

With 2016 behind us, the lawyers at Rubin Thomlinson LLP have once again undertaken to summarize the year's noteworthy developments in employment law. This list is not intended to be an exhaustive review of the past year (you will notice that we have cheated a little on the math). Rather, it is a curation created by all of us at the firm, in which we set out a number of developments that we often found ourselves discussing at the office and with our clients.

Top Ten Employment Law Developments of 2016

1. Limiting Bonus Entitlements upon Termination: *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 & *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619

Last year, we wrote about a trilogy of cases that reflected an evolving trend in the construction of contractual bonus provisions. Ontario courts were increasingly accepting the enforceability of contractual terms purporting to limit bonus entitlements to those employees who were "actively employed" on a prescribed date. On the appeals of two cases from that trilogy, the ONCA has somewhat shifted this trend, finding that the language "the employee must be actively employed" or "no bonus is payable in the event of termination" will generally be insufficient on its own to rebut the common law presumption of an entitlement to incentive compensation during the reasonable notice period.

To read more, please click [here](#).

2. Terminating Fixed Term Employment Agreements: *Howard v. Benson Group Inc.*, 2016 ONCA 256

New for 2017

Workplace Bystander Intervention Training

June 14 in Toronto

In this half-day session, participants will learn about the importance of bystanders in creating healthy and inclusive workplaces along with the underlying workplace dynamics that keep victims from speaking up and making complaints about harassment, discrimination and bullying in the workplace.

Visit rtworkplacetraining.com to learn more or to register.

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Top Ten Employment Law Developments of 2016

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For some time, there was uncertainty as to whether the early termination of fixed-term employment agreements obligated employers to pay out the balance of the unexpired term in the absence of contractual language dictating that outcome. The ONCA has now definitively resolved the uncertainty by answering that question in the affirmative. In addition, the ONCA has clarified that, absent contractual language to the contrary, fixed-term employees have no duty to mitigate or to account for any mitigation earnings in the event of early termination.

To read more, please click [here](#).

3. Dismissing Federally-Regulated Employees Without Cause: *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29

Last year, we discussed the ongoing debate as to whether federally-regulated employers have the right to terminate their employees “without cause”, as the common law would otherwise permit if those employees were given their proper termination entitlements. This year, the SCC overruled the FCA, and confirmed that the *Canada Labour Code* prevents federally-regulated employers from terminating the employment of non-managerial employees with more than 12 months of service “without cause”.

4. Revisiting Deficient Termination Clauses: *Oudin v. Centre Francophone de Toronto*, 2016 ONCA 514

While the common law implies an entitlement to reasonable notice of termination in every employment relationship, that presumption can be displaced by contract, so long as there is compliance with the minimums prescribed by the applicable employment standards legislation. In a case that appears to have gone against the tide on the subject, the ONSC and the ONCA

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Click [here](#) to listen to our first podcast of 2017 on performance management.

Investigating Complex Cases

March 2 in Toronto

This advanced workplace investigation training course looks at some unusual starting points for investigations and covers: investigations into complaints of systemic discrimination; responding to anonymous complaints; and reviews, assessments and other processes which can be undertaken when there is no “complainant”.

Participants will be provided with a diagnostic tool or “roadmap” to assist them in determining the appropriate course of action when they hit an investigation “road block.”

Learn more about this course, and about how you can earn our Advanced Workplace Investigation Certificate, by visiting rtworkplacetraining.com.

Top Ten Employment Law Developments of 2016

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upheld the enforceability of a termination provision despite the fact that the provision: (i) did not mention statutory benefit continuation or severance pay; and (ii) contemplated less than statutory minimums in certain hypothetical situations.

To read more, please click [here](#).

5. Re-formulating the Family Status Analysis: *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229

Although many believed the scope of the “family status” protection found in human rights statutes had been definitively established by the Federal Court in *Johnstone v. Canada (Border Services Agency)*, the HRTO has now reinvigorated the debate. In considering the test formulated by *Johnstone*, the HRTO determined that: (i) the focus of the analysis should be on “real disadvantages” to the family relationship rather than mere “legal responsibilities”; and (ii) as part of the test for discrimination, employees should not be required to establish that they made reasonable attempts to “self-accommodate” their family-related obligations.

To read more, please click [here](#).

6. Negligent Supervisor Sentenced to Three Years in Prison: *R. v Vadim Kazenelson*, 2016 ONSC 25

This year, for the first time in Ontario’s history, a workplace supervisor has been sentenced to three and a half years in prison under Bill C-45’s amendments to the *Criminal Code of Canada*. The supervisor was found guilty of criminal negligence causing death and bodily harm, after he failed to take reasonable steps to prevent bodily harm to five employees who fell from a thirteen story apartment building.

To read more, please click [here](#).

Cross-Canada Workplace Investigation Training

Join us in cities across Canada for Basic Workplace Investigation Techniques and the Report Writing Workshop and learn how to address inappropriate workplace behaviour before it becomes a legal issue.

- March 7 - 9, 2017 in **Ottawa**
- April 4 - 6, 2017 in **Calgary**
- April 25 - 27, 2017 in **Toronto**
- June 6 - 8, 2017 in **Vancouver**
- September 12 - 14, 2017 in **Calgary**
- October 3 - 5, 2017 in **Toronto**
- November 14 - 16, 2017 in **Vancouver**

Visit rtworkplacetraining.com to register.

For information on bringing customized workplace investigation training in to your workplace please call (416) 847-1814.

Top Ten Employment Law Developments of 2016

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7. Making Unilateral Amendments to Employment Agreements: *Nufrio v Allstate Insurance Company of Canada*, 2016 ONSC 2791

When attempting to unilaterally amend the fundamental terms of an employment relationship, employers are generally required to obtain the consent of the impacted employees, and in many cases, provide “fresh consideration” for the proposed change. However, an alternative that the ONSC endorsed in this case is the provision of unequivocal reasonable notice that a proposed change will take effect at some specified future date.

To read more, please [click here](#).

8. The Statutory Duty to Investigate Workplace Harassment: Ontario's *Bill 132, Sexual Violence and Harassment Action Plan Act*

It is one thing for employees to have protections against certain types of workplace misconduct – it is quite another to impose legal obligations upon employers to investigate and address breaches of those protections. Bill 132 has amended Ontario's *Occupational Health and Safety Act*, and imposed upon employers a statutory duty to conduct “appropriate” investigations into “incidents” and “complaints” of workplace harassment. The duty is located within a set of expanded requirements relating to preventing workplace harassment.

To read more, please [click here](#) and [here](#).

9. Further Judicial Guidance on Workplace Investigations: *Shoan v. Canada (Attorney General)*, 2016 FC 1003 & *Pierro v The Hospital for Sick Children*, 2016 ONSC 2987

With the introduction of Bill 132, workplace harassment policies

Conducting Workplace Assessments

**April 7 in
Calgary and
May 25 in
Toronto**

Studies show that only a fraction of workplace issues, including workplace harassment, are ever reported to the employer.

This session tackles the problem head on. We will discuss how to craft a proactive assessment process that will uncover and analyze the workplace culture through the use of surveys, focus groups and in-depth interviews.

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Top Ten Employment Law Developments of 2016

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and investigation procedures have been brought to the forefront of the employment relationship. Two cases this year have contributed to our understanding of proper workplace investigation procedure, reminding us that: (i) investigators must be unbiased throughout the investigation process; and (ii) employers have an implied power to place an employee on paid leave while investigating allegations of employee misconduct.

To read more, please click [here](#) and [here](#).

10. The Year of the Appeal: *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421; *Strudwick v. A.C.C.E. Inc.*, 2016 ONCA 520 & *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79

To conclude this year's top 10, we have revisited three cases that were addressed in our previous roundups. These cases were largely affirmed by the ONCA, suggesting that the following principles may be here to stay (at least for a while): (i) the remedy of reinstatement is always an option in human rights cases; (ii) courts remain willing to find unreasonably aggressive employers liable for significant damage awards; and (iii) like employees, dependent contractors may be entitled to significant damage awards in lieu of reasonable notice of termination.

To read more, please click [here](#), [here](#) and [here](#).

Conclusion

While these developments represent some of the more recent evolutions in employment law, subsequent years will most certainly yield further changes. As we advise every year, prudent employers must continue to monitor legal developments, keep themselves apprised of incoming changes and re-examine their workplace policies and procedures to ensure ongoing compliance with the latest legal requirements. 

RT Law at Work Blog

Here's what we've been blogging about:

Termination After a Complaint = Reprisal

Proposed Changes to ESA and OHS Act May Mean Additional Obligations for Employers

Increasing Employee Participation in Workplace Assessments

New year, new money: a quick overview of the EI Premium Reduction Program

'Tis the Season for Seasonal Employment

Have your bonus preconditions been "sufficiently" communicated to your employees?

The TTC's Random Drug Testing Program: Four major challenges to consider

How to Handle Employee Resignations

The sticky pitfalls of dismissing temporary workers

Employers Cannot Withhold Pay from an Employee without Authorization