be to see what transpires in the areas of social networking and class action law suits dealing with unpaid overtime. We hope you will join us again next year for a review of the noteworthy employment law decisions of 2011.