

A participação de Inês Albuquerque e Castro na Labour & Employment Virtual Roundtable 2018

Inês Albuquerque e Castro, sócia na **FCB Sociedade de Advogados (FCB)** e responsável pelo Departamento de Direito Laboral e da Segurança Social, foi uma das seis especialistas internacionais que participaram na Labour & Employment Virtual Roundtable 2018, da [Corporate LiveWire](#).

A Labour & Employment Roundtable 2018 conta com a participação de seis especialistas na área, de todo o mundo, respondendo a um conjunto de questões sobre o direito laboral em diferentes jurisdições. Entre os tópicos abordados estão: estratégias de retenção de colaboradores, processos de cessação de contratos, tribunais do trabalho, métodos de contencioso e acções industriais e o papel dos sindicatos.

A Virtual Roundtable pode ser lida, na íntegra e em inglês, nas páginas seguintes.

Labour & Employment Law 2018

Virtual round table

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Introduction & Contents

Labour & Employment Roundtable 2018 features six experts from around the world. Highlighted topics include: employee retention strategies, termination process, employment tribunals, dispute resolution

methods and industrial action and the role of the trade unions. Featured countries are: Australia, Canada, Mexico, Portugal and the United States.

James Drakeford
Editor In Chief



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Meet the experts



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Paula Barran, a founding Partner at Barran Liebman LLP, has been practicing labor and employment law since 1980. She has written extensively on management law and is a national speaker and trainer. In addition to providing employer advice, Paula handles employment litigation in state and federal courts, and labor disputes and employment arbitrations. Additionally, she develops and presents “train the trainer” programs to introduce comprehensive, and cost effective, training programs into workplaces. Since the first publication of the Oregon Super Lawyers Magazine in 2006, Paula has repeatedly been named as a “Top Ten Lawyer” in Oregon. In 2008, 2010, and 2017, she was honored as the “Top Point Getter” for the year and was honored as the #2 Top Point Getter in 2016. Since 2003, Paula has been ranked #1 (with partners Ed Harnden and Rick Liebman) for Labor and Employment Law defense in the State of Oregon by Chambers & Partners USA, America’s Leading Business Lawyers. She is also a fellow of The College of Labor and Employment Lawyers, a fellow of the American Bar Foundation, and has been named in The Best Lawyers in America directory since 1995. She is admitted to practice in Oregon, Washington and before the U.S. Supreme Court, U.S. Court of Appeals, Ninth Circuit, U.S. District Court, District of Oregon and U.S. District Court, Eastern and Western Districts of Washington.



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Inês frequently contributes to various legal publications, having written numerous articles on the subject of Labour Law in the context of several jurisdictions, namely Portugal, Angola and Mozambique. She is a regular speaker at conferences, seminars and workshops and has been recognized many times by legal guides.



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Natalie is the Owner and Founder of MacDonald & Associates, a boutique law firm specializing in Canadian Employment Law. MacDonald & Associates was formed following the dissolution of Natalie’s former firm, which had been in existence for four years, the last two for which it had been selected as one of the top three Employment & Labour Law firms in Canada, according to Canadian HR Reporter Readers’ Choice Awards.

Natalie was selected in 2016 and 2017 as one of the leading Labour and Employment Law Practitioners in the World, according to the 6th and 7th editions of the Expert Guides Women in Business Law Guide. Lawyers listed in these Guides are nominated by in-house counsel and peers, and selected through independent research and peer evaluations.



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Joydeep Hor is People + Culture Strategies Founder and Managing Principal. He is one of Australia’s most well-known workplace relations lawyers due to his high media profile (both as a sought-after media commentator and prolific keynote speaker including appearing regularly as a guest commentator on Sky Business Channel) and his representation of several high profile clients throughout his career.

While an expert in all areas of workplace relations, Joydeep is one of Australia’s “go to” lawyers for complex and sensitive terminations of employment and also for addressing all aspects of workplace behaviour and culture.

With professional qualifications already as a Fellow of the Australian Human Resources Institute, Chartered Fellow of the United Kingdom’s Institute of Personnel and development, a Master of Laws from University of Sydney (where he previously completed a Bachelor of Laws with Honours degree and a Bachelor of Arts majoring in English literature) Joydeep has been accepted into and is currently completing Harvard Business School’s Owner/President Program

1. Have there been any recent regulatory changes or interesting developments?

MacDonald: One of the most significant developments in Canadian Employment Law relates to the increase in extraordinary damages as awarded in the recent case of *Galea v. Wal-Mart Canada Corp.* 2017 ONSC 2045, argued by the author. In that case, Mr. Justice Emery, awarded \$250,000 in moral damages, a head of damages awarded for the employer’s bad faith conduct in its manner of dismissal, where it is reasonably foreseeable that this would cause the employee mental distress. The award in *Galea* is now the highest amount of moral damages ever awarded in Canadian employment law. Mr. Justice Emery made this award after reviewing Wal-Mart’s pre and post termination conduct, taking into consideration several factors, including its litigation misconduct, (pace and process of documentary disclosure); its misleading and dishonest conduct in general, and the fact that Wal-Mart cut off her compensation in the midst of its restrictive covenant with her, despite not having any evidence that she competed.

Of fundamental importance was that he also awarded the damages, where no expert medical evidence had been presented, but only the testimony of Ms. Galea. In that regard, he relied upon the Supreme Court of Canada’s decision in *Saadati v. Moorhead*, 2017 SCC 28 (CanLII) where the court found that expert medical testimony was not required in a personal injury case, which he applied in the employment law context. This was significant, as there had been much debate about whether medical evidence was required to award damages. *Galea* appears to have resolved that.

Equally of significance, Mr. Justice Emery also awarded \$500,000 in punitive damages against Wal-Mart, the highest reported level of punitive damages awarded

in the employment law context based on the bad faith displayed by Wal-Mart. This was found separate to the damages he had awarded for moral damages, as he concluded that the actions of Wal-Mart had surpassed the actions of another employer in *Pate Estate v. Galway-Cavendish and Harvey (Township)* 2013 ONCA 669, where \$450,000 was awarded to an employee who had been accused by the employer of criminal conduct, yet was found completely innocent.

Tostado: Yes. There was a constitutional reform in regards to labour justice, which was published in the Mexican Official Gazette on 24 February 2017. In summary, the reform contains the following outstanding points:

- The formation of labour courts or tribunals, now dependent of the Judicial Branch with respect to federal matters and dependent from the judicial branches of the States with respect to local matters (the Federal Labour Law establishes which are federal and which are local matters). It also refers to the disappearance of the Conciliation and Arbitration Labour Boards, which are the current authority that solves any dispute between employees and employers, or between unions and employers. The Labour Boards were dependent of the Executive Branch.
- The creation of Conciliatory Centres to deal with local matters; and the creation of the decentralised organism for federal matters, both having conciliatory functions, and the decentralised organism having an additional function of registering collective bargaining agreements,



union organisations and all of the administrative acts derived thereto.

- With respect to collective matters, the unions will now be obligated to evidence that they have the representation of the employees to present a notice to intent to strike to obtain the signature of a collective bargaining agreement. Likewise, for entitlement conflicts between unions, execution of a collective bargaining agreement and the election of union leaders, the reform guarantees that the employees’ vote will be personal, secret and at free will.
- Regarding the solution of employee-employer conflicts, before going to the labour courts, a mandatory conciliatory stage should take place, which will be handled by the conciliatory centres or the decentralised organism, in their corresponding venue.

The reform contemplates that the Congress and the local legislatures will have a year, as of the date in which the reform comes into effect, to do the necessary amendments to the corresponding legislation. There is currently one amendment to the Federal Labour Law

however we anticipate the amendments will contain eight new procedures, in addition to legislating the Organic Laws of the Conciliatory Centres and Decentralized Organisms.

Hor: In recent years, the national regulatory body, The Fair Work Ombudsman (“FWO”) has pursued employers in relation to a range of compliance issues, particularly the underpayment of wages and other minimum entitlements. The Fair Work Ombudsman takes around 50 matters to court each year. Increasingly it is focusing not only on the employing entity, but on other parties, such as directors and HR executives who are involved in the alleged contravention, and hence personally liable for any breach under accessorial liability laws. Prosecutions of this nature have recently extended to obtaining penalties against an accounting firm for knowingly helping one of its clients exploit a vulnerable worker.

The FWO has also been focused on compliance by employers where vulnerable workers are engaged. Reinforcing this approach, in September 2017, the Fair Work Act 2009 (Cth) (“FW Act”) was amended to include a number of new measures aimed at protecting “vulnerable workers.” These measures include:

- stronger powers for the FWO to collect evidence during investigations;
- new penalties for providing false or misleading information to the FWO, or hindering or obstructing an FWO investigation;
- increased penalties for “serious contraventions” of workplace laws (e.g. deliberate contraventions);
- increased penalties for breaches of record-keeping and pay slip obligations; and
- a reverse onus of proof in underpayment claims where an employer has not met record keeping or pay slip obligations and cannot show a reasonable excuse.

In July 2017, as part of its Four Yearly Review of Modern Awards, the Fair Work Commission (“FWC”) decided to incorporate a model “casual conversion” clause into 85 Modern Awards. The model clause allows for casual employees who have worked a standard pattern of hours over the 12-month period to be eligible to make a request to convert to full-time or part-time employment.

Importantly, the amendment also requires employers to inform casual employees of their right to request this conversion. The request to convert can only be refused by an employer on reasonable business grounds (for example, where the conversion would require a significant adjustment to the casual employee’s hours of work or where it is known or reasonably foreseeable that the employee’s position will cease).

Another interesting development in 2017 from this legislative review was the decision to reduce penalty

rates in the retail and hospitality sectors. Sunday and public holiday penalties were cut with the Full Bench of the FWC agreeing with the Productivity Commission’s findings that the reduction in penalty rates would have “some positive effects” on employment.

Garneau: In 2017, Canadian legislators were particularly prolific compared to judges, and we expect changes in the employment standards of at least four provinces. After two years of independent review and despite the polar opposite views of economists on the subject, the Ontario government enacted amendments to the Employment Standards Act and Labour Relations Act, which include a rise of the minimum wage to \$15 an hour by 2019. In Quebec, wages have been raised from \$10.75 an hour to \$11.25 an hour as of 1 May 2017, which is the highest annual increase since 2010. Finally, in Alberta, the New Democrat government drafted much needed amendments to the province’s workplace legislation, last updated in 1988. These amendments are expected to come into force in January 2018 and even if quite modest, their objective is to achieve a more fair and family friendly workplace.

On the heels of various highly publicised sexual scandals which have also occurred in Quebec, the government has introduced novel legislation to regulate and/or proscribe the nature of intimate relationships university and college teachers may have with students. Also, even though Quebec employment law already specifically regulates psychological harassment, the Labour Standards Act will be amended to compel employers to enact policies dealing specifically with sexual harassment and the investigation of such complaints. Finally, the legislation protecting whistle blowers in the public

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- Ines Albuquerque e Castro ”

sector was enacted by the Quebec government in May 2017. On the federal side, there will be major changes to the private pension plan legislation.

Castro: The previous government significantly reduced severance pay as part of the most substantial reforms of employment protection legislation among members of the Organisation for Economic Cooperation and development. Since then, no significant changes were inserted in the Portuguese legal labour framework. More recently, the most relevant change was brought by Law No. 73/2017, of 16 August 2017, which strengthened the legal framework for the prevention of harassment, imposing the obligation towards the employers to (i) adopt codes of good practice for preventing and combating workplace harassment, whenever the company has seven or more employees and (ii) file disciplinary proceedings, whenever there is knowledge of harassment situations at work. This law also established protection mechanisms for whistleblowers and for witnesses indicated by them.

Barran: Oregon, where I practice, has recently introduced a pay equity law that is very broad and far reaching. It is intended to address the statistical disparity in compensation between women and men, but it also affects people of colour and other protected classes. The U.S. Equal Pay Act (a federal law) has long required equal pay between the sexes for jobs in which performance requires similar working conditions and equal skill, effort, and responsibility. The new law forbids discrimination on the basis of protected class for work of a comparable character, even if the discrimination is unintentional. Differentials are acceptable if they result from:

- A seniority system
- A merit system
- A system that measures earnings by quantity, quality, or piece-rate work
- Workplace location
- Travel, if necessary
- Education
- Training, or
- Experience

2. Can you outline the current labour market conditions in your jurisdiction?

MacDonald: The most fundamental change to Ontario’s employment laws was the introduction of the Fair Workplaces, Better Jobs Act, 2017 (known as “Bill 148”) on 1 January 2018. Bill 148 is the most substantial overhaul of the Ontario’s provincial employment legislation the Employment Standards Act, 2000 (the “ESA”) and the Ontario Labour Relations Act in a generation.

The amendments to the ESA included in Bill 148 will change a number of areas of the ESA, mostly for the benefit of employees. The most publicised changes to the ESA are the increases to the minimum wage that will occur in 2018 and 2019. Less well-known are the myriad of other changes that will drastically impact the management of Ontario’s workforce for years to come. However, Ontario’s employment law now is now required to be better balanced for employees, and contract workers, through significant extensions to leaves of absence provisions, including domestic violence leave, paying for three hour shift-work, regardless of whether the employee works the shift, and ensuring equal work for equal pay.

Bill 148 brings a myriad of other changes that will drastically impact the management for small business owners, particularly those who offer shift work, contract work, or temporary work relationships to their workers. Not only will these employers need to be weary of their obligations pursuant to the new amendments to the Act, but also, the manner in which the worker is classified, especially if it as an independent contractor with the desire to avoid the Act minimums.

Tostado: Mexico has become a popular location for foreign invested manufacturing companies which are

focused in mainly the automotive and aerospace industries. As the constant establishment of these kinds of companies grows, the labour market has become much more competitive. Companies have adopted higher compliance and compensation standards in order to be able to have a better retention rate of employees. NAFTA has been a great supporter of this growth.

Similarly, a reason why Mexico has become an attractive location for these kinds of companies is that there is a highly qualified workforce available at a lower cost than in other developed countries. Local governments are investing in specialised universities and technical institutes to create a wider and more prepared workforce in order to be able to attract more foreign investment of these conditions.

Garneau: On the one hand, the right to unionise has been extended by provincial laws or court decisions to new groups of employees that were historically denied the right to unionise, including first level managers and foremen. In a recent decision, the Administrative Labour Tribunal of Quebec, ruling on the validity of a section of the Labour Code excluding managers from the right to unionise, opened the door to such unionisation by considering that the section prohibiting managers and foreman from unionising violated the constitutional right of freedom of association. Also, in Alberta, dependant contractors will have the right to create unions pursuant to the proposed amendments to employment standards.

On the other hand, the bargaining power of unions appears to be somewhat undermined by government incursions in the collective bargaining process of a certain category of employees. This was especially the



case in early May 2017, when the Quebec government passed a special law forcing the return to work of more than 175,000 construction workers then on strike following the collapse of the collective bargaining process. In addition, the government unilaterally imposed the restructuring of all municipal defined benefit pension plans. The government enacted a scheme which impacted previous acquired rights (including automatic indexation) under the plans and arbitrators were given the power to enforce the reductions if the parties could not agree on the proposed reductions.

Castro: The major reforms to the Portuguese labour market, enacted in 2012, were a move in the right direc-

tion. The Portuguese economy experienced growth in early 2013, and Portugal has seen significant improvements in both employment and unemployment rates – much more so, in fact, than what one would have expected given the pace of the recovery. However, despite the progress made, many challenges remain. Unemployment remains high and is linked to an increase in poverty rates, even though long-term unemployment itself is showing signs of reducing. The labour market remains highly segmented and, in the context of very low inflation, the presence of downward nominal wage rigidity is likely to remain a barrier to the competitiveness of the Portuguese economy – unless productivity growth is strengthened.

3. How can employers/employees better understand their rights?

MacDonald: Today, employers and employees may develop a more sophisticated understanding of their rights than ever before through the internet. However, the discerning employee or employer should never rely solely on what is written on the net, but must also conduct their own research by consulting with experienced employment counsel. It certainly is never as simple as just applying the facts of the situation to the case at hand. In Canada, Canlii, is a gratuitous service providing employees and employers with case law, and offering commentary as well. Additionally, there are many courses that are now offered by reputable schools for human resource management, and best practice, so employers can certainly take advantage of that. However, many other considerations are required, and it is only through reviewing the particular circumstances with counsel, that an employer or employee will be fully informed of their rights and obligations.

Tostado: Mexico has a very employee oriented Federal Labour Law, which contains the guidelines of the Labour Defence Office. Such office is in charge of representing employees and their unions on any matter related to the application of labour provisions, assessment related to the application of the Federal Labour Law, as well as serving as a conciliatory stage to solve disputes prior to engaging litigation before a Conciliation and Arbitration Board.

Any employee is granted with this benefit free of charge, and they may appear before this authority in order to obtain any information related to their employment rights or benefits.

On the other hand, the employer is not granted with such benefit as Mexican laws consider a legal entity to have sufficient means to be able to be correctly assessed on labour related matters, hence, an employer may not allege ignorance of the labour provisions, as any breach will be imputable to the organisation. Therefore, the way an employer may be provided with a better understanding of its rights will be through a consistent and regular legal advisory.

Hor: There are 10 minimum workplace entitlements under the National Employment Standards (“NES”) and one of these is the right for new employees to receive the “ Fair Work Information Statement ”. The Fair Work Information Statement must be provided to all new employees by their employer before or as soon as possible after the commencement of their employment. This statement outlines the minimum workplace entitlements in the NES (maximum working hours, parental leave, annual leave etc.) and information concerning the right to request flexible working arrangements and concerning the Modern Awards which may cover an industry/occupation.

Advice and support for employers/employees in understanding their workplace rights and obligations may also be provided by unions and employer associations. Strategic and commercial advice can also be sought from external professionals and may prevent dispute, conflict and legal problems from arising within organisations. This external advice may be especially beneficial for organisations where the internal human resource function is largely operational rather than strategic.



Barran: I practice in a broad jurisdiction with constantly evolving and developing regulation. Keeping up with it is difficult, even for people who are legally trained. Employees, and smaller employers who cannot afford in-house counsel, are at a disadvantage. However, many web-based resources can be effective:

- Most government agencies offer informational websites that include outlines of the law, FAQs, and hotlines or telephone resources. Finding the right site can generally be accomplished by searching online for the topic area and being alert for results that have a government domain.
- There are a number of public information sites, some related to newsletters or media. These of-

fer general discussions that can impart a lot of information.

- In recent years, law firms have promoted their practices by blogging. The best of these report on new events or provide short, plain-language articles on subjects of importance. They are, certainly, designed to attract business, but generally offer good entry-level information.
- Do not underestimate the value of books and manuals written for the general public. They don't replace lawyers, but the more an employer or employee knows in advance, the more cost effective the lawyer-client relationship can be.

4. Are there any effective employee retention strategies or best practices for manager-employee relations an organisation can implement?

Tostado: In our jurisdiction, the most effective employee retention strategy is being competitive in the labour market, this is, providing employees with benefits above the minimum standards set forth by the Federal Labour Law such as: food vouchers, life insurance, savings fund, private retirement plans, children scholarships, amongst others.

From our experience, companies that have low compensation plans have a high rate of employee rotation, moreover when they are located at industrial parks of commercial sites where it is very easy to spot the variation between the benefits granted on each company.

In addition to a competitive compensation plan, the Labour Department in Mexico has been active reviewing that companies are non-discriminatory and that are taking actions against labour and sexual harassment by establishing policies. We believe that being a respectful and compliant company may also be an effective strategy for employee retention, as employees feel comfortable on their work environment.

Hor: In today’s workforce, the opportunity to work flexibly is important to many employees. However, when employers think of flexible working arrangements, they usually limit themselves to the right to make a request for flexible working arrangements under the NES. This right is limited to employees who meet the eligibility requirement of performing 12 months’ continuous service, and must fit into one of the designated categories such as returning from parental leave, having carer’s responsibilities, or being over 55 years of age.

As part of an effective employee retention strategy, employers should consider taking a proactive approach to flexible working arrangements rather than simply waiting for eligible employees to make a request under the NES. For example, Ernst & Young has announced that coming into work is optional for its employees. A more open approach to flexible working arrangements can be used to attract talented people to the organisation and enhance satisfaction and retention among existing staff. A proactive approach necessitates a focus on identifying particular functions, positions or duties that can be performed on a flexible basis. Flexible work comes in many forms, with options growing rapidly as technology advances. Employees might be allowed to work, for example: part-time; compressed hours; at different locations; in job-sharing arrangements; or with reduced hours in certain weeks through the creative use of leave.

Garneau: This quote from Richard Branson has never been truer: ‘take care of your employees and they’ll take care of your business’. Indeed, over recent years, employees have become extremely concerned by their ability to manage their professional commitments without adversely impacting their personal and family life. This is particularly true for employees of the younger generation who expect their employer to be sensitive to their need to reconcile job and family and who will not hesitate to look for employment elsewhere if they feel their employer is only paying lip service to this principle. This is notably why the proposed or anticipated amendments to employment standards in various areas of Canada aim to create a better work-life balance and a better environment of work. In Quebec, there is a movement by the left to amend the labour laws to grant four weeks of paid vacation to all workers because of



the increasing number of hours lost to sick leaves and employees on burn-out.

Castro: In addition to the common salary package agreed with employees in general, employers try to be creative on the remuneration package of management teams in order to attract them and retain talents. Such package usually include: (i) stock options and shares; (ii) collective retirement insurance policies; (iii) pension plans; (iv) reimbursement of expenses; (v) labour tools; (vi) social benefits (lunch services provided by the company; supply of school materials for employ-

ees’ children; granting or duly documented payment of training and specialisation courses or seminars; reimbursements for medical and dental care expenses of the employee and of their family assumed by the employer; etc.); (vii) housing, among other benefits.

Before implementing such strategies or granting managers with such benefits, it is important to analyse whether the benefit can be deemed remuneration and the respective consequences, in order to minimise risks and exposure in case of a conflict.

5. What are the employment rights for those considering taking part in industrial action or strikes?

Tostado: Firstly, Mexican legislation states that employees are free to be part of an active union, therefore they may be involved in a strike claim that has any of the following purposes: (i) achieve a balance between the production factors (employee and company), (ii) for the signature of the collective bargaining agreement or for its annual or bi-annual revision, (iii) enforce the application of the agreement or any of its specific clauses, (iv) to require the company to comply with profit sharing related norms, (v) to support another strike, and (vi) to force the revision of the salary chart of the collective bargaining agreement.

During the strike process, employees will have the following rights:

- If the motives that caused the strike process are imputable to the employer, then the employees will be entitled to lost wages;
- Their vote, when necessary, will be personal, secret and with free will; and
- To be provided by the employer with the necessary infrastructure if voting is required.

Hor: There are limited circumstances in which lawful or “protected” industrial action – that is, industrial action in respect of which the parties are protected from legal action – may be taken. This protection relates to the right to strike as a collective bargaining tool. For industrial action to be protected under the FW Act it must either be in support of a new enterprise agreement, an existing agreement passed the nominal expiry date, or in response to industrial action taken by the other party. There are also procedural aspects which must be satisfied which include the need for the Fair Work Commission to grant an order for a protected ac-

tion ballot authorising the action and for written notice to be given to the employer three days in advance of the proposed action. If the industrial action is not protected, it may be unlawful and may expose those engaging in, or facilitating that industrial action, to legal action.

Employees are provided with a range of legislative protections in relation to engaging in industrial activity, including the general provisions in the FW Act. Under the general provisions in the FW Act, an employer is prohibited from taking “adverse action” (e.g. dismissal) against an employee or a prospective employee because of a “proscribed reason” (e.g. engaging or not engaging in industrial activity).

If an allegation is made that an employer has taken adverse action against an employee, the onus will fall on the employer to demonstrate that the subjective intention behind taking the adverse action was not because the employee engaged in protected industrial action. For example, the High Court of Australia found that an employer successfully demonstrated it had not terminated a union official for the prohibited reason of engaging in industrial activity, but it was because of the official’s conduct during a protected industrial action. The union official acknowledged that he knew his conduct in waving a sign reading “No Principles SCABS No Guts” was inappropriate and contrary to the company’s Workplace Conduct Policy. This was found to be the reason for dismissal and therefore not in breach of the FW Act.

The possible responses to industrial action are also dealt with under the FW Act. The Fair Work Commission must make orders stopping or preventing any un-



protected industrial action. An employer is prohibited from paying employees engaging in industrial action, but retains some discretion if the action only involves a partial work ban.

Garneau: Under Quebec law, the employment relationship is not severed during a legal strike or lock-out. At the end of a strike or lock-out, the employee has the right to be reinstated into his position regardless of the length of the strike or the lock-out. In addition, Quebec has anti-scab legislation which prohibits the use in the establishment which is the object of the strike of replacement workers and subcontractors. This severely restricts the ability of the employer to maintain its operations during a strike or lock-out because only those managers hired prior to the bargaining phase may legally perform the work of a striking employee. Other non-unionised employees may not perform this work.

Barran: American federal law (principally the National Labor Relations Act) has strong protections for em-

ployees who engage in concerted action to address the terms and conditions of their employment. The statute protects the right to engage in concerted activities for the purpose of bargaining collectively, or for other “mutual aid or protection” and the law does not “impede or diminish” the right to strike. Some strikes are lawful and for either an economic purpose or because of an unfair labour practice. Others are unlawful and unprotected (employees can lose their right to reinstatement) – because of the nature of the purpose, because they are called at an impermissible time, or because the employees involved in the strike engage in misconduct. Additionally, there are procedural notice requirements that must be fulfilled before health care workers can strike or picket. Employers may temporarily replace striking workers, or under some circumstances, “permanently replace” the strikers. Enforcement of employer or employee rights is typically through the unfair labour practices provisions of the statute, but under limited circumstances, employers may sue for damages under the statute.

6. In the UK, the public perception of trade unions is that their power has been slowly diminished since the premiership of Margaret Thatcher. What is the current role for trade unions in your jurisdiction both in regards to conflict resolution and workplace relations?

Tostado: Trade Unions in Mexico are currently perceived as being corrupt institutions. Furthermore, trade unions have had a very important role in the State and Presidential Elections. As we mentioned above, one of the purposes of a strike is to obtain the signature of a collective bargaining agreement with a company, nevertheless the current Federal Labour Law does not state any minimum requirements for a union to be able to file a strike claim of this nature. Therefore, there are groups of unions that take advantage of this legal loophole to file a strike process with the sole purpose of obtaining an economic benefit from the company, even when they are not supported by the company's employees. Another advantage of unions is that the Mexican treasury cannot inspect them in their tax compliance; therefore, unions are commonly used by employers to avoid full payment to employees, avoid taxes and social security contributions, as well as for money laundering.

What we stated above, is one of the reasons why the current perception of unions is not good regarding conflict resolutions, but contrarily, they are considered by many sectors of the industry as a cause of conflict.

Regardless of the above, there are some well-known unions that are more employee oriented and do work for their employees' benefits. Companies that have entered a collective bargaining agreement with one of these unions may have improved workplace relations, as there is constant presence of them within the Company and they are constantly trying to improve the employment conditions, providing recreational programs and campaigns for employees.

Garneau: Under the rule of the conservative government of Stephen Harper, legislation was passed to compel unions to disclose their financial records to the government. In addition, legislation was also passed to reduce or eliminate the tax deduction arising out of a contribution to a union sponsored financial fund. This was met with very negative reactions from both unions and businesses since these funds invest billions in the Quebec economy. When the new liberal government of Justin Trudeau was elected, these legislations were repealed.

7. How do employment tribunals operate in your jurisdiction?

Tostado: In Mexico, the labour disputes are managed by Conciliation and Arbitration Labour Boards dependent of the Executive Branch. There are Federal and Local Conciliation and Arbitration Boards. Their venue depends on the industry or kind of service or activity in which the employer is engaged.

As mentioned before, the main activity of the Conciliation and Arbitration Boards is to solve disputes between employers and employees, or between unions and employers. Nevertheless, they also have additional functions such as keeping a registry of the Collective Bargaining Agreements and Internal Working Rules, as the registration of both documents before the authority is mandatory in order to be able to enforce them.

The resolutions of the Labour Boards can be challenged by a constitutional appeal that will be studied by a court or tribunal dependant of the Judicial System.

Hor: The Fair Work Commission is the national statutory workplace tribunal ("FWC" or "Commission") which covers approximately 90% of all employers in Australia. The Commission is an independent body that performs a number of roles which include approving enterprise agreements, creating and varying modern awards, setting minimum wages, and resolving a variety of workplace disputes. Some States retain industrial tribunals that deal with state public sector employees, or any private sector employee outside the national system.

The States and Territories of Australia also have tri-

bunals that deal with particular complaints or applications relating to workers' compensation and workplace discrimination. The nature of the claim and the legislation under which it is brought will determine the appropriate tribunal to deal with the dispute. In some circumstances, the same set of facts may give rise to potential causes of action in various jurisdictions. For example, where an employee alleges they have been discriminated against at work, if the claim is:

- made under the general protections provisions in the FW Act it will be lodged with and dealt with at first instance at the Fair Work Commission;
- made under federal anti-discrimination legislation, the claim will be lodged with and dealt with at first instance by the Australian Human Rights Commission; or
- made under state anti-discrimination legislation it will be lodged with and dealt with at first instance by the tribunals established for that purpose in the relevant jurisdiction.

Garneau: On the federal side, disputes between unions and federally regulated employers are dealt by the Canada Industrial Relations Board. Individual disputes, including wrongful dismissals, are dealt by arbitrators appointed by the Minister of Employment. Directors and senior executives are excluded from the application of the Canada Labour Code and must seek redress before the ordinary courts of civil jurisdiction.

In Quebec, disputes between unions and provincially regulated employers are dealt by the *Tribunal administratif du travail* who also handles employment disputes between individuals who are not senior executives and

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. In general, the majority of disputes are resulted through judicial proceedings. A complaint is filed in state or federal court, it is answered, the parties engage in discovery (under the court’s general supervision), and eventually matters that do not settle are tried before a jury or, in some cases, a judge.
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- Paula Barran

employers. However, senior executives are excluded from most provisions of the Labour Standards Act and must seek redress before the ordinary courts of civil jurisdiction.

There are other specialised tribunals that deal with disputes concerning essential services in the public sector or disputes between public sector employees and the government. The *Tribunal des droits de la personne* has concurrent jurisdiction over employment disputes involving allegations of discrimination (age, sex, sexual orientation, religion, political opinions, etc.).

Castro: On a first instance level, the Labour Court, presided by one judge, has jurisdiction over employment-related complaints. Subsequently, the Social Division of the Court of Appeals, ruling with a panel of three judges, has jurisdiction to decide on appeals against Labour Courts’ decisions. At the last stage of hierarchy of the Courts stands the 4th Division of the Supreme Court of Justice also ruling with a panel of three Judges. Additionally, the Constitutional Courts exclusive jurisdiction over violation of any constitutional provision.

Barran: There has been discussion from time to time about developing specialised tribunals to address the kinds of matters that result in court trials (where many employment disputes are resolved). That has not yet happened, although there are a range of other mechanisms and forums depending on the nature of the dispute. In general, the majority of disputes are resulted through judicial proceedings. A complaint is filed in state or federal court, it is answered, the parties engage in discovery (under the court’s general supervision), and eventually matters that do not settle are tried before a jury or, in some cases, a judge. The process can take more than a year.

Employers and employees can agree to resolve disputes through arbitration before a single arbitrator or a panel (typically of three). This is paid for by the parties, with some jurisdictions requiring the employer to pay any fees that exceed what an employee would pay for a court filing. Arbitration is less formal and can generally be expedited. Various enforcement agencies can also bring enforcement actions through administrative contested case hearings. These are typically resolved by an appointed administrative law judge whose jurisdiction and authority are based on statutes.

8. Which dispute resolution method do you find are most commonly recommend to employers and why?

MacDonald: That answer very much depends on the particular circumstances of the case. First, you may have considerations which require that you not consider settlement for fear of creating a precedent. Second, you may wish to obtain further information from a plaintiff and require examination for discovery in order to elicit such information and documentation. Third, it may be a desired outcome to attempt to negotiate a settlement at the outset.

In Ontario, Canada, it is mandatory that in all employment related actions, (except in certain jurisdictions) mediation take place. Even if that were not the case, if the employer is seeking to resolve a dispute, I would recommend mediation as the preferred route to attempt settlement. However, timing of mediation is strategic, as it may be advisable for it to occur earlier or later in the litigation process, depending upon the issues at hand.

The purpose of mediation is to attempt to settle the matter. The process involves the parties coming together to focus on the issues and key documents, with the assistance of a neutral, third party facilitator. Mediation is a non-binding process. In that regard, the mediator is not a judge and therefore, cannot make a decision about the case. Rather, the mediator’s role is to assist the parties to attempt to resolve the matter. The process is confidential and nothing from the mediation can be used in the litigation process. If the parties are unable to reach a settlement, the matter will simply proceed.

In mediation, the parties may either select a mediator or have one appointed from the court. Typically, I attempt to select one, and not have a court appointed mediator,

as often they do not have the requisite employment law expertise to resolve the case.

Tostado: In Mexico, the only legal method to solve labour disputes is to engage litigation before a Conciliation and Arbitration Board. Nevertheless, a regular labour litigation process encourages both parties to seek for conciliation, as they can settle in any stage of the process.

Hor: Alternative dispute resolution (“ADR”) is commonly recommended or legislatively mandated for employers and can be incorporated into the litigation process or used alongside legal proceedings. ADR encompasses a wide range of processes designed to resolve disputes without judicial determination. ADR most commonly involves an independent person helping people in dispute resolve the issues between them. The flexibility of ADR means that it can be used for almost any kind of dispute and is particularly well suited to workplace grievances, particularly where there is an on-going employment relationship and there is the opportunity to preserve or repair that relationship. In some cases it is a voluntary process engaged in with the agreement of all parties, while in other cases legislation or an industrial instrument may require parties to participate in a particular form of ADR.

For example, the FW Act requires that all modern awards include a term which sets out a procedure for resolving disputes between employers and employees about any matter arising under the modern award and the National Employment Standards. In addition, when making an enterprise agreement, the FW Act requires the parties include a dispute resolution clause. Enterprise agreements lodged without that clause will not be approved.

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On the federal side, the CIRB also offers mediation services to resolve disputes between employers and unions and unfair representation disputes between unionized employees and their unions.
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- Francois Garneau

Within the workplace a dispute can be resolved through negotiation as a simple and flexible form of ADR which is suitable if the parties can discuss matters directly and want some control over the outcome. Settlement negotiations can be conducted by telephone, in correspondence or face-to-face. If there has been a breakdown in the employment relationship, it may assist to have another person, such as a lawyer, helping with the negotiations. Using a mediator can also be helpful when parties want an expert view or where self-represented litigants would like to reach an agreement on technical legal issues.

Garneau: In Quebec, there are three non-binding resolution processes which can be used to resolve employment disputes. Firstly, the Labour Standards Commission (CNESST) offers a mediation service once complaints have been filed under the provisions of the Labour Standards Act. If these complaints are not resolved, they are transferred to the *Tribunal administratif du travail*. This tribunal also has a department which offers a conciliation/mediation service. Finally, disputes involving senior executives who have filed action before the courts of civil jurisdiction can be resolved through a CRA (*conférence de règlement à l'amiable*).

This conference is presided by a judge who will not be the judge hearing the case if the parties fail to come to a settlement. On the federal side, the CIRB also offers mediation services to resolve disputes between employers and unions and unfair representation disputes between unionized employees and their unions.

Barran: When I am able to influence such a decision, I typically recommend arbitration. Having a trained arbitrator make a decision about an employment dispute more often than not avoids the “passion and prejudice” that can affect a jury. Many jurors have had their own bad employment experiences and it is asking a lot of them to set aside their own beliefs and perceptions about fairness. It is also easier for error to affect the proceedings, often leading to an appeal and perhaps retrials. Disputes can go on for many years – which is unhealthy for the parties and very expensive. In contrast, parties can agree that the arbitration would be final and binding. Arbitrators also more frequently impose limits on the kind of excessive scorched-earth discovery that has driven up the cost of pre-trial procedures, and that is an additional benefit of this forum.

9. What legal issues do employers often overlook during a termination process?

MacDonald: When employers dismiss their employees, they may dismiss their employees for just cause, or without cause. Often, I see employers leaping before looking at whether or not they have cause. If they allege cause where there is no evidence of cause, the employer could be liable for extraordinary damages.

“Where an employer claims that a termination was for just cause or summary dismissal, the onus is on the employer to prove the existence of grounds constituting just cause termination. The employer therefore has the burden of establishing the necessary facts to support the cause allegation. Failure to establish just cause in a courtroom can be severely harmful for an employer, often resulting in increased damages for bad faith, or may have much more severe results.”¹

Tostado: A common mistake to overlook is that in order to be able to terminate an employee by a justified cause, there must be sufficient evidence to be able to prove (in litigation), that such dismissal was, in effect, with cause.

Many employers believe that it is sufficient to state that the causes of the termination of the employees are imputable to them; however, employees do not take enough precaution to gather admissible evidence that could support the termination cause when in litigation. Some of this evidence may be: a written confession of the employee, taking toxicology exams, payroll receipts, videos, amongst others.

The consequence of not having sufficient evidence to prove a for-cause termination will be that it will be considered by the authority as an unjustified dismissal, by

which the employee will be entitled to receive full severance.

Hor: In circumstances where an employer is made aware of misconduct allegations against an employee that could justify termination, many employers fail to properly investigate the matter. Employers often overlook the possibility of assigning different persons with the investigatory and decision-making function in the termination process. An “independent” decision maker can review the report and accept or reject the findings and then determine the most appropriate course of action without the added pressure of having to defend the process and course they adopted, which may happen if they were the investigator.

Another common issue overlooked is where an employer is concerned about the underperformance of an employee and is seeking to terminate their employment, but has not taken appropriate steps to communicate to the employee that his or her work is below standard and/or has not provided an adequate opportunity or support to the employee to improve their performance. A classic problem is where this underperformance is presented as the reason for termination and the history of the employee’s performance reviews and other documents do not support evidence of underperformance and their performance has been rated as satisfactory or above on all other occasions. Finally, employers often seek to cushion the blow to an employee of having their employment terminated by trying to present what is a performance based termination as a redundancy instead.

An overarching theme is the importance of the em-

ployer ensuring that the termination process is procedurally fair. Procedural fairness can be dictated by applicable contractual obligations, policies or procedures. Any proposed action should be put to the employee and their response should be considered as this may be relevant to defending an unfair dismissal. It is appropriate to warn the employee prior to the meeting of the potential for dismissal, indicate that all circumstances will be taken into account, and allow a support person to be present.

Garneau: A lot of foreign companies (American, French and British) operate subsidiaries in Quebec. Very often, they do not have local employees handling HR. Unfortunately but quite often, they proceed to terminations of non-unionised employees. Most of these terminations turn-out to be “without cause” terminations because the employer failed to follow the rules of progressive discipline or the rules requiring that incompetence be proved. In addition, these employers rely on the erroneous assumption that the employee’s only recourse is a civil recourse where they can claim additional notice. This is not the case. Any employee in Quebec (except a senior executive) who has more than two years of continuous service can file a complaint with the Labour Standards Commission (CNESST) and request compensation for all lost wages and reinstatement. If the complaint is not resolved, it is referred to the *Tribunal administratif du travail*. The rules of reasonable notice do not apply before this tribunal and should the tribunal find that the termination was without cause, this can lead to very substantial compensation awards with interests and legal fees as well as an order of reinstatement. When this very specific aspect of Quebec law is overlooked or ignored by employers

it can lead to dire financial consequences. Please note that the federal labour code provides a similar recourse for wrongfully terminated employees who have more than one year of continuous service.

Castro: A key aspect of Portuguese employment law is the fact that employers may not unilaterally terminate employment contracts without legal grounds (i.e., by simply providing adequate notice), except by mutual agreement with the employee concerned, in which case the parties are free to negotiate the terms and conditions of the termination, as well as the amount of compensation. Additionally, unilateral termination of employment contracts must always follow the appropriate proceedings.

The courts tend to be very protective of employees’ rights and interests in their decisions. Therefore, the risk of an unlawful dismissal must always be taken into account when unilaterally terminating an employment contract.

Barran: I see two issues that often cause termination problems for employers. First, there is the matter of final payment of wages. My jurisdiction (like many states in the U.S.) has very strict “final paycheck” rules. In general, these rules require employers to issue a final paycheck for all wages owed within a set time upon termination. That sounds simpler than it is. Some employers pay employees a draw against commission and cannot calculate a commission payment until some set time after termination. It may make sense, depending on the way the law is written, to write those kinds of commission policies so that there is an earning cut off as of the moment of termination (for example: upon



termination employee has earned and is owed commissions on only those sales that have been finalised, or delivered, or paid for). Provisions like this help employers know exactly how much to pay. Secondly, there is the matter of intellectual property belonging to the employer. Some employees “forget” to return their laptops or smart phones, while others have done a very good job of making copies of documents and taking them home to use later in employment with a competi-

tor. Although employers cannot hold the final paycheck hostage, good policies and good exit practices can help identify this kind of theft, and employers can consider litigation, withholding references, notification of new employers, and other measures to ensure return of the kind of property that can harm their competitive advantage.

1. N. MacDonald, *Extraordinary Damages in Canadian Employment Law* (Toronto: Thomson Carswell, 2010)

10. What is the law for workers compensation in your jurisdiction and what does it cover?

Tostado: The legal framework for worker’s compensation in Mexico is the Federal Labour Law and it establishes the minimum standards for:

Vacation and Vacation Premium: Employees are entitled to the following days of paid vacation for a full year of services:

Years of Rendered Services	Days of Vacation
1	6
2	8
3	10
4	12
5-9	14
10-14	16
2 additional days per five years of rendered services	

If termination of employment prior to the end of any full year occurs of service, the employee is entitled to payment of the proportional part of his accrued vacation for that year.

Vacation pay is made at a rate of the normal daily wage plus a 25% premium.

Year-end (Christmas) Bonus: Employees are entitled to payment of an annual year-end bonus equal to at least the daily wage of 15 days. This bonus is payable before 20 December of each year.

Profit Sharing: Employees may receive their pro-rata portion of 10% of their employer’s fiscal year (January-December) pre-tax profit. 50% of the distributable amount is divided in proportion to the number of days worked during the employer’s fiscal year by each employee, and the other 50% is divided based on each employee’s wage. Payment of the distributable amount must be made within the 60 days (31 May) immediately following the date for filing the employer’s year-end income tax return (31 March).

11. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

MacDonald: The biggest trend I expect to see emerge in 2018 relates to the new workplace being revolutionised by the #METOO/TIME’S UP movement. I believe that employers will see an increasing number of claims as a result of workplace harassment and sexual harassment. In Canada, we are already seeing the impact of the “Weinstein” effect, as individuals who in the past, may not have had the courage to bring forward claims of harassment and sexual harassment are now stepping forward to initiate complaints for the workplace to investigate.

In an ideal world in employment law, I would like to see employers and employees be able to claim for legal fees incurred in order to either bring an action to the Human Rights Tribunal, or defend a frivolous complaint. In civil courts, both parties are able to claim for their legal fees, and that is not the case when the parties are in front of human rights tribunals. Just as much work goes into a human rights case, as it does for civil cases, and yet, the Supreme Court of Canada contends that the successful party cannot claim for the legal fees incurred.

With respect, that makes it difficult for a party either wishing to bring a meritorious claim, but requiring legal assistance to do so, or a party having to defend its actions against an unmeritorious claim – both situations are utterly unfair. The law on this is something that needs to change to allow both parties to benefit.

The complexities in navigating the human rights tribunals are immense, and good counsel is needed to help either party. This is particularly so, where a party having a legitimate complaint is up against a well-resourced

party, and is subjected to a barrage of tactics, for having brought the complaint, receiving no help from the tribunal in that regard, and is forced to obtain counsel. The same is true for a defendant, who, unfortunately, finds itself in a position of needing to defend its position, again, requiring, expert legal advice.

Tostado: The trending matter for the following year will certainly be the implementation of the constitutional reform in regards to labour justice, therefore, we will like to see the necessary amendments and the creation of secondary legislation so that the reform can become effective.

Many of the conflicts managed by the Labour Boards are unjustified dismissals, because employees seek severance. If the law could change, in order to be accruing severance throughout the employment relationship, we would not have far fewer conflicts and the employment relationships will be more flexible.

Hor: As the gig economy continues to expand so does the push to regulate this labour market of on-demand services. In 2016 a London employment tribunal determined that Uber drivers were not to be classified as self-employed and were consequently entitled to the basic employment worker rights. Uber’s appeal against this ruling was dismissed in 2017 and will likely be subject to a Supreme Court decision in 2018. It is expected that these debates concerning a gig workers’ status as an employee or independent contractor will continue and drive greater legal certainty in the gig economy.

The issue has not been decisively determined under Australian labour law, but there have been some inter-

esting recent developments. For example, Airtasker – an Australian based company that has created an on-line community marketplace for people to outsource a variety of everyday tasks – has deviated from the independence of other operators in the gig economy by exploring the possibility for greater supervision and involvement from the Fair Work Commission (Australia’s national workplace relations tribunal). Members of the FWC along with Unions NSW and Airtasker have entered into a heads of agreement which commits Airtasker to recommending the task-appropriate award rates of pay, an insurance product similar to workers’ compensation, a “best practice” WHS standard and by having the FWC rather than a third party provider involved in the dispute resolution process.

Garneau: Reasonable accommodation in the workplace for religious reasons continues to be a contentious issue in Canada. In Quebec, the government has recently enacted legislation to provide guidance to employers when dealing with such request. The legislation was immediately contested for constitutional reasons before the courts and its main provision is currently suspended. Also, the upcoming legalisation in Canada of the recreational use of cannabis and related products is going to confront employers with even more requests to accommodate the use of these drugs for medicinal purposes and to enact rules concerning the use of such products in and out of the workplace.

Castro: Rapid technological progress, globalisation and financial crisis have fundamentally changed labour markets worldwide and created space for growth of atypical or non-standard forms of work. These atypi-

cal employment relationships (e.g. telecommuting and telework, cloud working, zero working hours contracts, gig economy workers), are becoming increasingly popular – even among large and multi-national corporations which try to implement them in Portugal. Portuguese companies are therefore required to adjust those new employment relationships to the way they operate and to the legal framework.

On the other hand, the impact of technology on employment is also a hot topic nowadays since it creates vast opportunities and equally raises concerns. It addresses the limits of employee monitoring, the potential impact of artificial intelligence on the employment structure, the workplace and work requirements in the future. The impact of technology is likely to transform working patterns with increases in globalised workforces, mobile work and working from home.

Barran: We are at the beginning of a significant movement to readjust the balance of power regarding harassment in the workplace. If past civil rights movements of this kind are any clue, we can expect that employers are going to experience pressure to shortcut their processes, to believe that all (or most) complaints are true, and to impose severe disciplinary sanctions on respondents for all manner of offences. That will be followed by a push back, since movements of this kind are often followed by an equally fierce counter movement. The potential for liability on both ends is high and I hope that we can keep reminding employers that there isn’t a good substitute for fairness in the workplace on both sides of this issue.

