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The Eight-Minute Employment Lawyer 2023

CO-CHAIRS

Hena Singh
Singh Lamarche LLP

Craig Stehr
Gowling WLG (Canada) LLP

June 22, 2023

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Craig Stehr, *Gowling WLG (Canada) LLP*

June 22, 2023
9:00 a.m. to 12:30 p.m.
Total CPD Hours = 3 h 15 m Substantive + 15 m Professionalism

Webcast
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Agenda

9:00 a.m. – 9:05 a.m. **Welcome**

Hena Singh, *Singh Lamarche LLP*

Craig Stehr, *Gowling WLG (Canada) LLP*

9:05 a.m. – 9:14 a.m. **Update on Notice Periods**

Devin Jarcaig, *Mathers McHenry & Co.*

9:14 a.m. – 9:23 a.m. **Constructive Dismissal Update**

Alex Sinclair, *Hudson Sinclair LLP*

9:23 a.m. – 9:32 a.m.	**Enforceability of Termination Provisions** Tracy Lyle, *Nelligan Law*
9:32 a.m. – 9:41 a.m.	**Calculation of Unjust Dismissal Damages under the *Canada Labour Code*** Jeff Hopkins, *Grosman Gale Fletcher Hopkins LLP*
9:41 a.m. – 9:48 a.m.	**Question and Answer Session**
9:48 a.m. – 9:57 a.m.	**Recent Amendments to the *Competition Act:* Implications for Employment Law Counsel** Amy Derickx, *Gowling WLG (Canada) LLP*
9:57 a.m. – 10:06 a.m.	**Changes to the Agency Workers Provisions of the *ESA*** Mark Repath, *Israel Foulon Wong LLP*
10:06 a.m. – 10:15 a.m.	**Advantages and Pitfalls of Fixed-Term Employment Agreements** Matthew Wise, *Macdonald Sager LLP*
10:15 a.m. – 10:24 a.m.	**What are the Tax and other Implications to an Employer of an Employee Working Temporarily from Abroad?** Sharaf Sultan, *Sultan Lawyers PC*
10:24 a.m. – 10:30 a.m.	**Question and Answer Session**
10:30 a.m. – 10:50 a.m.	**Break**

10:50 a.m. – 10:59 a.m.	**Electronic Monitoring, Privacy, and Employment Law Implications** Siobhan O'Brien, *Hicks Morley Hamilton Stewart Storie LLP*
10:59 a.m. – 11:08 a.m.	**Working with In-House Counsel: Engaging Effectively and Adding Value** (7 m P) Marc Toppings, Vice President & Chief Legal Officer, *University Health Network*
11:08 a.m. – 11:17 a.m.	**Consequences at Trial for Employer Clients Who Behave Badly** Gurlal Kler, *Simafiru Tumarkin LLP*
11:17 a.m. – 11:26 a.m.	**Vicarious Liability, Assaults and Misbehaviour by Employees** David Whitten, *Whitten & Lublin PC*
11:26 a.m. – 11:34 a.m.	**Temporary Layoff, Long-Term Problems and Other Vexing Issues** Melanie Reist, *Morrison Reist Krauss LLP*
11:34 a.m. – 11:43 a.m.	**Workplace Harassment and Violence**: **Update on *Bill C-65*** Kim Patenuade, *RavenLaw LLP*
11:43 a.m. – 11:48 a.m.	**Question and Answer Session**
11:48 a.m. – 11:57 a.m.	**Update on Family Status Accommodation** Carita Wong, *Israel Foulon Wong LLP*

11:57 a.m. – 12:06 p.m.	**Credibility Assessments in Workplace Investigations** Jennifer White, *Jennifer White PC*
12:06 p.m. – 12:15 p.m.	**Update on Just Cause** Chris West, *Sherrard Kuzz LLP*
12:15 p.m. – 12:24 p.m.	**Pros and Cons of Voluntary Arbitrations and Mediations** (8 m P) Mitchell Rose, *Rose Dispute Resolution*
12:24 p.m. – 12:30 p.m.	**Question and Answer Session**
12:30 p.m.	**Program Ends**

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TAB 1

The Eight-Minute Employment Lawyer 2023

An Update on Notice Periods: Noteworthy Cases in 2022-2023

Devin Jarcaig
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Mathers McHenry & Co.

June 22, 2023

cpd

An Update on Notice Periods: Noteworthy Cases in 2022-2023

By: Devin Jarcaig and Amanda Pizzardi, Mathers McHenry & Co

There were a lot of developments in the jurisprudence on notice periods over the past year, suggesting a trend towards awarding longer notice periods in certain circumstances. Some of these cases exemplify the court's increasing lack of tolerance for employers who take untenable positions or otherwise engage in bad faith conduct during a termination. This paper will summarize some of the most significant Ontario court decisions focused on notice periods that were released in 2022-2023.

Currie v Nylene Canada Inc, 2022 ONCA 209

On March 14, 2022, the Ontario Court of Appeal upheld the trial judge's decision to award a 26-month notice period to an employee who had been terminated by her employer without cause. In doing so, the Court of Appeal relied on the following facts put before the trial judge in support of the finding that "exceptional circumstances" existed that justified a 26-month notice period:

(a) The employee had dropped out of high school and had worked for the same employer ever since;

(b) The employee was 58 years old and in "the twilight stages of her career" at the time of her termination without cause;

(c) The employee had a very specialized skillset, which made it difficult for her to find suitable alternative employment;

(d) The work landscape had evolved significantly since the employee had entered the workforce and since virtually all of her work experience was with the employer and its predecessors in a manufacturing environment her skills were not easily transferable; and

(e) The termination "was equivalent to a forced retirement" in light of the employee's advanced age, limited education, and lack of transferrable skills.[1]

[1] *Currie v Nylene Canada Inc,* 2022 ONCA 209 at para 11.

Key Takeaways: The courts are now considering a broad range of "exceptional circumstances" in order to depart from the general principle that a common law notice period will not exceed 24 months.

Milwid v IBM Canada Ltd, 2023 ONSC 490

More recently, the Ontario Superior Court of Justice elaborated on the types of "exceptional circumstances" that entitle an employee to a notice period in excess of 24 months and specifically commented on the impact of the COVID-19 pandemic in respect of an employee's entitlement to common law notice.

Justice Ramsay reiterated the principles articulated in *Dawe v The Equitable Life Insurance Company of Canada,*[2] confirming that "exceptional circumstances" must exist in order to support a notice period in excess of 24 months. He held that such circumstances were found in this particular case and specifically relied on the following factors in support of his conclusion that the employee was entitled to damages equal to 26 months of notice:

(a) The employee had worked for IBM for 38 years, which represented most of his working life;

(b) The employee was 62 years old at the time of his termination;

(c) The employee held a "technical position" which was specialized in nature; and

(d) The character of the employee's position, which was described as being one of substantial responsibility entitling him to significant compensation.

Notably, Justice Ramsay acknowledged the "unprecedented effect of the COVID-19 pandemic on the economy and the available job market" when determining that the employee was entitled to a lengthier notice period, noting that the impact of the COVID-19 pandemic has already been commented upon by a number of other recent court decisions[3].

Key Takeaways: In this decision, Justice Ramsay broadly interpreted the "exceptional circumstances" that warrant a notice period in excess of 24 months. Going forward, it is likely that other senior employees with lengthy tenures will attempt to advance similar arguments that such exceptional circumstances exist, even where those circumstances are limited to the usual *Bardal* factors.

[2] *Dawe v The Equitable Life Insurance Company of Canada*, 2019 ONCA 512.
[3] *Milwid v IBM Canada Ltd*, 2023 ONSC 490 at para 40.

Celistini v Shoplogix Inc, 2023 ONCA 131

The Ontario Court of Appeal upheld a motion judge's decision to award a common law notice period of 18 months to an employee who was 50 years old and had 12 years of service at the time of termination, notwithstanding the existence of an employment contract that purported to limit the employee's entitlement to only 12 months of notice upon a termination without cause. Specifically, the court applied the "changed substratum" doctrine in order to find that the employment contract was void and unenforceable at law, even though the employee's job title had remained unchanged.

The employee co-founded the defendant employer in 2002 and previously held the role of CEO. By 2005, he had sold the vast majority of his shares in the employer and stepped down to the role of CTO. As part of that transition, he signed a new employment agreement which contained a termination clause that purported to limit his entitlement upon a termination without cause to 12 months' salary and benefits continuation as well as a stub bonus. In 2017, the employee was terminated without cause.

The Court of Appeal upheld the trial judge's decision that the substratum of the employment contract had changed substantially after the 2005 Employment Agreement had been signed, which rendered the contract unenforceable and entitled the employee to common law reasonable notice. Specifically, the court relied on the following factors in making that determination:

(a) The employee's compensation had changed dramatically; and

(b) He had been tasked with a number of new duties and responsibilities that fundamentally changed his employment from what it was in 2005 when he commenced his role as CTO. For example, he became responsible for all of the company's infrastructure, he became responsible for a number of direct reports after working for several years as a sole contributor, and travel became a significant part of his job[4].

After concluding that the employment contract was unenforceable, the court upheld the motion judge's decision to award compensation based on 18 months in lieu of notice.

Key Takeaways: Based on the substratum change doctrine, an employment law contract may be rendered void and unenforceable at law if an employee's role, responsibilities, compensation, and/or benefits change (even in circumstances where his or her job title remains unchanged at the time of their termination). The court also relied on the usual *Bardal* factors to award a lengthy notice period of 18 months. Employers should consider updating their employment contracts whenever they implement any such changes, and employees should be proactive about seeking legal advice when an employer proposes any changes to their employment terms.

[4] *Celistini v Shoplogix Inc,* 2023 ONCA 131 at para 45.

Teljeur v Aurora Hotel Group Inc, 2023 ONSC 1324

An employee with only three years of service was recently awarded a seven month notice period, consistent with the growing trend of awarding lengthier notice periods to short service employees.

At the time of his termination, the employee was 56 years old and held the role of General Manager, earning a salary of $72,000 plus benefits. The employee had also incurred $16,800 in business expenses at the time of his termination, and the employer had failed to reimburse him for those expenses even at the time of trial. The employee sued for wrongful dismissal, reimbursement of the business expenses, as well as moral damages for the employer's bad faith conduct.

In awarding the employee seven months' of pay in lieu of reasonable notice, Justice McKelvey of the Ontario Superior Court of Justice held that the employee's age, level of seniority, and market conditions (i.e., he was dismissed during the COVID-19 pandemic) were all factors that necessitated a longer notice period despite the fact his tenure was "relatively short.[5]" He also specifically noted that, while the mitigation evidence produced by the employee was "skeletal" (he had only contacted three prospective employers over the course of 10 months), there was insufficient evidence to conclude that the employee could have found other work during the notice period.[6]

Moreover, Justice McKelvey concluded that the employee was entitled to $15,000 in moral damages after the employer: (a) failed to reimburse his business expenses; (b) failed to advise him of his termination in writing; (c) paid him only his statutory minimums despite having promised him eight weeks of severance at the time of termination; and (d) delayed in issuing his ESA payments.

Key Takeaways: This decision demonstrates a continuing tendency by the courts to award increased notice periods to short service employees, even in circumstances where there is evidence that the employee made minimal efforts to mitigate his damages. It also suggests that the courts are becoming increasingly less tolerant of employers who engage in bad faith conduct and will not hesitate to make an award for moral damages in those circumstances.

Griffon Integrated Security Technologies et al. v. Valley Associates Inc. et al., 2023 ONSC 2200

A Vice President and General Manager with 12 years of service was awarded a 20-month notice period, as well as $75,000 of punitive damages after he was terminated while battling colon cancer. Despite continuing to discharge his responsibilities to the extent he was able to do so, his employment was terminated while he was undergoing chemotherapy treatment.

[5] *Teljeur v Aurora Hotel Group Inc*, 2023 ONSC 1324 at paras 19-21.
[6] *Teljeur, supra* at paras 24 and 41.

After he was initially terminated without cause and had commenced a wrongful dismissal action, the employer accused the employee of financial irregularities and argued that it had after acquired cause . The employer also brought a counterclaim for breach of contract, fraud, and defamation even though the discovery process made it clear there was never any substance to the counterclaim or the defence generally. The employer's litigation tactics were rebuked by the court, who described it as a "scorched earth strategy."[7]

At some point during the litigation, the employer's counsel moved to get off the record and the employer advised that it did not intend to participate in the litigation going forward. It consented to the employee's motion to strike the Statement of Defence and dismissal of the defendant's Counterclaim. The court was then tasked with determining whether the employee's requested relief could be justified[8].

The court found that there was no cause for dismissal, and the employee was entitled to reasonable notice. He was 65 years old at the time of termination and was held the second most senior executive position in the corporation. The court held that it was also relevant that he was undergoing cancer treatments and was (to the employers' knowledge) in a difficult financial situation because it failed to pay him is accrued bonuses and commissions. The court noted that the employer's behaviour at the time of termination was a relevant factor in determining the applicable notice period, finding that "…*the brutality of the dismissal…can be considered in determining the notice period because the completely unfounded allegations of dishonesty would have rendered it far more difficult for the plaintiff to find alternative employment*". The court fixed the notice period at 20 months, and awarded punitive damages against the employer in the amount of $75,000 in light of the employer's egregious conduct[9].

Notably, the court held that the damages should be awarded against the employer (a corporation) as well as the owner/CEO of the employer in his personal capacity jointly and severally. Not only was the owner/CEO a named defendant in the action, but the court deemed that there were circumstances which warranted piercing the corporate veil to be pierced for the following reasons:

- The Statement of Defence had been struck;

  At all material times, the owner/CEO was the sole shareholder, director and most senior officer of the company. He wrote the termination letter and directed the conduct of the litigation;

  The corporate defendant and owner/CEO defended the action collectively, were represented by the same legal counsel, and did not differentiate as between themselves when they advanced the counterclaim;

[7] *Griffon Integrated Security Technologies et al. v. Valley Associates Inc. et al*., 2023 ONSC 2200 at paras 3-6/
[8] *Griffon, supra* at para 9.
[9] *Griffon, supra* at paras 12-18.

On the motion to strike, the owner/CEO attended the proceedings and advised the court that he consented to the order striking the Defence and the Counterclaim. He was fully aware that the employee was pursuing damages as against him in his personal capacity;

- There was confusion concerning the identity of the corporate defendants, as it was noted in the affidavit evidence that the defendants changed their letterhead and the name of the corporation throughout the course of the litigation; and

- The allegations in the Statement of Claim and the affidavit evidence led the court to conclude that there was conduct constituting an independent actionable wrongdoing sufficient to pierce the corporate veil.[10]

Key Takeaways: This decision stands for the proposition that an employer's conduct around the time of termination can be considered in determining the notice period in circumstances where the unfounded allegations of dishonesty would have rendered it far more difficult for an employee to find alternative employment. It also emphasizes the fact that the courts are becoming increasingly less tolerant of employers (and their directing minds) who engage in bad faith conduct at termination and during the course of litigation.

[10] *Griffon, supra* at para 24.

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TAB 2

The Eight-Minute Employment Lawyer 2023

Constructive Dismissal Update

Alex Sinclair
Hudson Sinclair LLP

June 22, 2023

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Constructive Dismissal Update

Alex Sinclair

Hudson Sinclair LLP

During the COVID-19 pandemic, many employers were forced to lay off employees in response to slowdowns in business and government-mandated closures. Some businesses pivoted to a work-from-home model in order to continue operating. Notwithstanding that the worst of the pandemic appears to be behind us, the legal ramifications of pandemic-induced changes to Ontario's workplaces are still coming home to roost.

The first part of this paper will address a recent Ontario Court of Appeal decision, which clarified the law with respect to issues that often arise in constructive dismissal disputes relating to temporary layoffs:

- When will an employer's right to impose a layoff be implied?
- When will an employee be found to have condoned a layoff?

The second part of this paper will consider potential constructive dismissal liability where employers recall remote workers to the office.

I. Constructive Dismissal Overview

A constructive dismissal occurs where an employer makes a unilateral and fundamental change to a term or condition of the employment contract without providing reasonable notice of that

change to the employee.[1] In such cases, the employee can either acquiesce to the fundamental change (expressly or impliedly), or reject the change, resign, and sue for damages.

In *Potter v. New Brunswick Legal Aid Services*, the Supreme Court of Canada held that constructive dismissal can be established in one of two ways:

(i) the employer's breach of an essential term of the employment contract; and

(ii) a course of conduct by the employer that establishes that it no longer intends to be bound by the employment contract.[2]

The following unilateral changes have been found to trigger a constructive dismissal:

- Demotion[3]
- Unilateral change to the method of calculating an employee's remuneration[4]
- Significant reduction in income[5]
- Removal of an employee's vehicle benefit[6]
- Elimination of an employee's position, even where a new position was offered[7]

[1] *Farber v. Royal Trust Co*., 1997 CanLII 387 (SCC), [1997] 1 SCR 846 at para. 34.
[2] *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 37-43.
[3] *Farber v. Royal Trust Co*., 1997 CanLII 387 (SCC), [1997] 1 SCR 846 at para. 36.
[4] *Ibid*.
[5] *Drake v. Blach*, 2012 ONSC 1855 at para. 23.
[6] *Quesnelle v. Camus Hydronics Ltd*., 2022 ONSC 6156.
[7] *Patrick Bannon v. Schaeffler Canada Inc./FAG Aerospace Inc*., 2013 ONSC 603.

II. Constructive Dismissal Arising from Unilateral Layoff

In Ontario, it has long been held that an employer has no right to impose a layoff either by statute or common law, unless that right is specifically agreed upon in the employment contract. Accordingly, unilaterally imposing a layoff where no contractual right to do so exists is generally considered a breach of an essential term of the employment contract, thus triggering a constructive dismissal.[8]

A common defence to constructive dismissal claims arising from a unilateral layoff is that an employee who fails to explicitly object to the layoff has therefore condoned it. The Ontario Court of Appeal addressed this issue and others in the recent case of *Pham v. Qualified Metal Fabricators Ltd*., 2023 ONCA 255 ("*Pham*").

III. *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255

i. Background

Qualified Metal Fabricators Ltd. (the "Employer") suffered significant financial losses as a result of the global COVID-19 pandemic, requiring that it lay off 31 of its 140 employees. On March 23, 2020, the plaintiff, Pham (the "Employee"), was provided a letter advising him that he would be placed on a temporary layoff. The layoff was extended a number of times.

In December 2020, the Employee consulted a lawyer, who wrote to the Employer to advise that the Employee was bringing a claim for wrongful dismissal. In response, the Employer took the

[8] *Elesegood v. Cambridge Spring Service*, 2011 ONCA 831, at para 14.

position that the Employee had signed a document agreeing to the layoff. In January 2021, the Employee issued a Statement of Claim commencing an action for constructive dismissal. The Employer sent the Employee a recall letter on February 9, 2021. The Employee did not respond to this letter, as he had already issued his Statement of Claim and secured alternate employment.

ii. Summary Judgment Motion

The Employer moved for summary judgment dismissing the claim on the basis that the Employee had condoned the layoff or, alternatively, failed to mitigate his damages.

The Employee initially took the position that summary judgment was appropriate and brought a cross-motion for an order that he had been constructively dismissed. However, by the time of the hearing, the Employee argued that summary judgment was not appropriate and asked for judgment in his favour only in the alternative.

The Employer argued, and the motion judge accepted, that the Employee condoned the layoff because he did not dispute the layoff for almost nine months before alleging constructive dismissal, which was beyond a reasonable time in the circumstances. Accordingly, the motion judge granted the Employer's motion for summary judgment dismissing the claim for wrongful dismissal. The Employee appealed.

iii. The Appeal

The Court of Appeal allowed the appeal and remitted the action back to the Superior Court for a trial. The Court held that the motion judge operated on the mistaken understanding that both parties agreed to proceed by way of motion for summary judgment. Because of this mistaken

assumption, the motion judge did not determine whether it would be fair and just to proceed in summary fashion. Nor did he acknowledge that the appropriateness of summary judgment was in dispute. The failure to engage with the Employee's position was an error in principle.

The Court of Appeal further found that the motion judge's decision was based on an incorrect view of the applicable law regarding implied terms permitting layoffs, and the issue of condonation.

iv. Implied Terms Permitting Layoffs

The Employer argued on the motion and on appeal that it had an implied right to lay off the Employee due to its past practice of laying off employees. The Court held that the motion judge erred in failing to consider the Employer's argument. Ultimately, the Court rejected the employer's argument that this created a legal basis for it to place the employee on layoff.

The Court held that where the employment contract has no express term concerning layoffs, a right that an employer may do so will not be readily implied: "The right to impose a layoff as an implied term must be notorious, even obvious, from the facts of a particular situation." The Court held that the fact that a co-worker had been previously laid off does not create a legal basis for the employer to impose a layoff on the employee.

v. Implied Terms Permitting Layoffs

The Court held that, when an employer unilaterally lays off an employee, the employee may elect to (i) wait and see if later they will be able to return to their previous job; or (ii) treat the layoff as a wrongful dismissal. In the case of unilateral layoff, as with constructive dismissals generally,

the employee must object to the change to the terms of their employment within a reasonable time.

An impermissible layoff that would otherwise support a finding of constructive dismissal may however be condoned by the employee, such that the employee cannot claim to have been constructively dismissed. Condonation requires a determination that, viewed objectively, the employer would believe at the time that the employee consented freely to the change. The burden is on the employer to prove that the employee condoned the layoff.

The Court held that condonation in the face of a layoff must be expressed by position action, including expressed consent to the layoff, or expressing a willingness to work before claiming wrongful dismissal such that the employer would reasonably believe that the employee consented to the change in the terms of employment. Silence alone is not condonation.

The Court ultimately held that the motion judge was not entitled to find that there was no genuine issue requiring a trial because, on the record before him, condonation was not established. It is important to note that the Court did not find that the defence of condonation failed on the facts of this case – only that condonation was a live issue requiring a trial.

Three findings were key to the Court of Appeal's decision:

- The Employee signing his layoff letter did not constitute condonation of the layoff as there was no evidence the signature was anything more than an acknowledgment of receipt;

- The Employee contacting a lawyer during his layoff was not evidence of the Employee's knowledge of the ramifications of the layoff or consent to the layoff; and

- The evidence did not permit the conclusion that the Employee's failure to object to the layoff when he was not permitted to work for the Employer constituted condonation.

vi. Takeaways from *Pham*

- An employer's past practice of laying off an employee's coworkers is insufficient to find an implied term permitting layoffs in that employee's contract.

- An employee is permitted reasonable time to assess unilateral changes to their employment before claiming constructive dismissal. Determining a "reasonable period" is a fact-specific determination.

- Condonation of a layoff is expressed by positive action. Silence alone is not condonation.

- An employee may be unable to condone changes to their employment when they are not actively working.

- The fact that a layoff was conducted in accordance with the ESA is irrelevant to the question of whether the layoff constitutes a constructive dismissal at common law.

IV. Constructive Dismissal Arising from a Return to the Workplace

The past year has seen many employers require employees to return to the workplace after more than two years of remote work. Many employers moved to fully remote work at the start of the COVID-19 pandemic. That state of affairs continued for many employers even after restrictions were lifted; however, in 2022 and continuing into 2023, employers are increasingly requiring employees to perform in-person work either on a hybrid or full-time basis.

Some employees have been resistant to these new requirements to perform in-person work. Some have underlying health conditions or have moved to remote locations. Others have made childcare arrangements based on performing remote work. Claims for constructive dismissal based on a return to the workplace are becoming more common. Ontario courts are yet to weigh in on when a recall to in-person work may amount to a constructive dismissal.

i. The Starting Point

Employers have a general right to manage their affairs. Even if there is no specific contractual term, there is an implied right for an employer to dictate the location of work.

ii. Employer Representations

Some employment contracts promise remote or hybrid work arrangements as a condition of employment. In those circumstances, an employer cannot unilaterally alter the work arrangement without breaching the contract. It is always important, from the employer perspective, to ensure that any provisions respecting work arrangements included in the contract contain a carve-out that reserves the employer's right to modify the arrangement depending on the needs of the business.

iii. Implied Terms

Employment contracts contain both express and implied terms. An implied term forms part of the contract even though it was not written into the contract. For example, if the contract is silent as to place of work, and the employee has always worked remotely, then it is likely that remote work is an implied term of the contract. The risk of a claim of constructive dismissal would be

high if the employer hired an employee to work remotely, knowing they lived far away from the office, and later required that employee to start performing in-person work.

Where the employment contract is silent as to location of work and the employee has always worked from the office and only worked remotely during the pandemic, it is likely an implied term of the contract that the employee will work from the office when it becomes safe to do so, if requested by the employer. If the employer has delayed in asking the employee to return back to the office for a prolonged period of time after it is deemed safe, it is possible that remote work could become a new implied term. The longer an employer allows remote work to continue, the higher the likelihood of a finding that it has become an implied term of the employment agreement.

iv. Health & Safety, Human Rights Implications

In-person work requirements may not be enforceable if they are found to violate the *Occupational Health and Safety Act*. If an employer complies with all the post-pandemic public health guidelines and workplace safety measures, then the in-person requirement will likely be enforceable.

Where an employee has a *Human Rights Code*-protected characteristic that requires accommodation in the form of remote work, it may be more difficult for an employer to make out undue hardship if that employer has been allowing employees to work from home with minor business interruption for the past few years. For example, family-status accommodation (like caring for young children or elderly parents) might arguably entitle an employee to work from

home. Similarly, physical or mental disabilities may also require remote work accommodation, if recommended by an employee's doctor.

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TAB 3

The Eight-Minute Employment Lawyer 2023

Update on the Enforcement of Termination Provisions

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June 22, 2023

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Update on the Enforcement of Termination Provisions

By Nelligan Law- Tracy Lyle, Rhian Foley and Philip Byun

This presentation provides an update on the treatment of termination provisions in Ontario courts in the past year. Overall, courts continue to apply the approach in *Waksdale* and continue to require that termination provisions adhere to the minimum standards set out in the *ESA*. If a termination provision is found to contravene the *ESA*, the whole termination clause is rendered void.

A few highlights in the jurisprudence over the past year:

- The ONCA's confirmation, in *Rahman v Cannon Design Architecture Inc.*, 2022 ONCA 451, that considerations such as the employee's sophistication and access to independent legal advice, and the parties' subjective intention to not contravene the *ESA*, do not override the plain language in termination provisions. The wording of a termination provision determines whether it contravenes the *ESA*.[1]
    - Followed in *Tarras v The Municipal Infrastructure Group Ltd.*, 2022 ONSC 4522.
- The ONSC's decision in *Henderson v Slavkin et al.*, 2022 ONSC 2964, wherein the Court looked to the Conflict of Interest and Confidential Information clauses to invalidate the termination clause. These clauses allowed the employer to terminate the employee without notice or compensation in lieu of notice if the employee breached the clauses.
- The Costs Endorsement, in *Summers v OZ Optics Limited*, 2023 ONSC 723, wherein the Court considered the employer's refusal to acknowledge the application of *Waksdale* (and subsequent decisions), in providing a higher costs award.

[1] At para 24.

Case	Termination Clause	Key Takeaways
Gracias v Dr. David Walt Dentistry 2022 ONSC 2967	15. Your employment may be terminated without cause for any reason upon the provision of notice equal to the minimum notice (or pay in lieu of notice) and severance (if applicable), as required to be provided under the terms of the *Employment Standards Act*. If your employment is terminated without cause, the Employer will continue your benefit coverage (if any) for such period as the *Employment Standards Act* shall require. By signing below, you agree that upon receipt of your entitlements under the *Employment Standards Act*, no further amounts shall be due and payable to you, whether under the *Employment Standards Act*, any other statute, or at common law. In no circumstances will you receive less than your entitlements to notice, severance (if appliable), and benefits continuation (if any), pursuant to the *Employment Standards Act*. … 21. You agree that you will ensure that your direct or indirect personal interests do not, whether potentially or actually, conflict with the Employer's interests. You further covenant and agree to promptly report any potential or actual conflicts of interest to the Employer. A conflict of interest includes, but is not expressly limited to the following: (a) A private or financial interest in an organization which does business or which competes with our business interests; (b) A private or financial interest, direct or indirect, in any concern or activity of ours of which you are aware of or ought reasonably to be aware;	The termination for cause provision contracts out of the *ESA* and is void. The rule in *Waksdale* applies, and the Employee is entitled to reasonable notice at common law. "The unlawful termination provision cannot be severed, and it taints the entirety of the termination provisions. More precisely, the termination provision for cause provisions would deny Ms. Gracias any notice and her benefits under the *Employments Standards Act*, for conduct that may not amount to wilful misconduct which is the benchmark set by the Act."[2]

[2] At para 94.

Case	Termination Clause	Key Takeaways
	(c) Engaging in unacceptable conduct, including but not limited to soliciting patients for dental work, which could jeopardize the patient's relationship with us. A failure to comply with this clause above constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice. 22. Confidential Information – You recognize that in the performance of your duties, you will acquire detailed and confidential knowledge of our business, patient information, and other confidential information, documents, and records. You agree that you will not in any way use, disclose, copy, reproduce, remove or make accessible to any person or other third party, including family members, either during your employment or any time thereafter, any confidential information relating to our business, including office forms, instruction sheets, standard form letters to patients or other documents drafted and utilized in the Employer's practice except as required by law or as required in the performance of your job duties. For clarity, confidential information includes, without limitation, all information (in written, oral, tape, cd rom, diskette, and USB keys or any electronic form) which relates to business, affairs, properties, assets, financial condition and plans, concerning or relating to the Employer, our dental practice or patients, and specifically includes all records, patient files, patient lists, patient names, patient addresses, patient telephone numbers, email addresses, invoices and/or statements, daily appointment sheets, radiographs, marketing information and strategies, advertising information and strategies, and financial information.	

Case	Termination Clause	Key Takeaways
	In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause. This provision shall survive the termination of this Agreement. … 24. You are not permitted to use the internet, update Facebook, or perform any social networking on the internet during office hours, unless you are on your lunch or a break. You should also not receive personal phone calls, or receive or send text messages during working hours, except while on break. Personal phone calls should be restricted to emergency calls only. A breach of this provision will result in disciplinary action, up to and including termination for cause. … 26. Severability…	

Case	Termination Clause	Key Takeaways
Nicholas v Dr. Edyta Witulska Dentistry Professional Corporation 2022 ONSC 2984	6. Termination (a) Termination with Cause Your employment may be terminated immediately by the Employer without notice or pay in lieu of notice should cause for termination exist under the common law of the courts of Ontario. (b) Termination without cause The Employer may terminate your employment at its sole discretion, for any reason whatsoever that does not amount to cause, upon giving you the appropriate advance notice in writing, or paying you the equivalent termination pay in lieu of notice based on the greater of the following or pursuant to the *Employment Standards Act, 2000*, S.O. 2000 c. 41 (or its successor), which payment is inclusive of all entitlement under statute, common law, contract or otherwise: [a table of various lengths of service and listed periods of notice was set out. The period of notice for a length of service of eight years or more was stated to be eight weeks] The above-noted entitlement is set out in the *Employment Standards Act, 2000*. … 16. Severability…	The termination for cause provision breaches the *ESA*. Thus, the termination clause is unenforceable. "[t]he *ESA* imposes a higher standard for termination for cause than does the common law, that of "wilful misconduct, disobedience or willful neglect of duty" and prohibits any contracting out of or waiver of an employment standard and provides that any such contracting out or waiver is void."[3] The defendant argued that the Severability provision applied, and the Termination without Cause provision remained in force. The Court cited *Waksdale* at para 14: "we decline to apply this clause to termination provisions that purport to contract out of the provisions of the *ESA*. A severability clause cannot have any effect on clauses of the contract that have been made void by statute . . . Having concluded that the Termination for Cause provision in the Termination of Employment with Notice provision are to be understood together, the severability clause cannot apply to sever the offending portion of the termination provisions."[4]

[3] At para 53.
[4] At para 59.

Rahman v Cannon Design Architecture Inc. 2022 ONCA 451	Just Cause Provision CannonDesign maintains the right to terminate your employment at any time and without notice or payment in lieu thereof, if you engage in conduct that constitutes just cause for summary dismissal.	The Court of Appeal allowed the appeal and set side the motion judge's order in 2021 ONSC 5961. The motion judge rejected the submission that the for cause provisions of the termination clause violate the ESA because the Employee had independent legal advice, she was experienced and sophisticated, and the parties' subjective intention was to comply with the ESA minimum standards. The ONCA held that "the motion judge erred in law when he allowed considerations of Ms. Rahman's sophistication and access to independent legal advice, coupled with the parties' subjective intention to not contravene the *ESA*, to override the plain language in the termination provisions in the Employment Contracts. By allowing subjective considerations to distort and override the wording of those provisions, the motion judge committed an extricable error of law reviewable on a correctness standard: Amberber v. IBM Canada Ltd.,2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 65. It is the wording of a termination provision which determines whether it contravenes the *ESA* — even compliance with *ESA* obligations on termination does not have the effect of saving a termination provision that violates the *ESA*: Wood v. Fred Deeley Imports Ltd, 2017 ONCA 158, 134 O.R. (3d) 481, at paras. 43–44."[5] There is nothing in the termination clause that limits its scope to just cause terminations for wilful misconduct.

Case	Termination Clause	Key Takeaways
		Rather, the plain reading of the language suggests that employment could be terminated without notice or payment for conduct that constitutes just cause alone. The termination clause contravenes the *ESA* and is rendered void.

[5] At para 24.

Case	Termination Clause	Key Takeaways
Tarras v The Municipal Infrastructure Group Ltd. 2022 ONSC 4522	11. Termination (a) Termination for Cause. TMIG may terminate Employee's employment hereunder for "Cause" immediately upon delivery of a written termination notice to Employee. "Cause" means the repeated and demonstrated failure on Employee's part to perform the material duties of his/her position in a competent manner, which Employee fails to substantially remedy within a reasonable period of time after receiving written warnings and counseling from TMIG; Employee engaging in theft, dishonesty or falsification of records; Employee willful refusal to take reasonable directions after which Employee fails to substantially remedy after receiving written warnings from TMIG; or any act(s) or omission(s) that would amount to Cause at common law. In the event that Employee's employment hereunder is terminated pursuant to the provisions of section 11 (a), Employee shall not receive payment of any kind, including notice of termination or payment in lieu thereof, or severance pay, if applicable, save and except accrued and outstanding salary and vacation pay. (b) Termination Without Cause. TMIG may terminate Employee's employment in it's sole discretion for any reason whatsoever without Cause or upon expiry of the Term, by providing Employee with notice of termination, or payment in lieu thereof, or a combination of both, and severance pay, if applicable, pursuant to the Ontario Employment Standards Act, 2000. In addition, TMIG will continue to pay its share of employees benefits, if any, for the duration of the notice of termination., pursuant to the employment standards act of 2000. TMIG will also provide Employee any accrued and outstanding salary and vacation pay.	The termination provisions, particularly 11(a) conflicts with the *ESA* as it deprives an employee of their entitlements under the *ESA* for conduct lower than the standard set out in the *ESA*. The offending clause renders the entirety of s. 11 void and unenforceable. "The fact of sophisticated parties, the presence of legal counsel, and the fact the employee participated in the negotiation process have all been found to be "subjective considerations" that should not be given any weight whatsoever in cases of this nature. Allowing such factors to override the plain wording of the agreement has been found to be an error of law…"[6]

[6] At para 29.

Case	Termination Clause	Key Takeaways
Henderson v Slavkin et al. 2022 ONSC 2964	13. Your employment may be terminated without cause for any reason upon the provision of notice equal to the minimum notice or pay in lieu of notice and any other benefits required to be paid under the terms of the *Employment Standards Act*, if any. By signing below, you agree that upon receipt of your entitlement under the *Employment Standards Act*, no further amount shall be due and payable to you, whether under the *Employment Standards Act*, any other statute or common law. 18. Conflict of Interest. You agree that you will ensure that your direct or indirect personal interests do not, whether potentially or actually, conflict with the Employer's interests. You further covenant and agree to promptly report any potential or actual conflicts of interest to the employer. A conflict of interest includes, but is not expressly limited to the following: (a) Private or financial interest in an organization with which does business *[sic]* or which competes with our business interests; (b) A private or financial interest, direct or indirect, in any concern or activity of ours of which you are aware or ought reasonably to be aware; (c) Financial interests include the financial interest of your parent, spouse, partner, child or relative, a private corporation of which the [*sic*] you are a shareholder, director or senior officer, and a partner or other employer; (d) Engage in unacceptable conduct, including but not limited to soliciting patients for dental work, which could jeopardize the patient's relationship with us. A failure to comply with this clause above constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice.	The Court looked to the Conflict of Interest and Confidential Information clauses to invalidate the termination clause. These clauses allowed the employer to terminate the employee without notice or compensation in lieu of notice if the employee breached the clauses. The Court found that Clauses 18 and 19 did not comply with the *ESA* and therefore the termination clause was invalid. The Court found Clause 18 to be overly broad and ambiguous, and the language of the clause to be inconclusive to determine that provision only applied to wilful misconduct and wilful neglect of duty. Clause 19 similarly was ambiguous, and the Court determined that it violated the *ESA*.

Case	Termination Clause	Key Takeaways
	19. Confidential Information. You recognize that in the performance of your duties, you will acquire detailed and confidential knowledge of our business, patient information, and other confidential information, documents, and records. You agree that you will not in any way use, disclose, copy, reproduce, remove or make accessible to any person or other third party, either during your employment or any time thereafter, any confidential information relating to our business, including office forms, instruction sheets, standard form letters to patients or other documents drafted and utilized in the Employer's practice except as required by law or as required in the performance of your job duties. For clarity, confidential information includes, without limitation, all information (in written, oral, tape, cd rom, diskette, and USB keys or any electronic form) which relates to the business, affairs, properties, assets, financial condition and plans, concerning or relating to the Employer, our dental practice or patients and specifically includes all records, patient files, patient lists, patient names, patient addresses, patient telephone numbers, email addresses, invoices and/or statements, daily appointment sheets, radiographs, marketing information and strategies, advertising information and strategies, and financial information, In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause. This provision shall survive the termination of this Agreement.	

Case	Termination Clause	Key Takeaways
Nassar v Oracle Global Services 2022 ONSC 5401	6. Termination of Employment: (a) *For Cause*: Oracle Canada may terminate your employment at any time, for just cause, without any notice or pay in lieu of notice. (b) *Without Cause*: Oracle Canada may terminate your employment in your present position or any other position that you may occupy at Oracle Canada as a result of a promotion, reassignment or any other change at any time, without just cause, by providing you with only the minimum statutory notice or termination pay, minimum entitlement to benefit continuation and statutory severance (if applicable) in accordance with the employment standards legislation of the province in which you are employed, as well as accrued wages and vacation pay, in full satisfaction of all entitlements or claims you may have of any kind whatsoever.	The just cause termination clause contracts out of the *ESA*. The "for cause" provision is overbroad as it purports to deprive the Employee from the statutory minimum benefits under the *ESA* in a situation where the Employee might be terminated at common law for "just cause" but would still be entitled to statutory benefits.

Case	Termination Clause	Key Takeaways
Baker v Fusion Nutrition Inc. 2022 ONSC 5814	ARTICLE 4 TERMINATION 4.1 Termination for Cause (sic): Both parties may terminate this Agreement at any time without notice of further payment/provisions of services if either is in breach of any of the terms of this Agreement. 4.2 Termination with Notice: Either party may terminate this agreement upon providing thirty (30) days written notice to the other party. 4.3. Notice Payments: Upon termination of the Contractor's engagement pursuant to article 4 hereof, the Company shall pay the Contractor all monthly payments for a period of 4 months commencing on the termination date.	Clause 4.1 would allow the Employer to terminate the Employee for "cause" without complying with the minimum notice under the *ESA*. The entire termination clause is therefore unenforceable. "[A]bsent an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, an employer must pay a terminated fixed-term employee to the end of the contract term…"[7]

[7] At para 29.

Case	Termination Clause	Key Takeaways
Summers v OZ Optics Limited 2022 ONSC 6225	(b) Termination by OZ OPTICS without Cause After you successfully complete the first three (3) months of your employment, your employment may be terminated by OZ OPTICS at any time and for any reason on a without cause basis, upon the provision of notice of termination as is minimally required by the Ontario *Employment Standards Act, 2000*, as amended from time to time (the "ESA"). At its discretion, OZ OPTICS may give you pay in lieu of notice, or a combination of both working notice and pay in lieu of notice. The notice referenced in the above paragraph is inclusive of all statutory and common law entitlements to notice of termination or payment in lieu of that notice. In addition to the notice and/or payments referred to in the above paragraph, you shall be provided with all your entitlements under the ESA including but not limited to severance pay if you are eligible, as well as any outstanding vacation pay accrued to the end of the statutory notice period required by the ESA. You shall also be entitled to continuation of any benefits to which you are in receipt during the statutory notice period required by the ESA after which all your benefits, if any, will cease. (c) Termination by OZ OPTICS with Cause This Agreement may be terminated effective at any time <u>for cause by OZ OPTICS without any notice or pay in lieu of notice, or severance pay, or payment to the Employee whatsoever, except payment of wages and vacation pay earned to the date of termination</u>. Cause includes, but is not limited to, acts of theft, fraud, insubordination, conflict of interest and documented unsatisfactory performance, as well as any violation of Schedules "A", "B", and "C" to this Agreement." (underlining added).	The with cause termination provision is inconsistent with the *ESA*. The termination clause is void. The "for cause" termination provision captures conduct that is not sufficiently serious to satisfy the *ESA* criteria for absolving the Employer of the obligation to provide statutory benefits. The Court further noted that unsatisfactory performance will not normally amount to cause, insubordination may not amount to cause, and "*any* violation of the schedules" to the employment contract are unlikely to amount to cause. They do not amount to wilful misconduct, disobedience or wilful neglect of duty. <u>2023 ONSC 723</u> In the Costs Endorsement, in determining the quantum of costs, the Court considered, amongst other things, the employer's continued refusal to acknowledge the application of *Waksdale* (and subsequent decisions) to the issue of the validity of the termination agreement.

Case	Termination Clause	Key Takeaways
Tan v Stostac Inc. 2023 ONSC 2121	**Termination** The Employer may end the employment relationship at any time without advanced notice and without pay in lieu of such notice for any just cause recognized at law. Subsequent to the probationary period, the Employee understands and agrees that employment may be terminated at any time by the Employer providing the Employee with two (2) weeks of notice, pay in lieu of notice or a combination of both, at the Employer's option, plus one additional week of notice (or pay in lieu) for each year of completed service to a maximum of eight (8) weeks. In addition, after completing five (5) years of continuous employment, severance pay pursuant to the *Ontario Employment Standards Act, 2000* may be payable upon termination of employment in accordance with the terms of the *Ontario Employment Standards Act, 2000*. Upon receipt of the above notice (and severance pay if applicable) the Employee agrees that no further amounts shall be owing to him/her on account of the termination of the Employee's employment under statute or at common law. The provisions of the *Ontario Employment Standards Act, 2000*, as they may from time to time be amended, are deemed to be incorporated herein and shall prevail if greater.	The termination provision is inconsistent with the *ESA* and is void. The termination clause gives "the defendant the right to terminate the plaintiff's employment without notice of payment for just cause that might fall short of non-trivial willful misconduct. I do not accept that the attempt to incorporate the *ESA*'s provisions in the final sentence of the clause's "without cause" portion detracts from the clear assertion of a right to terminate without notice for any just cause."[8]

[8] At para 11.

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TAB 4

The Eight-Minute Employment Lawyer 2023

An Update on the Calculation of Unjust Dismissal Damages under the *Canada Labour Code*

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An Update on the Calculation of Unjust Dismissal Damages under the *Canada Labour Code*

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Overview

The *Canada Labour Code* ("*CLC*") protects all federally regulated employees, excluding managers and those covered by a collective agreement, who have completed at least 12 consecutive months of continuous employment with the same employer from without just cause termination in most circumstances. Where a federally regulated employee has been found to be unjustly dismissed, the employee may seek the remedy of reinstatement. However, in circumstances where reinstatement is not considered, an unjustly dismissed employee may be entitled to damages in lieu of reinstatement.

The Federal Court of Appeal in *Hussey v Bell Mobility Inc.*, 2022 FCA 95 ("*Hussey*") contemplated the two competing approaches to calculating unjust dismissal damages under the CLC.

Hussey v Bell Mobility Inc., 2022 FCA 95

The matter was originally heard by an adjudicator appointed under the CLC, who had found that the applicant was unjustly dismissed by the employer. The arbitrator declined to reinstate the applicant because he did not believe that the applicant was remorseful or would change the behaviour that led to her dismissal. The arbitrator awarded compensation in lieu of reinstatement using the common law principles of reasonable notice.

The applicant applied for judicial review of the decision, arguing that the common law method of calculating damages was not appropriate and that the fixed term approach should have been adopted. The main issue before the Court was whether the adjudicator's assessment of compensation in lieu of reinstatement was reasonable.

Two approaches to calculating unjust dismissal damages: Common law vs. Fixed-Term

In assessing the reasonableness of the adjudicator's decision, the court defined the two competing approaches to calculating unjust dismissal damages.

Common law approach

The common law approach refers to compensation that is provided to a terminated employee for the loss of protection from unjust dismissal, that is expressed in terms of income (i.e., wages or salary) proportional to an employee's length of service.[1] In other words, this approach parallels the method of calculating damages for provincially regulated employees by assessing an employee's *Bardal* factors in awarding compensation in lieu of common law reasonable notice. However, the damages under this approach are adjusted to provide 'extra compensation' to account for the loss of the protection from dismissal other than for just cause under the *CLC*.

Fixed-term approach

The fixed-term approach to calculating unjust dismissal damages calculates the amount that the employee would have earned until retirement, and then discounts the amount for various possibilities such as the likelihood of dismissal at any time during the continued employment, a change in the employee's health, a change in employer, technological or environmental changes, or the employer's insolvency, among other contingencies.[2]

Reinstatement as a remedy

Unlike provincial legislation, the CLC establishes the authority of an adjudicator to reinstate an employee that has been found to have been unjustly dismissed. However, it is important to note that reinstatement is not a default remedy that is awarded in every case, but rather, it is discretionary under the CLC.[3] An adjudicator can order that compensation be awarded instead of reinstatement in circumstances where the relationship between the employer and employee cannot be restored. The Federal Court in *Kouridakis v Canadian Imperial Bank of Commerce*,

[1] Hussey v. Bell Mobility Inc., 2022 FCA 95 (CanLII), at para 25.
[2] Hussey v. Bell Mobility Inc., 2022 FCA 95 (CanLII), at para 7.
[3] Kouridakis v. Canadian Imperial Bank of Commerce, 2019 FC 1226 (CanLII).

2019 FC 1226 ("*Kouridakis*"), at para 45, clarified the point that reinstatement is not the standard remedy in unjust dismissal cases:

> [45] The fact that reinstatement may have been determined to be the appropriate remedy more often than not does not mean that it becomes the norm or somehow becomes the standard to be deviated from only in exceptional circumstances. I do not accept that, as a matter of law, reinstatement is the default position which should be ordered unless the employer shows, on the balance of probabilities, that such reinstatement is inappropriate. Reinstatement is but one of a number of remedies which, like any other, is open to the arbitrator to order either on its own, in conjunction with other monetary compensation, or not at all, even where the dismissal is found to be unjust.

The critical question for the remedy of reinstatement is whether or not the employee can be reintroduced into the workplace.[4] In general, the likelihood of an employee being successfully reinstated is low, particularly where the employment relationship has deteriorated or been negatively impacted. Where reinstatement is impractical or unsuitable, the court is unlikely to consider reinstatement as a remedy. In *Kouridakis,* the court found that reinstatement was not a reasonable remedy because the employment relationship had broken down due to the allegations of harassment and bullying by the employee. In *Hussey*, the court declined to award reinstatement because the arbitrator did not believe that the applicant was regretful of her actions and was unlikely to change her behaviour that led to the dismissal.

In *Bank of Montreal v Sherman*, 2012 FC 1513, the Federal Court set out a non-exhaustive list of factors to be considered in the assessment of whether reinstatement is an appropriate remedy. At para 11, the court stated the factors include:

1. The deterioration of personal relations between the complainant and management or other employees.

2. The disappearance of the relationship of trust which must exist in particular when the complainant is high up in the company hierarchy.

[4] Payne v. Bank of Montreal, 2013 FCA 33 (CanLII), at para 88.

3. Contributory fault on the part of the complainant justifying the reduction of her dismissal to a lesser sanction.

4. An attitude on the part of the complainant leading to the belief that reinstatement would bring no improvement.

5. The complainant's physical inability to start work again immediately.

6. The abolition of the post held by the complainant at the time of [their] dismissal.

7. Other events subsequent to the dismissal making reinstatement impossible, such as bankruptcy or lay-offs.

Conclusion

As it stands, there is continued support for the adoption of both the common law and fixed term approach. The court in *Hussey* declined to determine which of the two approaches is more appropriate to use in the circumstances. The court reiterated that both approaches recognize that an unjustly dismissed employee who is not awarded reinstatement has lost valuable rights for which compensation is payable, the notable difference between the two approaches is the manner in how the compensation is assessed.[5] Ultimately, the court in *Hussey* dismissed the appeal, holding that the use of the common law approach to calculating unjust dismissal damages was not unreasonable.

[5] Hussey v. Bell Mobility Inc., 2022 FCA 95 (CanLII), at para 29.

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TAB 5

The Eight-Minute Employment Lawyer 2023

Remote Work and Relevant Considerations

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Remote Work and Relevant Considerations

By: Sharaf Sultan

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1) Introduction:

In the post-pandemic era, there has been a noticeable surge in people's desire to travel and explore different parts of the world. With the widespread adoption of remote work arrangements, many employees have been granted the flexibility to work not only from the comfort of their homes but also from various locations abroad.

This shift has created a range of issues, and related legal challenges. Various factors such as employment matters, immigration requirements, and tax implications, need to be considered. It is crucial to have a comprehensive understanding of the applicable laws, thereby establishing effective communication channels and policies, and overall ensuring compliance while mitigating potential risks. By addressing these considerations, both employees and employers can navigate the challenges of remote work in a global context successfully.

2) Employment Considerations

a) Employment Standards Act

An important consideration when dealing with an employee working abroad is to determine which employment standards legislation is applicable. In Canada, each province and territory have their own respective employment standards legislation.

At the most basic level, the *Employment Standards Act* ("*ESA*") applies to those who work in Ontario.

Specifically, *ESA* applies if:

- the employee's work is conducted within the province; or,
- the work is performed both in Ontario and outside of Ontario, and if the work conducted outside of Ontario is considered a continuation of the work performed within the province.[1]

Whether the ESA applies to mobile workers has been the subject of recent case law. To this end, *Zhang v IBM Canada Ltd.*,[2] remains a leading case on determining if work done outside of Ontario is still considered a continuation of work performed within the province.

The court specifically determined that the Ontario *ESA* did not apply after reviewing the employee's work situation, which involved working remotely from British Columbia, while having an office in Ontario. This decision relied on the fact that the applicant had been working exclusively outside of Ontario for more than two years, including performing the core aspects of his work. Despite adjusting to align with the time zone in Ontario, the applicant did not perform any work in Ontario during that lengthy period and it was

[1] *Employment Standards Act,* 2000, SO 2000, c 31, s 3.
[2] *Zhang v IBM Canada Ltd.*, 2019 CarswellOnt 13721.

not an expectation for him to do so. Further, the court did not deem it relevant that there was a chance for him to return to Ontario, as it was only a "mere possibility".[3]

To maintain the applicability of the Ontario *ESA* for employees working abroad, the following should be considered:

- Establishing clear communication and policies regarding the temporary nature of remote work;
- Determining the duration of the remote work period;
- Establishing a timeline for returning to the office;
- Defining what constitutes as a "considerable amount of time"; and
- Providing clarity on working hours under a Disconnect from Work policy to accommodate employees working in different time zones.

If you do not meet the criteria defined in the Ontario *ESA*, the employment legislation of the relevant location will apply. It is important to consider that different provinces and countries have their own specific requirements for common employment elements, such as notice periods and minimum wage. It is crucial to be aware of and comply with the employment legislation of the respective country to ensure legal and regulatory compliance.

b) Employment Contract

The relocation of employees and the establishment of work-from-home agreements outside of Ontario raises important considerations regarding the jurisdiction that will govern the employment contract. Depending on the circumstances, extended remote work can raise questions about the applicable law governing the employee's employment, particularly if specific contractual provisions are relied upon to restrict or define rights. Case law indicates that various factors come into play, including:

- the source of benefits and wages;
- the level of direction and control over the employee's work;
- the location and frequency of work between jurisdictions; and
- the residence and place of business of the parties involved.[4]

To address these considerations, it is recommended that the intentions of both parties be clearly articulated in the employment contract and any remote working arrangements. Employers may benefit from enhancing their existing and future employment agreements to outline specific expectations, especially regarding remote work locations. It should be noted that any amendments to existing agreements require the employer to provide new consideration to the employee, such as a signing bonus or additional pay increase.

To navigate the jurisdictional aspects of employee contracts and remote work arrangements more effectively, it is important for employers to establish and maintain a strong working relationship with their Ontario-based headquarters, if applicable. Furthermore, it is recommended to keep all employee benefits within the jurisdiction of Ontario or Canada. By adhering to these recommendations, employers can better

[3] *Ibid*
[4] *Machado v The Catalyst Group Inc*, 2015 ONSC 6313.

manage the challenges posed by jurisdictional considerations and promote a smooth operation of remote work arrangements.

c) Human Rights

Human rights protections apply to all employees, even those engaged in remote working arrangements outside of Ontario. This includes safeguarding employees from harassment, including cyberbullying, as outlined in the *Ontario Human Rights Code (*the "*Code*"). Employers should establish clear protocols, policies, and training programs to address and prevent cyber harassment in the workplace, ensuring a safe and respectful online environment for their remote workforce.

An employer's duty to provide reasonable accommodation extends to employees working remotely outside of Ontario. It is crucial for employers to have protocols in place to receive and handle accommodation requests, as failure to accommodate an employee based on a protected ground can be considered a violation of the *Code*. This may involve considering accommodation based on specific protected grounds outlined in the *Code*, such as providing flexible working hours to support employees managing childcare responsibilities or providing necessary equipment to fulfill work duties. By proactively addressing accommodation needs, employers can foster an inclusive and supportive remote work environment while complying with human rights obligations.

d) Health and Safety Responsibilities

Employers are obligated to ensure a safe and healthy workplace for their employees, as required by the Ontario *Occupational Health and Safety Act* (*OHSA*). The *OHSA* defines the term "workplace" in a comprehensive manner, covering any place where employees carry out their job responsibilities.[5] To fulfill their obligations, employers should maintain regular communication with employees to ensure clear articulation of health and safety information and policies.

3) Immigration Matters

Working remotely provides the opportunity to blend travel and work. It is crucial for employers and employees to acknowledge that working while abroad necessitates adherence to immigration regulations. Individuals entering the workforce should carefully consider the applicable immigration policies that pertain to their circumstances.

a) Foreign Nationals Coming to Canada

i) Work Permit Basics

A temporary resident in Canada refers to a foreign national who is granted permission to enter and stay in the country for a limited and temporary period, typically for purposes like visiting, studying, or working. According to the Immigration and Refugee Protection Regulations ("IRPR"), work is defined as an activity that involves receiving wages, commissions, or engaging in direct competition with Canadian citizens or permanent residents in the Canadian labour market.[6]

[5] *Occupational Health and Safety Act,* RSO 1990, c 0.1.
[6] Immigration and Refugee Protection Regulations, SOR/2002-227.

The primary concern regarding foreign workers entering Canada is to ensure their eligibility to work in compliance with the appropriate immigration procedures. Engaging in unauthorized work can result in serious consequences, including being prohibited from obtaining future work permits, potential arrest, and deportation from the country. It is crucial for individuals to comply with the necessary regulations and obtain the appropriate authorization before engaging in any work activities in Canada.

In light of the above, a foreign national can temporarily work within Canada through the following three immigration processes:

i. An individual can apply for a work permit after the company they are or will be working for has received a positive Labour Impact Assessment ("LMIA");
ii. An individual qualifies for a work permit under one of the LMIA-exempt work permit categories; or
iii. An individual qualifies to work in Canada without the requirement for a work permit (these are special circumstances that are usually short-term mandates).

ii) Labour Market Impact Assessment

Generally, temporary foreign workers require a LMIA before Immigration will consider a work permit application.

An LMIA is essentially a document from Employment and Social Development Canada ("ESDC"), which permits an employer to hire a foreign worker rather than a Canadian/permanent resident.

Employers must apply for the LMIA and, as a part of the process, are generally required to advertise the position for at least thirty (30) days to try to find a Canadian/permanent resident to fill the role and ultimately justify why a Canadian/permanent resident could not be found, if in fact that is the case.

iii) LMIA: Global Talent Stream Pilot Project – No advertising requirement

The Global Talent Stream is a pilot program specifically designed to meet the needs of Canadian companies seeking to hire highly skilled global talent and expand their workforce. This program primarily targets two types of employers: those with in-demand highly skilled positions listed on the Global Talent Occupations List, which highlights occupations experiencing chronic shortages, and innovative companies referred by designated partners. These employers recognize the importance of acquiring unique and specialized talent to drive their company's growth and scaling efforts.

Under the Global Talent Stream, participating employers enjoy a notable advantage. They are exempted from the requirement to advertise the relevant position, a common step in the traditional LMIA stream. Instead, they can directly apply to EDSC for an LMIA, while adhering to specific terms and conditions, including meeting the median wage criteria. This streamlined approach not only expedites the hiring process but also aims to facilitate the growth and success of Canadian businesses by enabling them to secure skilled global talent efficiently.

Through this program, the employer would work with ESDC to develop a Labour Market Benefits Plan that demonstrates the employer's commitment to activities that will have lasting, positive impacts on the Canadian labour market. Some examples of these activities could include:

- Committing to increasing skills and training investments for Canadians and permanent residents;

- Committing to hiring an intern and/or new worker (whether in the tech area or otherwise);
- Committing to attending career fairs to attract young Canadians and permanent residents to join the employer's company as employees or interns; and
- Committing to targeting underrepresented groups with the abovementioned efforts.

These proposed activities would then be subject to a follow-up audit by ESDC.

The Global Talent Occupations List, can be found here: https://www.canada.ca/en/employment-social-development/services/foreign-workers/global-talent/requirements.html#gtol

iv) LMIA Exemptions

The regulatory authority for issuing a work permit to a worker exempt from requiring an LMIA is outlined in sections 204 to 208 of the IRPR[7]. A foreign national may be issued an LMIA exempt work permit pursuant to an international agreement, Canadian interests, or other special programs.

An LMIA exemption work permit can be based on a range of things such as:

- Type of work;
- Foreign national's qualifications;
- Country of citizenship; and
- International Treaties.

b) Working as a Canadian Abroad

If you are a Canadian national employed by a Canadian company but choose to work remotely in a foreign country, an important question arises: do you need a work visa or can you continue working on a visitor's visa? The answer to this depends on the destination country and the nature of your work. Different countries have varying regulations and policies regarding remote work. In certain cases, there are digital nomad visas available that allow foreign nationals to work for an employer outside the host country or even work as self-employed individuals. Therefore, it is crucial to determine the specific requirements and work authorization rules of the country you are travelling to and the type of work you will be engaged in.

c) Recommendations:

Maintain Awareness: Employers should stay informed about the remote work locations of their employees to ensure compliance and address any legal requirements that may arise.

Establish Remote Working Policies: Develop clear and concise policies that outline expectations, guidelines, and procedures for remote work, including work hours, productivity standards, data security, and legal considerations.

By implementing these recommendations, employers should be able to better manage remote work, maintain compliance, and promote a productive work environment.

[7] *Ibid*.

4) Tax Considerations

a) Employee Perspective

From an employee's perspective, it is important to consider the tax implications of remote work in different countries. Spending a certain number of days in a country may subject an individual to its tax laws, but it does not automatically mean losing Canadian tax residency. This can result in potential tax obligations in multiple jurisdictions. Determining tax residency and assessing if income is derived from an international company's labour market are crucial factors to consider. It is also necessary to understand non-resident tax obligations and any relevant tax treaties. Seeking appropriate legal advice is recommended.

b) Employer Perspective

From an organizational standpoint, there is a risk of establishing a permanent establishment in the country where a remote worker is located. This may lead to tax and social security contribution obligations imposed by foreign jurisdictions. Employers should remain aware of their employees' work locations and the duration of their remote work to determine potential tax residency implications. Clear work arrangements should define the responsibility for tax and social security payments, with employers effectively communicating their expectations. By fostering open communication and careful planning, employers and employees can proactively address tax-related challenges, ensuring compliance and mitigating financial penalties.

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TAB 6

The Eight-Minute Employment Lawyer 2023

Electronic Monitoring, Privacy and Employment Law Implications

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cpd

Electronic Monitoring, Privacy and Employment Law Implications

Siobhan O'Brien, *Hicks Morley Hamilton Stewart Storie LLP*

Introduction

In 2022 the Ontario government introduced a series of changes to the *Employment Standards Act* (*ESA*) through Bill 88, the *Working for Workers Act.*[1] Among other things, Bill 88 amends the *ESA* to require employers with 25 or more employees to have a written policy with respect to electronic monitoring of employees.

Electronic Monitoring Policies (Ontario)

Section 41.1.1 of the *ESA* now requires employers of 25 or more people to provide employees with a written policy (Policy) on how they are being electronically monitored.[2] The stated purpose of the change was to improve transparency in the workplace and provide employees access to information on how and why they are being monitored.

The requirement to have a Policy applies to all employers covered by the *ESA* except the Crown, a Crown agency or authority, board, commission or a corporation whose members are all appointed by the Crown and their employees.

The Policy must state whether or not the employer electronically monitors employees. If the employer does, the Policy must include:

- a description of how and in what circumstances the employer may electronically monitor employees;

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[1] Bill 88, *An Act to enact the Digital Platform Worker's Rights Act, 2022 and to amend various Acts*, 2nd Sess, 42nd Parl, schedule 2 (assented to April 11, 2022).

[2] *Employment Standards Act, 2000,* S.O. 2000, c. .41, s 41.1.1.

- the purposes for which the information obtained through electronic monitoring may be used by the employer;

- the date the Policy was prepared and the date any changes were made to the Policy;

- such other information as may be prescribed.[3]

The *ESA* does not define what constitutes electronic monitoring but the Ontario Ministry of Labour, Training and Skills Development's guide to the *Employment Standards Act, 2000* (Guide) suggests that it is intended to cover a very broad range of activity:

> …"electronic monitoring" includes all forms of employee and assignment employee monitoring that is done electronically. Section 41.1.1 is not limited to the electronic monitoring of devices or other electronic equipment issued by the employer, nor is it limited to electronic monitoring that happens while employees are at the workplace".[4]

Therefore, according to the Guide, policies must capture monitoring of employees' personal devices and any electronic monitoring which takes place in the context of a remote work arrangement.

The Guide provides the following examples of electronic monitoring:

- use of a GPS to track the movement of an employee's delivery vehicle;

- use of an electronic sensor to track how quickly employees scan items at a grocery store checkout;

- tracking the websites that employees visit during working hours.

Among other things, the Guide:

- confirms that the *ESA* requirements "do not establish a right for employees not to be electronically monitored by their employer," "do not create any new privacy rights for employees," and "do not affect or limit

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[3] *Employment Standards Act, 2000,* S.O. 2000, c. .41, s. 41.1.1(2).

[4] Ontario, Ministry of Labour, Immigration, Training and Skills Development, *Employment Standards Act Policy and Interpretation Manual,* Version: 2022 Release 3 (Toronto: Employment Standards Program, 2018) at 392.

an employer's ability to use information obtained through the electronic monitoring of its employees in any way it sees fit";

- contains examples of how a Policy could capture various forms of electronic monitoring;

- clarifies that while the Policy applies to all employees in Ontario who are captured by the *ESA*, including management, executives and shareholders if they are employees under the *ESA*, the employer can have a different Policy (or different sections of the same Policy) for different groups of employees;

- sets out which "employees to include in the count" when determining if the 25-employee threshold is met, which includes employees at multiple locations or those of related employers;

- confirms that assignment employees of temporary help agencies are employees of the agency and are included in the count to determine if the temporary help agency has met the 25-employee threshold;

- clarifies that determining whether an employer has 25 or more employees as of January 1 is a point-in-time assessment;

- clarifies that the Policy may be a stand-alone document or part of a comprehensive workplace policy document; and,

- sets out the requirements to provide the Policy to existing employees or to new hires, as well as the retention obligations.

The language of the provision does not consider the intent of the employer. This suggests that inadvertent monitoring should still be included in the Policy, even if the employer has no intention of using the collected data.

Notably, the *ESA* does not limit employers to using the data produced by electronic monitoring in the ways outlined by the Policy.

It is important to note that only a failure to provide a policy to employees is subject to *ESA* investigation. The Ministry cannot investigate company practices to make sure that the Policy is accurate or comprehensive.

Privacy

Tort

In *Jones v Tsige*[5] the Ontario Court of Appeal recognized the tort of "Intrusion Upon Seclusion." That case arose in in the context of a workplace invasion of privacy.

The core dispute in *Jones v Tsige* was between two bank employees. Jones and Tsige worked in different offices and had no relationship with one another bar the fact that Tsige was in a relationship with Jones' former husband. During the financial dispute with Jones' former husband, Tsige checked on Jones' bank accounts 174 times over 4 years. Allegedly this was to make sure Jones was receiving child support although Jones disputed this justification.

The bank in question was subject to PIPEDA and Jones could have filed a complaint under that legislation.[6] However the court did not see why the employer should be held responsible for the actions of an employee who accepted that she was violating bank policy.

The court was mindful not to open the floodgates so that any trivial breach of an individual's privacy could lead to a claim for damages. The defendant's conduct leading to the intrusion needs to have been reckless or intentional and the defendant must have invaded the plaintiffs private concerns.

The court established a high standard for the types of private concerns protected by the privacy tort. Intrusions on "one's financial or health records, sexual practises and orientation, employment, diary or private correspondence" were held out as an example of the type information that could sustain a finding for the plaintiff.[7]

The inclusion of "employment" in the above list of "private concerns" should be of particular concern to employers as they obviously have a great deal of access over an employee's sensitive employment data. Strict data security may protect the data from accusations of reckless or intentional intrusions, but limiting the use of the data also undermines its usefulness to the employer.

In June 2022, the Court of Appeal heard three grouped appeals arising out of three separate class actions. In each of those proceedings, the plaintiffs sought to apply

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[5] 2012 ONCA 32 (*Jones).*

[6] *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5.

[7] *Jones, supra* note 5 at 72; The standard is an objective one, the plaintiff needs to demonstrate that a reasonable person would expect that the information would be kept private.

the tort of intrusion upon seclusion, first recognized in *Jones v Tsige*, to Database Defendants. All three proceedings are at the certification stage.

The Court provided its reasoning in detail in *Owsianik v. Equifax Canada Co*. and then applied it to the other two cases (*Obodo v. Trans Union of Canada* and *Winder v. Marriott International, Inc.*), all rendered concurrently.[8]

The representative plaintiff in *Owsianik* was initially successful in certifying an intrusion upon seclusion claim as part of a class proceeding. However, the majority of the Divisional Court reversed the motion judge and held the tort had no application to a Database Defendant when the private information was accessed by a third party hacker acting independently of the Database Defendant.

At the Court of Appeal

In *Owsianik*, the Court reiterated the finding in *Atlantic Lottery Corp. Inc. v. Babstock* that "novel legal claims which are doomed to fail even if the alleged facts are true, should be disposed of at the certification stage."[9] The test to be applied in deciding whether a claim discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992* is that a claim should only be struck if it is "plain and obvious" that it cannot succeed.[10]

The Court referred to the elements of the tort of intrusion upon seclusion as set out in *Jones v. Tsige* and focused on the first element, which is that the defendant must have invaded or intruded upon the plaintiffs' private affairs or concerns, without lawful excuse.

The Database Defendant in *Owsianik* was alleged to have failed to take steps to prevent the hackers from invading the plaintiffs' privacy interests. However, the Court stated that the Database Defendant itself did not interfere with those privacy interests: the wrong arose out of its failure to meet its obligations to protect the plaintiffs' privacy interests.

As a result, the Court agreed with the majority of the Divisional Court that the claim must fail as there was no conduct by the Database Defendant, or on its behalf, amounting to an intrusion into, or an invasion of, the plaintiffs' privacy. The Database Defendant's recklessness in negligently storing the plaintiffs' personal information could not make it liable for the invasion of the plaintiffs' privacy by third party hackers.

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[8] *Owsianik v Equifac Canada Co.,* 2022 ONCA 813 (*Owsianik); Obodo v Trans Union of Canada, Inc.* 2022 ONCA 814*; Winder v Marriott International, Inc.,* 2022 ONCA 815.

[9] *Owsianik, supra* note 8 at 31.

[10] *Class Proceedings Act,* 1992 S.O. 1992 c. 6.

To impose liability in such a situation would, the Court stated, create a new and broad basis for a finding of liability for intentional torts:

> [65] … A defendant could be liable for any intentional tort committed by anyone, if the defendant owed a duty, under contract, tort, or perhaps under statute, to the plaintiff to protect the plaintiff from the conduct amounting to the intentional tort. The security guard who fell asleep on the job, recklessly allowing an assailant to assault the person who the security guard was obliged to protect, would become liable for battery. The garage operator who negligently, and with reckless disregard to the risk of theft, left the keys in a vehicle entrusted to his care, would become a thief if an opportunistic stranger stole the car from the garage parking lot.[11]

The Court of Appeal held that if an individual's privacy is breached in this manner, they may have recourse against the hackers for invasion of privacy.

Privacy Breach

In *Ari v. Insurance Corporation of British Columbia*, the British Columbia Supreme Court (the Court) found that the Insurance Corporation of British Columbia (ICBC) was vicariously liable for the actions of an employee (Employee) who fraudulently accessed personal information maintained by ICBC.[12] ICBC was ordered to pay damages to the members of a class action (Class Members) as a result of the privacy breach.

Factual Background

ICBC is the operator of a universal compulsory vehicle insurance plan and maintains databases that include the personal information of everyone in the province who holds a driver's licence or who is a registered owner of a motor vehicle.

The Employee had improperly accessed the personal information of the Class Members and sold it to a third party. That information, in turn, was used by others to carry out shooting attacks and arson on the houses and vehicles of 13 of the Class Members (Subclass). There was a total of 78 Class Members whose information had been breached, including the individuals victimized in the attacks.

The persons responsible for the attacks and the Employee were criminally charged for their actions. The victims of the privacy breach also commenced a civil proceeding against ICBC, which was certified as a class action proceeding in

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[11] *Owsianik, supra* note 8 at 65.

[12] *Ari v Insurance Corporation of British Columbia,* 2022 BCSC 1475 (*"Ari"*).

2017. In 2019, on appeal by the plaintiff to the British Columbia Court of Appeal, the common issues of the class action were expanded to include a claim for punitive damages, among other things.

The Court's Analysis and Decision

In May 2022, the parties appeared before the Court for a summary trial to settle the common issues.

On the issue of the Employee's liability, the Court held that it was clear that the Employee's actions had breached the *British Columbia Privacy Act* (*Act*)[13], as she had accessed personal information willfully and without a claim of right from ICBC databases.

The Court then turned to the key issue for ICBC: whether ICBC would be vicariously liable for the Employee's breach of the *Act*. Following its review of the principles for attributing vicarious liability to an employer, the Court concluded that ICBC had "clearly created the risk of wrongdoing by an employee in [her] position and that her wrongdoing was directly connected to her employment."

The Court also held that the type of risk that had arisen in this case was foreseeable and could potentially have been addressed, writing:

> [74] […] The risk of such conduct by an employee was not only foreseeable, it was actually foreseen. Employees were told of the need to protect the privacy of customers' personal information and warned of adverse consequences if they accessed that information for reasons unrelated to ICBC's business.
>
> [75] ICBC had in place rules and policies forbidding improper use of its databases, but the possibility of an individual employee choosing to ignore them was clearly foreseeable and there is no evidence of any system or method that would have prevented or detected that conduct at the time it happened.[14]

After establishing that ICBC was vicariously liable for the Employee's wrongdoing, the Court concluded that all of the Class Members were entitled to an award of non-pecuniary damages arising from the mere fact that their privacy was violated, without proof of loss. In addition, Class Members who claimed to

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[13] *Privacy Act,* RSBC 1996*,* c. 373.

[14] *Ari*, *supra* note 12 at 74-75.

have suffered non-pecuniary damages over and above the award could advance that claim in a future process to deal with individual issues.

The Court also considered the common issues of the Subclass. ICBC had argued that no amounts were owed to the Subclass because the attacks stemming from the privacy breach were too remote to be considered "foreseeable." In the alternative, ICBC took the position that the Subclass members were not entitled to additional damages (in addition to the common damages). The Court disagreed. It concluded that the attacks were foreseeable intervening acts, and that members of the Subclass may be entitled to damages over and above those general damages awarded to the whole class.

The final issue was whether ICBC's conduct in the circumstances of the Employee's breaches of the *Act* justified an award of punitive damages against ICBC. The Court reviewed the standard of "reprehensible conduct" required of an employer to warrant an award of punitive damages and concluded that, while ICBC could have done more to prevent the Employee's misconduct, there was nothing to suggest that its conduct was high-handed, malicious or arbitrary to justify such an award.[15]

While this judgment settles the common issues in the class action, the parties must now decide upon the quantum of common issue damages and will then turn to litigating individual issues, such as the claims of any Class Members with pecuniary damages claims.

[15] *Ari, supra* note 12 at 105.

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TAB 7

The Eight-Minute Employment Lawyer 2023

Working with In-House Counsel – Engaging Effectively and Adding Value

Marc Toppings, Vice President & Chief Legal Officer
University Health Network

June 22, 2023

cpd

8-Minute Employment Lawyer

Working with In-House Counsel - Engaging Effectively and Adding Value

Marc Toppings, Vice President & Chief Legal Officer, University Health Network

Know the Business

- Learn the client's business. Our particular needs and wants. Our risk tolerance.
- Are there other legal or regulatory issues that impact your advice (i.e. charitable law considerations; statutory frameworks; etc)
- Learn the client's motivations – are we concerned with non-financial drivers (reputation; leadership; public good)
- Come visit; meet the team; attend a team meeting.

Establish Trust

- Trite to say but be available! Pick up your phone.
- Don't delegate others to attend meetings without checking.
- Set team members up in advance. Meet with the GC to discuss expectations, introduce key members of your team.
- Stick to agreed upon fixed prices, discounts

Billing

- Understand that legal in-house is an expense, not a revenue generator. Be prepared to think creatively about costs and risk sharing. Think creatively about supporting our legal needs.
- Never add lawyers, students, etc without checking.
- Check with in-house counsel re format of invoices.

Appreciate the Value of Value-Adds

- Proactively consider how you can distinguish yourself and your firm.
- Training sessions
- Lunch and learns
- In-house team retreats
- Legal updates; case law summaries

Reporting

- How do you keep me updated? Am I chasing?
- Appreciate from whom you can take instructions.

- Proactively and regularly update me.

Check In

- Ensure there is a relationship management partner.
- Debrief after completion of files. What worked, what did not.
- Conduct an annual temperature check / check in.

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TAB 8

The Eight-Minute Employment Lawyer 2023

Consequences at Trial for Employer Clients Who Behave Badly

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June 22, 2023

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Consequences at Trial for Employer Clients Who Behave Badly

By Gurlal S. Kler and James Hickey

Overview

Employer clients who engage in misconduct and fail to treat their employees with fairness, dignity and respect, may not only be liable for severance pay but also additional damages. The quantum of these damage awards can be substantial and have the potential to significantly impact an employer's financial standing. This paper provides an overview of the most common additional damage awards in the employment law context and summarizes 15 key cases from the past decade, all of which demonstrate how an employer's bad behaviour can have costly consequences at trial. By understanding the potential consequences of misconduct and drawing lessons from case law, employer clients can proactively adopt practices and policies that minimize the risk of costly damage awards at trial.

The Cost of Bad Behaviour: Additional Damage Awards in Employment Law

Aggravated and Moral Damages

Aggravated damages, which have now been consolidated with moral damages, may be ordered against an employer where they have acted in bad faith prior to, or following, the termination of an employee. These damages are compensatory in nature and seek to compensate an employee for intangible injuries and/or mental distress caused by an employer's bad faith conduct.

Aggravated/moral damages may be awarded if: (a) an employer breaches its duty of good faith and fair dealing in the course of dismissal; and (b) the employee suffers mental distress and/or some other intangible injury as a result of said breach.

Punitive Damages

Punitive damages center on an employer's misconduct rather than an employee's loss and are granted with the intention of deterring and condemning the employer's misconduct.

Punitive damages are typically granted when compensatory damages are deemed inadequate in accomplishing the objectives of denunciation and punishment. For punitive damages to be awarded, an employer's conduct must be considered reckless, harsh, reprehensible and malicious, to the extent of being independently actionable.

Punitive damages may be deemed an appropriate remedy where an employee can demonstrate that:

(a) An employer's conduct was malicious, oppressive and high handed, and constituted a marked departure from ordinary standards of decent behaviour;

(b) An employer committed an actionable wrong independent of the claim for wrongful dismissal; and

(c) A punitive damages award meets the objectives of retribution, deterrence and denunciation.

Damages for Breach of the Ontario *Human Rights Code*

Ontario's *Human Rights Code* provides that every person has a right to equal treatment with respect to employment without discrimination or harassment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

The right to "equal treatment with respect to employment" encompasses all aspects of the workplace environment and the employment relationship. This includes various stages such as job applications, recruitment processes, training opportunities, transfers, promotions, terms of apprenticeships, as well as procedures related to dismissal and layoffs. Furthermore, it applies to matters such as remuneration, including rate of pay, overtime, and hours of work, as well as entitlements to holidays, benefits, shift work arrangements, and disciplinary actions.

Where it is found that an employer has discriminated against an employee contrary to the *Human Rights Code*, Ontario courts have jurisdiction to award general damages to compensate an employee for any injury caused to their dignity, feelings and self-respect as a result of the discrimination they experienced.

These damages aim to acknowledge and address the emotional and psychological harm inflicted on the employee due to the discriminatory actions or treatment they endured. The specific quantum of general damages awarded may vary depending on the circumstances of the case, the severity of the discrimination and its impact on the employee's well-being.

Employer's Beware: Recent Case Law That Every Employer Should Know

Pate Estate v Galway Cavendish and Harvey (Township), 2013 ONCA 669:

The employee, John Gordon Pate ("Pate"), had been employed by Galway for approximately 10 years as a building inspector, when his employment was terminated, allegedly for cause, at the age of 43.

In December 1998, the Township of Galway-Cavendish merged with the Township of Harvey to form an amalgamated township. Prior to the merger, Pate had served as Chief Building Official to the former township of Galway-Cavendish. After the amalgamation, Pate assumed the role of a building inspector in the newly formed township.

Shortly after the amalgamation, the Township terminated Pate's employment, citing alleged discrepancies in building permits. However, the Township failed to provide specific details or particulars regarding these allegations. Prior to his dismissal, the Township's Chief Administrative Officer approached Pate and suggested that if he chose to resign, the Township would refrain from involving the police. Pate chose not to resign, resulting in the Township's decision to terminate his employment. Subsequently, the Township conducted an investigation and handed over certain information to the Ontario Provincial Police (OPP).

At trial, it was revealed that the Township had failed to inform the OPP about two critical pieces of information. First, the Township did not disclose that it had lost files pertaining to the alleged discrepancies during the relocation of municipal offices, which took place as part of the amalgamation process. Second, the Township did not inform the OPP that a committee of its council had already determined that at least one of the cases involving the alleged discrepancies had no factual basis or foundation.

The investigating officer of the OPP initially hesitated to bring charges against Pate. However, due to pressure exerted by the Township at higher levels within the OPP, charges were laid against Pate. Subsequently, in 2002, Pate stood trial for the alleged offenses, and he was ultimately acquitted. Throughout the criminal proceedings, the case was extensively covered by the local media. The media attention surrounding the case contributed to public scrutiny of Pate and caused him significant reputational damage.

At the civil trial, the Court concluded that the Township's mistreatment of Pate was of a sustained nature, over a period of ten years. The Township's dismissal of Pate and the subsequent events caused by its baseless accusations had a lasting impact on Pate, causing him significant and enduring harm. The entire ordeal, including the termination of his employment, criminal trial, and the persistent media coverage, had a devastating effect on Pate's life.

Moreover, the Court noted that despite being a public body, the Township failed and/or refused to apologize to Pate for its misconduct.

After an appeal and a retrial on the issue of punitive damages, which was also appealed, Pate was awarded **$23,413.00** on account of the bad faith manner of his dismissal, **$7,500.00** in special damages for his criminal defence costs, general and aggravated damages in the amount of **$5,000.00** and punitive damages in the amount of **$450,000.00.**

***Wilson v Solis Mexican Foods Inc.*, 2013 ONSC 5799:**

The plaintiff employee, Ms. Patricia Wilson ("Wilson"), had been employed by Solis for approximately 16 months, when her employment was terminated, without cause, at the age of 54.

Wilson was initially hired by Solis to fill the role of Controller. However, she was later transitioned to the position of business analyst. Wilson's employment commenced on January 4, 2010, and in November of that year she received a performance review with positive feedback which led her to believe Solis was satisfied with her overall performance.

Following the positive performance review in November 2010, Wilson began to suffer serious back issues. In March 2011, Wilson took a leave of absence from work based on her doctor's recommendation.

After a few weeks, Wilson submitted a doctor's note to Solis outlining a proposed graduated return to work plan. The plan suggested a gradual increase in working hours, starting with a few hours per week and gradually progressing to full-time hours. However, Solis rejected the proposed plan, taking the position that that it would not be feasible.

Subsequently, Wilson's doctor provided a second note, stating that Wilson could resume working full-time hours with accommodation, specifically a combination of sitting, standing and walking. Once again, Solis expressed concerns regarding the proposed return to work plan.

One month later, on May 19, 2011, Wilson's employment was terminated by Solis, purportedly due to a restructuring of the company.

At trial, the Court determined that Wilson's dismissal was, at least partially, motivated by her disability. Accordingly, it was found that Solis had discriminated against Wilson on the basis of her disability in its decision to terminate her employment. The Court reaffirmed that in cases of employment discrimination based on disability, it is sufficient for the disability to be a contributing factor leading to dismissal or unfair treatment. That is, damages for a violation of human rights may be awarded even if disability is just one factor influencing an employer's actions.

In awarding Wilson **$20,000.00** in general damages for Solis' breach of the *Human Rights Code*, the Court emphasized that such an award recognizes the significance of the right that was violated and the unique circumstances of the case.

***Boucher v Wall-Mart Canadian Corp.*, 2014 ONCA 419:**

The plaintiff employee, Ms. Meredith Boucher ("Boucher"), had been employed by Wal-Mart for approximately 10 years, when her employment was constructively terminated as a result a toxic workplace environment caused by Wal-Mart and her immediate supervisor and store manager, Jason Pinnock.

Boucher was subjected to a formal disciplinary session and ongoing profane and disrespectful language after refusing to falsify a store temperature log at the request of Pinnock. On June 3, 2009, Boucher attempted to raise her concerns about Pinnock to Wal-Mart management in accordance with the company's Open Door Communication Policy. Unfortunately, her concerns were not addressed or resolved by management. In fact, in violation of the Policy, Pinnock was informed about Boucher's complaint, which subsequently led to a relentless torrent of abuse directed at Boucher. From June to November 2009, Pinnock subjected Boucher to a continuous stream of belittlement, demeaning behaviour, berating, criticism, taunting, and humiliation. These abusive actions often occurred in the presence of co-workers and customers. Pinnock made derogatory remarks about Boucher, including calling her stupid and implying that she was ruining her career. At trial, other employees testified that Pinnock's treatment of Boucher was ferocious and described his actions as humiliating, terrible and horrific.

Boucher had a second meeting with senior management of Wal-Mart on October 26, 2009, specifically addressing Pinnock's behaviour. During this meeting, Boucher continued to report specific instances of abuse. However, on November 14, 2009, Wal-Mart informed Boucher that it had conducted an investigation and reached two conclusions: (a) that Boucher's complaints could not be substantiated; and (b) Boucher's complaints were an attempt to undermine Pinnock's authority. Distressed by this response, Boucher left the meeting in tears. Despite her credible version of events, Pinnock faced no disciplinary action.

Due to Pinnock's mistreatment and Wal-Mart's failure and/or refusal to address the situation, Boucher began to experience significant physical and emotional distress. She suffered from a loss of appetite, insomnia and weight loss as a direct result of the abusive treatment she endured. Colleagues described her appearance as ill, grey, and haggard, indicating the visible impact on her well-being. The Court determined that Pinnock was not only aware of the physical and emotional toll that his mistreatment had on Boucher but, also, that he had expressed his intention to continue until she was forced to resign.

A significant incident occurred on November 18, 2009, which served as a culmination of Pinnock's mistreatment, and which forced Boucher out of the workplace. During the incident, Pinnock publicly grabbed Boucher by the elbow and mocked her in front of a group of employees, challenging her to prove her ability to count to 10. The humiliation caused by this event was so severe that Boucher left the store. Boucher sent an email to Wal-Mart stating that she would not return to the workplace until her complaints regarding Pinnock's behaviour were addressed. However, Wal-Mart failed to address her complaints, resulting in Boucher never returning to work.

[6]

Ultimately, after a jury trial and an appeal on the issue of damages, Boucher was awarded **$200,000.00** in aggravated/moral damages and **$100,000.00** in punitive damages as against Wal-Mart, and **$100,000.00** in damages for intentional infliction of mental suffering as against Pinnock.

***Silvera v Olympia Jewellery Corporation*, 2015 ONSC 3760:**

The plaintiff employee, Ms. Michelle Silvera ("Silvera") had been employed by Olympia for approximately 1.5 years when her employment was terminated, allegedly for cause.

Silvera commenced a civil action against Olympia and her direct supervisor, Morris Bazik, alleging wrongful dismissal, sexual assault, battery, and sexual and racial harassment.

The Court held that, during her employment, Silvera endured various forms of misconduct, including inappropriate racial comments, derogatory language, and multiple instances of sexual assault perpetrated by Morris.

The Court recognized that Morris' behaviour had a heightened effect on Silvera due to several factors, including the absence of a sexual harassment policy or any other mechanism to address such misconduct in Olympia's workplace. The lack of proper policies and procedures exacerbated the harm caused to Silvera by failing to provide adequate safeguards and support to address the inappropriate conduct she endured.

Olympia attempted to justify Silvera's dismissal by arguing that that she had been absent from work for a prolonged period of time and had failed to communicate with Olympia about her absence and return to work. The Court dismissed Olympia's position and found that it had no valid basis to terminate Silvera's employment.

Both Morris and Olympia were ordered to jointly and severally pay Silvera damages in the amount of **$206,711.93** for Morris' misconduct, broken down as **$90,000.00** in general and aggravated damages; **$10,000.00** in punitive damages; **$30,000.00** for breach of the *Human Rights Code*; **$42,750.00** for costs of future therapy care; **$37.18** for a subrogated OHIP claim; and **$33,924.75** for future lost income.

Further to the above, and in addition to damages for wrongful dismissal, Olympia was ordered to pay Silvera aggravated damages in the amount of **$15,000.00**, punitive damages in the amount of **$10,000.00** and **$57,869.13** for lost income.

Morris and Olympia were also ordered to jointly and severally pay Silvera's daughter, Aleisha, **$15,000.00** in damages under the *Family Law Act,* for loss of guidance, care and companionship as a result of their mistreatment of her mother.

***Morrison v Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725:**

The plaintiff employee, Mr. Tom Morison ("Morison"), had been employed by Ergo for approximately 8 years when his employment was terminated at the age of 58, allegedly for cause.

At the time of his termination, Morison was employed by Ergo as a regional manager, responsible for Eastern Ontario and Western Quebec, as well as manager for federal government sales. At trial, Ergo argued that it had a *bona fide* belief of cause relating to an alleged mismanaged demo chair account, Morison's failure to properly market Ergo's health care line of products, and difficulties with Morison cooperating positively with his immediate superior.

The Court awarded Morrison **$50,000.00** in punitive damages based on the following factors:

1. Morison had been terminated by way of a quick telephone call followed by a letter that alluded to the possibility of cause. No further reasons were provided by Ergo at the time of termination. The Court found this manner of dismissal to be highly inappropriate;
2. While Ergo had initially pleaded cause, the Court found that there was a lack of reasonable belief on the part of Ergo to support its allegations;
3. The Court found that Ergo's allegations of cause were made with no reasonable basis and for tactical and financial gain;
4. Morison was never provided any warning that his employment was at risk, and Ergo failed to investigate any of its allegations;
5. There was a 2-month delay by Ergo in providing Morrison his record of employment; and
6. The termination letter did not comply with the *Employment Standards Act, 2000*.

***Strudwick v Applied Consumer & Clinic Evaluations Inc.*, 2016 ONCA 520:**

The plaintiff employee, Ms. Vicky Strudwick ("Strudwick"), had been employed by Applied Consumer for approximately 15 years when she was dismissed from her position at the age of 56.

In October 2010, Strudwick suddenly became completely deaf. While the cause was uncertain, her doctors believed it was a virus. Shortly after Strudwick became deaf, Applied Consumer's general manager and Strudwick's immediate supervisor began engaging in a pattern of demeaning, harassing, and isolating conduct towards her, in ways that directly related to her disability. Moreover, Applied Consumer not only refused to provide Strudwick with any accommodations for her deafness, but also took

deliberate steps that were designed to exacerbate the challenges she faced as a result of her condition.

The Court concluded that Applied Consumer had engaged in disability-based discrimination, contrary to the Ontario *Human Rights Code*. The effect of Applied Consumer's discriminatory conduct resulted in Strudwick feeling isolated, anxious, stigmatized and vulnerable. Accordingly, Strudwick was awarded **$40,000.00** in general damages for injury to her dignity, feelings and self-respect.

The Court awarded Strudwick **$61,599.82** in aggravated/moral damages due to Applied Consumer's "unfair treatment" and "extreme bad faith."

In finding that Applied Consumer's conduct warranted retribution, deterrence and denunciation, the Court awarded Strudwick **$55,000.00** in punitive damages.

Finally, on appeal, the Ontario Court of Appeal (ONCA) reviewed the damages awarded by the trial judge and decided to increase the amount granted for the reimbursement of behavioural therapy sessions. The original award of $18,984.00 was revised to **$35,294.00.** The ONCA determined that the trial judge had overlooked two significant factors: (a) the increased cost of therapy resulting from the permanent nature of Strudwick's disability; and (b) the non-pecuniary losses experienced by Strudwick, including pain, suffering, and loss of enjoyment of life. Considering these factors, the ONCA adjusted the damage award to more accurately reflect the lasting impact of Applied Consumer's misconduct on Strudwick's health and well-being.

***Galea v Wal-Mart Canada Corp.*, 2017 ONSC 245:**

The plaintiff employee, Ms. Gail Galea ("Galea"), had worked for Wal-Mart in a management position for approximately 8 years when her employment was terminated, without cause, in 2010.

Galea had been promoted several times throughout her tenure with Wal-Mart. At the time of her termination, she held the position of Vice President, General Merchandising. When she was promoted to this position in 2008, she was made to sign a Non-Competition Agreement which provided that upon termination of employment without cause, Galea would be entitled to a 2-year severance payment.

Based on Galea's consistently positive performance reviews, she understood that she may one day be promoted to a high-level executive position within Wal-Mart. In fact, Galea's reviews were so favourable that it led her to believe that she would eventually be promoted to the role of Chief Merchandising Officer.

In January 2010, Galea was unexpectedly removed from her position, as a result of a restructuring within Wal-Mart. Wal-Mart advised Galea that it was uncertain about her future role within its organization. In the following months, Wal-Mart made efforts to find an alternative position for Galea, however, none of the identified roles carried the same level of responsibility as her previous position. Additionally, some of

the proposed positions were located abroad in South America and Asia, which further deviated from her prior responsibilities and geographic preferences.

In February 2010, Wal-Mart made Galea its Senior Vice-President for Merchandising-Strategic Initiatives. However, this new role was perceived by Galea as a demotion because she was now required to report to someone who had previously been of the same seniority level as her. Moreover, the manner in which the decision was announced added to Galea's humiliation, in that Wal-Mart sent an email to over 500 employees disclosing the change of position. Furthermore, Galea was not provided with a clear job description for at least an additional 10 days. When Galea sought clarification, Wal-Mart informed her that they remained unsure about her role within its organization.

During the course of the next year, Galea discovered that a Wal-Mart executive had manipulated her internal performance review scores, rendering her ineligible for any potential promotions, and hindering her career advancement within Wal-Mart.

In September 2010, Galea attended an 8-week course at Harvard. Upon her return to work, Galea discovered that her belongings had been removed from her office without prior notice or explanation.

During a meeting, held on November 9, 2010, Galea was presented with two options: she could either accept a lower position within Wal-Mart, accompanied by an extended probation period, or she could choose to receive severance pay.

Despite the fact that she had not yet made a decision with respect to the November 9th offer, on November 19, 2010, Wal-Mart terminated Galea's employment without cause.

According to the terms of the 2008 Non-Competition Agreement, Galea was entitled to receive a severance package equivalent to 2 years' compensation. Initially, Wal-Mart made payments to Galea through a salary continuance plan. However, Wal-Mart abruptly ceased all payments after only 11.5 months, contrary to the terms of the Non-Competition Agreement.

At trial, the Court determined that Wal-Mart's actions had inflicted humiliation upon Galea. This humiliation resulted from Wal-Mart initially creating an expectation of a promotion, only to unilaterally demote Galea instead. Furthermore, Galea was left in a state of uncertainty throughout most of 2010, while her performance score was unjustly altered to render her ineligible for promotion. Moreover, the Court found that Wal-Mart had acted inappropriately in the litigation process by unnecessarily delaying its responses to several requests for information.

The Court awarded Galea **$250,000.00** in moral damages to compensate Galea for having been dismissed in a manner that was dishonest, misleading and unduly insensitive. These damages were intended to acknowledge the emotional harm caused by the wrongful termination and the manner in which it was conducted.

The Court also awarded Galea **$500,000.00** in punitive damages to serve as a form of punishment for Wal-Mart's malicious, oppressive and high-handed conduct, and to deter similar actions in the future.

***Ruston v Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919:**

The plaintiff employee, Mr. J.P. Ruston ("Ruston"), had been employed by Keddco for approximately 11 years when his employment was terminated at the age of 54, allegedly for cause.

In 2015, Keddco terminated Ruston's employment, alleging that he had committed fraud. When Ruston expressed his intention to hire a lawyer, Keddco warned him that they would initiate a counterclaim and that he would incur significant expenses as a result.

Following Ruston's commencement of an action for wrongful dismissal, Keddco responded with a statement of defence and counterclaim. Keddco's counterclaim alleged misconduct on Ruston's part and sought damages amounting to $1.7 million for unjust enrichment, breach of fiduciary duty and fraud, as well as $50,000.00 in punitive damages.

At trial, the Court held that Keddco was unable to substantiate its allegations of cause or any of the other claims against Ruston. Moreover, the Court determined that Keddco's counterclaim was primarily an attempt to intimidate Ruston. The Court also ruled that Keddco had violated its duty of good faith and fair dealing in the manner of Ruston's termination of employment.

The Court also noted that in its pleadings, Keddco had resorted to making personal attacks against Ruston. However, it wasn't until the trial had concluded that Keddco withdrew these unsupported claims and did so only after it was brought to its attention that it had failed to lead any evidence to substantiate its allegations.

The Court further found that Keddco had made several of its accusations against Ruston known to the public. The Court accepted Ruston's evidence that these false allegations had a lasting impact on his professional reputation and would potentially affect his career prospects and continue to follow him throughout his life.

The Court also acknowledged, and accepted Ruston's evidence, that the termination, allegations of cause, and the counterclaim had a "devastating" and "very stressful" impact on him. In doing so, the Court awarded Ruston **$25,000.00** in moral damages.

For the foregoing reasons, the Court also concluded that Keddco's conduct constituted an independent actionable wrong deserving of censure and denunciation. Accordingly, the Court awarded Ruston an additional **$100,000.00** in punitive damages.

***Russell v The Brick*, 2021 ONSC 4822:**

The plaintiff employee, Mr. Tom Russell ("Russell"), had been employed by The Brick for approximately 36 years when his employment was terminated, without cause, at the age of 57, due to the economic downturn caused by the COVID-19 Pandemic.

Upon receiving a letter of termination, Russell made the following requests of The Brick:

(a) The Brick have his statutory severance and termination pay deposited into his RRSP without withholdings;

(b) The Brick provide him his vacation entitlement that would accrue throughout the statutory notice period; and

(c) The Brick provide him a positive letter of reference.

On July 31, 2020, The Brick inadvertently provided Russell with a payment that was double the amount he was entitled to for statutory termination and severance pay, in addition to unpaid wages and accrued vacation pay. Subsequently, Mr. Russell sought legal representation to negotiate with The Brick. The Brick requested that Russel's lawyer hold the excess payment in trust until further discussions took place, but the lawyer declined to do so. Consequently, The Brick requested that Russell return the overpaid amount. However, instead of returning only the excess funds, Russell returned the entire sum and proceeded to commence an action against The Brick for wrongful dismissal.

On November 12, 2020, The Brick sent a letter to Russell's lawyer along with a cheque that was for an amount less than Russell's minimum statutory entitlements. Since the funds were not allocated toward Russell's RRSP, as originally requested, the cheque was returned.

On December 22, 2020, The Brick issued a second cheque to Russel, which aimed to cover the discrepancy between the previous payment made and the actual amount of Russell's statutory minimum entitlements. However, as these funds were not designated for Russell's RRSP, they were once again returned.

Due to these events, which were deemed "missteps" by the Court, Russel's termination and severance pay were not paid into his RRSP until litigation had already commenced.

The Court awarded Russell **$25,000.00** in moral damages on the basis that The Brick:

1. Failed to inform Russell that if he declined the severance offer contained in the termination letter, he would promptly receive his minimum entitlements under the *Employment Standards Act, 2000*;

2. Failed to inform Russell that his benefits would be extended in accordance with the statutory notice period, irrespective of whether he accepted its offer or not; and

3. Acted unfairly toward Russel by failing to include all of his statutory entitlements in its severance offer.

The Court accepted Russell's evidence that The Brick's failure to transfer the correct severance and termination pay had caused him mental distress.

***Humphrey v Mene*, 2021 ONSC 2539:**

The plaintiff employee, Ms. Jacquelyn Humphrey ("Humphrey"), had been employed with Mene Inc. for approximately 3 years when her employment was terminated, for cause, at the age of 32.

Humphrey was awarded **$50,000** in moral damages based on the following findings:

1. Mene alleged just cause for termination based on unfounded claims of performance issues and misconduct. The Court determined that Mene had devised these accusations as a pretext for terminating Humphry's employment;

2. Humphrey had been deliberately set up for failure in that she had never received a performance review or any indication that her employment was at risk;

3. Humphrey's termination had been initiated by Mene after she had requested a raise, and she was abruptly removed from her position and suspended from her employment pending an investigation that never took place;

4. Mene informed clients and other employees about Humphrey's removal from her position before notifying her directly, and her dismissal relied in part on the fact that she had sought legal representation;

5. Internal correspondence sent to Humphrey's colleagues contained baseless allegations of cause, which Mene claimed to have extensive evidence to support, but failed to produce at trial;

6. Humphrey's manager engaged in a pattern of communication that was designed to humiliate and embarrass Humphrey;

7. Humphrey experienced ongoing abuse throughout her employment, which was directly connected to the manner of her dismissal; and

8. Humphrey suffered embarrassment and humiliation due to the public nature of her dismissal and suffered reputational damage as a result.

Ultimately, in awarding moral damages, the Court accepted Humphrey's evidence that Mene's treatment of her had a devastating, and lasting, impact on her sense of self-worth.

Further to the above, the Court held that, in the circumstances, compensatory damages would not suffice in accomplishing the objectives of denunciation and punishment. Humphrey was thereby awarded **$25,000.00** in punitive damages for the following reasons:

1. Mene persisted in raising baseless performance issues despite having abandoned its allegations of just cause;

2. Mene engaged in a persistent search for any possible negative information about Humphrey, including matters that were demonstrated to be irrelevant to Mene's own pleadings. The Court concluded that this conduct reached a level of malicious intent;

3. Mene was dishonest about the existence of evidence;

4. Mene had included inappropriate and irrelevant references to Humphrey's personal life in its Court filings; and

5. Mene's conduct demonstrated a sense of entitlement, "consistent with a litigant who sees itself as above the rules."

***McGraw v Southgate (Township),* 2021 ONSC 7000:**

The plaintiff employee, Ms. Melanie McGraw ("McGraw"), had been employed by the Township of Southgate for approximately 13 years when her employment was terminated for cause, at the age of 41, based on what the Court described as, unfounded, sexist allegations and gender-based discrimination.

In addition to being awarded six months' compensation in lieu of notice, McGraw was awarded an additional **$190,000.00**, made up of **$35,000.00** in damages for discrimination contrary to the Ontario *Human Rights Code,* **$75,000.00** in moral damages, **$60,000.00** in punitive damages, and **$20,000.00** in damages for defamation.

The Court found that McGraw had faced numerous rumours and allegations, primarily based on hearsay and that had been spread by her co-workers and other members of the small community of Southgate. These accusations included sending inappropriate photos to colleagues, engaging in sexual relationships at work, and exchanging sexual favours for academic grades while instructing at the Township's local fire college. Additionally, McGraw was accused of negatively affecting morale, causing a decline in staff retention at the fire station, and damaging the overall reputation of the Dundalk Fire Department within the community.

The Court determined that none of the accusations set out above could be supported by evidence and that they relied on outdated stereotypes. The Court also noted that

the Township had no existing policy regarding workplace relationships upon which it could rely to allege misconduct.

The evidence presented by the Township consisted of a single memo and handwritten notes, and it failed to provide the Court with any witness statements. Notably, McGraw was not interviewed as part of the Township's investigation. The Court determined that the memo came to incorrect conclusions due to the investigating employee's heavy reliance on inaccurate and outdated second-hand information.

General damages for breach of the Ontario *Human Rights Code* were awarded for gender-based discrimination, as the Court concluded that McGraw's termination was based on sexist allegations and that she experienced a toxic, male-dominated work environment.

Moral damages were awarded based on the "exceptional" unfairness of the Township's investigation, which inappropriately conflated gossip with facts.

Punitive damages were awarded due to the Township's treatment of McGraw being deemed "reprehensible" and a significant departure from acceptable standards, reminiscent of a "different era."

***Moffatt v Prospera Credit Union*, 2021 BCSC 2463:**

In this case, out of British Columbia, the plaintiff employee, Ms. Brenda Moffatt ("Moffatt"), had been employed with Prospera as a Financial Services Associate for approximately 2 years when her employment was terminated, without cause, at the age of 59.

The Court awarded Moffatt punitive damages equivalent to **2 ½ months' salary**, or approximately **$7,500.00**, for errors made by Prospera in Moffatt's letter of termination.

The errors found in the termination letter consisted of the following:

1. The letter offered Moffatt 2 weeks' pay in accordance with the B.C. *Employment Standards Act*, in breach of Moffatt's Contract of Employment, which provided that upon termination she was to be paid 3 months' salary; and

2. The non-solicitation period specified in the letter was twice as long as the non-solicitation period set out in Moffatt's Contract of Employment.

Further to the above, the Court took note of Prospera's instruction to Moffatt that she sign a release absolving Prospera of all liability within one week. Had Moffatt signed the termination letter as presented to her, she would have released all legal claims against Prospera despite that fact that Prospera stood to benefit from the misleading errors contained in the termination letter.

Prospera argued that the errors contained in the termination letter were the result of a mistake that had been made while preparing several other termination letters as part of a corporate restructuring. Prospera took the position that the errors constituted an honest mistake, and, therefore, could not be described as intentional, harsh, vindictive, reprehensible or malicious.

The Court rejected Prospera's position and held that in such situations, there exists an obligation on the part of an employer to act in good faith and with reasonableness when terminating an employee. A generic or standardized termination letter that fails to consider the unique circumstances of each employee falls below the expected standard. The Court was emphatic that employers must tailor termination letters to the individual circumstances of the dismissed employee.

***Pohl v Hudson's Bay Company*, 2022 ONSC 5230:**

The plaintiff employee, Mr. Darren Pohl ("Pohl"), had served as a Sales Manager at HBC for approximately 28 years when his employment was terminated, without cause, at the age of 53.

At trial, the Court found that Pohl had suffered significant mistreatment by HBC in the course of the termination process. For example, despite having no involvement in any wrongdoing, HBC opted to escort Pohl off of its premises, which the Court deemed "unduly insensitive."

In awarding Pohl **$45,000.00** in moral damages, the Court took into account the following conduct by HBC:

1. HBC terminated Pohl as a result of a national restructuring of its operations, and not due to any misconduct, yet Pohl was escorted off HBC's premises in a manner that was "unduly insensitive";

2. Prior to his termination of employment, HBC had presented Pohl with a lower-paying role as a sales associate, which would have resulted in a demotion. The Court found that HBC had attempted to deceive Pohl into accepting its offer in order to prevent him from claiming his rightful entitlements under the common law. The offer was structured such that had Pohl accepted it, he would have forfeited all 28 years of past service. The Court determined that HBC's offer was misleading and violated HBC's duty of good faith and fair dealing;

3. HBC also contravened the *Employment Standards Act, 2000* by failing to provide Pohl with a lump sum payment of his wages owing and by mishandling the issuance of his record of employment. HBC had attempted to justify the delay and staggering of payment by asserting that Pohl had declined the separation package they had offered. However, the Court determined that HBC's conduct in this regard constituted a deliberate violation of the *Employment Standards Act, 2000*;

4. Pohl received 2 records of employment, instead of one, and both contained inaccuracies and mistakes. Both ROE's incorrectly indicated the reason for issuance as "shortage of work/end of contract or season." Similarly, both ROE's mistakenly mentioned the expected date of recall as "unknown". Moreover, one of the ROE's stated an incorrect last date of payment as December 5, 2020, while the second ROE indicated November 21, 2020. Both dates were incorrect.

The Court ultimately concluded that HBC had prioritized its own interests over those of Pohl, resulting in Pohl feeling exploited, humiliated and depressed. Given the various wrongdoings described above, the Court deemed it appropriate to award moral damages against HBC.

The Court awarded Pohl an additional **$10,000.00** in punitive damages, citing HBC's failure to comply with the *Employment Standards Act, 2000*, and for its failure to pay Pohl in a lump sum.

***Osmani v Universal Structural Restorations Ltd.*, 2022 ONSC 6979:**

The plaintiff employee, Mr. Rezart Osmani ("Osmani") had served as an employee of Universal for approximately 14 months when his employment was constructively terminated at the age of 47.

In finding that Universal had made Osmani's continued employment intolerable, thereby resulting in his constructive dismissal, the Court awarded Osmani **$50,000.00** in damages for Universal's breach of the Ontario *Human Rights Code*, **$75,000.00** in aggravated damages, and **$25,000.00** in punitive damages.

The facts supporting the above damage awards included the following:

1. Osmani had experienced humiliating, degrading and embarrassing treatment in the workplace, which included being physically assaulted (punched in the testicles) by a supervisor while in the presence of his colleagues;

2. Osmani's supervisor engaged in harassing behaviour that violated the *Human Rights Code*, including using ethnic slurs, making derogatory comments related to Osmani's immigration status, threatening Osmani with deportation if he did not comply with his instructions, referring to Osmani as a bitch, making inappropriate offers to assist Osmani with his wife's sexual needs as a result of the injury to Osmani's testicles, and engaging in various "pranks" involving Osmani's testicles following the assault;

3. Universal did not respond promptly to the complaint made by Osmani concerning the assault on his testicles, and Universal's witnesses attempted to justify the supervisor's harassment by characterizing it as mere "construction talk" and "play talk," demonstrating a lack of appropriate

action and a dismissive attitude towards the seriousness of Osmani's complaint;

4. Aside from conducting a perfunctory meeting, Universal made no further efforts to investigate Osmani's allegations of harassment. This lack of action indicated a failure on the part of Universal to properly address the serious nature of the assault and investigate Osmani's allegations of harassment.

***Teljeur v Aurora Hotel Group*, 2023 ONSC 1324:**

The plaintiff employee, Mr. Jon Teljeur ("Teljeur"), had served Aurora in a senior management role for approximately 3 years when his employment was terminated, without cause, at the age of 56.

In awarding Teljeur **$15,000.00** in moral/aggravated damages, the Court held that Aurora had acted in a manner that was "untruthful, misleading or unduly insensitive" as a result of the following aspects of Teljeur's dismissal, which the Court deemed "disturbing":

1. Aurora failed and/or refused to provide Teljeur with written notice of termination, despite Teljeur explicitly requesting "something in writing" on at least 3 occasions. Aurora's failure to provide written notice of termination constituted a violation of section 54 of the *Employment Standards Act, 2000*, which mandates that employers provide written notice of termination to those who have been employed for more than 3 months;

2. Aurora did not fulfill its obligation to provide Teljeur with his minimum statutory entitlements within 7 days of the termination of his employment or on his next regular pay day, as required by section 11(5) of the *Employment Standards Act, 2000*. The substantial delay in issuing a payment to Teljeur meant that he had to endure the holiday season without any financial assistance from Aurora;

3. Aurora failed to reimburse Teljeur for business expenses in the amount of $16,680.00, which accounted for approximately 23% of his annual income. This imposed a substantial financial burden on Teljeur. During the meeting in which Teljeur was notified of his termination of employment, Aurora had assured him that he would be paid these business expenses within the following week or so. However, Aurora failed to fulfill this promise, even up to the date of the hearing, nearly a year later;

4. During the termination meeting, Aurora had also provided Teljeur with assurance that he would receive 8 weeks of severance or additional compensation. However, Aurora subsequently restricted the amount paid to Teljeur to his minimum statutory entitlements, thereby failing to fulfill its initial commitment;

5. Finally, during the termination meeting, Aurora also actively encouraged Teljeur to resign from his employment, stating that "it is better off for you

to do it." The Court contemplated the potential motive behind this encouragement, suggesting that it may have been an attempt by Aurora to minimize its liability in a potential wrongful dismissal claim.

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TAB 9

The Eight-Minute Employment Lawyer 2023

Vicarious Liability: Assault and Misbehaviour by Employees

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Vicarious Liability: Assault and Misbehaviour by Employees

by Carson Healey and Ciara Halloran

In general terms, vicarious liability is a doctrine used to transfer responsibility for misconduct from one entity or person to another entity or person in cases where the latter is better equipped to absorb liability and compensate the victim(s) for the harm caused. The rationale behind this transfer is the relationship between the two entities.[1] These relationships, commonly those with an uneven power dynamic, can consist of a parent and child, an employer and employee, or an owner of a vehicle and the driver. Our focus here is on vicarious liability in the employment context, specifically pertaining to misconduct and assaults committed by employees.

Vicarious liability is a type of strict liability, which means that an employer can be found liable for its employee's acts even if the employer cannot be proven to have committed any wrongdoing of its own accord, provided the acts were within the course and scope of the employee's employment.[2] The doctrine provides a remedy for harm suffered and to deter future harm, as employers can take steps to reduce the risk of both accidents and intentional wrongs via policy changes and other means.[3]

A finding of vicarious liability will necessarily be fact-specific and hinge on whether an employee's wrong is merely coincidentally linked to the employer or closely connected to duties carried out or actions taken as part of their employment, with the risk of harm flowing from that circumstance.[4] In the latter instance, it is appropriate for an employer to bear the liability. In some cases, such a finding is supported by the fact that the employer has profited from the activity that created the risk of harm and is in a better position than the employee to bear or shift those costs, through pricing or liability insurance, to the public at large.[5]

1. The Test

The traditional common law test for vicarious liability has been dubbed "the Salmond test" (per its formation in John Salmond's treatise, The Law of Torts).[6] The Salmond test has two branches, rendering employers vicariously liable for acts of its employees that are:

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[1] *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59 at para 25 [*Sagaz*].
[2] *Ibid* at para 26.
[3] *Bazley v Curry*, 1999 SCC 692 at paras 31-34 [*Bazley*].
[4] *Cimpean v Payton*, (2008) OJ No. 2665 at para 28; *Bazley*, *supra* note 3 at para 36.
[5] *Bazley*, *supra* note 3 at paras 38 and 54.
[6] John Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens & Haynes, 1907).

1) authorized by the employer; or

2) unauthorized but are so connected with authorized acts that they may be regarded as modes, albeit improper modes, of doing an authorized act.[7]

To most effectively demonstrate the application of this test and ensuing case law, we will discuss several cases in which it has been applied and expanded.

a) *Bazley v Curry*, 1999 SCC 692

In *Bazley*, assuming that the Foundation was not negligent in hiring or supervising the employee, the Court sought to determine if the Children's Foundation (the "**Foundation**") was vicariously liable for sexual abuse committed by an employee against a person under its care. The Court focused on the second branch of the Salmond test: whether sexual acts were a "mode" of performing authorized tasks within the course of employment. The lower courts had found the Foundation vicariously liable, and the Foundation appealed the British Columbia Court of Appeal's decision to the Supreme Court of Canada.

Prior to this case, the Court would typically turn to policy considerations if there were no clear precedents for determining liability. However, in *Bazley*, the Court explored a new approach to distinguish between unauthorized modes of an authorized act that attracted liability and entirely independent actions that did not. In cases where a legal precedent does not provide a clear answer, the Court laid out a set of principles to be used as a guide:

1. From a policy perspective, should the employer be held vicariously liable for the employee's wrong?

2. Is the wrongful act sufficiently related to conduct authorized by the employer?

    i. Vicarious liability is generally appropriate if there is a significant connection between the employer's enterprise and the act.

    ii. Vicarious liability is generally inappropriate if there is merely an "incidental connection," such as the fact that the wrong was committed during work hours or at the workplace.

3. In determining the sufficiency of the connection between the employer's enterprise and the wrongful act, the following factors may be relevant:

[7] *Canadian Pacific Railway Co. v Lockhart*, (1941) SCR 278 at para 32.

i. The opportunity afforded the employee by the enterprise to abuse their power;

ii. The extent to which the wrongful act may have furthered the employer's aims;

iii. The extent to which the act was related to friction, confrontation, or intimacy inherent in the employer's enterprise;

iv. The extent of the power conferred on the employee in relation to the victim; and

v. The vulnerability of potential victims to a wrongful exercise of the employee's power.[8]

In this case, the Court found that the Foundation created and fostered a risk that led to the harm at bar and that it had not resulted from a mere accident of time and place but from a "special relationship of intimacy and respect that the employer fostered," providing a sinister opportunity for exploitation.[9]

The key takeaway in *Bazley* is that if an employer's enterprise and the authority and power it confers on its employee materially increase the risk of the harm that ensued or the action that led to that harm, the employer is vicariously liable. The Court noted that this "test" is always to be applied with the policy considerations in mind that justify the finding of vicarious liability: fair and efficient compensation for the harm caused and the deterrence of future such harms.[10] It is important that the adjudicator seek to understand and apprehend the employee's duties vis a vis the employer and determine if they gave rise to opportunities for wrongdoing.

The Court also noted that, because in childcare scenarios there are unusual opportunities for relationships of power and trust to be taken advantage of, employers who are childcare providers must pay special attention to the existence of these unique relationships, as these often create a significant risk of misbehaviour and abuse.[11]

b) *Jacobi v Griffiths*, (1999) 2 SCR 570

[8] *Bazley*, *supra* note 3 at 40-41.
[9] *Ibid* at para 58.
[10] *Ibid* at para 46.
[11] *Ibid*.

Despite the Court's decision in *Bazley*, the same panel of judges spilt 4-3 against the imposition of liability in *Jacobi v Griffiths*.[12] This finding can be attributed to the unique circumstances of the harm caused.

The defendant, Harry Charles Griffiths (**"Griffiths"**), was a program director of a youth club (the "**Club**") that offered group recreational activities. He pled guilty to 14 counts of sexual assault against children who participated in the Club's programming. The Court held that existing legal precedents did not support the imposition of non-fault liability, and, per *Bazley*, there was an insufficiently strong connection between any risk caused by the Club and the harm caused by the employee's misconduct.[13] The finding centered on the notion that the opportunity afforded to Griffiths to abuse his power was minimal, and that the sexual abuse he engaged in was only possible because he purposely targeted and attempted to establish personal relationships with the victims, which was clearly outside the scope of his employment, and invited them into private settings (including his home), where the harm occurred.[14]

While a unanimous Court rejected the argument that non-profit organizations, such as the Club, should be exempted from vicarious liability, the majority noted that they are commonly not in a place to internalize the costs of no-fault liability. Therefore, judicial restraint must be used, and these organizations are entitled to insist on a rigorous application of the "strong connection" test before vicarious liability is found.[15]

c) Dagenais v Pellerin, 2022 ONCA 76

In *Dagenais v Pellerin*, an employer's vicarious liability was examined in the context of a motor vehicle accident in which the employee admitted fault.[16] The accident transpired after the employee was instructed by their supervisor to travel to a job site two hours away. After stopping for a coffee and recommencing their journey, the employee struck another vehicle.

The trip the employee undertook, as well as the coffee stop, were found to have been authorized by the employer. Therefore, the employer was found vicariously liable under the first branch of the Salmond test (i.e., acts that are authorized by the employer).[17] For this reason, the court upheld the finding of the lower court that the employer failed to demonstrate that they were *not* vicariously liable for the motor vehicle accident. This case

[12] *Jacobi v Griffiths*, (1999) 2 SCR 570.
[13] *Ibid* at para 29.
[14] *Ibid* at para 80.
[15] *Ibid* at para 30.
[16] *Dagenais v Pellerin*, 2022 ONCA 76 at para 1.
[17] *Ibid* at para 18.

is a perfect example of when an employee's "misbehaviour," or wrongdoing, can form the basis for a finding of their employer's vicarious liability.

d) *Cimpean v Payton*, (2008) OJ No. 2665

In *Cimpean v Payton*, the Ontario Superior Court considered whether the National Basketball Association ("**NBA**") was vicariously liable for an assault committed by three players (i.e., employees) from one of its teams, the Milwaukee Bucks (the **"Bucks"**).[18] There was a secondary question as to how liability could or should be split between the NBA and the Bucks.

Although the assault took place outside an adult entertainment lounge and the employees were clearly "off duty," the court found their actions to be within "the course of employment" as per their employment contracts. This was because the contracts included provisions mandating morality and good behaviour off-court and therefore had clearly outlined expectations in that regard.[19] Policy concerns were also at play, as the court held that holding the Bucks vicariously liable for the players' actions would cause the organization to take more serious measures to regulate players' behaviour and prevent such assaults from occurring in the future. In turn, the court found that the NBA had enough influence on the Bucks' business undertakings to be held vicariously liable for its negligence in failing to prevent the players' misconduct, with the ability to sanction players for off-court conduct and control its franchisee.[20]

This case clarified that when an employer makes it its business to attempt to control an employee's off-duty conduct, it can be held vicariously liable for the same.

e) *Ivic v Lakovic*, 2017 ONCA 446

In *Ivic v Lakovic*, a taxicab passenger alleged that she was sexually assaulted by a driver of United Taxi Limited ("**UTL**") after leaving a party intoxicated.[21] The passenger sued UTL, arguing that it was vicariously liable for the actions of its employee.

While UTL admitted that the driver was one of their employees, and it was found that the passenger was exposed to a situation in which she was vulnerable to an assault, these facts alone were not enough to hold the company vicariously liable. Following *Bazley*, the court found an insufficient connection to the employer's actions, deeming the claim only

[18] *Cimpean v Payton*, (2008) OJ No. 2665.
[19] *Ibid* at para 30.
[20] *Ibid* at paras 40 and 44-45.
[21] *Ivic v Lakovic*, 2017 ONCA 446 at para 2 [*Ivic*].

"coincidentally" connected. As such, the court upheld the finding that UTL was *not* vicariously liable.[22]

Since the decision in *Ivic*, Bill 148 has been passed.[23] This enactment has allowed more individuals to fall under the definition of employee in Ontario's *Employment Standards Act, 2000*, which will increase the number of possible claims against employers for damages related to the actions of their workers (perhaps, including employers in situations like that in *Dagenais*). Consequently, the implementation of preventative strategies (i.e., clear policies and training outlining what is expected from employees on the job and detailing what types of conduct employees should not engage in) to avoid exposure to vicarious liability is good practice.

2. Conclusion

The ability to hold an employer vicariously liable for the actions of their employee is entirely dependent on the facts of each case; namely, whether an employee's wrong is merely coincidentally linked to the employer or closely connected to a risk entailed in the employer's enterprise. As such, employers should be mindful of any acts they authorize their employees to do that could potentially lead to harm and implement policies to mitigate that risk.

In addition to commonplace misconduct, employers can also be liable for acts of sexual harassment or sexual assault that occur at work or work-related functions if they do not have procedures in place to investigate and act on complaints of this nature. This is reinforced by Bill 132's amendments to the *Occupational Health and Safety Act* in September 2016, which impose a duty on employers to watch out for and proactively combat sexual assault and harassment.[24] Although an employer can never fully control what employees do while at work, in any instance, having good organizational practices can lessen the risk of adverse outcomes.

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[22] *Ivic* at para 44.
[23] *Fair Workplaces, Better Jobs Act*, SO 2017, c 22.
[24] *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, SO 2016, c 2.

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TAB 10

The Eight-Minute Employment Lawyer 2023

Temporary Layoff, Long-Term Problems and Other Vexing Issues

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Temporary Layoff, Long-Term Problems and Other Vexing Issues

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Ontario employers sometimes find themselves in situations where they need to temporarily lay off employees due to unforeseen circumstances, such as a slowdown in business or a global pandemic. Since the COVID-19 pandemic, there has been a great deal of uncertainly surrounding the law on temporary layoffs, specifically as it concerns the rights of employees to claim constructive dismissal due to being placed on a layoff as a result of the pandemic. While many of these questions remain unanswered, to the dismay of employment lawyers everywhere, the Ontario Court of Appeal has recently answered some of our burning questions relating to temporary layoffs, including those related to condonation and the importance of contractual terms permitting an employer to place an employee on a temporary layoff.

This paper will start with an overview of the law of temporary layoffs, followed by an overview of the developments we saw during the COVID-19 pandemic, and then discuss the most recent updates from the Court of Appeal. This paper will then pivot and look at an interesting new case out of Alberta, ushering in the tort of harassment for the first time in that province.

Temporary Layoffs: The Basics

A temporary layoff is when an employer temporarily stops an employee's work with the intention of bringing them back to work at a later date. It is distinct from a termination of employment. According to the *Employment Standards Act, 2000*[1] ("ESA"), a temporary layoff can last up to 13 weeks within a 20-week period or up to 35 weeks within a 52-week period, in prescribed circumstances (where the employee continues to receive substantial payments from the employer or the employer continues to make payments on account of employee benefits or pension s. 56 (2) (b) ESA). Generally, if a layoff exceeds the maximum time permitted under the ESA, the layoff is deemed to be a termination of employment.

[1] *Employment Standards Act, 2000*, S.O. 2000, c. 41.

Uncertainty Surrounding Temporary Layoffs During COVID

On May 29, 2020, the Ontario government passed Ontario Regulation 228/20 (known as the Infectious Disease Emergency Leave (IDEL) provisions). As a result of this Regulation, if an employer temporarily reduced or eliminated an employee's wages or work hours for COVID-19 related reasons during the specified "COVID-19 period," such changes would not be deemed not to be a constructive dismissal.

While many employers relied on IDEL to protect against constructive dismissal claims employment lawyers and employees alike questioned whether given that, unless contractually agreed to, temporary layoffs generally constituted constructive dismissal at common law, had IDEL extinguished this claim.

The two most significant cases that were decided with regards to this question were *Coutinho v. Ocular Health Centre Ltd.*[2] and *Taylor v Hanley Hospitality Inc.*[3].

In *Coutinho*, the Superior Court of Justice determined that O. Reg 228/20 did not impact the common law right to pursue a civil claim for constructive dismissal. In effect, the Court accepted that reducing an employee's hours of work due to the pandemic and placing them on an "Infectious Disease Emergency Leave" as permitted under the legislation had no bearing on an employee's right to sue the employer for constructive dismissal.

Later that year, another case also considered this issue. In *Taylor* the Court stated that *Coutinho* was wrong. The Court in *Taylor* determined that by enacting O. Reg 228/20, employees on IDEL were on a leave of absence for all purposes. The Court also stated that the context of IDEL was important, finding that the legislature amended the ESA so employers would be shielded from the consequences arising from decisions to layoff employees in response to the pandemic and it would not have made sense for the legislature to do so if it meant exposing employers to constructive dismissal claims. The Court concluded that it did not make sense to rule on the one hand that an employee is on a lawful eave of absence for the purposes of the ESA but constructively dismissed at common law on the other hand. As a result, the Court

[2] 2021 ONSC 3076 [*Coutinho*].
[3] 2021 ONSC 3135 [*Taylor*].

determined that an employee placed on IDEL was not constructively dismissed for the purposes of either the ESA or the common law.

In 2022, *Taylor* was appealed to the Ontario Court of Appeal and the appellate court delivered its decision on May 12, 2022.[4] Unfortunately, the Court of Appeal did not take this opportunity to clarify the law. Rather, it returned the matter back to the Superior Court of Justice on other grounds and was silent on the issue of the interaction between employment standards legislation and common law constructive dismissal. With two contrary decisions issued by the Superior Court of Justice, there was no clear precedent on whether constructive dismissal damages under the common law were temporarily extinguished during the pandemic because of the emergency pandemic-related provisions in employment standards legislation.

Recent Updates from the Court of Appeal

In the recent Court of Appel decision, *Pham v. Qualified Metal Fabricators Ltd.*[5] ("*Pham*"), the Court clarified that unless an employee's employment contract provides otherwise via an express or implied term, an employer's unilateral lay off of an employee will constitute constructive dismissal, even when the layoff is temporary and in accordance with the requirements of the ESA. Further, the Court found that silence from an employee during a temporary layoff does not equate to condonation, which requires a positive action on the part of the employee.

The employee began his employment with the employer in October 2000. On March 23, 2020, the employee was given a "Notification of Temporary Layoff", which stated that due to budgetary considerations and recent slowdown, he would be placed on temporary layoff with continued benefits for 13 weeks "in accordance with [the employee's] work agreement." The notification also provided that the layoff was subject to Ontario Regulation 228/20 under the *Employment Standards Act, 2000*. The employer subsequently extended the employee's layoff multiple times. In December 2020, the employee consulted a lawyer and wrote to the employer to advise that he was bringing a claim for wrongful dismissal.

[4] 2022 ONCA 376.
[5] 2023 ONCA 255 [*Pham*].

On February 9, 2021, the employer sent the employee a recall letter. However, by that time, the employee's Statement of Claim had already been issued and since the employee had secured alternate employment, he did not respond to the recall letter.

i. Motion for Summary Judgement

The employer then brought a motion for summary judgment to dismiss the employee's claim on the basis that the employee had agreed to or condoned the layoff. The motion judge granted the employer's motion for summary judgment and dismissed the claim for wrongful dismissal, finding that the employee condoned the layoff and therefore was not constructively dismissed.

The employee appealed the decision, arguing that the motion judge erred in several ways, including in finding an implied agreement to layoff and condonation.

ii. The Court of Appeal

The Court of Appeal overturned the motion judge's decision, finding that the motion judge's decision was based on an incorrect view of the law surrounding temporary layoffs and condonation of fundamental changes to terms and conditions of employment. The Court reviewed the general legal principles for constructive dismissal, which provide that in the absence of an express or implied term in an employment agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment contract that constitutes constructive dismissal, even when the layoff is temporary. In such cases, an employee has a right to pursue a claim for constructive dismissal. The fact that the employer laid off other employees did not constitute an implied term of the employee's employment agreement permitting his layoff. The Court noted that an implied term that the employer has a right to lay off an employee "must be notorious, even obvious, from the facts of a particular situation."[6]

Although the employee had signed the layoff letter, the court found that the letter did not constitute condonation of the layoff because there was no evidence that it was anything more than the employee's acknowledgment that he received the employer's layoff terms. The court held further that "although the motion judge was alive to the concern of reasonable time,

[6] *Ibid at* para 31 citing *Michalski v. Cima Canada Inc*., 2016 ONSC 1925, at para. 22.

he erred in equating silence during these reasonable periods, with condonation."[7] The employee's failure to object to the layoff did not constitute condonation. According to the court, not only may an employee take reasonable time to assess the new terms of their contract before advancing a constructive dismissal claim, but "condonation in the face of a layoff is expressed by positive action."[8] The type of positive action referred to by the court **"includes expressed consent to the layoff or expressing a willingness to work before claiming wrongful dismissal such that the employer would reasonably believe that the employee consented to the change in the terms of employment"**, of which there was no evidence in this case. Moreover, the Court held that "there is no requirement for an employee to ask when they might be called back to work before commencing an action for constructive dismissal."[9]

Based on the foregoing, the Court of Appeal held that there was no evidence to support the motion judge's conclusion that the wrongful dismissal action should be dismissed. On the contrary, the Court held there is a live issue as to whether there was condonation[10] and remitted the action for wrongful dismissal back to the Superior Court for trial.

iii. Key Takeaways from *Pham*

The key takeaways from this decision for both employees and employers are:

- An employee who signs a layoff letter is not accepting the legality of the letter, only acknowledging its receipt.
- An employee is permitted reasonable time to assess contractual changes before they are forced to take an irrevocable legal position.
- Condonation in the face of a layoff is expressed by positive action. Positive action includes expressed consent to the layoff or expressing a willingness to work before claiming wrongful dismissal such that the employer would reasonably believe that the employee consented to the change in the terms of employment.
- The fact that the employee was not actively at work during the layoff period means that he could not condone the change in his employment.

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[7] *Ibid at* para 54.
[8] *Ibid*.
[9] *Ibid at* para 57.
[10] *Ibid at* para 58.

- There is no requirement for an employee to ask when they might be called back to work before commencing an action for constructive dismissal.
- This decision highlights the importance for employers of building an express term permitting layoffs into an employee's employment contract to mitigate against the risk of a constructive dismissal claim in the face of a layoff.

It is important to note that this case has not definitively resolved any substantive issues, as the Court remitted the action for wrongful dismissal back to the Superior Court for trial because condonation was not established. Moreover, although the Court of Appeal again could have considered O. Reg 228/20, it declined to do so in this case. Finally, the Court did not discuss the tension between COVID-19 layoffs and an individual's common law rights.

The findings of the Court of Appeal in *Pham* with respect to the issue of condonation varies greatly from what the Alberta Court of Appeal recently held in the case of *Kosteckyj v. Paramount Resources Ltd.*[11]. In this case, the Court held that the 25 days within which the employee worked following the salary reduction was sufficient for them to decide whether they accepted the employment changes or not. Justice Wakeling went a step further and said it was reasonable for the Employee to decide within 10 business days (up to 15 business days for employees without the same knowledge and attributes of the Employee) whether to accept or reject the reduction in compensation. This is a cautionary tale for employee counsel of the importance of assessing each case on its own facts to determine when and what positive action is required to mitigate against a finding of condonation in a constructive dismissal claim.

Alberta's New Tort of Harassment

The Court of King's Bench of Alberta has recently expanded the law of harassment by establishing an independent tort of civil harassment in the province. In the recent case of *Alberta Health Services v Johnston*[12], the court observed that existing tort law did not adequately address the harm caused by harassment.

[11] 2022 ABCA 230.
[12] 2023 ABKB 209.

In this case, Kevin Johnston, an online talk show host and candidate in Calgary's mayoral election, defamed and harassed an Alberta Health Services (AHS) public health inspector. Among other things, Mr. Johnston alleged the public health inspector was a "terrorist" and a "fascist" due to her involvement in the implementation of public health measures related to COVID-19. He also mocked the plaintiff and her family while using pictures of them from the plaintiff's social media and his statements could reasonably be interpreted as inciting his followers to enact violence against the plaintiff and her family. He also threatened to use his mayoral powers to send her to prison if he won the election. The plaintiff was awarded $100,000 in general damages for the tort of harassment. (Damages for defamation and aggravated damages of $250,00.00 were also awarded).

While there was human rights and health and safety legislation that provided employee protections from and limited remedies for harassment, there was no formally recognized tort of harassment in Alberta. As such, it was determined that a gap existed in the law, as the complex nature of harassing behaviour did not always fit neatly into existing causes of action. The Court noted that no existing tort fully addressed the harm caused by harassment, in that the torts of defamation and assault only captured harassing behaviour if there were other circumstances present, such as reputational damage or threats of physical harm.

The Court defined the tort of harassment as follows:

- The defendant has engaged in repeated communications, threats, insults, stalking, or other harassing behaviors in person or through other means;
- That they knew or ought to have known was unwelcome;
- Which impugn the dignity of the plaintiff, would cause a reasonable person to fear for their safety or the safety of their loved ones, or could foreseeable cause emotional distress; and
- Caused harm.

Ontario courts have attempted to recognize a tort of harassment in the past, such as in *Merrifield v. Canada (Attorney General)*[13]. However, when *Merrifield* advanced to the Court of

[13] 2017 ONSC 1333.

Appeal[14], it was held that the Superior Court had erred by recognizing a tort of harassment. According to the Court of Appeal, the proposed tort of harassment was, in essence, a less onerous version of the already well-established tort of "intentional infliction of mental suffering" and this was not a case "whose facts cried out for the creation of a novel legal remedy." In 2021, the Superior Court of Justice in *Caplan v Atlas*, 2021 ONSC 67 distinguished itself from *Merrifield*, find that there was a compelling reason to recognize the tort in this case, and recognized a new tort of online harassment.

Given the importance of the issue, and its variable treatment by provincial courts, it seems likely that the Alberta Court of Appeal or other appellate level courts will eventually weigh in on the matter. It again underscores the importance of employers having appropriate workplace policies and processes to address and effectively respond to issues of harassment as they arise in the workplace.

[14] 2019 ONCA 205 [*Merrifield*].

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TAB 11

The Eight-Minute Employment Lawyer 2023

The Promise of Bill C-65

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The Promise of Bill C-65

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How do we address workplace violence? Work has been acknowledged by the Supreme Court as "one of the most fundamental aspects in a person's life… A person's employment is an essential component of their sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect. "[1] A recent survey conducted by the federal government revealed that 6o% of the survey respondents had experienced harassment in the workplace while 30% had experienced sexual harassment, 21% experienced workplace violence, and 3% experienced sexual violence. [2] Viewed in this light, the question of how best to prevent, interrupt, and address workplace violence is not an esoteric or academic question but should in fact be at the heart of employment law.

On November 7, 2017, the Honourable Patty Hajdu, Minister of Employment, Workforce Development and Labour introduced *Bill C-65: An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1,* which aimed to revamp the approach taken to harassment and violence in the context of federal workplaces. Bill C-65 made significant changes to the *Canada Labour Code* and introduced the *Workplace Harassment and Violence Prevention Regulations* which came into force on January 1, 2021 and replaced Part XX of the *Canada Occupational Health and Safety Regulations.*

The bill was presented as being built upon three pillars: preventing incidents of violence and harassment from occurring, responding effectively to these incidents

[1] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, at para 91. See also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986.
[2] Harassment and Sexual Violence in the Workplace, Government of Canada, 2017 https://www.canada.ca/en/employment-social-development/services/health-safety/reports/workplace-harassment-sexual-violence.html

when they do occur, and supporting victims, survivors and employers in the process.[3] Due to the recency of this change, the case law on this issue is currently being developed. This paper will dive into some of the legislative changes to determine whether this bill will live up to its promise of preventing, responding to, and supporting victims of workplace harassment.

A definition of workplace violence

In order to address violence in the workplace, it is necessary to define it. The *Canada Occupational Health and Safety Regulations* did not define harassment although workplace violence was defined as "any action, conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee."[4]

Bill C-65 replaced this definition with the following:

> Harassment and violence means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.[5]

This expanded definition represents an important move forward as, prior to the legislative change, some employers had argued that they were not required to appoint an investigator if harassment allegations did not meet the definition of workplace violence set out in the *Canada Occupational Health and Safety Regulations*.[6] The adoption of a more expansive definition that encompasses physical and psychological harm provides employers, employees, and decision makers with a shared understanding of the breadth of workplace harassment and violence and replaces the patchwork of individual workplace definitions that existed prior to the change.

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[3] Employment and Social Development Canada, "Government of Canada takes strong action against harassment and sexual violence at work", November 7, 2017, https://www.canada.ca/en/employment-social-development/news/2017/11/government_of_canadatakesstrongactionagainstharassmentandsexualv.html

[4] *Canada Occupational Health and Safety Regulations*, SOR/86-304, s. 20.2

[5] *Canada Labour Code*, RSC 1985, c L2, s. 122(1).

[6] See for example, *Public Service Alliance of Canada v. Canada (Attorney General)*, 2014 FC 1066 (CanLII), [2015] 3 FCR 649, https://canlii.ca/t/gfrqn

Strict employer time limits

Under the *Canada Occupational Health and Safety Regulations*, if an employer became aware of workplace violence or alleged workplace violence, they were required to attempt to resolve the matter with the employee as soon as feasible.[7] In contrast, the new *Workplace Harassment and Violence Prevention Regulations* mandate strict timelines that employers must meet at each stage of the investigation process. Within seven days of receiving a notice of occurrence of workplace harassment and/or violence, the employer is required to contact the person experiencing the harassment and /or violence to advise them of the Regulations, the steps in the resolution process, and the fact that they can be represented throughout this process.[8] Within forty-five days of receiving the notice of occurrence, the employer is required to attempt to resolve the complaint via negotiated resolution,[9] and must ensure that the process is completed within one year after the day on which the notice of occurrence was provide.[10] An employer who fails to meet these time limits must document the reason why and is required to keep a record of this for ten years.[11] The implementation of strict employer time limits is an improvement on the previous legislation which resulted in significant delays in the investigation of harassment complaints.

No time limit for employees

One site of tension with regards to the implementation of measures to address workplace harassment and violence is how to deal with the matter of timeliness. Employers must be incentivized to act quickly to address violence as it occurs and, as with any investigation, memories may be compromised by time and important witnesses may change positions or move away. However, survivors of workplace harassment and violence, particularly sexual violence, may delay reporting these events out of fear of reprisal, embarrassment/shame, fear of not being believed,

[7] *Canada Occupational Health and Safety Regulations,* s. 20.9 (2)
[8] *Workplace Harassment and Violence Prevention Regulations*, SOR/2020-130, s. 20, https://laws-lois.justice.gc.ca/eng/regulations/SOR-2020-130/page-2.html#docCont
[9] Ibid at s. 23(1)
[10] Ibid at s. 33(1)
[11] Ibid at s. 35(f)

and being unsure if what they experienced could be classified as sexual violence.[12] For that reason, the institution of a hard time limit to bring forth a complaint represents a significant hurdle for individuals who have experienced violence and harassment in the workplace. Bill C-65 acknowledges the need for finality and certainty in the complaint resolution process, while still recognizing the reality that many individuals may initially delay reporting. To that end, the *Canada Labour Code* does not prescribe a time limit for current employees to report an occurrence. However, former employees must make a complaint within three months after the day on which they ceased to be employees. [13] Although former employees will have access to internal complaint mechanisms after they leave employment, the institution of a three-month time limit may prove problematic.

The Head of Compliance and Enforcement may extend the time period if a former employee demonstrates in an application that they were unable to make the occurrence known to the employer within the time period either because they incurred trauma as a result of the occurrence or because of a health condition.[14] Although this measure does provide some marginal protection to former employees, employees may not be aware of their right to request an extension and may not know how/where their application must be made. The fact that the Head of Compliance and Enforcement may extend the time period suggests that this is discretionary and former employees who delay reporting may nevertheless see their applications denied.

Multiple avenues for resolution and supporting employee agency

Individuals who experience workplace harassment will now have three avenues for redress: negotiated resolution, conciliation, and/or an investigation. These processes are permitted to run in parallel until an investigator issues a report. Once the investigator issues their report, resolution by conciliation or negotiated resolution are no longer possible. [15] The inclusion of conciliation and negotiated resolution as options for addressing workplace harassment and violence complaints

[12] Supra note 2.
[13] *Workplace Harassment and Violence Prevention Regulations*, SOR/2020-130, s. 4.
[14] Ibid at s. 3
[15] Ibid at s. 23 (1) and 24.

may prove beneficial to employers and employees by providing a less adversarial option than a formal investigation and may, if done correctly, adopt a restorative justice approach that centralizes the needs of the person experiencing the harassment/violence.

One question that may be at the forefront of the minds of individuals experiencing workplace harassment and/or violence is whetehr the employer can compel their participation in any of the aforementioned processes. The employer is required to conduct a review of every notice of occurrence, including anonymous ones submitted by witnesses.[16] They must then contact the individual who has been identified as having experienced harassment and advise them how the workplace harassment and violence policy can be accessed, the steps of the resolution process, and the fact that they may be represented during the resolution process.[17] However, the individual facing the harassment may end the resolution process at any time by informing the employer that they choose not to continue.[18] Therefore, employees now have some measure of protection against being forced to testify or participate in a workplace violence investigation against their will provided that they are the ones who have experienced the harassment.

Section 25 (1) seeks to protect the agency of individuals experiencing workplace violence in a similar way by mandating that, if the occurrence is not resolved under conciliation or negotiated resolution, an investigation must be carried out if the principal party requests it.[19] The addition of "if the principal party requests it" may be beneficial as it provides the employee with some measure of control. However, it also highlights the importance of employers making the *Workplace Harassment and Violence Prevention Regulations* widely available and of providing adequate training so that employees are aware of their rights. Similarly, if the employer fails to adequately resolve the harassment complaint, the employee can refer the complaint to the Minister of Labour. On completion of their investigation, the Minister is empowered to issue a direction or recommend that the employer and

[16] Ibid at s. 15 (4) and 19(1)
[17] Ibid at s. 20
[18] Ibid at s. 18
[19] Ibid at s. 25(1)

employee resolve the matter themselves.[20] This recourse is also available to an employer who disagrees with the findings of a workplace harassment investigation.[21]

Although the settlement options provide the affected employee with agency and some measure of control over the process, it is important to note that they are required to make every reasonable effort to resolve their complaint via negotiated resolution.[22] This includes reviewing the occurrence with the employer to determine if it meets the definition of harassment and, if the employer and employee determine that the occurrence does not constitute harassment, this can end the process provided that an investigation report has not already been released.[23] As the Supreme Court stated in *McKinley v. BC Tel*, 2001 SCC 38, the power imbalance between an employer and employee is ingrained in most facets of the employment relationship and this inequality in bargaining power places employees in a particularly vulnerable position vis-à-vis their employer.[24] As previously discussed, one of the reasons that some individuals hesitate to report their workplace violence and harassment is a fear of not being believed or uncertainty regarding whether what occurred was harassment. Again, although it is too soon to tell how this provision will be applied, it is nevertheless easy to imagine a scenario where vulnerable employees find themselves gently convinced by their employer that was occurred was not serious and/or did not amount to harassment.

The conclusion of the process

One aspect of Bill C-65 that remains potentially problematic is how a workplace harassment investigation is brought to a close. If the complaint is not resolved by negotiated resolution or conciliation, it will be considered concluded when the employer implements the recommendations made by the investigator.[25] Although there have been no cases grappling with the new regulations, CBC News recently reported on a case of workplace harassment in the federal sector that demonstrates

[20] *Canada Labour Code*, R.S.C., 1985, c. L-2, s. 127.1(8)
[21] Ibid at s. 127.1 (8)
[22] Ibid at s. 23(1)
[23] *Ibid* at s. 23(2) and 23(3).
[24] *McKinley v. BC Tel,* 2001 SCC 38, https://canlii.ca/t/521q at para 54
[25] Supra note 8 at s. 32(c)

the danger of ending the process once the recommendations have been implemented.

In 2019, an independent investigator determined that Rachel Hansen, a Parks Canada employee based in Inuvik, Northwest Territories, had experienced workplace sexual harassment. The investigator made several recommendations which included having Ms. Hansen and her harasser leave at different times and via different routes. However, when the individual who had harassed Ms. Hansen failed to modify his behaviour, she was required to go on stress leave. When Ms. Hansen attempted to return to the workplace, her physician recommended that she not work in the same section as the harasser. Parks Canada took this recommendation and interpreted it to mean that Ms. Hansen could not return to the workplace at all.[26] As Ms. Hansen's case illustrates, the way in which recommendations are implemented may significantly impact the victim's ability to function in the workplace. Without an adequate follow-up or enforcement mechanism, it is possible that employers may implement such recommendations in a haphazard or lackadaisical manner that ultimately re-traumatizes survivors of workplace harassment and violence.

The employer veto

Unfortunately, one barrier to the successful resolution of workplace violence concerns is often the employer's response. Prior to the enactment of Bill C-65, there were a litany of cases of workplace harassment and violence that saw inadequate employer responses, inappropriate resolutions, and incompetent investigations. For example, in *Doro v. Canada Revenue Agency*, 2019 FPSLREB 6, in response an employee's complaint that she was being sexually harassed, the employer, the Canada Revenue Agency (CRA), pressured the complainant to either move her workplace to a new city, stay home and telework, or move to a new floor.[27] This prompted Adjudicator Gray to remark that, while the CRA may have responded promptly, it did not respond effectively.[28]

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[26] Parks Canada Employee Found to be Victim of Workplace Sexual Harassment Fighting to Return, CBC News, December 22, 2021, online: https://www.cbc.ca/news/canada/north/parks-canada-sexual-harassment-1.6238820
[27] *Doro v. Canada Revenue Agency*, 2019 FPSLREB 6 (CanLII), https://canlii.ca/t/hz4cg at para 66
[28] Ibid at para 133

Although Bill C-65 was presented as a means of ensuring that employers take effective steps to address workplace violence and harassment,[29] the resulting *Workplace Harassment and Violence Prevention Regulations* reveals something quite different in practice in the form of section 2. Section 2 of the *WHPA Regulations* states:

> If an employer and the policy committee, the workplace committee or the health and safety representative are unable to agree on any matter that is required by these Regulations to be done jointly by them, the employer's decision prevails.[30]

On its own, this provision appears innocuous, but when read in conjunction with section 31(1) of the Regulations, it becomes problematic. Section 31(1) specifies that an employer and the workplace committee, or the health and safety representative, must jointly determine which of the recommendations set out in the investigators report that it will follow.[31] Although an employer is bound to implement all of the selected recommendations,[32] the fact that the employer gets final say if there is a disagreement undermines the efficacy of the health and safety committees and could result in employers prioritizing individualistic and inexpensive recommendations that ultimately leave the underlying workplace conditions that facilitated the violence or harassment unaddressed. It is too early to tell how this provision will be implemented in practice, but its presence slightly undercuts the framing of this legislation as ensuring employer compliance. Although it is clear that employers will be held to their *procedural* obligations regarding timelines, the wording of the *Workplace Harassment and Violence Prevention Regulations* renders it unclear whether employers will be permitted to sidestep investigator recommendations that they do not agree with.

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[29] Government of Canada Takes Strong Action Against Harassment and Sexual Violence at Work, press release, November 7, 2017, https://www.canada.ca/en/employment-social-development/news/2017/11/government_of_canadatakesstrongactionagainstharassmentandsexualv.htm

[30] Supra note 8 at s. 2

[31] Ibid at s. 31(1)

[32] Ibid at s. 31 (2)

The lived experience of the investigator

The difficulty in addressing and investigating workplace violence is that the individuals doing so come with their own particular biases. Although the new definition of harassment and workplace violence is expansive, it remains to be seen whether this definition will be responsive enough to account for systemic and subtle forms of workplace violence and harassment like, for example, microaggressions. Microaggressions have been defined as "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights and insults toward the target person or group."[33] Whether someone has the ability to recognize these more subtle, but no less damaging, forms of harassment may hinge on their training and lived experience.

Section 28 (1) of the *Workplace Harassment and Violence Prevention Regulations* outlines the qualifications that an investigator must hold. They must be trained in investigative techniques, have knowledge, training and experience that are relevant to harassment and violence in the workplace, and must have knowledge of the *Canada Labour Code*, the *Canadian Human Rights Act*, and any other legislation that is relevant to harassment and violence in the workplace.[34] However, there is no requirement that investigators be appointed from diverse backgrounds or have a range of lived experiences. This potential pitfall was in the mind of MP Karine Trudel when she stated the following at Bill C-65's second reading:

> Apparently, the recommendation made by the UN Secretariat concerning labour was not good enough for the Liberals, because they did not let Canada adopt legislation to guarantee equality and non-discrimination in the investigators' profile. We need to remember that minorities are disproportionately affected by workplace harassment and violence. By "minority" I mean members of an ethnic or religious minority as well as lesbian, gay, bisexual, transgender, and intersex workers, and migrant

[33] Ronald Wheeler, "About Microaggressions", Law Library Journal Vol 108:2 [2016-15], https://www.aallnet.org/wp-content/uploads/2018/01/vol-108-no-2-2016-15.pdf at p. 1
[34] Supra note 8 at s. 28 (1)

> workers. That is why the profile of individuals responsible for the investigation must at all costs reflect diversity. However, it seems that our legislation will not take into account national diversity in the selection of investigators, and that is very unfortunate.[35]

Despite MP Trudel's concerns, Bill C-65 does not require a consideration of equity concerns in the assignment of an investigator, nor does it require that investigators have undergone unconscious bias training. Again, it is too soon to determine the ultimate impact that this will have on how such investigations are conducted, but it does illustrate that the workplace is not hermetically sealed against broader systems of oppression and that addressing workplace violence requires grappling with the unconscious biases of, not only the individuals committing workplace harassment and violence, but also those of employers, investigators, and institutions.

The issue of available remedies

It is important to note that one aspect that Bill C-65 has not addressed is compensation. Bill C-65 has provided a more streamlined approach to addressing workplace violence and harassment but has not displaced the need for either the grievance procedure or applications to the Canadian Human Rights Tribunal. Individuals seeking damages will still be required to make use of those procedures and the applicable timelines continue to apply. Section 123.1 of the *Canada Labour Code* specifies that nothing regarding occupational health and safety may be construed as abrogating or derogating from the rights provided for under the *Canadian Human Rights Act*.[36]

The issue of remedy becomes more complex when the person engaging in violence and harassment is not an employee or ceases to be an employee. Under the *Workplace Harassment and Violence Prevention Regulations*, employers are required to carry out workplace assessments that consists of identifying risk factors that contribute to harassment and violence in the workplace and developing and

[35] *Hansard*, 42nd Parl, 1st Sess (May 7, 2018), online: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-293/hansard
[36] *Canada Labour Code*, R.S.C, 1985, c L-2, s. 123.1, https://laws-lois.justice.gc.ca/eng/acts/L-2/index.html

implementing preventative measures.[37] If an individual who engaged in the workplace violence and harassment ceases to be an employee, the only requirement that the employer has is that it, and the health and safety committee, must review and update their workplace assessment.[38] Again, one of the stated goals of Bill C-65 was to provide support to employees experiencing violence, but it is apparent that the requirement that the employer review its policies falls far short of providing such support. Similarly, section 13 requires an employer to convey information respecting medical, psychological, and other support services available within their geographical area, but does not require that the employer compensate the employee for any out of pocket costs associated with those services. [39] It is therefore important that individuals who have experienced workplace violence and harassment, particularly from individuals who are not employees or are former employees, continue to exercise their rights under collective agreements or via the Canadian Human Rights Tribunal in order to ensure that they are afforded some form of redress.

Conclusion

In conclusion, the coming into force of Bill C-65 and the creation of the *Workplace Harassment and Violence Prevention Regulations* represents a mixed blessing for workers experiencing workplace harassment and violence. Employers, employees, and decision makers now have an expansive shared definition of what constitutes workplace violence and harassment. Employees now have some measure of agency in that they can select what type of resolution process they would like to engage with, have the power to stop the process at any point, and have recourse under the *Canada Labour Code*'s internal complaint mechanisms if they feel as though their complaint has been inadequately addressed. Likewise, the introduction of clear timelines for employers provides for a more streamlined and less piecemeal approach. However, Bill C-65 will likely not result in a displacement of grievance procedures or applications to the Canadian Human Rights Tribunal for those workers seeking damages for a breach of their rights. Similarly, the presence of an

[37] Supra note 8, a s. 5(1)
[38] Ibid at s. 6(1)(b)
[39] Supra note 8, at s. 13

employer veto in the *Regulations* may limit what recommendations the employer ultimately adopts and the lack of diversity in the appointment of investigators may leave unconscious bias and microaggressions unaddressed. As cases grappling with these legislative changes begin to emerge, we will hopefully find that Bill C-65 has lived up to its potential and avoid these pitfalls.

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TAB 12

The Eight-Minute Employment Lawyer 2023

Refresher on Family Status Discrimination and Accommodations

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Prepared for The Eight-Minute Employment Lawyer 2023

Introduction

Under the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*"), individuals are entitled to be free of discrimination and to receive accommodations up to the point of undue hardship in their employment on the basis of family status. The *Code* defines family status as "being in a parent and child relationship," such that the Code ground of family status protects parents caring for children (whether the relationship is established by blood, fostering or through step-parenting), younger individuals caring for aging parents or relatives with disabilities, and any such relationships involving LGBTQ+ individuals. Although the ground of family status protects and is most often raised with respect to an individual's caregiving responsibilities, at this time, the Code's definition of family status does not extend to protect extended family members (e.g. aunts, uncles, nieces and nephews) or the kind of "chosen family" support systems often relied on by LGBTQ+ or disabled individuals.

The Test for Family Status Discrimination for Employees

While the test for family status discrimination does vary across Canadian jurisdictions, the Human Rights Tribunal of Ontario ("HRTO") held in *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229 ("*Misetich*") that the test to establish family status discrimination is the same as with respect to all other Code grounds:

1. The employee must establish that they have a characteristic protected from discrimination under the Code (i.e. that the ground of family status applies to their circumstance);
2. The employee must establish that they suffered an adverse impact in their employment; and,
3. The employee must establish that their protected characteristic (i.e. their family status) was a factor in the adverse impact suffered.

In our review of the HRTO's recent decisions, numerous applications, including applications alleging discrimination and/or failure to accommodate on the basis of family status, are being dismissed summarily for failing to point to any evidence beyond subjective belief that links the applicant's protected characteristic to the adverse impact suffered. However, where an individual is able to establish the above, the employer then bears the burden to demonstrate that accommodating the employee would create a situation of undue hardship.

Employers who fail to engage in an accommodation analysis or conversation with the employee will be vulnerable to claims of discrimination. In *Kendrick v. Canadian Air Specialists Incorporated*, 2022 HRTO 1441, for example, when the employee returning from maternity leave advised her employer that she would not be able to work the proposed schedule of hours, the employer simply told her that she could not be returned to her pre-maternity leave schedule and that they did not know whether a position was available for her at all. The employer did not respond to the employee's human rights application in this

case, and the HRTO found discrimination on the basis of family status and awarded the employee $15,000 in general damages, and $9,464 as damages for loss of wages.[1]

The accommodation analysis is a multi-party inquiry in which the employee is responsible for requesting accommodation and cooperating in the accommodation conversation, including by providing their employer with sufficient information relating to the family-related needs and working with the employer to identify possible solutions.[2] Employees are not able to insist on a particular accommodation and resign when such an accommodation is denied.[3] The employee is not expected to exhaust or consult all self-accommodation avenues before a finding of discrimination can be made under the Code, but as the approach to family status discrimination involves a contextual analysis, the employee's ability to reasonably self-accommodate is a relevant factor in the overall assessment of whether they participated appropriately in the accommodation conversation/process with their employer.[4]

In comparison to the *Misetich* framework to establish family status accommodation that has been repeatedly affirmed by the HRTO, federal courts and the Ontario Superior Court of Justice also tend to rely on a separate test established by *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 ("*Johnstone*"). Under the *Johnstone* test, in order to make out a prima facie case of family status discrimination,[5] the individual advancing the claim must show:

1. That a child/parent is under his or her care and supervision;
2. That the caregiving obligation at issue engages the individual's legal responsibility, rather than just a personal choice;
3. That the individual has made reasonable efforts to meet the caregiving obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible (an element not required under the *Misetich* approach to establish prima facie discrimination); and,
4. That the impugned workplace rule interferes, in a manner that is more than trivial or insubstantial, with the fulfillment of the caregiving obligation.

There is some confusion about which test properly applies in undertaking a family status discrimination analysis in Ontario. *Johnstone* was decided in 2014 and adopted as the "leading Canadian authority on family status discrimination" in 2015,[6] whereas *Misetich* clarified the test for family status discrimination in 2016, but in subsequent decisions, the HRTO has restricted its analysis on family status discrimination to the *Misetich* test whereas both labour arbitrators and the Superior Court of Justice have considered both the *Misetich* and *Johnstone* tests together in analyses.[7] Notably, the Divisional Court's 2019 decision in *Paternel* acknowledged that *Misetich* and *Johnstone* provide two separate lines of authority in Ontario's family status discrimination analysis, the Divisional Court declined to clarify which line of authority should

[1] *Kendrick v. Canadian Air Specialists Incorporated*, 2022 HRTO 1441, at para 36.
[2] *Espinoza v. The Napanee Beaver Limited*, 2021 HRTO 68 at para 90 ["*Espinoza*"].
[3] *Ibid* at para 99.
[4] *Ibid* at paras 95 – 97.
[5] Although *Johnstone* was originally formulated in the context of childcare obligations, subsequent Federal Court authority has provided that *Johnstone* equally applies in the context of eldercare obligations; see *Canada (Attorney General) v. Hicks*, 2015 FC 599 at para 71.
[6] *Partridge v. Botony Dental Corporation*, 2015 ONSC 343 at para 87.
[7] See for example: *Interim Place v Ontario Public Service Employees Union – Local 518*, 2020 CanLII 17782 (ON LA); *Peternel v. Custom Granite & Marble Ltd.*, 2018 ONSC 3508, aff'd 2019 ONSC 5064 (Div. Ct.) ["*Peternel*"].

prevail in Ontario. [8] it is now common for decision-makers to apply both tests in analysis, or to apply principles from both tests without specifying which test is preferred, to conclude that based on the facts, the analytical result is the same regardless of the application of either the *Misetich* of *Johnstone* analysis.[9]

Recent Family Status Discrimination Jurisprudence

In the past few years, very few applications to the HRTO alleging discrimination on the basis of family status have been heard on their merits. An increasing number of applications are being summarily dismissed at early stages of the hearing process for applicants' failures to provide evidence that their family status was connected to the adverse impact they allege. However, we do have some examples of cases from the arbitration contexts where the assessments relating to family status discrimination are instructive in the present era.

In *Toronto (City) v Canadian Union of Public Employees, Local 79*[10], though Arbitrator Sheehan found that the grievor did not successfully establish prima facie family status discrimination, he awarded the grievor $1,000 in damages for the employer's failure to keep the grievor's family status circumstances confidential. The grievor had requested the accommodation of adjusted hours of work for the 2016/2017 school year, stating that she needed to leave work early to receive her children at home after school. The grievor had stated that her children needed to be bussed home from a private school and that the family could not afford after-school care or make alternative arrangements, such that the accommodation was necessary. The employer had applied the *Johnstone* test in the fall of 2016 (prior to the release of the *Misetich* decision) and refused the accommodation.

Arbitrator Sheehan found that the grievor was pursuing a personal choice rather than a legitimate need relating to the childcare issues in requesting accommodation—he found that after-school care was available and at least comparable to the cost of the after-school bus, and therefore, the grievor's professed need for accommodation (that she be allowed to leave work early to receive her children from the school bus) was in fact a personal choice as opposed to a *bona fide* childcare need. In other words, if the grievor's children could have been placed into after-school care that was at least comparable to the cost of the after school bus, then the grievor or her spouse could have picked up their children after leaving their respective jobs without a significant adverse impact on the grievor in either her employment or in the family's personal finances. Arbitrator Sheehan noted that it would have been more reasonable for the grievor to conclude that given that the children would be unsupervised at home if they were bussed home, the bussing option "was just not viable."

However, the arbitrator also noted that the employer had made the grievor's direct supervisor the de facto point of contact on the accommodation conversation in that the supervisor conveyed the grievor's information and requests to the employer's internal decision-maker. The arbitrator found that the supervisor's superfluous access to the grievor's confidential information meant that "the Employer did not treat the grievor with the respect and dignity she was entitled to; and by doing so, breached… its procedural obligations associated with the duty to accommodate." Though neither the employer nor the

[8] *Ibid*, 2019 ONSC 5064 at para 32.
[9] *Idem*; *Simpson v. Pranajen Group Ltd. o/a Nimigon Retirement Home*, 2019 HRTO 10 at para 31
[10] 2022 CanLII 51865 (ON LA) ["*Toronto*"].

grievor's supervisor was found to have conducted themselves in bad faith, Arbitrator Sheehan awarded the grievor $1,000 as general damages.

In *United Steelworkers Local 2251 v Algoma Steel Inc.*[11], Arbitrator Jesin allowed a grievance where the employer's policy in response to COVID-19 measures imposed an adverse effect on one of its employees. The grievor was a dual citizen of Canada and the USA who lived in Michigan with his two (2) minor children and worked in Sault Ste. Marie, such that he crossed the national border daily for work. After the outbreak of the COVID-19 pandemic, the federal government enacted an emergency order requiring individuals who enter Canada via the USA to self-isolate for 14 days; the order exempted the grievor under the category of persons who cross the border regularly in the course of their employment, but the employer instituted its own policy requiring employees who crossed the border to self-isolate for 14 days without exemption. As a result, the grievor was essentially faced with a choice of maintaining access to his children or maintaining his ability to work for his employer in Canada. Arbitrator Jesin found that it was unreasonable for the employer to have "forced" the grievor to make such a choice without meaningfully considering accommodation in the circumstances, such as allowing the grievor to work away from other employees or requiring the grievor to adhere to increased protocols related to workplace distancing and/or the wearing of personal protective equipment. The employer could also have simply assigned the grievor different shifts or required him to undertake COVID-19 testing as appropriate. Arbitrator Jesin directed the employer to allow the grievor to work without requiring him to adhere to the employer's all-encompassing self-isolation policy.

Based on these instructive cases, employers should continue to follow the below best practices in engaging with employees in the context of requests for workplace accommodations:

1. Always engage with the employee in good faith, and with the understanding that the procedural duty to accommodate requires ongoing conversations, the ability to request clarifying details from the employee, and a contextual analysis of what the employee is really asking for.
2. A contextual analysis of any employee's accommodation request requires parsing whether the ground of family status is engaged, whether the ask is based on a personal choice in caregiving arrangements or a bona fide lack of alternative caregiving arrangement, and should never involve a flat or summary refusal to the employee's request.
3. A contextual analysis means an individualized analysis from employee to employee, meaning that an appropriate solution or accommodation for one employee may not be appropriate for another employee.
4. Where there is a workplace rule or policy that does adversely affect the employee on the basis of their family status (e.g. by requiring the employee to take unpaid leaves or reduced positions), the employer must always undertake an internal analysis of whether the workplace rule is a bona fide occupational requirement ("BFOR"). To establish a workplace requirement as a BFOR, the employer must (1) establish that it adopted the requirement for a purpose rationally connected to the performance of the job, (2) establish its honest and good faith belief that the work requirement is necessary to the fulfilment of the work-related purpose, which must be legitimate, and (3) establish that the requirement is reasonably necessary to the accomplishment of the legitimate work-related purpose.

[11] 2020 CanLII 48250.

5. Where an employee's family status is engaged and a workplace requirement does adversely affect the employee, the employer must consider what kinds of accommodations are possible to allow the employee to perform their caregiving duties while not suffering an adverse effect at work, or, alternatively, whether an accommodation would lead to undue hardship for the employer.
6. It may be that some requirements are BFOR such that the employee's inability to comply might result in an undue hardship to the employer.

Family Status Evidence in Services Discrimination

Strictly speaking, the Code ground of family status is only engaged in the context of caregiving responsibilities. However, it is important for employment counsel to be aware of how employer clients who provide services to the public can also incur human rights liability for their conduct where such conduct has a negative impact on a vulnerable individual based on their association with or lack of contact with their family. In other words, family status and particular familiar arrangements often can form part of the evidentiary background of any claim so as to attach liability for breaches of the Code even if the family status is not the Code ground on which discrimination is claimed. As a result, neither service providers nor employers should ignore any circumstance where an individual suffers an adverse impact, such as harassment or social exclusion, due to the particular structure of their family.

In the case of *AA as Represented by their Litigation Guardian TA v. Burlington Training Centre*[12], the HRTO found that a gym discriminated against a nine (9)-year-old child on the basis of perceived sexual orientation and his association with his own gay parents. In this case, the minor applicant kissed a younger boy on the cheek and patted his head; the respondent and the younger boy's parents were aware that the applicant's parents were a same-sex couple and both characterized the applicant's behaviour as a safety issue. The younger boy's parents felt that the applicant's behaviour was "not normal," and the respondent gym chose to revoke the applicant's membership.

The HRTO found that the applicant was covered by the Code grounds of perceived sexual orientation and his association with his gay parents, and that the revocation of the applicant's gym membership constituted an adverse impact. The HRTO found that "the applicant's childish affection and playful behaviour was mischaracterized based on homophobic stereotypes" and that both Code grounds were a factor in the respondent's decision to terminate the applicant's membership.[13] Tellingly, the gym's own manager testified that in 10 years of her tenure, no other child's membership had ever been revoked for breach of an alleged "no touch" policy at the gym.[14] The HRTO awarded the applicant $10,000 as general damages for the respondent's breach of the Code.

In *JL v. Empower Simcoe*[15], the HRTO considered the role of human rights in the context of a pandemic when visitation restrictions were imposed to protect public health, but with the result of a negative impact on a disabled minor child. In this case, a child with a disability lived in a group home with visitation restrictions due to the COVID-19 pandemic. One of the ways the child communicated with their parents was through physical touch; the child's parents requested that they be allowed to visit the child while following all health recommendations except physical distancing, which request was ultimately denied.

[12] 2022 HRTO 1361 ["*AA*"].
[13] Ibid at para 53.
[14] Ibid at para 69.
[15] 2021 HRTO 222 ["*JL*"].

The HRTO held that the group home failed to consider the accommodation requested, to investigate into the subject matter appropriately or to seek public health advice in application to the accommodation requested. The HRTO further held that the group home had failed to establish that accommodating the parents' request would lead to undue hardship. The HRTO awarded the applicant $10,000 in general damages.

The foregoing two cases are included to clarify that while family status discrimination analysis in itself is strictly construed in the context of caregiving responsibilities, service-providers in particular must be aware that any conduct that has an adverse impact on individuals due to their association with their family, their particular family structure, or in restricting their access to their family to the detriment of their personal development, may result in human rights liability even if disconnected from the ground of family status as defined by the Code.

For example, in *AA*, discrimination was alleged on the basis of perceived sexual orientation and association. The Code ground of family status was not engaged in the HRTO's analysis, but the applicant's actual family status (i.e. of being the child of a same-sex couple) was in effect a factor in the respondent's discrimination, and damages were awarded.

In *JL*, discrimination was alleged on the basis of the applicant's disability and in how the respondent's policy prevented physical touching between the applicant and his family, which prevented the applicant from connecting with his family. The Code ground of family status was not engaged in the HRTO's analysis, but the applicant's actual family status (i.e. being a vulnerable individual who experienced heightened social exclusion in being denied physical contact with his parents) coloured the HRTO's contextual analysis in finding that the respondent's policy did have an adverse impact on the applicant that was not supported by a BFOR analysis in the services context.

Conclusion

As there have not been significant advancements in the family status discrimination jurisprudence as of late, it is always worth remembering that when addressing such issues, both the *Misetich* and *Johnstone* approaches should be applied to any set of facts so as to be able to provide a fulsome analysis under either approach before a decision-maker.

Most adjudicators seem to agree that *Misetich* and *Johnstone* are ultimately complimentary tests that require a contextual analysis where the employee's ability to self-accommodate to find a solution is relevant at some stage. However, for counsel's purposes, the employer's legal duty has never truly changed, and so the practical steps to follow remain the same. Employers must accommodate employees based on valid Code grounds up to the point of undue hardship; employers have a duty to inquire if employees require support where they are reasonably cognizant of a workplace requirement adversely affecting the employee on the basis of family status; and, employers have a duty to engage with employees in good faith and in an individualized manner in assessing allegations of discrimination and/or accommodation requests.

Law Society of Ontario | Barreau de l'Ontario

TAB 13

The Eight-Minute Employment Lawyer 2023

Credibility Assessments in Workplace Investigations

Jennifer White
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June 22, 2023

LSO CPD The Eight-Minute Employment Lawyer
June 22, 2023

Credibility Assessments in Workplace Investigations

Jennifer White

Summary: Credibility Assessments in workplace and human rights investigations, whether done by an internal or external investigator, are often the most important part of the report, but are also often the trickiest to write. A recent Ontario Court of Appeal decision shows that they can also be the most contentious part of the report, even well after the investigation has concluded and the employer has made decisions about what to do with the findings.

Why Are Credibility Assessments So Important?

As we know, many workplace and human rights complaints are about events that are alleged to have taken place in private, with only the complainant and respondent present. There are often no witnesses and findings will need to be made without any corroborating witness evidence. Even if there are witnesses to the event, they may not be able to answer the question: *Did the respondent know, or ought reasonably to have known, that the behaviour was unwelcome?* This is the usual definition of harassment in most policies and legislation.

This means that in order to make findings about a) what happened and b) did it violate the policy or legislation, the investigator will have to assess the credibility of the complainant, the respondent and the witnesses, and express clearly in their report whether they found one of these people more credible (honest and reliable) than the other. This credibility assessment sets the foundation for determining whose evidence the investigator preferred.

What Makes Credibility Assessments So Tricky?

It is not enough for the investigator to simply say that they found XX more credible than YY. It is important that whoever reads the report understands exactly why the investigator found one person's evidence more credible than the other. This makes it vital for the investigator to be able

to articulate clearly how they came to their credibility determination. Even the most seasoned investigators will find it challenging to express this in words on a paper. Some of the factors that will be included in a thorough credibility assessment include (in no particular order):

- Does the person have a clear recollection of the event?
- Were they forthcoming with all of the details?
- Are they aware of the shortcomings in their evidence, ie. what they might have missed?
- Has this person's evidence remained consistent during an interview as well as each time they have told their version?
- Did the person show a particular grudge toward or have loyalty toward anyone?
- Is their verbal evidence supported by other documentary evidence (texts, emails, etc.)
- Have they spoken to other investigation participants or witnesses that may have affected their own evidence?
- Do they have a personal interest in the outcome of the investigation?
- Did their evidence make sense in itself or with other evidence provided?

It becomes particularly challenging for the investigator to write this credibility assessment when considering that the investigator may be writing a report that ends up in one of the parties' hands. In my own practice, I am always conscious, particularly in workplace investigations where the parties will be continuing to work together, about not exacerbating the already-contentious relationship, while still considering each of these credibility factors.

Recent Ontario Case Law on Credibility Assessments in Investigations

Safavi-Naini v. Rubin Thomlinson LLP, 2023 ONCA 86 (CanLII), https://canlii.ca/t/jvd59

This recent Ontario Court of Appeal decision has highlighted the importance of well-explained credibility assessments in workplace investigations. In this case, after an investigation by an external investigator, the claims of harassment were not substantiated. The matter then went through the Human Rights Tribunal of Ontario process and the employer included copies of the executive summary investigation reports in their submissions. The original complainant later sued

the employer for defamation about the content of those reports. This defamation matter made its way to the Court of Appeal, where it was eventually dismissed.

What was interesting from an investigator's lens was that it appears that the credibility assessment summary in the reports were what the complainant (eventual plaintiff and then appellant) felt was most defamatory. Sections from the executive summary reports are included in the court of appeal decision and although the full details of how the investigator came to her determination (ie. the analysis of the factors noted above that were likely contained in the full version of the report), the summary report included some of her conclusions on credibility:

- "[the complainant] did not provide a detailed interview or evidence in support of her allegations."
- "[The investigator] preferred [the respondent's] version of events to that of [the complainant] and she found that [the complainant] was not a credible or reliable witness."
- "[the investigator] based this conclusion on [the complainant's] undermined credibility, the absence of detailed documentary evidence, and [the complainant's] acknowledgment in communications that her knowledge of the bet was hearsay."

Although certainly in this case the language in the executive summary reports was found not to be defamatory, the consideration for all workplace investigators, and those who oversee the investigation process, is just how important that articulation of a credibility determinations is. If our reports become subject to subsequent litigation processes, these critical foundation pieces need to be thoughtful, well-articulated, and thorough.

Conclusion

Credibility assessments are probably the most challenging part of an investigation report as it can be difficult to explain why the investigator preferred one person's evidence over another's. However they are critical foundation pieces for the investigator to make findings of fact and must be well articulated and done thoroughly in order to withstand future litigation.

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TAB 14

The Eight-Minute Employment Lawyer 2023

The Pros and Cons of Voluntary Arbitrations and Mediations of (Civil) Employment Law Disputes

Mitchell Rose
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June 22, 2023

cpd

The Pros and Cons of
Voluntary Arbitrations and Mediations of (Civil) Employment Law Disputes

Mitchell Rose, Mediator & Arbitrator, Rose Dispute Resolution

1) What do you mean by "voluntary" arbitrations and mediations?

- Arbitrations which are not contractually mandated (i.e., by virtue of an arbitration provision in an employment contract). These are often called "ad hoc" arbitrations.

- Mediations which are not mandatory, in that they are held,

    - prior to the commencement of proceedings in a region where mediation would be mandatory under R. 24.1 of the *Rules of Civil Procedure* after the commencement of proceedings (Toronto, Ottawa, Essex County), or

    - at any time regarding a dispute in which proceedings, if commenced, would not trigger a mandatory mediation under R. 24.1 (i.e., the action is, or would be, commenced in a region other than Toronto, Ottawa, or Essex County), or

    - with respect to Small Claims Court matters, or

    - prior to an arbitration, but mediation was not required pursuant to a contractual arbitration provision, or as part of an agreed-upon, integrated mediation-arbitration ("med-arb") process where the mediator and arbitrator are one and the same person.

2) Why is this topic important?

- R. 3.2-4 of the LSO *Rules of Professional Conduct* require a lawyer to "discourage a client from commencing or continuing useless legal proceedings".
- According to the Commentary for R. 3.2-4: "It is important to consider the use of alternative dispute resolution (ADR). When appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options."
- It is always appropriate to inform clients of ADR options -including voluntary mediations and arbitrations – for the following reasons:

    - Courts are backlogged.
    - Litigation is expensive.
    - Court proceedings are inherently public.
    - Due to the prospect of appeals, there is a lack of finality until appeals are exhausted. With arbitration, appeal rights are more limited, or non-existent - depending on the parties' agreement.
    - The parties cannot choose their decision maker with litigation, unlike arbitration (including med-arb).
    - Where an action has been commenced, but mediation is not mandatory, the courts are starting to penalize parties who refuse to mediate by way of costs awards (see: *Canfield* v. *Brockville Ontario Speedway*, 2018 ONSC 3288, and *Gregor Homes Ltd.* v. *Woodyer*, 2023 ONSC 689).

- In the author's experience, voluntary ADR processes in employment disputes are on the rise in any event, due to the above factors and because:

    - Early mediation, especially mediation prior to the close of pleadings or before documentary discovery, is already popular amongst employment lawyers (unlike in other bars where mediation takes place later).

- Many employment contracts contain arbitration provisions. While those provisions may not require a mediation to be held first, the parties will later agree to mediation or med-arb.

3) Aside from what is discussed in 2) above, what are the other pros of voluntary arbitrations?

- The *Rules of Civil Procedure* do not automatically apply (and the parties should not agree that they apply).
- The *Arbitration Act, 1991* (the "Act") applies.
- Parties can agree to different procedural rules that specifically govern arbitrations, such as the *ADRIC Arbitration Rules*.
- Therefore, potentially:

  - There are fewer procedural steps than in litigation.
  - The rules of regarding discovery and evidence at a hearing are more relaxed as compared to litigation.
  - The arbitrator may have wider jurisdiction with respect to awarding costs (even full indemnity).
  - The arbitrator may have early dates available.

- There are various options for hearing format, including,

  - virtual attendances,
  - fully or partially in-writing hearings,
  - summary trial-style hearings,
  - summary judgment-style hearings,
  - final-offer selection ("baseball arbitration"),
  - bifurcation of issues.

4) What are the cons of voluntary arbitrations?

- Paying the arbitrator, especially as the case proceeds, can be challenging for some parties, even with the prospect of a favourable costs award in the end (and that party might not be awarded costs, or costs could be awarded against them).
- The parties may agree that the arbitrator cannot award costs, or that the jurisdiction to award costs is curtailed in some way (i.e., no counsel fees).
- The parties may agree that appeal rights are expanded beyond what is set out in the Act (with leave, on question of law).
- If the parties treat an arbitration like litigation – and the arbitrator permits this - arbitration can cost as much as or more than litigation.
- Some arbitrators (and lawyers) have busy calendars, thereby reducing the speed of the process.
- Ultimately, the arbitrator can determine the hearing format under the Act (although this is useful if the parties cannot agree on the process).
- It may prove challenging if all sides are not represented by counsel.

5) Aside from what is discussed is discussed in 2) above, what are the other pros of voluntary mediation?

- The potential for cost and time savings if the dispute settles is relatively high.
- The prospect of obtaining early neutral evaluation from the mediator.
- The *Commercial Mediation Act, 2010* might apply, which can prove helpful since the *Rules of Civil Procedure* do not apply to a mediation held before the commencement of a Superior Court action.
- Voluntary mediation is suitable in many cases where there is a self-represented party.
- The parties can frame the issues of the mediation themselves using a demand letter and a response to that letter, or a draft Statement of Claim and draft Defence.

- For employees (or employers with a counterclaim): a simple agreement between counsel to mediate can suspend the running of certain limitation periods
- For mediations held prior to an arbitration or the commencement of an action, where all issues were not resolved, the parties can potentially agree to convert the process to a med-arb so that the mediator becomes the arbitrator. This can result in cost and time savings.

6) What are the cons of voluntary mediations?

- For employers: suspension of the running of a limitation period.
- If the case does not settle at or soon after the mediation:
    - If R. 24.1 applies to any action commenced after the voluntary mediation is held, then the parties can agree in advance that should there not be a full and final settlement then the voluntary mediation fulfils their obligations under R. 24.1 However, before setting the action down for trial, a party may need to obtain an order exempting them from mandatory mediation (in other words, a mediation held after a Defence is filed). However,
        i) one factor the Court is to consider on a motion for such an order is "whether the parties have already engaged in a form of dispute resolution, and, in the interests of reducing cost and delay, they ought not to be required to repeat the effort" (*(G.)* v. *H. (C.D.)* (2000), 50 O.R. (3d) 82 (S.C.J.)).
        ii) a court order may not be necessary if the mediator issues a report in the prescribed form, and it is accepted by the local mandatory mediation office for filing.
        iii) In some cases, a second mediation, held after an action is commenced, may be beneficial.
    - A party will find it difficult to obtain a costs award from a Court in relation to voluntary mediations held pre-litigation.
    - With regard to mediations held prior to arbitrations and that are not part of a med-arb process, the parties likely won't be able to recover costs of the

mediation from the arbitrator unless they explicitly gave the arbitrator that jurisdiction.

7) ***What if I want more information about any of the above topics, including med-arb?***

Email the author at adr@mitchellrose.ca.

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TAB 15

The Eight-Minute Employment Lawyer 2023

Prohibition on Wage-Fixing and No-Poach Agreements: What Employers Need to Know

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June 22, 2023

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Prohibition on Wage-Fixing and No-Poach Agreements: What Employers Need to Know

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Introduction

On June 23, 2022, Parliament enacted the most significant amendments to the *Competition Act* (the "Act") in over a decade.[i] Among other notable changes, the amendments expand the criminal conspiracy provisions in section 45 of the Act to include new prohibitions on wage-fixing and no-poach agreements between unaffiliated employers. The new prohibitions come into force on June 23, 2023.

On May 30, 2023, the Competition Bureau, which administers and enforces the Act, published its wage-fixing and no-poaching enforcement guidelines (the "Guidelines")[ii]. The Guidelines are intended to provide businesses with transparency and clarity on the Bureau's enforcement approach to the new criminal provisions coming into force on June 23, 2023. The publication of the Guidelines follows a public consultation process, where interested parties were invited to provide their views on a draft version. The Guidelines clarify a number of important points, and flag areas for consideration as employers implement compliance strategies in preparation for the coming into force of the new provisions.

New Criminal Prohibitions

Section 45 is the cornerstone of the Act. It criminally prohibits types of conduct that are considered egregious violations of competition, such as agreements between competitors to: (i) fix prices; (ii) allocate markets; and (iii) implement controls/limits on supply or production.

The amendments added a new subsection 45(1.1) to the Act that makes it a criminal offence (as of June 23, 2023) for unaffiliated[iii] employers to enter into agreements:

1. to fix, maintain, decrease, or control salaries, wages or other terms and conditions of employment (e.g., wage-fixing agreements); or,
2. to not solicit or hire each other's employees (e.g., no-poach agreements).

The conspiracy provisions in the Act, including the forthcoming prohibitions on wage-fixing and no-poach agreements, are considered *per se* criminal offences. *Per se* offences address conduct that is presumed to be injurious to fair and proper competition, and are treated as inherently illegal. As such, simply engaging in the conduct is sufficient to violate the law, regardless of other factors such as business rationale or actual competitive effects.

Notably, the prohibition on no-poaching agreements only applies to agreements to not solicit or hire "each other's" employees. Therefore, one-way non-solicit clauses are not captured by the new provisions.

Penalties

Contraventions of the new criminal prohibitions on wage-fixing and no-poach agreements will be subject to a fine in the discretion of the court and, in cases where an individual is prosecuted, the possibility for imprisonment for a term not exceeding 14 years.

Businesses should also be aware of the possibility of private actions for damages, including class actions. Section 36 of the Act permits any person who has suffered loss or damage as a result of conduct that is criminally prohibited in the Act to sue for and recover damages. For example, class action litigation regarding alleged price-fixing schemes is already common in Canada. Accordingly, employers who enter into illegal no-poach or wage-fixing agreements in contravention of subsection 45(1.1) may also face private actions for damages, including possibly class actions.

Defences

The Act contains certain defences applicable to section 45 offences that will also be available for cases involving wage-fixing and no-poach agreements. These include a general exemption from competition laws under section 4 of the Act for certain collective bargaining activities, as well as the regulated conduct defence that applies to conduct that is required or authorized by or under another Act of Parliament or the legislature of a province.

However, the most important defence is the ancillary restraints defence ("ARD"), which serves to allow restraints on competition that would otherwise violate section 45 if:

i. the restraint is ancillary to a broader or separate agreement that includes the same parties;
ii. the restraint is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement; and,
iii. the broader or separate agreement, considered alone, is not prohibited under the Act.

Ancillary restraints are distinct from "naked restraints", which are restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance, or joint venture, and are commonly recognized as the most egregious forms of anti-competitive conduct. Ancillary restraints, on the other hand, are restraints that are truly subordinate and collateral to a broader agreement, and generally regarded as efficiency enhancing and therefore pro-competitive. As noted in the Guidelines, "subsection 45(1.1) is directed at "naked restraints" on competition … include[ing] restraints on wages or job mobility that are not implemented to further a legitimate collaboration, strategic alliance or joint venture".

In the Guidelines, the Bureau helpfully explains that, in assessing whether a restraint is directly related and reasonably necessary to give effect to the objective of a broader agreement, "the Bureau will not "second guess" the parties with reference to some other restraint that may have been less restrictive in some insignificant way". At the same time, the Bureau cautions that it may conclude that a restraint was not reasonably necessary "if the parties could have achieved an equivalent or comparable arrangement through practical, significantly less restrictive means that were reasonably available to the parties at the time when the agreement was entered into". Generally, the Bureau will consider the duration of an ancillary restraint, the subject of the restraint and its geographic scope (e.g., whether it applies to employees unrelated to the collaboration) to determine whether it is reasonably necessary to give effect to the objective of the broader agreement. Accordingly, parties are encouraged to consider these aspects of any ancillary restraints, in order to maximize the chances that the ARD will apply, if necessary.

Circumstantial Evidence

The Act provides that courts may infer the existence of a conspiracy, agreement, or arrangement contrary to the criminal provisions in section 45 of the Act from circumstantial evidence alone, with or without direct evidence of communication. Indeed, as the Guidelines point out, while "conscious parallelism" (i.e., acting independently with awareness of the likely response of one's competitors or in response to the conduct of competitors) does not violate section 45 (including the new prohibitions on wage-fixing and no-poach agreements), parallel conduct coupled with facilitating practices, such as sharing sensitive information, may be sufficient to prove an agreement was concluded.

For this reason, employers and human resources professionals should be wary of information sharing and/or casual discussions between unaffiliated employers regarding wages, salaries, terms and conditions of employment, and non-solicitation/non-hiring of each other's employees, as any such communication may be viewed by the Bureau as a "facilitating practice" in furtherance of an illegal conspiracy. Employers should now regard internally held information on these matters (including, for example, wages) as competitively sensitive.

Key Takeaways

(1) Wage-fixing and no-poach agreements between unaffiliated employers will be criminally prohibited as of June 23, 2023, and subject to significant penalties, including potentially private litigation such as class actions;

(2) Naked restraints will almost always be unlawful, whereas ancillary restraints may be defensible; and

(3) Strictly avoid information sharing and/or casual discussions between unaffiliated employers that may give rise to the impression or appearance of an illegal conspiracy.

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[i] *Competition Act,* RSC, 1985, c C-34.

[ii] Government of Canada: Enforcement Guidelines on wage-fixing and no poaching agreements (https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements)

[iii] The new prohibitions apply only to unaffiliated employers. Under the Act, "affiliation" is determined on the basis of control. See subsection 2(2) of the Act. For example, if the same parent company or individual controls two employers, those employers would be considered affiliated for the purposes of the Act (however, franchisors and franchisees are not generally regarded as affiliated).

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TAB 16

The Eight-Minute Employment Lawyer 2023

Update on Just Cause: The Distinction Between the Common Law and Statutory Standard in Ontario

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June 22, 2023

cpd

Update on Just Cause: The Distinction Between the Common Law and Statutory Standard in Ontario

by Chris West[1]

In *Wood v. Fred Deeley Imports Ltd.*,[2] Justice Laskin articulated that an individual's labour is tied to their identity and thus necessarily informs how a court should evaluate the circumstances surrounding the termination of the employment relationship:

> [26] In general, courts interpret employment agreements differently from other commercial agreements. They do so mainly because of the importance of employment in a person's life. As Dickson C.J.C. said in an oft-quoted passage from his judgment in *Reference re Public Service Employee Relations Act (Alberta),* 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, [1987] S.C.J. No. 10, at p. 368 S.C.R.:
>
> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.
>
> [27] As important as employment itself is the way a person's employment is terminated. It is on termination of employment that a person is most vulnerable and thus is most in need of protection.

It is through this lens that courts continue to contextually interpret the nature and manner of the cessation of the employment relationship, including whether the surrounding facts support a termination for just cause.

Clients often possess a colloquial understanding of what it means to terminate employment for cause. As employment lawyers, we understand that determining whether a termination for just cause is appropriate in the circumstances is a nuanced exercise.

For example, courts in Ontario have clarified there is a quantifiable difference between a termination of employment for just cause at common law and a termination of employment pursuant to the *Employment Standards Act, 2000* ("ESA")[3] standard of "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer". The key distinction appears to be intent.

As discussed in more detail below, courts in Ontario have held that for an employee to lose their minimum entitlements to notice and severance pay under the ESA, they must be shown to have knowingly participated in an intentional act or course of conduct that is detrimental to the

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[1] With thanks to Aicha Raeburn-Cherradi who assisted with research for this paper.
[2] *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158
[3] *O. Reg. 288/01*: TERMINATION AND SEVERANCE OF EMPLOYMENT

workplace or fundamentally alters the relationship of trust between the employer and the employee. However, it is also possible that, absent intent, a termination for just cause under the common law may still be appropriate in the circumstances thereby eliminating the employee's entitlement to common law notice but not their ESA minimum entitlements.

It is essential for employment lawyers to understand and explain this distinction whenever a client seeks counsel concerning a termination for just cause. Responsible counsel requires employment lawyers to remain up to date with how courts in Ontario evaluate both the just cause common law threshold as articulated by the Supreme Court of Canada in *McKinley v. BC Tel.* [4] and the "wilful" standard set out in the ESA. Advice concerning this differentiation should be provided at the outset of a matter and, if possible, before the separation occurs.

This article reviews current trends in recent just cause cases in Ontario with a focus on how courts interpret and bifurcate their analysis pursuant to the concept of just cause at common law and the statutory standard of wilful misconduct, disobedience or neglect of duty. The purpose of this focus is to illustrate the importance for employment lawyers to explain the difference to their clients and allow them to make informed decisions regarding how to manage the end of an employment relationship.

Implementing this nuanced approach from the outset of a matter will also assist counsel in managing and preparing for each stage of the litigation process, right up to trial.

Ontario Court of Appeal Decisions

Rahman v. Cannon Design Architecture Inc. ("*Rahman*")[5]

In *Rahman*, the Plaintiff's employment agreement provided that if there was just cause to terminate her employment, the Plaintiff would receive no termination notice or pay in lieu. However, the offer letter failed to contemplate a situation wherein the Plaintiff may be terminated for cause but still be entitled to statutory minimum payments pursuant to the ESA.

The Superior Court determined the termination provisions were enforceable, in part relying on the fact Rahman had engaged in negotiations concerning the offer letter and received legal advice.

The Court of Appeal found the motion judge erred in law when he allowed considerations of Ms. Rahman's sophistication and access to independent legal advice, coupled with the parties' subjective intention to not contravene the ESA, to override the plain language in the termination provisions in the employment agreement. As such, the court held the termination provisions were unenforceable, including the without cause termination provision, pursuant to the well documented Court of Appeal decision of *Waksdale v. Swegon North America Inc.*[6]

The Court of Appeal noted that the ESA requires payment of termination pay for all terminations, including those for just cause at common law, unless an employee is "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been

[4] *McKinley v. BC Tel.*, [2001] 2 SCR 161
[5] *Rahman v. Cannon Design Architecture Inc.,* 2022 ONCA 451
[6] *Waksdale v. Swegon North America Inc.,* 2020 ONCA 391

condoned by the employer". The wilful misconduct standard requires the employer to produce evidence the employee was "being bad on purpose".[7]

Since its release, the *Rahman* decision has been followed in *Nassar v. Oracle Global Services*, 2022 ONSC 5401, *Summers v. Oz Optics Limited*, 2022 ONSC 6225 and *Tarras v. The Municipal Infrastructure Group Ltd.,* 2022 ONSC 4522, all of which note the Court of Appeal's analysis that, because of the bifurcation between the just cause threshold at common law and the wilful misconduct, disobedience and wilful neglect of duty threshold in the ESA, a 'no notice if just cause' provision in an employment agreement will invalidate all the termination provisions contained in the contract.

***Render v. ThyssenKrupp Elevator (Canada) Limited ("Render")*[8]**

In *Render*, the Court of Appeal again noted the bifurcation between the just cause standard at common law and the statutory standard of wilful misconduct, disobedience or wilful neglect of duty.

The Plaintiff's employment was terminated following a single incident in the workplace where the Plaintiff struck a female co-worker on her buttocks. The trial judge found the incident caused a breakdown in the employment relationship that justified dismissal for cause.

On appeal, the Plaintiff argued there was no just cause. The Court of Appeal found the employer did have just cause to terminate the Plaintiff's employment, but the misconduct did not meet the ESA standard of wilful misconduct, disobedience or wilful neglect of duty. As such, the Plaintiff remained entitled to his ESA entitlements to notice or pay in *lieu*.

Notably, while the Plaintiff did not raise entitlement to ESA minimums in his pleadings or his closing submissions, the Plaintiff did refer to entitlement to ESA minimums in his opening statement at trial. The Court of Appeal found this was a sufficient basis to consider the issue of statutory entitlements on appeal.

The Court of Appeal further held that "wilful misconduct" requires more than what is required to satisfy the just cause at common law standard. It requires that an employee do something deliberately they know or ought to know is wrong.

Referring to the Superior Court decision of *Plester v. Polyone Canada Inc.*[9] the Court of Appeal noted:

> [55] … Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose.
>
> [56] … Wilful misconduct involves an assessment of subjective intent, almost akin to a special intent in criminal law. It will be found in a narrower cadre of

[7] *Rahman*, *supra* note 5 at para 28
[8] *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310
[9] *Plester v. Polyone Canada Inc.*, 2011 ONSC 6068

> cases: cases of wilful misconduct will almost inevitably meet the test for just cause but the reverse is not the case.

In *Render*, the Court of Appeal held the Plaintiff's conduct did not rise to the level of wilful misconduct, stating:

> [81] … the appellant's conduct does not rise to the level of wilful misconduct required under the Regulation. While the trial judge found that the touching was not accidental, he made no finding that the conduct was preplanned. Indeed, his findings with respect to the circumstances of the touching are consistent with the fact that the appellant's conduct was done in the heat of the moment in reaction to a slight. Although his conduct warranted dismissal for cause, it was not the type of conduct in the circumstances in which it occurred that was intended by the legislature to deprive an employee of his statutory benefits.

In *Render*, the court suggests that evaluating just cause at common law is an objective exercise, whereas a finding of wilful misconduct involves a contextual assessment of the employee's subjective intent.

Hucsko v. A O Smith Enterprises Limited ("Huscko")[10]

In *Hucsko*, the Court of Appeal found that four sexually harassing comments made by the Plaintiff to a coworker, coupled with a refusal to apologize, constituted just cause.

The employer terminated the Plaintiff for just cause following comments made to a coworker that constituted sexual harassment. The employer offered the Plaintiff the opportunity to take remedial action including sensitivity training and to make a direct apology to the complainant. The Plaintiff refused to apologize and was terminated for cause.

The trial judge found the termination for cause was not justified and awarded damages to the employee of 20 month's pay in lieu of notice. The Court of Appeal found the trial judge erred in law by failing to find that the inappropriate and demeaning comments the Plaintiff made to his coworker justified the action taken by the employer. In particular, the Plaintiff's failure to accept the opportunity offered to remediate and show remorse for his behavior resulted in an irreparable breakdown in the employment relationship that could not be tolerated by the employer.

The Court of Appeal revisited the three-part test for determining whether termination for cause is justified:

> [49] Following *McKinley*, it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional — dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the misconduct.

[10] *Hucsko v. A O Smith Enterprises Limited*, 2021 ONCA 728

> [50] Application of the standard consists of:
>
> 1. determining the nature and extent of the misconduct;
>
> 2. considering the surrounding circumstances; and
>
> 3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

While the Court of Appeal did not directly reference the statutory standard of wilful misconduct, disobedience or neglect of duty, its analysis confirmed the Plaintiff was aware that his actions were demeaning and unwelcome and were comments that would only have been made to a woman and not a man.

This again demonstrates that courts will not only evaluate the circumstances surrounding a termination for just cause but also the subjective nature of the actions of the Plaintiff and whether they understood what they were doing would cause a breakdown of the employment relationship.

Ontario Superior Court Decisions

Park v. Costco Wholesale Canada Ltd. ("Park")[11]

In *Park,* the Superior Court found the employer successfully established both just cause and wilful misconduct pursuant to the ESA.

The Plaintiff was responsible for building an internal cloud-based website which allowed users within his department to easily share files with one another. The Plaintiff developed and worked on the website during work hours with the assistance of a coworker. There was no dispute that the website was the employer's property.

The court found the Plaintiff was unhappy when he was transferred out of his department. After he left the department, the employer asked the Plaintiff to transfer "ownership" of the website to other employees. In response to the email, the Plaintiff deleted the website. The Plaintiff advised the employer that he thought no one wanted the website so he had deleted it.

The employer was able to restore the website and emailed the Plaintiff to advise him accordingly. In the time between the website being restored and the employer emailing the Plaintiff to advise the website had been restored, the Plaintiff deleted the website again, first from his computer and then from his computer's recycling bin.

The court found the deliberate deletion of the website amounted to damage or destruction of the employer's property and was contrary to the terms of the employee agreement. In addition, the emails sent by the Plaintiff to the employer regarding the situation were not forthright and were inflammatory.

The court found the Plaintiff engaged in wilful misconduct which met the threshold for a statutory just cause summary dismissal:

> [90]…This was not conduct that was merely careless, thoughtless, or inadvertent. Mr. Park's conduct was not trivial, and it was not condoned by Costco. Mr. Park

[11] *Park v. Costco Wholesale Canada Ltd*., 2023 ONSC 1013

> was, colloquially, "being bad on purpose." I find that his conduct amounted to wilful misconduct that meets the test for just cause for summary dismissal.

Goruk v. Greater Barrie Chamber of Commerce ("Goruk")[12]

Goruk provides another useful example of conduct that has been found to meet both the just cause and wilful misconduct standards.

The Plaintiff was 75 years old with 17 years of service and held the organization's most senior staff position of executive director. The Plaintiff was placed on paid administrative leave pending an investigation into "irregularities" in her performance. Her employment was subsequently terminated for cause and she received no compensation at the time of termination.

The employer argued it had just cause to terminate the Plaintiff, asserting she occupied a position of trust and owed a duty to act in the employer's best interests. The employer alleged the Plaintiff breached that duty by:

- uttering a forged document to the employer's bank;
- taking unauthorized vacation pay;
- granting herself an unauthorized pay raise;
- awarding contracts to her sons without following the employer's established protocol and without disclosing those transactions to the employer's auditor;
- suppressing a letter from the employer's auditor which expressed a number of concerns regarding its financial statements; and
- reimbursing herself for charges on her personal American Express credit card without supplying proper supporting documentation.

The court found the Plaintiff stood in the position of a fiduciary to the employer and therefore owed the employer duties of loyalty, honesty, good faith and a strict avoidance of conflicts of interest.

The court evaluated the factual circumstances contextually by going through each allegation individually. Ultimately, the court found the Plaintiff engaged in two acts of misfeasance: altering the banking document and not reporting that she was being overpaid. The court found the significance of the misfeasance was the element of dishonesty. In addition, the employee had exercised poor judgement in significant ways by, amongst other things, impeding the treasurer's access to the books of the employer.

The court concluded that any one of the incidents of malfeasance or the exercise of poor judgment would not be sufficient to support a termination for cause. However, considered collectively, the Plaintiff's misconduct was shown to be intentional and justified her termination for cause.

As a result of the conclusion that just cause existed for termination, no damages in lieu of notice were payable to the Plaintiff. Further, no termination pay was payable pursuant to the ESA as the court found that the employee "engaged in wilful misconduct, particularly in relation to the forged banking document and the unauthorized pay raise."

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[12] *Goruk v. Greater Barrie Chamber of Commerce*, 2021 ONSC 5005

Employment Standards Act Appeals

The standard of wilful misconduct, disobedience and wilful neglect of duty is also interpreted by Employment Standards Officers ("ESO") in wrongful dismissal claims submitted to the Ministry of Labour. Published appeals of ESO decisions from the Ontario Divisional Court and the Ontario Labour Relations Board ("OLRB") are another resource lawyers can use to interpret how decision makers may apply the wilful standard in the context of a termination of employment for just cause.

Below are summaries of recent ESA appeals concerning the interpretation of the wilful standard.

Cambridge Pallet Ltd. v. Pereira ("Pereira")[13]

In *Pereira*, the Claimant was terminated for conduct when he was heavily intoxicated and called a co-worker threatening to kill him. The Claimant was off duty when he made the call. The OLRB determined the employee's conduct did not rise to the level of wilful misconduct. Upon judicial review the Divisional Court found the OLRB's decision fell within a range of reasonable outcomes.

Perez v. HealthPro Procurement Services Inc.("Perez")[14]

In *Perez,* the Claimant resigned from his employment, providing the employer with two weeks of notice. The employer enquired whether the Claimant was leaving to join a competitor or supplier, potentially constituting a conflict of interest. The Claimant refused to respond, even when the employer advised the Claimant would need to leave immediately if a response was not provided. When the Claimant still did not respond, the employer terminated the Claimant's employment during the resignation period. The OLRB determined the refusal to answer the question constituted wilful misconduct, disentitling the Claimant to payment of his statutory minimum entitlements.

Manuel v. Triple M Metal LP, 2022 ("*Manuel")*[15]

In *Manuel*, the ESO refused to issue an order requiring the employer to pay the employee termination and severance pay as they were satisfied the employee had engaged in wilful misconduct. The OLRB disagreed.

The Claimant used inflammatory language in the workplace including cursing and referring to someone as a "dick". The Claimant was never previously disciplined for swearing in the workplace prior to his termination and acknowledged calling someone a dick was disrespectful and inappropriate. The OLRB noted there were no efforts made by the employer to correct the Claimant's use of inappropriate language nor was he ever warned about his language use.

Further, the OLRB heard evidence that the Claimant's supervisor had used offensive terms when referring to the Claimant. Due to the fact the Claimant arguably did not know the employer took issue with vulgar language, the OLRB held the misconduct could not be said to be wilful. As such, the employee was entitled to termination and severance pay.

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[13] *Cambridge Pallet Ltd. v. Pereira*, 2022 ONSC 3213
[14] *Perez v. HealthPro Procurement Services Inc.,* 2022 CarswellOnt 7736 (OLRB)
[15] *Manuel v. Triple M Metal LP*, 2022 CanLII 40751 (ON LRB)

Conclusion

The fact-specific nature of a just cause analysis makes predicting how a court will evaluate an employee's conduct a difficult and evolving exercise. However, counsel for both employers and employees will do well to ensure they counsel their clients that the evolving standard of what constitutes just cause is further complicated by the differing analysis of just cause at common law and the "wilful" standard derived from statute.

Evaluating the context of an employee's departure through this lens both at the outset and throughout the litigation process is essential to assist counsel in ensuring their clients are fully informed of the case to meet in their particular circumstances.

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TAB 17

The Eight-Minute Employment Lawyer 2023

Changes to the Agency Workers Provisions of the *ESA*

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June 22, 2023

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EMPLOYMENT AND LABOUR LAWYERS

CHANGES TO THE AGENCY WORKERS PROVISIONS OF THE *ESA*

Mark Repath, Partner

Prepared for The Eight-Minute Employment Lawyer 2023

INTRODUCTION

Whether you agree with the particular policies or not, there has been considerable attention placed by recent governments on attempting to regulate the "gig economy" in Ontario. In the *Working for Workers Act, 2022*, there was the protections for "digital platform work". In the *Working for Workers Act, 2021*, the right to disconnect and ban on non-compete agreements serve to protect those in the gig economy on a disproportionate basis.

This paper looks at another aspect of the gig economy – temporary help agencies ("THAs").

Specifically, this paper will look at the regulation of THAs through the *Employment Standards Act, 2000* (the "ESA") and address common employment law pitfalls observed in the industry.

As there are growing numbers of: THAs, agency workers (otherwise known as assignment employees), recruiters, clients of THAs, and/or "consultants", it is likely a matter of time before one of the issues raised in this paper comes across your desk.

Lastly, this paper will provide an overview of licensing requirements for THAs and "recruiters" recently proclaimed to be coming into force, in two stages, on: (i) July 1, 2023; and (ii) January 1, 2024.

PART XVIII.1 OF THE ESA

Before certain digital platforms, THAs were viewed as one of the main vehicles for avoiding minimum employment protections.

By their nature, THAs can be viewed as providing precarious employment if looked at on an assignment-by-assignment basis. On top of that, in practice, many THAs often sought to classify their assignment employees as independent contractors.

In 2009, the ESA was amended to add Part XVIII.1, entitled "Temporary Help Agencies".

Section 74.3 of the ESA was introduced in this new Part of the ESA and still reads today as follows:

Employment relationship

74.3 Where a temporary help agency and a person agree, whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency,

(a) the temporary help agency is the person's employer;

(b) the person is an employee of the temporary help agency.

Section 74.3 appears to dictate that the THA, and only the THA, is *the* employer of a person being placed with its client(s).[1]

As the "employer", the THA is the responsible party for ensuring minimum standards in the ESA are met and, in combination with section 5 of the ESA, section 74.3 leaves little doubt that the relationship is anything other than one of employer-employee. The clarity of section 74.3, therefore, provides at least a base level of protection for assignment employees.

Nevertheless, it is not uncommon, even 14 years after the introduction of Part XVIII.1, to see THAs still attempting to classify persons they assign to clients as independent contractors. The lack of jurisprudence in this area means they have largely been able to get away with this arrangement to date. However, there are obvious employment law (and likely tax law[2]) consequences associated with such a business model.

Best Practices Tip: if you are a THA, lean into the automatic employer-employee relationship deemed by the ESA, rather than shy away from it.

First, if a THA is operating under the assumption that the individuals it places with its clients are independent contractors, it almost certainly means any termination clause in those contracts will be found unenforceable if put to the test. Alternatively, there may be no termination clause at all.

In either case, THAs are slapped with the statutory designation as an "employer", which will likely lead to an obligation to provide reasonable notice of termination, or pay in lieu thereof, at common law.

Of course, the timing and process of implementing a termination clause in an employment relationship is always critical. It is well-accepted that there has to be fresh consideration provided at the time of implementing a new agreement/termination clause and simply offering to continue employment does not qualify as said consideration.[3]

In the context of a THA and its assignment employee, section 74.3 arguably establishes an employer-employee relationship at a stage earlier than a typical employment relationship. It is established at the time where the THA and person agree (whether or not in writing) that the agency *"will assign or attempt to assign the person"*.

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[1] *2517906 Ontario Inc. o/a Temporary Personnel Solutions v. Canadian Personnel Solutions o/a CPS et al.*, 2022 CanLII 78147

[2] These are outside the scope of this paper.

[3] *Goberdhan v. Knights of Columbus*, 2023 ONCA 327, paras. 17-23.

In other words, before the employer (the THA) even knows whether there is a need or demand for a person's services, an employment relationship is created. Fundamental terms of a typical employment relationship, like compensation or role, may be absent in the agreement between the THA and the person, but an employer-employee relationship could nonetheless be crystallized.

After that point, any new written employment contract and/or termination clause that the THA seeks to implement will likely be deemed unenforceable unless additional consideration is provided.

With enforceable written terms of employment, a THA can limit its exposure on termination of employment to the statutory minimums as other employers may do.

> **<u>Best Practices Tip:</u> if you are a THA, ensure you receive a signed written employment contract prior to offering to assign, or even attempting to assign, a person with a client.**

It is a popular misconception among THAs that they do not need to provide statutory notice of termination (or termination pay) and/or severance pay as other employers do.

Although there are some modified rules to the application of the termination and severance provisions to assignment employees in Part XVIII.1, there is no escape from these obligations as compared to any other employer.

Termination and severance obligations can sneak up on THAs unlike for other employers.

Paragraph 1 of section 74.11 of the ESA deems an assignment employee to be on a layoff for one week if the employee was not assigned to work for a client during that week.

Section 56 deems a layoff longer than 13 weeks in any period of 20 consecutive weeks to be a termination. Section 63 contains a similar mechanism for deeming a layoff that exceeds "temporary layoff" status to be a severance of employment.

For THAs with hundreds or thousands of assignment employees on their roster, it would be very easy for a THA to be deemed to have terminated (and, perhaps, severed) an employee's employment if they are not diligent in continuing to search for and offer each and every inactive assignment employee a reasonable assignment.[4]

In isolation, the exposure to claims from short-serving assignment employees is likely low. Another reason, perhaps, why there is little jurisprudence in this area.

However, on a weekly/monthly/yearly basis, the exposure for termination/severance pay could grow for each new employee deemed to have been terminated. This author believes it is only a matter of time before there is a lawsuit with multiple plaintiffs against a THA on this point, or, perhaps, a class action.

> **<u>Best Practices Tip:</u> THAs need to be diligent in timetabling when assignment employees could be deemed to have their employment terminated/severed by the ESA.**
>
> **<u>Best Practices Tip:</u> have a paper trail showing when reasonable assignment offers were made to all assignment employees, regardless of whether it is known or believed that the**

[4] By offering an assignment to an assignment employee, if they are not available or refuse a reasonable offer, this would be an "excluded week" and stop the clock in terms of the temporary layoff period.

assignment employee is unavailable and regardless of whether the offer is likely to be accepted.

Part XVIII.1 of the ESA distinguishes between a termination of employment versus a termination of an assignment. With the latter, the only notice (or pay in lieu of notice) requirement for a THA is to provide one week's notice to the assignment employee if the work they were performing for the client had an estimated term of more than three (3) months and the assignment is being terminated before the end of its estimated term.[5]

THAs will want to ensure that they are not seen or understood to be terminating the assignment employee's *employment* in such a moment, which would trigger the usual termination (and, perhaps, severance) provisions of the ESA (and, perhaps, at common law).

As section 74.4 of the ESA makes clear, an assignment employee does not cease to be the agency's assignment employee just because he or she is not assigned by the agency to perform work for a client of the agency.

<u>Best Practices Tip:</u> if you are a THA, ensure that your communications to assignment employees are clear and do not confuse the termination of an assignment with the termination of employment.

"CONSULTANTS" EXEMPTION

Effective January 1, 2023, certain "business consultants" and "information technology consultants" became exempt from the application of the entire ESA. This, of course, includes the provisions surrounding termination pay, severance pay, vacation pay, public holiday pay, maternity leave, and Part XVIII.1 regarding temporary help agencies.

While the exemption from the ESA for "consultants" is not limited to the THA context, since a large portion of the THA industry involves IT professionals (and to a lesser extent, business professionals), these exemptions to the ESA warrant discussion in this paper.

Part XVIII.1 was designed to bring the ESA's protections to more people in the gig economy. The consultants' exemption[6] will, to a certain extent, undo this.

One of the stated reasons for the consultants' exemption is that:

> *"Some businesses have voiced concern about the uncertainty involved in entering contracts with these types of workers. These businesses want assurance that they will not be found to be in an employment relationship – with all the additional costs that entails."*[7]

The consultants' exemption makes it clear that the ESA won't imply an employment relationship. But, in this author's opinion, it cannot go further than that. As will be discussed below, a consultant could be

[5] See section 74.10.1 of the ESA.
[6] Consultants' exemption is comprised of: section 1(1) "business consultant" and "information technology consultant"; paragraph 11.1 of section 3(5); and section 3(7).
[7] https://www.ontariocanada.com/registry/view.do?postingId=41089&language=en

found to be an employee at common law, which could still invite additional costs on the host employer. The consultants' exemption may not give these businesses the assurance they think they are getting and remove the floor of protections the ESA typically offers.

In any event, the consultants' exemption seems based on a policy decision that those who are higher paid do not need the protections of the ESA. It could lead to many people who are paid greater than $115,000 /year[8] being exempt from the ESA.

To qualify as a "consultant" and be exempt from the ESA, a person needs to:

1. provide services:
    a. through a corporation (where they are a sole director or shareholder); or
    b. through their own sole proprietorship with a registered business name;
2. have an agreement that:
    a. expressed as an hourly rate, pays equal to or greater than $60 / hour (not including bonuses, commissions, benefits, etc.); and
    b. states when this amount will be paid to the consultant;
3. actually be paid the amount at #2.

Under the definition of "information technology consultant", in addition to the above, the person would need to be providing: *"advice or services… in respect of its information technology systems"*.

Under the broader definition of "business consultant" the individual would need to be providing:

> *"advice or services… in respect of its performance, including advice or services in respect of operations, profitability, management, structure, processes, finances, accounting, procurements, human resources…"*[9]

Therefore, if an individual would have otherwise been deemed to be an assignment employee of a THA, but could now qualify as a "consultant", then, practically, the THA and the individual being assigned can organize their relationship as if it were pre-2009.

> **Best Practices Tip: if you are a THA, consider attempting to qualify certain of your assignment employees as consultants, to avoid your obligations as a deemed "employer" under the ESA.**

> **Best Practices Tip: if you are a client, considering hiring consultants yourself for discrete tasks rather than pay a premium for assignment employees through a THA.**

It needs to be remembered that the ESA does not govern the taxation requirements that THAs, assignment employees, or "consultants" need to observe. It should not be assumed, for example, that a THA is exempt from deducting and withholding income tax, CPP contributions and EI premiums for a

[8] Assuming $60.00 /hr x 40 hours /wk x 48 weeks per year.

[9] In this author's opinion, a large majority of management-level employees could qualify as "business consultants". The government's Guide to the consultants' exemption makes clear that the exemption applies to those who would otherwise be covered by the ESA. It does not simply reinforce that true independent contractors are exempt from the ESA. It creates an exception for those who would otherwise have been found to be employees. Any further comment is outside the scope of this paper.

"consultant", simply because that individual meets the definition and requirements of the ESA. A "consultant" under the ESA is not equivalent to an independent contractor.

> **<u>Best Practice Tip:</u> if you are an individual, consider what your risks and benefits are in being classified as an assignment employee versus a consultant. Consult a tax professional before determining what label would provide you with more favourable tax treatment.**
>
> **<u>Best Practice Tip:</u> if you are a THA, do not assume that an individual who meets the definition of "consultant" in the ESA relieves you from statutory deductions and withholdings. Consider a tax indemnity if an individual insists on being paid as an independent contractor.**

COMMON LAW UNAFFECTED

So far, the discussion of protection/exposure in this paper has been from the point of view of the THA and assignment employee.

It needs to be remembered that due to the application of section 8 of the ESA, an individual's rights pursuant to the ESA run parallel to their common law remedies. Therefore, in this author's opinion, section 74.3 has not provided clarity or significant protection for "clients" of THAs. What it has done is given a false sense of security.

If you are, or represent a client of a THA, you would be mistaken if you think section 74.3 of the ESA shields you from any employment law exposure, by putting it all on the THA instead. Many clients believe that the reason they pay THAs a premium is because they are not just sourcing/supplying the actual labour, but because they are taking on the exposure as well.

To a certain extent, that may be true, but the common employer doctrine at common law could easily be invoked by an agency employee to demand entitlements from the THA and the client, such as reasonable notice of termination (or pay in lieu), likely catching many clients off-guard.

To avoid an allegation of common employer, or, at the very least, to decrease your chances of being hit with an "employer" label if such an argument is made, clients of THAs should insist that as a condition of any assignment with it, the THAs require any person to be assigned first sign a document acknowledging that the client is not an employer of the assignment employee at common law.

As the Court of Appeal in *O'Reilly*[10] made clear, intention of the parties is critical to the common employer doctrine. A document at the inception of the relationship that establishes who will be the employer as between the THA and the client, or even better, setting out what responsibilities fall to each, will likely help insulate the client from being found to owe traditional employer duties to the assignment employee.[11]

> **<u>Best Practices Tip:</u> if you are a client, insist that the THA require its assignment employees to acknowledge in writing that you are not an employer and/or not responsible for certain common law duties, such as reasonable notice of termination.**

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[10] *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385.

[11] See *Mazza v. Ornge Corporate Services Inc.* 2015 ONSC 7785 at paras. 93-99, aff'd 2016 ONCA 753 at paras. 4-8.

As a second line of defence, clients of THAs should also insist on a services agreement with the THA, particularly one that includes an indemnity for certain costs employers may typically incur vis-à-vis employees, such as wrongful dismissal damages and legal costs associated with same.

> **<u>Best Practices Tip:</u> if you are a client, negotiate an indemnity from the THA for certain employment-related costs often placed on employers, such as wrongful dismissal damages.**

In this author's opinion, the THAs that educate their clients on the common law exposure and provide the best shield possible to their clients will be better able to justify their services and premiums in the long run.

In connection with the consultants' exemption, those who use a consultant's services may also be caught off-guard to find out that an exemption from the ESA does not mean a consultant cannot pursue certain rights against the THA or the host employer under the common law.

That said, as the ESA provisions will not stand in the way, with a proper contract, those who use the services of a consultant ought to be able to protect themselves. As always, implementing that contract on the front end will be critical.

> **<u>Best Practices Tip:</u> if you use the services of a "business consultant" or "information technology consultant", either through a THA or directly, ensure you have an enforceable contract that will oust common law rights the consultant may have, like reasonable notice of termination.**

UPCOMING LICENSING REQUIREMENTS – THAs AND RECRUITERS

On July 1, 2023, Part XVIII.1 of the ESA will be renamed to "Temporary Help Agencies **and Recruiters**" and a new licensing regime will begin to be in force (fully in force by January 1, 2024).

It has been known for some time – since the *Working for Workers Act, 2021* bill was assented to on December 2, 2021 – that a licensing regime would be coming to THAs. A brief review of this regime will be covered here.

What may catch some by surprise is how wide the net has been cast on the licensing of "recruiters". It is not just THAs – organizations that offers *temporary* work to individuals – that are being regulated. Agencies, or "recruiters" who provide services for *indefinite* employment placement have also been caught up in the regulatory web.

Newly-released O. Reg. 99/23 establishes the definition for who is a "recruiter". It appears that the employees of THAs (sometimes referred to as recruiters) or other permanent placement agencies do not need to be licensed on an individual basis. It is the entity that: *"for a fee, finds or attempts to find…*

(a) …employment in Ontario for prospective employees…"; or
(b) …employees for prospective employers in Ontario…",

who requires licensing. There are exceptions for educational institutions, trade unions, charities and those recruiting as part of specific government programs.

Between July 1, 2023, and January 1, 2024, any THA or "recruiter" should be starting the process to prepare their application for licensing – which comes with a $750 fee and the requirement to provide an irrevocable letter of credit to the Director of Employment Standards in the amount of $25,000. This letter of credit will be used if there are violations of the ESA.

Commencing January 1, 2024, it is a violation of the ESA to be operating as a THA or recruiter unless you hold a license for that purpose.[12]

> **Best Practices Tip: if you are a THA or meet the definition of "recruiter", you will want to commence an application for a license as soon as possible, and submit it no later than December 31, 2023.**

It is also a violation of the ESA, beginning on January 1, 2024, if you are a client of a THA, or use the services of a recruiter, knowing that the THA or recruiter does not hold the required license.

> **Best Practices Tip: if you are a client of a THA, or use the services of a recruiter, ensure that you are given positive representations in writing that the THA and/or recruiter hold the required license to operate. Notwithstanding those representations, if you have knowledge they may be untrue, cease using the services of the THA and/or recruiter.**

While fines for contravention of the licensing scheme start at $250, they can escalate to $1,000 for a third violation in a three-year period. If a THA or client agree to assign a high number of employees in the absence of a license, this author sees no reason why that could not be treated by an Employment Standards Officer as a separate violation for each assignment – fines that would add up quickly.

To circle back to the topic that started this paper, namely, THAs owing their assignment employees notice of termination of assignment, notice of termination of employment (or termination pay) and severance pay: it is important to note that a failure of a THA to get a license to operate does not create a frustration of contract scenario. If a THA or recruiter do not receive a license (or get a license renewed at a later point) and therefore must terminate all of their employees, they will be on the hook, at a minimum, for each person's statutory termination and severance obligations.

[12] If you have submitted an application for a license, but have not received a decision by January 1, 2024, you are entitled to continuing operating without a license, until a decision is made.

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TAB 18

The Eight-Minute Employment Lawyer 2023

Fixed-Term Employment Agreements: Key Considerations and Recent Case Law

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June 22, 2023

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Fixed-Term Employment Agreements: Key Considerations and Recent Case Law

By: Matthew Wise

Introduction

Fixed-term employment agreements are characterized by the stipulation of an employment relationship that lasts for a specific duration of time. The employment relationship terminates on the predetermined end date, unless both parties mutually decide to renew or extend the duration of the agreement. Since the end date is predetermined, there is no need for an employer to provide notice. The duration of such agreements can vary widely, ranging from a few weeks or months to a few years, depending on the nature of the work.

Advantages

When executed properly, fixed-term employment agreements can be beneficial to employers and employees. For example, employers may need to source workers with specialized skills for a short-term project or assignment, or temporarily need more workers to cover a busier-than-normal season. Employees on the other hand may benefit from the short-term commitment, which may allow for versatility in exploring various types of roles. However, there is no doubt that the advantages skew towards employers. Through this set-up, employers can enjoy the flexibility of hiring workers for their specialized needs, all while avoiding common law notice and severance obligations.

Heavy Scrutinization by Courts

Despite the many advantages for employers, fixed-term employment agreements can easily backfire in cases where they are terminated early or found unenforceable—and they are often found unenforceable. Generally, courts are wary of fixed-term employment agreements as they may be seen as a vehicle for employers to avoid their obligations under the *Employment Standards Act*, 2000, S.O. 2000, c.41 [*ESA*]. The Court in *Ceccol v. Ontario Gymnastics Federation*, [2001] OJ No 3488 (QL) [*Ceccol*] cautioned that:

> *Employers should not be able to evade the traditional protections of the ESA and the common law by resorting to the label of 'fixed-term contract' when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite-term relationship.*

A Cautionary Tale

More recent cases in Ontario continue to point to the pitfalls of fixed-term employment agreements. In *Tarras v. The Municipal Infrastructure Group Ltd.*, 2022 ONSC 4522 [*Tarras*], the plaintiff employee was dismissed by the employer only 13 months into a fixed, three-year employment contract "without cause." The employee commenced an action for damages. The

Court's decision turned on the wording of the early termination clause, which it found ambiguous and therefore unenforceable.

> *TMIG*, [the Employer], *may terminate Employee's employment in its sole discretion for any reason whatsoever without Cause or upon expiry of the Term, by providing Employee with notice of termination, or payment in lieu thereof, or a combination of both, and severance pay, if applicable, pursuant to the Ontario Employment Standards Act, 2000.*

While it was not surprising that the without-cause termination clause was found unenforceable, the employer's contract also contained a clause that stated it may terminate the employee without notice or severance pay in the event of cause. "Cause" in this scenario was defined as the failure to perform material duties, engagement in theft/dishonesty, and the willful refusal to take directions. This definition contravened Section 2(1) of Ontario Regulation 288/01 under the *ESA*, which only allows the termination of employees without notice or severance pay if the employee is guilty of willful misconduct or disobedience.

Since both termination clauses were found unenforceable, the Court relied on the principle in *Howard v. Benson Group Inc.*, 2016 ONCA 256. "*In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation.*"

As a result, the court ordered the employer to pay the employee for the balance of the fixed term: 23 months' pay in lieu of notice in the amount of $479,166.67—an amount which far exceeds what the employee would have received under common law notice. In addition, the Court found that the employee did not have any obligation to mitigate his damages.

Best Practices

If employers still wish to use a fixed-term employment agreement despite the risks, there are several ways to ensure that the termination clause will be enforceable. In contrast to *Tarras*, a case called *Steele v. The Corporation of the City of Barrie*, 2022 ONSC 7245 [*Steele*] demonstrated that explicit and unambiguous language, coupled with conduct that suggests a clear understanding of the temporary employment situation, can combat many of the concerns regarding fixed-term employment agreements.

In *Steele*, the plaintiff employee was hired for a fixed term of two years with only four options to extend. The employee exhausted these options and later sued for wrongful dismissal, claiming that the City employer's conduct suggested that his employment was indefinite. However, the Court found that there was no breach of contract nor wrongful dismissal. Unlike the continuous service issue pointed out in *Ceccol*, everything from the job posting to the employment agreement, extensions, and conduct of the employer clearly indicated a fixed-term employment agreement.

The lessons from these recent Ontario cases are clear: Fixed-term employment agreements will always be heavily scrutinized by Courts. So, if employers still want to go down this route, they should ensure that their written agreements and conduct are as air-tight as the case in *Steele*.