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Welcome to
Devry Smith Frank *LLP*'s
HR/Employment Seminar

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Mediation in Employment Law

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Graduate of Dalhousie University in Halifax, Nova Scotia and of Queen's University in Kingston, Ontario where she obtained her LL.B in 1980.

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Lynne's practice currently focuses on the mediation of personal injury claims, including claims arising from motor vehicle accidents, accident benefits claims, slips and falls and LTD claims, as well as commercial and employment matters.

What is a Mediation?

What are the Goals and Objectives of Mediation?

What is the Role of the Mediator?

How Does the Mediation Process Work?

What is Mandatory Mediation?

What is the Difference Between Roster and Private Mediators?

What are the Benefits of Mediation in the Employment Law Context?

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Employer Immigration Compliance – Recent Provincial & Federal Trends

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Introduction

- In November 2015, Ontario amended its *Employment Protection for Foreign Nationals Act, 2009* (EPFNA). The amendments impact any employer in Ontario that currently employs temporary foreign workers (TFWs) or is contemplating hiring TFWs in Ontario.

- In December 2015, the federal government, through the *Immigration and Refugee Protection Act* (IRPA), implemented a more stringent compliance regime which directly affects employers hiring TFWs.

- Employers must be aware of the new requirements imposed by the amended EPFNA because being in violation of the EPFNA could result in a finding of non-compliance under IRPA, as explained below.

Employment Protection for Foreign Nationals Act, 2009 (EPFNA)

- Put in place in 2009 as a protective measure primarily regulating recruiters and recruiting practices.

- To address concerns that foreign nationals, primarily live-in caregivers experienced:
  - confiscation of passports and documentation by employers
  - lower salary and longer work hours upon arrival
  - unpaid wages, exploitation, and vulnerability

Amended EPFNA now applies to:

1. Every foreign national who, pursuant to an immigration or foreign temporary employee program, is employed in Ontario or is attempting to find employment in Ontario.
2. Every person who employs a foreign national in Ontario pursuant to an immigration or foreign temporary employee program.
3. Every person who acts as a recruiter in connection with the employment of a foreign national in Ontario pursuant to an immigration or foreign temporary employee program.
4. Every person who acts on behalf of an employer described in paragraph 2 or a recruiter described in paragraph 3.

Who Is a Foreign National?

- "Foreign national" is defined in the EPFNA as an individual who is not,
  (a) a Canadian citizen, or
  (b) a permanent resident within the meaning of the *Immigration and Refugee Protection Act*
- There are over 100,000 temporary foreign workers in Ontario[1]

1. Ministry of Labour, "Province Helping Vulnerable Workers Collect Unpaid Wages," November 20, 2015, www.news.ontario.ca

Who Is a Recruiter?

- A person is a “recruiter” under the EPFNA

  (a) if the person finds, or attempts to find, an individual for employment;

  (b) if the person finds, or attempts to find, employment for an individual;

  (c) if the person assists another person in doing the things described in clause (a) or (b); or

  (d) if the person refers an individual to another person to do any of the things described in clause (a) or (b)

Who Is An Employer?

- Every person who employs or acts on behalf of an employer to employ a foreign national in Ontario pursuant to an immigration or foreign temporary employee program.

- Does not apply to employers if the *Employment Standards Act, 2002* (ESA) would not apply to the employer, for example:
  - Federal jurisdiction employers
  - Embassies or consulates

Compliance Provisions

- No employer may take possession of, or retain property that, the foreign national is entitled to possess, e.g., passports or work permits.

- No employer may intimidate, penalize or attempt or threaten to intimidate or penalize the foreign national, because he or she takes steps to inquire about rights or enforce rights under the EPFNA.

Compliance Provisions

- Foreign nationals shall be provided a copy of the most recent documents published by the Director of Employment Standards, which currently include:
  - Employment Standards in Ontario
  - Your Rights under the *Employment Protection for Foreign Nationals Act, 2009*
  - Your Rights under the *Employment Standards Act, 2000*
- These documents are available online in multiple languages on http://labour.gov.on.ca

Compliance Provisions

- No employer shall directly or indirectly recover or attempt to recover from a foreign national or from such other persons as may be prescribed,

  (a) any cost incurred by the employer in the course of arranging to become or attempting to become an employer of the foreign national; or

  (b) any other cost that is prescribed.

Effect of EPFNA

1. Employers should build into their hiring process the provision of the EPFNA prescribed brochures, in addition to the general rights brochure required by the ESA. If the foreign national's first language is not English the employer has an obligation to ascertain if there is an information sheet from the Ministry of Labour in the foreign national's first language.

   This information must be provided even for foreign nationals employed prior to November 2015.

Effect of EPFNA

2. Employers should not utilize so-called “claw back” agreements stating that if the foreign national leaves within a certain time period, s/he is responsible to reimburse all or part of the employers’ expenses relating to obtaining the work permit.

Employers should review their current hiring practices and ensure they are not using such agreements and/or they do not have such terms in their employment agreements.

The EPFNA imposes on employers a retention requirement for certain records and documents, which employers must be aware of.

Inspections

- An employment standards officer may, without a warrant, enter and inspect any place in order to investigate a possible contravention of the EPFNA or to perform an inspection to ensure that the EPFNA is being complied with.

- Must comply with requirements under the ESA, ss. 91-92, e.g., inspection must be during regular business hours or daylight.

Inspections

- Officers may make demands for records, and remove records to be copied, use computer systems, and question “any person on matters the officer thinks may be relevant to the investigation or inspection”.

Consequences of Non-Compliance

- A compliance order or notice of contravention from an employment standards officer may be issued;

- Further non-compliance may result in the Ministry of Labour commencing a prosecution under the *Provincial Offences Act*.

Immigration and Refugee Protection Act

The Canadian government is increasingly focused on employer compliance and has implemented several initiatives since 2014.

February 2015

- The government began requiring employers to provide substantial information about their operations as well as detailed descriptions of job offers to foreign nationals. In addition the government began collecting a $230 application fee to fund investigations of potential non-compliance.

December 2015

- Introduction of severe consequences for non-compliance, such as Administrative Monetary Penalties (described below), in additional to bans from accessing the foreign worker programs, and online publication of details about the employer's non-compliance.

The government has committed to inspecting 1 in 4 employers this year.

Selection of Employer for Inspection

1. There is a reason to inspect for non-compliance – could be based on a whistleblower or other sources, such as media reports;
2. Employer has a previous history of non-compliance;
3. Random selection.

Compliance Factors

An employer who makes an offer of employment to a foreign national must:

- Remain actively engaged in the business for which the offer was made;
- Comply with all federal and provincial laws that regulate employment where the foreign national works;
- Provide employment in the same occupation, with wages and working conditions that are substantially the same as – but not less favourable than - those in the offer of employment;
- Make reasonable efforts to provide a workplace free of abuse, including physical, sexual, psychological and financial abuse;
- Demonstrate that information provided in the offer of employment was accurate;
- Retain documents relating to compliance for the required retention period.

Inspection Powers

Immigration Officials have the authority to:

- Require employers to provide documents to verify compliance with specific conditions;
- Conduct on-site visits without a warrant;
- Interview foreign workers or other Canadian employees, with written consent;
- Attend at the premises of an employer's customer to investigate with respect to activities of the foreign worker.

Consequences of Non-Compliance

Previously, penalties for non-compliance were limited to a two-year ban for all offences and publication of the employer's name without details of the non-compliance. Post December 2015 following are the possible consequences:

- A warning letter for minor violations;
- Administrative Monetary Penalties (AMPs):
  - Can range from $500 to $100,000 with the total not to exceed $1M over a one-year period;
  - AMPs are accumulated through a points-based system.
- Bans
  - In addition to AMPs an employer can be banned from hiring foreign workers for 1, 2, 5 or 10 years, or a permanent ban for egregious non-compliance. Bans are also accumulated through a point system.
- Publication
  - An employer who receives a Final Determination of non-compliance will have its business name and specific violation published on a public website. The reason given by the government for publication is to provide transparency to foreign workers; however, publication can result in untold reputational damage.

Linkage Between the EPFNA and IRPA

- IRPA requires that “the employer must comply with the federal and provincial laws that regulate employment, and the recruiting of employees, in the province in which the foreign national works”.

- Whenever an employer files a Labour Market Impact Assessment or an Offer of Employment (both are prerequisites to the work permit application process), the employer declares compliance with “all applicable federal and provincial laws relating to employment and recruitment.”

- Therefore, if an employer is non-compliant with the EPFNA, for example, by failing to provide the EPFNA brochure, the employer could also be found to be non-complaint with IRPA, which could lead to administrative penalties.

- The same linkage holds true for violations of other provincial statutes relating to employment standards, labour law, health and safety, workplace privacy, etc.

Conclusion – What Can We Do For You

- Audit the employment arrangements of all foreign workers and your business practices to ensure compliance with the EPFNA and IRPA;
- Audit your immigration records to ensure all documents relating to program compliance are being retained;
- Review your internal policies to ensure they properly support compliance;
- Address and remedy any non-compliance identified;
- Assess whether voluntary disclosure of non-compliance is warranted; and
- Provide relevant training to your immigration and HR professionals, as needed.

Thank you!

Questions?

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Notice Periods for Short Service Employees

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Termination of Employees

- Termination with cause
  - No notice required
- Termination without cause
  - Notice required

The Theory of Reasonable Notice

- Statutory aspects
  - Ontario *Employment Standards Act, 2000*
  - *Canada Labour Code*
- Common law aspects
  - Law developed out of cases decided by the courts

Why Common Law Notice Must be Given: Implied Term in the Employment Contract

Based on the "implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term."

- *Honda Canada Inc. v. Keays* [2008] 2 S.C.R. 362.

How Notice is Given

- Working notice
- Payment in lieu of notice

How Much Notice?

"There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

- *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140.

The *Bardal* Factors, Listed

- Length of service
- Age
- Character of employment
- Availability of similar employment

The *Bardal* Factors: There May be Other Factors

- The Supreme Court of Canada has endorsed the *Bardal* approach
- But, has also told us that the *Bardal* factors do not form an exhaustive list and, depending on the case, other factors may be relevant
  - *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

Applying the *Bardal* Factors

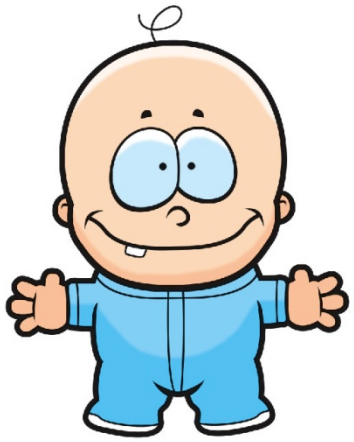
- "Determining the period of reasonable notice is an art not a science."
  - *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.)
- The "rule of thumb" of one month notice per year of service
  - Not really a rule at all
  - Jurists have repeatedly held that there is *no* "rule of thumb"

The *Bardal* Factors: Length of Service

- The longer the period of service, the longer the notice period
- "Common law jurists have implicitly recognized a limited proprietary right to one's employment which grows the longer one has been employed."
  - Stacey Ball, *Canadian Employment Law*
- But, no "rule of thumb"!

The *Bardal* Factors: Age

- Older employees may have more difficulty than younger employees in finding similar employment.



The *Bardal* Factors: Character of Employment

- Weight may be given to the importance of the employee's position within the employer's organization
- But, there is also authority though which suggests that unskilled and clerical employees should not receive lesser notice periods than managerial employees

The *Bardal* Factors: Availability of Similar Employment

- Purpose of the implied term is to permit the employee to find a new job
- Must take into account the availability of similar positions in the type of industry the employee worked in with similar compensation

Short Service Employees: The Recent Trend

- In recent years, there has been something of a trend towards enlarging periods of notice of short service employees.
- Additionally, lawyers dealing with employment litigation have struggled to find an approach to understanding recent caselaw that will yield predictable results in terms of the notice period for short service employees

Factors Entitling Short Service Employees to Lengthy Notice Periods

- High remuneration
- High level of responsibility
- No similar employment available
- Specialized skills of employee
- Inducement to leave previous employment

Short Service Employees: Jurisprudential Guidance

"The determination of the length of applicable period of reasonable notice is always more difficult with short service employees. Reference to caselaw is often not of particular utility."

- *Iliescu v. Voicegenie Technologies Inc.*, 2009 CanLII 385 (Ont. S.C.J.)

McNevan v. AmeriCredit Corp.,
(2008) 94 O.R. (3d) 458 (C.A.).

- Assistant vice-president, collections, at a call centre
  - Oversaw 45 to 60 people
- 44 years old, earning an annual salary of $62,500
- 13 months' service
- Trial judge also noted a dearth of available employment

McNevan v. AmeriCredit Corp.,
(2008) 94 O.R. (3d) 458 (C.A.).

- Trial judge awarded 6 months' pay in lieu of notice plus an additional 6 months' pay for bad faith termination
- The Court of Appeal upheld the award of 6 months' pay in lieu of notice but overturned the trial judge on bad faith termination

Love v. Acuity Investment Management Inc.,
(2011) CanLII 130 (Ont. C.A.).

- Employee was one of two senior vice-presidents and 2% owner
  - Overseeing company of 90 employees
- 2.53 years of service
- 50 years old
- Total annual compensation of $633,548

Love v. Acuity Investment Management Inc.,
(2011) CanLII 130 (Ont. C.A.).

- Trial judge awarded 5 months' pay in lieu of notice
- Court of Appeal set aside and substituted an award of 9 months'
  - Held that the trial judge overemphasized the employee's short length of service, underemphasized the character of employment, and ignored the matter of availability of similar employment

Rodgers v. CEVA Freight Canada Corp.,

2014 CanLII 6583 (Ont. S.C.J.).

- Country Manager, Canada, for trucking company earning $276,000.00 per year
- 57 years old
- 2 years and 9 months' service

Rodgers v. CEVA Freight Canada Corp.,

2014 CanLII 6583 (Ont. S.C.J.).

- Awarded 14 months' pay in lieu of notice
- Note: Employee was recruited while at previous job, and the trial judge accepted that there was some level of inducement

Felice v. Cardinal Health Canada Inc.,

2014 CarswellOnt 8419 (S.C.J.)

- Senior executive earning salary of $130,000.00 per year
- 52 years old
- 19 months' service

Felice v. Cardinal Health Canada Inc.,

2014 CarswellOnt 8419 (S.C.J.).

- Awarded 12 months pay in lieu of notice

"There is a lot of judicial support for awards to short term senior executives receiving lengthy notice periods, both with and without enticement as a factor."

- The Honourable Madam Justice Pollak

Tiltins v. RIM Transportation International Inc.,

2003 CanLII 36650 (S.C.J.)

- Truck driver
- Employed for 17 months
- Awarded three weeks pay in lieu of notice

King v. Regional Municipality of Peel,

2012 CanLII 1730 (S.C.J.).

- Employee worked as a scheduling assistant earning $38,695.00 per year
- 34 years old at the time of termination
- 10 months' service
- Awarded two weeks' pay in lieu of notice

Miller v. A.B.M. Canada Inc.,

2014 CanLII 4062 (S.C.J.).

- Regional Director earning $135,000.00 per year
  - Characterized by trial judge as “middle management”
- 39 years old
- Employed for 17 months
- Awarded 3 months’ pay in lieu of notice

Iliescu v. Voicegenie Technologies Inc.,

2009 CanLII 385 (Ont. S.C.J.).

- Director of Q.A. earning $80,000.00 per year plus stock options
- 46 years old
- Employed for 15 months
- Employment relationship broke down and Mr. Iliescu alleged constructive dismissal

Iliescu v. Voicegenie Technologies Inc.,

2009 CanLII 385 (Ont. S.C.J.).

- Trial judge found no constructive dismissal (upheld by the Court of Appeal)
- But, nonetheless found that the appropriate notice period was four months

How to predict results?

- Notice periods for short service employees ranging from 2 weeks to 14 months
- “Determining the period of reasonable notice is an art not a science.” - *Minott*
- “Reference to caselaw is often not of particular utility.” - *Iliescu*

How to predict results?

- Notice periods for short service employees ranging from 2 weeks to 14 months
- "Determining the period of reasonable notice is an art not a science." - *Minott*
- "Reference to caselaw is often not of particular utility." - *Iliescu*

Interpreting the Jurisprudence

- Cases dealing with short service employees place significant emphasis on the character of the employment as a factor
  - Employees in managerial positions attract lengthy notice periods
  - Employees in unskilled positions attract lesser notice periods
- Explains *Love*, *Rodgers*, *Felice*, etc

A Word of Caution about this Approach

- *Di Tomaso v. Crown Metal Packaging Canada*, 2011 CanLII 469 (Ont. C.A.): Character of employment is today "a factor of declining relative importance."
- However, cases adopting this approach tend to involve lengthy periods of service

Consider: Availability of Similar Employment

- *Rodgers v. CEVA Freight Corp.*: Specific reference to the fact that the parties would understand it would be difficult for the employee to find similar employment
- *McNevin v. AmeriCredit Corp.*: Reference to dearth of similar employment
- Consider also: A short period of service may be more significantly detrimental to the resume of a managerial level employee than an unskilled worker

Conclusion

- Great caution must be exercised in speculating as to notice periods for short service employees
- Managerial and executive level employees will generally attract longer notice periods
- Particular regard should also be had to the availability of similar employment in dealing with short service employees

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Case-Law Update

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Topics

1. Fixed Term Contracts: *Howard v. Benson*
2. Unilateral Suspensions and Constructive Dismissal: *Potter v. New Brunswick Legal Aid Services Commission*
3. Termination Clauses: *Luney v. Day & Ross Inc.*
4. Unfounded Allegations of Cause: *Gordon v. Altus Group Limited*
5. Dependent Contractors: *Keenan v. Canac Kitchens*
6. Frustration of Contract: *Estate of Christian Drimba v. Dick Engineering Inc.*

Termination of Fixed–Term Contracts: Employers Beware

- *Howard v. Benson* *- 2016 ONCA 254*
- No properly worded early-termination provision (provision in the contract was vague; they must be clear and unequivocal)
- Dismissed fixed-term employee is entitled to full value of wages and benefits for duration of contract
  - in this case 37 months or $200,000
- Court of Appeal found that employees with fixed-term contracts have bargained for certainty, and there is no duty to mitigate

Unilateral Suspensions and Constructive Dismissal

- *Potter v. New Brunswick Legal Aid Services Commission* – 2015 SCC 10
- Employee and employer in the process of negotiating a buy-out of his fixed-term contract when he took an unrelated medical leave
- Prior to his return, the employer (who was considering firing him for cause) advised him not to return until instructed
- Despite pay and benefits continuing throughout, unilateral suspension constituted constructive dismissal
- Implied term in employment contracts that employers will not withhold work in bad faith or without justification

Saving Language in Termination Provisions

- *Luney v. Day & Ross Inc.* – 2015 ONSC 1440
- Employee subject to *Canada Labour Code* dismissed without cause, claimed termination clause void for referring to notice and severance pay but not benefits over the notice period (lesser entitlement than that under the *Code*)
- Clause included wording to the effect that "in the event the aforesaid notice and severance entitlements are not in conformity" with the statute, statutory minimums shall apply
- Termination provision not void, thanks to saving language

Unfounded Allegations of Cause

- *Gordon v. Altus Group Limited* – 2015 ONSC 5663
- Gordon sold his business to Altus and entered into an employment agreement with them
- Disagreement arose over adjustment pursuant to sale agreement, putting stress on employment relationship
- Gordon was fired, allegedly for improper workplace behaviour
- Held: employer invented reasons for dismissal to gain advantage in upcoming arbitration and avoid severance pay
- Employer's "outrageous" actions found to be "mean and cheap"
- $100,000 in punitive damages

Independent v. *Dependent* Contractors

- *Keenan v. Canac Kitchens* – 2016 ONCA 79
- Mr. and Mrs. Keenan had worked for Canac for 32 and 25 years respectively
- Contracts characterized them as “independent contractors”
- Canac terminated relationship with no notice or pay in lieu
- Keenans sued, relationship provided 75-90% of their income
- Trial and appellate court found Keenans sufficiently economically dependent on Canac to constitute “dependent” contractors, entitled to reasonable notice or pay in lieu

Terminal Illness and Frustration of Contract

- *Estate of Cristian Drimba v. Dick Engineering Inc.*- 2015 ONSC 2843
- An employment contract is "frustrated" when the employee will be unable to perform the basic tasks of their job for the reasonably foreseeable future
- In this case, the contract of a terminally ill employee, who later succumbed to his illness, was found to be frustrated by his cancer, at some point between his diagnosis and death
- Death did not terminate the employer's obligations
- The estate was entitled to both termination and severance pay

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Networking Break!

Time for coffee ☺

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Allegations of Discrimination & Harassment: Employer's Duty to Investigate

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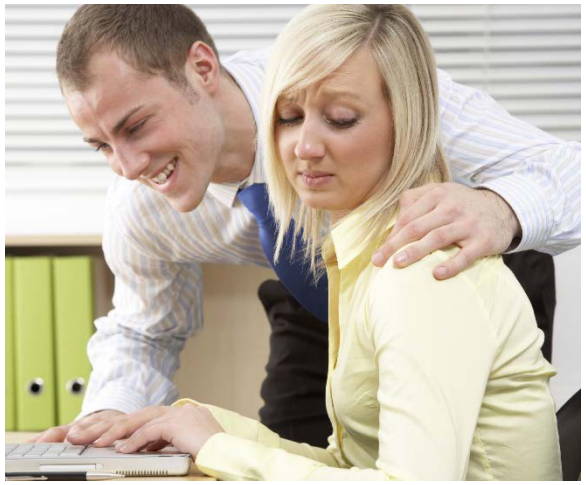

Human Rights Code, RSO 1990, c H. 19

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because 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

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Occupational Health and Safety Act, RSO 1990, c O. 1

"workplace harassment" means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or

(b) workplace sexual harassment;

"workplace sexual harassment" means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome;

Duty of Employers

1. Develop and implement anti-discrimination, workplace violence and harassment policies
2. Establish reporting mechanisms and investigation procedures for employee complaints
3. Revisit, reassess and (re)train

Establishment of Workplace Policies & Programs

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

Facts: *Boucher v. Wal-Mart Canada Corp.*

- 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

Boucher v Wal-Mart Canada Corp. 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

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

Consequences of Insufficient Investigation

Disotell v Kraft Canada Inc.

- 16 year, non-management employee
- 36 years of age
- Mitigated his damages by receiving a substantially reduced salary

Employer's failure to properly investigate = 12 months' notice ($43,978) + pre-judgement interest (3 years) + partial indemnity costs

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

Failure to Investigate / Failure to Accommodate

Sears v Honda Canada Manufacturing

- Complaint filed with the Human Rights Tribunal for company's failure to accommodate and to take appropriate steps after harassment complaints made by employee
- Sears, who had vision problems, stated a colleague harassed him on the basis of his disability, calling him a "blind dog" and poking him
- HR representative conducted one investigation but did not investigate subsequent incidences when further complaints arose

Sears v Honda Canada Mg, 2014 HRTO 45

Factors in Determining Adequate Investigation

Three factors in determining adequate investigation:

1. Awareness of issues of discrimination/harassment policy, complaint mechanism and training
2. Post-complaint: seriousness, promptness, taking care of the employee, investigation and action
3. Resolution of the complaint (providing healthy work environment) and communication

Award: Order for Compensation for Intangible Loss = $35,000

Opportunity for Response

Chandran v National Bank of Canada

- Chandran was a senior manager of a commercial banking centre, employee of the bank for 18 years
- Employees in survey complained about managers condescending and bullying behaviour
- No investigation conducted into allegations and no opportunity for Chandran to defend himself; offered 2 reassignment options that did not have supervisory duties

Award: 14 months' salary ($115,294.66) + partial-indemnity costs ($65,833.35)

Chandran v National Bank of Canada, 2011 ONSC 777, aff'd on other grounds, 2012 ONCA 205.

Poor Investigation May Cloud Proper Termination

Failing to ensure the panel had complete and accurate information, and forging ahead with a termination despite having a heightened responsibility to get it right was cavalier, reckless and negligent…

… Their corporate mindset was to paper files about employee behaviour and be perceived to have taken action. While its purpose was laudable, hasty and incomplete investigation by management resulted in erroneous conclusions and wrong disciplinary actions taken; in this case with disastrous consequences.

Ogden v. CIBC, (2014) BCSC 285 – note: case overturned on appeal and directed to new trial

Changes to the *OHSA* – effective Sept 2016

Bill 132

- addition of "workplace sexual harassment" definition
- program needs to be written and prepared in consultation with health and safety committee or representative
- program should set out measures where the employee can report incidents to someone other than the complained person
- employers must provide workers with much more information
- inspector may order an employer to have an investigation conducted by 3rd party at employer's expense

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Tax Issues: Employees vs. Independent Contractors

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Overview – Tax Issues: Employee vs. Independent Contractor

1. Why is it important?
2. What are the differences between an employee and an independent contractor?
3. What are the tax consequences to the employer when a worker who is treated as an independent contractor is really an employee?
4. What if the worker provides services through a corporation?

Why is it important?

The issue of whether an individual is an employee or an independent contractor can have significant repercussions and give rise to the application of a variety of statutory rights and obligations under the following statutes:

- Income Tax Act;
- Excise Tax Act;
- Employment Insurance Act;
- Canada Pension Plan Act;
- Employment Standards Act;
- Workers Compensation Act; and
- Labour Relations Code

Where the Canada Revenue Agency finds that an independent contractor is actually an employee, companies may be subject to significant taxes, penalties and interest.

Employee vs. Independent Contractor

- Requires analysis of the facts surrounding relationship between worker and company
- Courts generally look at the following criteria in determining whether a worker is an employee or an independent contractor:
  - Control
  - Chance of profit / risk of loss
  - Integration
  - Tools and equipment
- Recent court decisions have placed more emphasis on the legal relationship and common intention between the parties
- Overall, contextual analysis

Factors to Consider

Factors relevant in determining the relationship between payer and worker:

- Control
  - The ability, authority or right of a payer to exercise control over the worker's daily activities and the manner in which the work is done and what work will be done
  - Degree of autonomy held by the worker
- Opportunity for profit or risk of loss
  - Can the worker realize a profit or incur a loss?
  - Employees have their expenses reimbursed – no fixed ongoing costs
  - Self-Employed individuals pay monthly costs – even if there is no work
  - Self-Employed individuals are financial liable
- Integration
  - Degree to which the individual is integrated into the company's business
- Tools & equipment
  - Does the worker own or provide tools for the work?
  - Who invests in the tools and equipment
  - Who covers the costs of repair, replacements and insurance

Employee

- The payer is the employer
- Employers deduct Canada Pension Plan contributions (CPP), Employment Insurance premiums (EI), and Income Tax from remuneration
- These must be remitted to the CRA by the employer
- More difficult to be terminated
- Eligible for Canada Employment Amount Tax Credit
- Employee benefits
  - Medical, dental, vacation, disability etc.
- Contract ***of*** service

Independent Contractor

- Self-employed
- In a business relationship
- Engaged, on their own account, to carry out services as a person or business
- Can deduct generally all expenses
- No EI benefits
- Income Tax for first year is not payable until April 30th following first year end
- Contract ***for*** service

Repercussions of Wrongful Determination

- If an employer hires and employee, they must
  - Deduct CPP contributions
  - Deduct EI premiums
  - Deduct Income Tax from remunerations
  - Remit employee's CPP contributions and EI premiums
- This is not the case for an independent contractor
- If the CRA determine that an independent contractor is really an employee:
  - The employer will be liable for employees CPP and EI
  - The employer will be liable for withholding taxes
  - Additional penalties and interest on the under-remittance of the taxes

Tax Implications:

- The *Income Tax Act*: An employer who fails to withhold and remit an employee's taxes is subject to:
  - A 10% penalty of the amount which should have been withheld
  - Up to a 20% penalty, if the failure to deduct was done knowingly or out of negligence
  - Criminal charges if the conduct amounts to a criminal offence.
  - Interest on the unpaid taxes

– Penalties and interest will not be deductible to the company

– Company may be liable for Employer Health Tax, under the *Employer Health Tax Act* (Ontario) if the worker reports to a permanent establishment of the company in Ontario

Tax Implications (cont'd)

- Possible the CRA will assess individual members of company's Board (jointly and severally) for the following:
  - Income tax which the company was required to withhold and remit
    Employer and employee CPP contributions which the company was required to remit
  - Employer and employee EI premiums which the company was required to remit
- There may be penalties and interest on all of the above
- Due diligence defence available under the *ITA*, *CPPA* and *EIA*
- CRA cannot assess the company for GST/HST/QST purposes for services rendered by the worker if the worker is found to be an employee
- From the worker's perspective, there could be considerable issues or assessments re GST/HST/QST

Personal Services Businesses

- Defined in ss. 125(7) of the *ITA*, in part, as a business carried on by a corporation through which services are provided by an individual who would, but for the existence of the corporation, be considered an employee of the recipient of the services
- With lower corporate tax rates, PBSs become more popular (deferral opportunities)
- For tax years beginning after October 31, 2011, PBS tax rate increased to approx. 13% higher than the general corporate tax rate
- Taxpayers with a PSB should consult with a tax advisor
- Incorporated independent contractors should review all contract

Minimizing the Risk

- Enter into a written contract
  - Make sure the contract addresses each of the factors that are considered
  - Make sure the contract includes a termination clause
  - Make sure the parties act consistently with the terms of the contract
  - Make sure the contractor is registered with the CRA
  - Make sure the contractor charges applicable taxes
  - Make sure the contractor has insurance to cover workplace injuries
  - Consider an indemnity provision, making the worker liable for any amounts the company or Board might be found liable for if the CRA determines the worker is an employee
- A well written contract could be the biggest difference in the determination
- The existence of a contract will not eliminate the potential for an adverse finding, but it will put the company in a better position to defend against claims

Minimizing the Risk (cont'd)

- Worker should invoice the company on a regular basis for services provided and GST/HST/QST should be collected, reported and remitted by the worker on the value of all consideration received from the company for the supply of taxable services
- Worker should consult tax counsel to confirm the tax requirements and collection, reporting and remitting obligations, and potential methods of minimizing risk
- If the worker or company is unsure of the worker's employment status, either party can request a ruling from the CRA to determine whether employee or self-employed and whether employment is pensionable or insurable
- A ruling can be requested before June 30th of the year following the relevant work

THANK YOU!

QUESTIONS?

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Just Cause or Not for Cause

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Termination for Cause

- The misconduct must be sufficiently serious that it "strikes at the heart of the employment relationship"…the relationship cannot continue in light of the wrongdoing.
- The Court takes a contextual approach: the nature and extent of the misconduct, and the surrounding circumstances

What constitutes cause?

- Depends on context
- *May* include:

✓ Serious misconduct
✓ Theft
✓ Dishonesty
✓ Breach of trust
✓ Insubordination
✓ Incompetence
✓ Excessive absenteeism
✓ Misuse/misappropriation of confidential material

Relevant factors in determining whether there is cause:

- Whether the employee was guilty of serious misconduct or whether the conduct is "trifling";
- Proportionality: the longer the employment, the more serious the misconduct will likely have to be;
- Where an employee has been dishonest, more likely to be a breakdown in the employment relationship;

Relevant factors cont'd:

- Whether the employee's misconduct was in breach of an express provision of the employment agreement;
- Whether the misconduct was prejudicial to the employer's business, and therefore in breach of an implied term of the employment agreement

Unfounded Allegations of Cause

- The Courts require clear and cogent evidence that an employer had cause to terminate an employee
- If an employer is found to have invented the cause allegations to avoid giving reasonable notice, they could be subject to substantial punitive damages .
- *Gordon v. Altus Group Limited*
- The result: $100,000 in punitive damages

Cause or Not for Cause?

Some recent cases…

Roe v. British Columbia Ferry Services Ltd. – 2015 BCCA 1

Facts:

- Manager of ferry terminal; employed 5 years; company had policy re donating free food and beverage vouchers; on two occasions employee donated vouchers to his daughter's sports team ($130 and $70 value); was a corporate code precluding conflict of interest; no approval procedure or informing the regional manager
- Employer found out and fired him

Cause or not for cause?

- Trial Decision: No Cause for dismissal – awarded damages

- Given the low quantum of the vouchers, misconduct bordered on “trifling”, misconduct was on the low end of spectrum
- Very little personal benefit
- Otherwise reliable employee
- Lack of attempt to deceive or cover his tracks
- Discipline other than dismissal for cause more appropriate

- On appeal: trial decision set aside – new trial ordered
- Trial judge did not apply contextual approach and made a palpable and overriding error
- Was a personal benefit
- Did attempt to deceive and he only admitted once caught
- The corporate code precluded using corporate property for their own benefit
- Employee held senior mgmt. position; trust, integrity and honesty were essential conditions of his employment; high standard of conduct expected of him at all times;

Fernandes v. Peel Educational & Tutorial, 2014 ONSC 6506

- High school teacher with 9 year employment record
- Well- regarded teacher, but reputation for being sloppy
- Distorted student marks unduly by assigning zero grades
- Gave marks to students before assignments submitted and was found to have fabricated marks of some students (on a presentation they had not yet given)
- Entered marks for some assignments which were submitted but that he had not reviewed
- Lied to the school about how the marks were calculated, then admitted it
- School dismissed him for academic fraud

Cause or not for cause?

- Held: no cause
- "Academic fraud" was a dramatic way of describing a few students who were marked on presentations that they had not given!! Presentations were worth very little, one small part of overall mark of one course!!
- Longstanding record as a well-regarded teacher; could have fashioned a reprimand and a warning instead
- Punishment outweighs the seriousness of the infraction
- After learning of the falsified grades the school administration produced marks to students and parents on the report cards anyway
- Take-away: if an employer is going to allege that misconduct is serious, it must treat it as such

George v. Cowichan Tribes, 2015 CarswellBC 875

Facts:

- Long-serving "exemplary" employee was drinking at a local bar one evening and got into a verbal altercation with another patron who was romantically involved with the employee's family member
- The next day the employee warned her employer that a complaint may be filed against her; it was filed and, after an investigation of the incident, she was fired

Cause or not for cause?

- Held: dismissal not for cause
- While misconduct outside of work may affect an employer's reputation or damage the employment relationship and be grounds for cause;
- Proportionality requires that the conduct effectively destroy the relationship
- In this case, it was an isolated incident, away from work, related to a family matter, and uncharacteristic of the employee: not cause for dismissal

Things to remember:

- Case by case analysis – while there are accepted categories, whether something constitutes cause is contextual.
- Unfounded allegations of cause should not be used to avoid notice and severance pay
- Employees in positions of trust will be held to high standard
- If an employer has not treated misconduct as serious, it will not be allowed to rely on it for cause

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