Good Morning!

Welcome to the HR/Employment Seminar

Employment Contracts: Termination Clauses, Consideration and Restrictive Covenants

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Employment Contracts are Contracts

- Offer (in terms that can be enforced, made with intent to create legal relations)
- Acceptance
- Consideration
- Capacity
- Legality

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Employment Contracts are Special Contracts

- Special relationship to which special policy considerations apply
- Implied terms
- Statutory terms (*Employment Standards Act, 2000*, S.O. 2000, c. 41, *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, etc)

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Consideration: *Francis v. CIBC*

- June 9, 1978, the bank made Mr. Francis an offer of employment, which he accepted.
- On July 4, 1978, Mr. Francis signed an employment contract with the bank which said that the bank could terminate his employment without cause upon giving one month's notice for each completed year of service, up to a maximum of three months' notice.
- In 1986, Mr. Francis was terminated without cause and sued for wrongful dismissal.

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Consideration: *Francis v. CIBC*

- The court had to determine whether the contract was enforceable.
- If it was enforceable, Mr. Francis would be entitled to three months' pay in lieu of notice.
- If not enforceable, Mr. Francis would be entitled to significantly more (12 months).

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Consideration: *Francis v. CIBC*

- The contract did not contravene the provisions of the relevant legislation (in this case, the *Canada Labour Code*, R.S.C. 1985, c. L-2).
- Was the plaintiff bound by the contract he signed on July 4, 1978? Was that contract enforceable?

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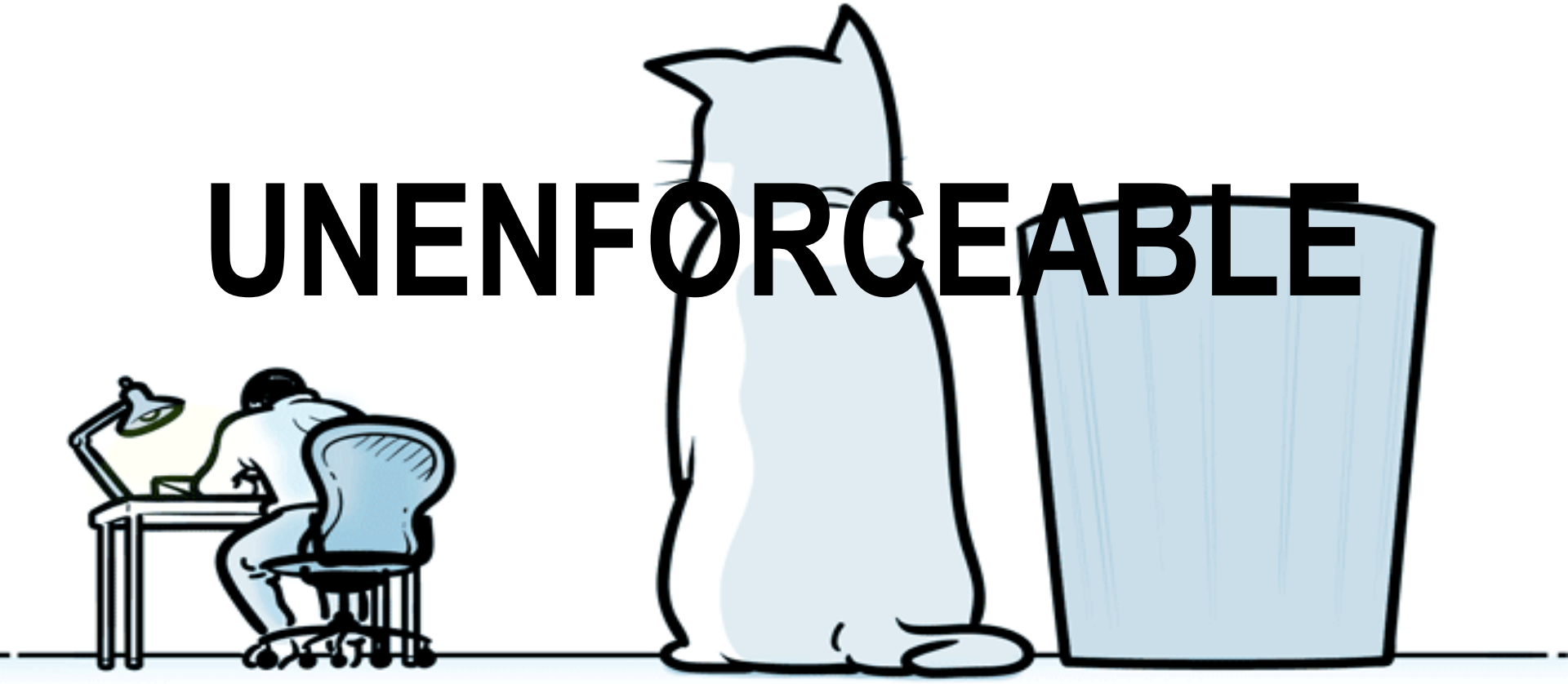
Consideration: *Francis v. CIBC*



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Consideration: *Francis v. CIBC*

- The contract was void for lack of consideration.
- The bank was already bound to employ the plaintiff by virtue of the fact that he had accepted the bank's offer of employment, something which he had done prior to signing the contract.
- There was no additional consideration to support modification of the implied term which required the bank to give the plaintiff reasonable notice of termination.

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Consideration: The Lesson

- Past consideration is not consideration.
- Allowing an employee to continue their employment without being fired is not consideration.

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Helpful Tips!

- Ensure contracts are executed before the start of employment or a new role.
- If a contract is introduced after the commencement of employment, the drafter should ensure that the recitals highlight the intentions of the parties and clearly identify the bonus, raise or other consideration that was exchanged in lieu of the terms of the contract.

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Restrictive Covenants

Non-Competition

Employee undertakes not to compete with the employer post-employment.

Non-Solicitation

Employee undertakes not to solicit customers or employees of the employer post-employment.

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Restrictive Covenants

- Found in employment contracts and in contracts for the sale of a business.
- Tension in common law between the concept of freedom of contract and public policy considerations against restraint of trade.
- Restraint of trade is enforceable only if it is REASONABLE.

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Determining Reasonableness

- **GEOGRAPHY AND TIME:** As a general rule, the reasonableness of a restrictive covenant is determined in reference to geographic coverage and the period of time during which it is to be effective.
- **AMBIGUITY:** For a determination of reasonableness to be made, the terms of a restrictive covenant must be unambiguous.

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H.L. Staebler Company Ltd. v. Allan

Example

"In the event of the termination of your employment with the Company, you undertake that you will not, for a period of 2 consecutive years following said termination, conduct business with any clients or customers of H.L. Staebler Company Limited that were handled or serviced by you at the date of your termination."

- *H.L. Staebler Company Ltd. v. Allan*, 2008 Carswell Ont 4650 (C.A.).

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H.L. Staebler Company Ltd. v. Allan

- Employees resigned and began to work selling insurance for a new employer.
- A significant number of clients followed them.
- Is the restrictive covenant enforceable?

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H.L. Staebler Company Ltd. v. Allan

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H.L. Staebler Company Ltd. v. Allan

- The covenant was not reasonable – while it had a two year time limit, it had no geographic limit.
- The covenant was also too broad in that it did not merely restrict solicitation of Staebler's customers, but prohibited the employees from conducting business with the customers in any line of business, commercial insurance or otherwise.

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Restrictive Covenants: Ambiguity

Another Example

12. Shafron agrees that, upon his leaving the employment of MSA or KRG Insurance for any reason save and except for termination by KRG Insurance without cause, he shall not for a period of three (3) years thereafter, directly or indirectly, carry on, be employed in, or be interested in or permit his name to be used in connection with the business of insurance brokerage which is carried on within the metropolitan City of Vancouver. [Emphasis added.]

KRG Insurance Brokers (Western) Inc. v. Shafron, 2009 CarswellBC 79 (S.C.C.)

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KRG Insurance v. Shafron

- There is no such thing as the "metropolitan City of Vancouver".
- The covenant is ambiguous.
- As a result, it is unenforceable.

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You're Stuck with what You Drafted

- The fact that a clause might have been enforceable had it been drafted in narrower terms will not save it. The question is not whether a valid agreement might have been made but whether the agreement that was made is valid.

J.G. Collins Insurance Agencies v. Elsley, [1978] 2 S.C.R. 916.

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General Principles:
J.G. Collins Insurance Agencies Ltd. v. Elsley

The onus lies on the employer to show the following:

(i) that it has a a proprietary interest entitled to protection;

(ii) that the covenant is reasonable in terms of time and space; and

(iii) where a non-competition clause is involved, that a non-solicitation clause would not suffice to protect the employer's interests.

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Non-Solicitation: The Principles

- Non-solicitation clauses in an employment contract are enforceable so long as the restrictions are reasonable.
- They must be clearly drafted.
- Employee should be able to solicit clients if the employee moves to employment in an unrelated business.

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Non-Solicitation: More Principles

- The clients should be limited to those serviced directly by the employee.
- The geographic scope should be where the employee operated.
- The duration must be reasonable (will seldom exceed 12 months).

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Non-Competition

- Non-competition clauses in employment contracts are *prima facie* void and unenforceable unless it can be shown that the agreement was reasonable as between the parties in light of the particular facts of the employment relationship.
- Non-competition clauses are not enforceable where a non-solicitation clause would adequately protect and employer's interest. (*Lyons v. Multari* (2000), 50 O.R. (3d) 526 (C.A.).)

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Helpful Tips!

- Ensure restrictive covenants are not overly broad.
- Non-solicitation clauses will generally suffice for most employees.

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Termination Clauses

Why do they matter?

- Implied term that the employer has a duty to provide reasonable notice of dismissal
- If no notice, employer must provide payment in lieu thereof
- Property drafted termination clauses seek to limit or "cap" the amount of notice to be provided

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Termination Clauses: A Problem

- An improperly drafted termination clause may be struck out by the court and, as a result, the employee will be entitled to notice as prescribed by common law.
- An employee's common law entitlements may be far in excess of what they would be under the relevant legislation or contract.

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Termination Clauses: Must Comply with *ESA*

No contracting out

5.(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

- *Employment Standards Act, 2000*, S.O. 2000, c. 41.

Ontario

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Termination Clauses: Compliance with the *ESA*

Sample

"The corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario." - *Stevens v. Sifton Properties Limited*, 2012 CanLII 5508 (Ont. S.C.J.)

- Is this enforceable? Does it comply with the *ESA*?

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Termination Clauses: *Stevens v. Sifton*

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Termination Clauses: *Stevens v. Sifton*

Pay instead of notice

61. (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,

(a) pays to the employee termination pay in a lump sum […]; and

(b) continues to make whatever benefit plan contributions would be required to be made […]. [Emphasis added]

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Termination Clauses: *Stevens v. Sifton*

- No mention of benefits in termination clause.
- Court found clause to be void.
- Employee was entitled to common law reasonable notice.

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Termination Clauses: *Wright v. Young*

- President of the Company terminated
- 49 years old
- Compensation $285,000
- Hired January 10, 2005
- Terminated February 1, 2010 (5 years of service)
- Company provided 13 weeks base pay, RRSP contributions, benefits and car allowance

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Termination Clauses: Compliance with the *ESA*

The employment of the Employee may be terminated ... by the Company upon payment in lieu of notice, including severance pay as follows:

a) ...
b) within two years of commencement of employment – four (4) weeks Base Salary;
c) after two and up to three years ...– six (6) weeks' Base Salary;
d) ...
e) five years or more and up to ten years after commencement of employment – thirteen (13) weeks' Base Salary, plus one (1) additional week of Base Salary for every year from 6–10 years of service up to a maximum of 18 weeks;

- *Wright v. The Young and Rubicam Group of Companies (Wunderman)*, 2011 CanLII 4720 (Ont. S.C.J.).

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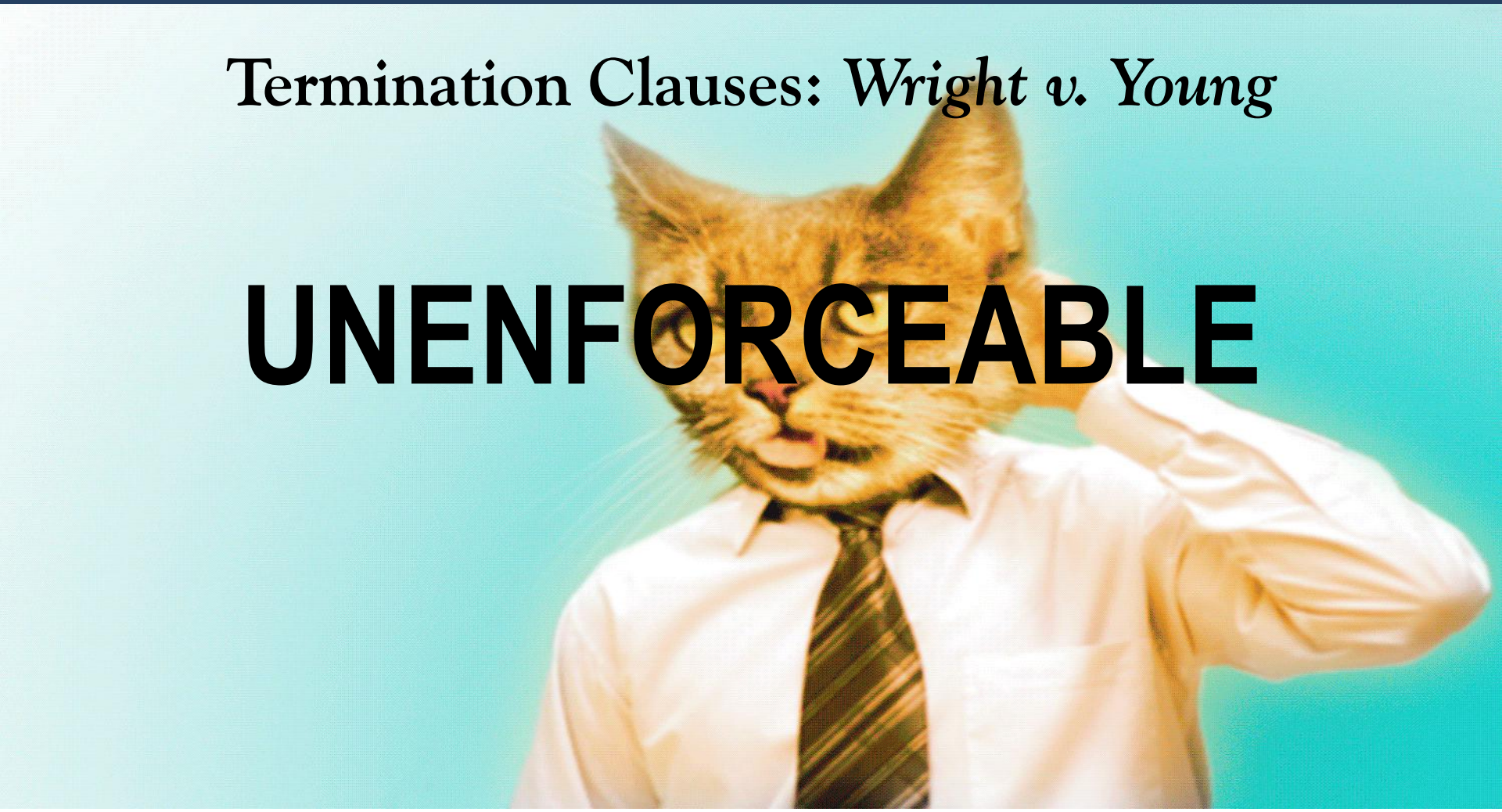
Termination Clauses: *Wright v. Young*



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Termination Clauses: *Wright v. Young*

- The termination clause provided for only base pay, without mentioning the continuation of benefits
- Further, if employee had 8.5 years of service, the contract would provide 16 weeks base pay. ESA would entitle the employee to 16.5. Contract provides less than ESA.

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Termination Clauses: *Wright v. Young*

- Court awarded 12 months reasonable notice (including pay and benefits).

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Helpful Tips!

- Make sure termination provisions comply with the applicable legislation.
- The law tends to evolve over time – speak with a lawyer!

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Violence and Harassment in the Workplace

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What is "Workplace Violence"?

"workplace violence" means,

(a) the *exercise* of physical force by a person against a worker…

(b) an *attempt to exercise* physical force against a worker…

(c) a *statement or behaviour that it is reasonable* for a worker *to interpret as a threat* …

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 1

What is "Workplace Harassment"?

"workplace harassment"
means engaging in a course of vexatious *comment or conduct*...
…that is known or ought reasonably to be known to be *unwelcome*.

***Occupational Health and Safety Act,* R.S.O. 1990, c. O.1, s. 1**

Employers Must Prepare Violence and Harassment Policies

An employer shall,

(a) prepare a policy with respect to workplace violence;

(b) prepare a policy with respect to workplace harassment; and

(c) review the policies as often as is necessary, but at least annually.

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 32.0.1

HR's Top Concerns

1. Proper investigation of employee complaints
2. Effective execution of workplace violence and harassment policies
3. Appropriate consequences for perpetrators of violence and harassment

Proper Investigation of Employee Complaints

Disotell v Kraft Canada Inc.

- Disotell was subjected to approximately 100 sexually inappropriate and offensive comments made by co-workers. Disotell felt he was the laughing stock of his night shift and his work conditions became intolerable.
- Disotell repeatedly complained to his shift supervisor, who refused to intervene.
- Disotell told his supervisor he was going to file a formal written complaint.
- The supervisor told Disotell that if he filed a complaint, he should seek transfer out of the department. The supervisor warned Disotell that if he filed a written complaint, it could result in his termination.

***Disotell v Kraft Canada Inc.*.. 2010 ONSC 3793, 2010 CarswellOnt 5781**

Proper Investigation of Employee Complaints

Kraft's Harassment Policy undertakes and obliges supervisors to maintain a work environment free of intimidation or harassment, to stop the same from occurring and to respond immediately to complaints.

Disotell v Kraft Canada Inc.. 2010 ONSC 3793, 2010 CarswellOnt 5781

Proper Investigation of Employee Complaints

Outcome:

16 year non-management employee
36 years of age
Mitigation with substantially reduced salary
Employer's failure to properly investigate
= **12 months' notice** ($43,978.00) + pre-judgment interest (for 3 years) + partial indemnity costs

Effective Execution of Workplace Violence and Harassment Policy

Boucher v Wal-Mart Canada Corp.

Employees are encouraged to report, on a confidential basis, concerns about how the store is operated or how employees are treated.

Wal-Mart undertakes to take all reports of incidents seriously and to protect an employee making a complaint from acts of retaliation.

Wal-Mart will protect employees from unwelcome conduct that offends a person's feelings.

Boucher v Wal-Mart Canada Corp., 2014 ONCA 419, 2014 CarswellOnt 6646

Effective Execution of Workplace Violence and Harassment Policy

- Pinnock asked Boucher to falsify a temperature log. When Boucher refused, Pinnock subjected her to a disciplinary "coaching" session.
- Boucher felt that this "coaching" session was unfair and used Wal-Mart's open door communication policy to complain.
- Pinnock was made aware of Boucher's complaint and from that day forward he continuously and increasingly abused her.
- Boucher then met with three senior management representatives of Wal-Mart.

Boucher v Wal-Mart Canada Corp., 2014 ONCA 419, 2014 CarswellOnt 6646

Effective Execution of Workplace Violence and Harassment Policy

Outcome (on Appeal):

Against Walmart: **$200,000** in aggravated damages
$100,000 in punitive damages

Against Pinnock: **$100,000** in damages for intentional infliction of mental suffering
$10,000 in punitive damages

Boucher v Wal-Mart Canada Corp., 2014 ONCA 419, 2014 CarswellOnt 6646

Appropriate Consequences for Perpetrators of Violence and Harassment

Hydro One Inc. v CUSW

- Ms. Allan made multiple comments to co-workers that could be perceived as threats.
- For example:
    - "Don't worry about me. I carry weapons."
    - "It would feel really good to kill something today."

Hydro One Inc. CUSW, 2014 CarswellOnt 10678

Appropriate Consequences for Perpetrators of Violence and Harassment

- Ms. Allan was terminated for cause
- The termination letter stated "Your inappropriate behaviour and serious breaches of the Code of Business Conduct and Workplace Violence and Harassment policy have resulted in irreparable harm to the employer-employee relationship."

Hydro One Inc. CUSW, 2014 CarswellOnt 10678

Appropriate Consequences for Perpetrators of Violence and Harassment

Aggravating/Mitigating Factors to Consider:

- Who was the subject of the threat?
- Was it a momentary flare-up or a pre-meditated threat?
- How serious was the threat?
- Was there any provocation?
- What was the employment and discipline record of the employee?
- What are the economic conditions?
- Has the grievor offered an apology?

Appropriate Consequences for Perpetrators of Violence and Harassment

- Every act of workplace violence/harassment will not necessarily warrant discharge.
- The *Occupational Health and Safety Act* does not address the nature or quantum of discipline for workplace violence.
- The *Act* does not say that all incidents of workplace violence are equally serious, but rather that they are all required to be taken seriously, investigated and addressed.

THANK YOU!

HUMAN RIGHTS DAMAGES IN WRONGFUL DISMISSAL CASES

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Human Rights Damages in Wrongful Dismissal Cases

- Awarded for violations of the Ontario Human Rights Code (the "Code")
- Violations include:
  - Discrimination or harassment in the workplace because of race, ancestry, place of origin, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability

2008: Important Change in the Law

- Before June 30, 2008 – courts had no authority to award Human Rights damages
- On June 30, 2008 – the Code was amended to include section 46.1

Section 46.1 of the Code

- The court may make an order to:
  - pay monetary compensation; and/or
  - make “restitution”

Section 46.1 of the Code

- For loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect
- Creates efficiencies and avoids multiplicity of proceedings

Summary

Non-Unionized Employees:

- Wrongful dismissal claim → Court
- Wrongful dismissal claim + Human Rights claim → Court
- Human Rights claim → Tribunal

Tribunal v. Court

- Tribunal has used its broad remedial power to order an employee be made "whole" through reinstatement
- Unclear whether courts will order reinstatement
- No authority for Tribunal to award costs for legal fees (although this may be changing)

Wilson v. Solin Mexican Foods Inc.

- 2013 Ontario Superior Court decision – first one since the amendment of the Code
- 54-year old employed for 16.5 months as an assistant controller then as a business analyst

Wilson v. Solin Mexican Foods Inc.

- Salary of $65,000
- Employment terminated “for organizational changes” while on leave of absence for temporary back ailment

Wilson v. Solin Mexican Foods Inc.

- Doctor's note indicating that employee could return to work on a gradual basis
- Employer demanded that employee return full-time with full-time duties
- Employer provided two weeks' pay in lieu of notice

Wilson v. Solin Mexican Foods Inc.

Held:

- Employee's back ailment significant factor in termination of her employment
- Employer discriminated against employee due to disability

Wilson v. Solin Mexican Foods Inc.

Held:

- Employers have a duty to act fairly
- Employers are required to be candid, reasonable, honest and forthright when dismissing employees

Wilson v. Solin Mexican Foods Inc.

Factors Considered in Assessing Amount of Human Rights Damages:

- The employee's loss of her right to be free from discrimination
- The employee experienced "victimization"

Wilson v. Solin Mexican Foods Inc.

Factors Considered:

- Employer's behaviour: the employer orchestrated the dismissal and was disingenuous at various times both before and during termination

Wilson v. Solin Mexican Foods Inc.

Factors Considered:

- Employee's evidence that she was "shocked, dismayed and angered" by employer's pre-termination letter
- Employee vaguely referred to "loss of dignity and loss of feelings of self-worth" in relation to the same letter

Wilson v. Solin Mexican Foods Inc.

Decision:

- 3 months' pay in lieu of notice;
- $20,000 in general damages for Human Rights infringement (30% of employee's salary); and
- Legal Costs

Berkhout v. 2138316 Ontario Inc.

- 2013 Ontario Small Claims Court decision
- Employed for only 4 months
- Employee dismissed after complaining about sexual harassment at work

Berkhout v. 2138316 Ontario Inc.

- In addition to awarding damages for “unlawful dismissal”, employee was awarded $15,000 for the violation of her Human Rights
- Decision has been appealed

Fair v. Hamilton-Wentworth District School Board

- 2013 Tribunal decision
- Employee developed general anxiety disorder that prevented her from doing her job duties
- Employment terminated after employee returned from disability leave

Fair v. Hamilton-Wentworth District School Board

- Employer claimed no other positions available to accommodate employee
- Employee claimed discrimination based on her disability

Fair v. Hamilton-Wentworth District School Board

- Employer discriminated against the employee by failing to accommodate
- Reinstatement of employment

Fair v. Hamilton-Wentworth District School Board

- $30,000 general damages for injury to employee's dignity, feelings and self-respect
- **$420,000 for wages dating back 9 years!!!!**

What Employers Should Know

- Tribunal awards typically $500 to $15,000
- Exceptional awards $25,000 to $40,000
- The Court is looking at Tribunal decisions for guidance

What Employers Should Know

- Use extra caution in any decision to terminate an employee who may be suffering from an illness or disability
- Increase in Human Rights claims upon termination
- Risk of reinstatement and order to pay lost wages

Employment Law: Drugs and Privacy in the Workplace

Presented by Jennifer Rosser

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Overview

Recent cases on

- Drug and alcohol testing
- Work issued devices

The Latest on Drug Testing

- *CEP v. Irving Pulp and Paper*, [2013] SCJ No. 34. Supreme Court of Canada decision

IRVING Decision

Facts

- Parties subject to a collective agreement. There was no clause restricting a drug and alcohol use policy.
- Irving brought in policy on alcohol and drug use
- Under the policy, 10% of employees in safety sensitive positions were to be randomly selected for unannounced breathalyser testing

IRVING Decision

Facts

- Under the policy, a positive test for alcohol of 0.04% or higher attracted significant disciplinary action, including dismissal.
- Refusal to submit to testing was grounds for immediate dismissal.

IRVING Decision

- The policy also required testing if there was reasonable cause

  1. to suspect the employee of alcohol or other drug use in the workplace,
  2. after direct involvement in a work-related accident or incident, or
  3. as part of a monitoring program for any employee returning to work following treatment for substance abuse.

- This part of the policy was not challenged.

IRVING Decision

- Perley Day – a member of CEP – was subject to mandatory testing
- Day was in a safety sensitive position
- Day was a "teetotaller" and had not had a drink since 1979
- It was agreed that Irving was a dangerous work environment

IRVING Decision

Facts

- Irving had eight documented incidents of alcohol consumption or impairment at the workplace over a 15 year period
- No accidents, injuries or near misses were connected to alcohol use
- In 22 months of random alcohol testing, not a single employee tested positive

IRVING Decision

SCC decision

- Upheld the arbitrator's decision that the policy as it pertained to random alcohol testing was unreasonable

IRVING Decision

SCC decision

- Court attempted to limit finding to workplaces governed by a collective agreement, but....

  "...even in a non-unionized workplace, an employer must justify the intrusion on privacy resulting from random testing...There are different analytic steps involved, but both essentially require attentive consideration and balancing of safety and privacy interests."

IRVING Decision – subsequent cases

- *UNIFOR, Local 707A v SUNCOR ENERGY Inc.*
- decision March 18, 2014
- Policy being arbitrated: Random Alcohol &Drug Testing Policy

UNIFOR v SUNCOR

- SUNCOR implemented random drug and alcohol testing for workers in safety sensitive positions
- SUNCOR submitted at arbitration that there was a culture of drugs and alcohol at the workplace and that the testing was for safety purposes

UNIFOR v SUNCOR

- Arbitrator refers to the SCC comments in *Irving:* in some dangerous environments, testing may be allowed – but must be a proportionate response with legitimate safety concerns and privacy interests
- Must be justified by concerns of serious drug or alcohol issues in workplace

UNIFOR v SUNCOR

- SUNCOR presented 14 positive tests in 9 years at the work place
- Found that these numbers do NOT establish significant substance problems or legitimate safety risks

UNIFOR v SUNCOR

- Without justification, the testing was deemed an **unreasonable exercise of management rights**
- Arbitrator comments that unilaterally imposing random tests without reasonable cause will be difficult to sustain, and no reasonable cause here

UNIFOR v SUNCOR

- Again citing the SCC the arbitrator ruled that the proposed policy would intrude into privacy of employees 'beyond what is reasonably necessary to address the issues which have been raised by the Employer' (para 333)

Shaw Cablesystems GP v Telecommunications Workers' Union

- March 31, 2014 decision
- Found that a post-treatment agreement was part of employer's duty to accommodate and not a last chance agreement

Shaw Cablesystems GP v Telecommunications Workers' Union

- Worker sent to rehabilitation centre for drinking
- Signed post-treatment agreement stating that he would avoid alcohol
- Admitted to have relapses

Shaw Cablesystems GP v Telecommunications Workers' Union

- Union grieved termination, and employee was reinstated
- Arbitrator found that the agreement was not a last chance agreement and employee had not met duty to accommodate the illness

Shaw Cablesystems GP v Telecommunications Workers' Union

- Employee reinstated with new terms including abstaining from alcohol
- Further relapses would be considered undue hardship on employer

REVISIT *ENTROP V. IMPERIAL OIL*

- Ontario Court of Appeal
- Non-Unionized Workplace

REVISIT *ENTROP*

- Ontario Court of Appeal found:
  - Pre-employment drug testing is discriminatory
  - Random drug testing is unreliable and discriminatory because cannot test current impairment
  - Discriminatory to automatically terminate an employee for drug use as employer has a duty to accommodate

REVISIT *ENTROP*

- Ontario Court of Appeal found:
  - Random alcohol testing prima facie discrimination but...
  - The Court held "*For employees in safety-sensitive jobs, where supervision is limited or non-existent, alcohol testing is a reasonable requirement....provided the sanction for an employee testing positive is tailored to the employees' circumstances.*"

BEST PRACTICES FOR DRUG AND ALCOHOL TESTING

- NO pre-employment testing
- NO random drug testing unless you can limit the test to current impairment and then must balance employee privacy and safety
- NO random alcohol testing unless proper balance between employee privacy and safety. Employer may have to show alcohol in the workplace is a problem.

BEST PRACTICES FOR DRUG AND ALCOHOL TESTING

- ✓ YES can generally test after an accident or incident in which drug or alcohol use is suspected by the employee
- ✓ YES can test as part of a monitoring/ rehabilitative program
- ✓ YES can do random alcohol testing where a demonstrated problem in the workplace that cannot be addressed by less invasive means

WORK ISSUED DEVICES

- When an employer provides a device to employees ie. a computer
- Employer owned, employee operated – what are the implications?

LAW PRIOR TO COLE

- Before Cole, there was limited jurisprudence dealing with privacy issues and work issued devices
- Much of the case law that did exist limited employee's rights and expectation of privacy

- ie. *Poliquin v. Devon Canada Corporation*
- Alberta Court of Appeal 2009 stated that employees do not have a reasonable expectation of privacy for information stored on a work place computer

WORK ISSUED DEVICES

- *R. V COLE*
- 2012 SCC 53
- Supreme Court of Canada decision October 19, 2012

WORK ISSUED DEVICES

FACTS:

- Cole was a high school teacher in Ontario
- The School Board provided teachers with laptops
- Policy permitted personal use of laptops by teachers

WORK ISSUED DEVICES

- During a routine systems maintenance, a school board technician discovered a file
- The file contained pictures of an underage female student

WORK ISSUED DEVICES

- The technician alerted the school board officials, who turned the laptop over to the police
- The police searched and obtained the file without a warrant

WORK ISSUED DEVICES

- The central issues:
  - What level of privacy exists on a work issued device?
  - How do employee policy effect this privacy?
  - How can an employer prepare for this situation?

PRIVACY

- SCC ruled that an employee in possession of a work issued device is entitled to some expectation of privacy
- This includes the right to be secure from unreasonable search and seizure

PRIVACY

- In this case, the school board was entitled to seize the laptop, but the police were NOT entitled to search without a warrant merely because the school board owned the property
- The school board could not grant a third party (the police) permission to search the computer – an employer cannot grant the government the right to search on behalf of the employee

POLICY V. PRIVACY

- The personal nature of the information stored on the computer (there were other legal files/documents) engaged the teacher's right to privacy

POLICY V. PRIVACY

- 'The more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest' para 46

POLICY V. PRIVACY

- The school policy warned that the user's files on the laptops were NOT private and that the board was entitled to access
- The Policy and Procedures Manual asserted ownership of the computer and the data

POLICY V. PRIVACY

- Was there a reasonable expectation of privacy?
- '*For*, because written policy and actual practice permitted Mr. Cole to use his work-issued laptop for personal purposes. *Against*, because both policy and technological reality deprived him of exclusive control over — and access to — the personal information he chose to record on it.' – para 54

- Mr. Cole's personal use of his work-issued laptop generated information that is meaningful, intimate, and organically connected to his biographical core. Pulling in the other direction, of course, are the ownership of the laptop by the school board, the workplace policies and practices, and the technology in place at the school. These considerations diminished Mr. Cole's privacy interest in his laptop, …, but they did not eliminate it entirely. – para 58

POLICY V. PRIVACY

- The SCC found that while the school board could search and seize the device, third party involvement must consider the rights of the user
- Ownership is not more powerful that right to privacy, if reasonable held

EMPLOYERS

- What is the takeaway for employers?
- In this case, the school board had a strict policy limiting the privacy accorded to the user
- SCC ruled that you cannot extinguish constitutionally protected reasonable expectation of privacy

EMPLOYERS

- This privacy can survive the employer's ownership of the device
- A strong employer policy limiting privacy expectations can be taken into account, but are not on their own determinative

EMPLOYERS

- An employer that discovers an employee using the work issued device for illegal activities CAN inform the police or relevant authority
- The employer CANNOT consent to a police/government search of the device without the consent of the user

R v. COLE

- The SCC ordered a new trial to be held
- SCC allowed the illegally obtained evidence to be admitted
- Excluding evidence would have a significant negative impact on truth seeking procedure

R v VU 2013 SCC 60

- Criminal case re: search and seizure of computers and cell phones
- SCC considered whether search of cell phone or computer required specific warrants
- In this case, the police had a warrant for 'computer generated notes' only

R v VU 2013 SCC 60

- New digital age: SCC considers unique privacy interests in computers and cell phones
- SCC stated that the search of a personal or home computer is a very intrusive invasion of privacy
- Computers and cell phones are NOT equal to filing cabinets and other 'traditional' receptacles

R v VU 2013 SCC 60

- Confirms SCC position that computers (and cell phones) engage reasonable expectation of privacy
- When read with *R v Cole,* SCC maintains position that work issued devices engage reasonable expectation of privacy to the user, despite employer ownership

Thank you!

Managing Employee Medical Leaves of Absence

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Topics of Discussion

- Job Protected Leaves & Human Rights Protections
- Family Medical Leave
- Personal Emergency Leave
- New Leaves under the ESA
- Short Term Disability Leaves
- Long Term Disability Leaves

Job Protected Leaves of Absence

Employees on leave have several rights:

- The right to **reinstatement**
- The right to be **free from penalty/discrimination**
- The right to continue to **participate in benefit** plans

Family Medical Leave

To qualify:

- Full time, part time, contract
- Family member at risk of dying in next 26 weeks
- Provide employer certificate from qualified doctor

Entitlement:

- 8 weeks unpaid job-protected leave

Family Medical Leave

Management Tips:

- Leave doesn't have to be consecutive & more time can be provided
- 8 weeks can be shared with others
- Employee must provide written notice (in reasonable time)
- Employee can apply for government **EI benefits** ("Compassionate Care" benefits)

Personal Emergency Leave

Entitlement:

- 10 days unpaid, job protected leave per year
- Days are not pro-rated if employee starts half-way through year

To qualify:

- Personal emergency can be for illness/injury or “urgent matter” related to themselves or certain family members
- List of family members is more restrictive
- Employer must employ 50 employees

Personal Emergency Leave

Management Tips: What's an "Urgent Matter"?

"An event that is unplanned or out of the employee's control, and raises the possibility of serious negative consequences, including emotional harm, if not responded to."

- ***QUALIFIES:*** *Planned surgeries,* babysitter calls in sick, appointment at child's school to discuss behavioural problems, elderly parent's house broken into and parent is upset; includes careless behaviour!

- ***DOES NOT QUALIFY:*** Daughter's track meet; sister's wedding; liposuction appointment

Personal Emergency Leave

Management Tips: How to integrate Employer sick-day policies?

- If employment contract provides greater right, then contract applies
- If not, Personal Emergency Leave provisions apply
- Ministry will not answer questions related to how employer sick leave policies interact with Employment Standard Act (ESA) provisions

New Leaves under the ESA

Family Caregiver Leave:

- Family member does not need risk of dying in next 26 weeks
- 8 weeks of unpaid leave

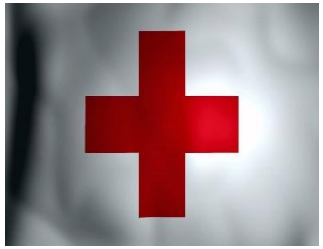
Critically Ill Child Care Leave:

- Must be employed for at least 6 months
- Up to 37 weeks of unpaid leave

Crime-Related Death & Child Disappearance Leave:

- Must be employed for at least 6 months
- Up to 52 weeks of unpaid leave (up to 104 weeks if child has died)

Short Term Disability Leave



Management Tips:

- **Review your Leave & Group Benefit Policies**
  - How many paid sick/PTO days are offered?
  - Is Short Term Disability offered as part of your Group Benefits Plan?
  - Is the employee “Totally Disabled”?
  - Was accident or hospitalization required?

Short Term Disability Leave

Management Tips:

- **Obtain medical documentation**
  - Ensure employee is under care of qualified doctor
  - Use a “Medical Request Form” (include job description!)
  - Medical documentation is important as evidence for leave *as well as* to indicate if modified work is needed

Short Term Disability Leave

Management Tips:

- Provide all necessary paperwork (e.g. Employee, Physician, & Employer Statements)
- Keep confidentiality top of mind!
- Remain empathetic

Short Term Disability Leave

Management Tips:

- **If no STD Policy, issue the Record of Employment (ROE):**
  - Government Sick Leave (EI) Benefits:
  - 2 week waiting period
  - 15 week maximum pay out
  - 55% of salary to maximum of $514/week

Service Canada

Short Term Disability Leave

Management Tips:

- **Remain in contact with the employee!**
  - Keep the employee's Group Benefits active while they are on leave
  - Ensure the employee has all the information they need
  - Be cautious of surveillance!
  - Obtain clearance from doctor to return to work
  - Implement any accommodations required and backed by completed "Medical Request Form"

Long Term Disability Leave

Management Tips:

- **Work with your Group Benefit Plan carrier**
  - Check your “Elimination Period” with your insurance carrier (e.g. 119 days of total disability)
  - Can employee do “trial work period” to determine if they are healthy enough to work?
  - Follow STD tips for completion of insurer forms

Long Term Disability Leave

Management Tips:

- **Don't reply on the insurance carrier to provide information – stay in touch with the employee:**
  - Employee is required to share basic information with you
  - Use your own "Medical Request Form" to collect return-to-work and any accommodation data

Long Term Disability Leave

Management Tips:

- **Determine when, and if, you can terminate Group benefits:**
  - Do you have a statement in your Employment Agreement stating when Health and Dental benefits will be terminated if an employee is on LTD?
  - If not, work with your Devry lawyer to determine when the employment contract is frustrated…!

THANK YOU FOR LISTENING!

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