# WELCOME

## EMPLOYMENT AND HUMAN RESOURCE SEMINAR

***February 3, 2014***

# EMPLOYMENT STANDARDS UPDATE 2014

**Presenter:**
**Christopher Statham**

# OVERVIEW

- New leaves under the *Employment Standards Act*, 2000 (ESA), *Canada Labour Code* and *Employment Insurance Act*
- Proposed amendments under Bill 146 to ESA
- Key ESA cases

# EMPLOYMENT INSURANCE

- Effective June 9, 2013 the *Employment Insurance Act* was amended to allow EI benefits for eligible parents who to take a leave from work to provide care or support to their critically ill or injured child
- Up to 35 weeks of EI benefits

# CANADA LABOUR CODE

- Federally regulated employers
- Code amended to provide for:
    1. Critically ill child leave
    2. Leave related to death or disappearance of a child
- These leaves are now law

# CANADA LABOUR CODE

- Crime-related death or disappearance leave
  - Employee must be employed for at least six consecutive months to be eligible
  - Up to 104 weeks if his/her child dies as a result of a crime
  - Up to 52 weeks if his/her child disappears as a result of a crime
  - Disqualified if employee charged with the crime against his/her child or disappeared as a result of a crime committed by the employee

# ESA LEAVE AMENDMENTS (BILL 21)

- Not yet law, third reading
- Expanding family medical leave
- Critically ill child leave
- Crime-related death or disappearance leave
- All of the above are unpaid leaves

# ESA LEAVE AMENDMENTS (BILL 21)

- Expanding family medical leave from imminent risk of death to serious medical condition
  - Up to 8 weeks
  - Qualified health practitioner has to state the family member has serious medical condition
  - Family member includes employee's spouse, parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild, step-grandchild, spouse of a child of the employee, employee's brother or sister, relative dependent on the employee for care or assistance, or prescribed family member

# ESA LEAVE AMENDMENTS (BILL 21)

- Critically ill child care leave
  - Child whose "baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury"
  - Up to 37 weeks
  - Employee must be employed at least six consecutive months to be eligible
  - Qualified health practitioner needs to issue certificate

# ESA LEAVE AMENDMENTS (BILL 21)

- Crime-related death or disappearance leave
  - Employee must be employed for at least six consecutive months to be eligible
  - Up to 104 weeks if his/her child dies as a result of a crime
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  - Disqualified if employee charged with the crime against his/her child or disappeared as a result of a crime committed by the employee

# PROPOSED ESA AMENDMENTS (BILL 146)

- Bill 146 was introduced on December 4, 2013
- Received first reading
- Not law as of today

# PROPOSED ESA AMENDMENTS (BILL 146)

- Bill 146 would remove the $10,000 Order to Pay cap on the recovery of unpaid wages (including termination and severance pay)
- Under Bill 146, no cap on recovery

# PROPOSED ESA AMENDMENTS (BILL 146)

- Example:
  - An 10-year service employee who claims termination and severance pay is entitled to 8 weeks termination pay and 10 weeks severance pay for a total of 18 weeks. If the employee makes $1000 per week, they would be owed to $18,000.
  - Ministry of Labour Employment Standards Officer can only order $10,000 even though the employee is owed $18,000.

# PROPOSED ESA AMENDMENTS (BILL 146)

- Increasing the time limit for a claim for wages from six- months (twelve-months for vacation or recurring violations) to 2 years.

# PROPOSED ESA AMENDMENTS (BILL 146)

- Employment Standards Officer may direct, by written notice, an employer to complete an ESA self-audit
- Self audit includes the employer reviewing its records, practices or both

# PROPOSED ESA AMENDMENTS (BILL 146)

- An Officer can require in the written notice for the self-audit:
  - The method for the audit
  - A written report of the audit be submitted to the Ministry of Labour
  - The area (i.e. hours of work or overtime) or provisions of the Act for review
  - Report violations of the Act and wages owing (Self Incrimination)

# PROPOSED ESA AMENDMENTS

- An Officer can require in the written notice for the self-audit:
  - The Employer report violations of the Act and wages owing (Self Incrimination)

# PROPOSED ESA AMENDMENTS (BILL 146)

- Requiring employers to provide a copy of the most recent ESA poster to employees within 30 days of their hire. Upon request, the employer would be required to provide the poster in one of 23 other languages.

# PROPOSED ESA AMENDMENTS (BILL 146)

- Introducing 'joint and several liability' between temporary help agencies and their client employers for unpaid wages (including overtime, termination and severance pay).
- Requiring both the client employers and temporary help agencies to keep records on hours of work.

# KEY CASES

- **Be careful** how you draft your termination clauses in the employment contract
- Cannot contract out of the ESA

# KEY CASE - STEVENS

- *Stevens v. Sifton Properties Ltd.*
  - Employee argued not limited to ESA termination pay
  - Contract stated:

    *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.*

# EMPLOYMENT STANDARDS ACT

**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. 2000, c. 41, s. 5 (1).

# EMPLOYMENT STANDARDS ACT

**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 equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and

(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive. 2000, c. 41, s. 61 (1); 2001, c. 9, Sched. I, s. 1 (14).

# KEY CASE - STEVENS

- Court found the termination clause void.
- Employee entitled to common law reasonable notice.

# KEY CASE – WRIGHT V. THE YOUNG AND RUBICAM GROUP OF COMPANIES (WUNDERMAN)

*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;*

# KEY CASE – WRIGHT V. THE YOUNG AND RUBICAM GROUP OF COMPANIES (WUNDERMAN)

- 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

# KEY CASE – WRIGHT V. THE YOUNG AND RUBICAM GROUP OF COMPANIES (WUNDERMAN)

- Court found the clause void
  - Provided for only base pay; no mention of benefits continuing
  - 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.

# KEY CASE – WRIGHT V. THE YOUNG AND RUBICAM GROUP OF COMPANIES (WUNDERMAN)

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


- ✓ Conduct random ESA Audits before the Ministry of Labour comes knocking
- ✓ Post the ESA Poster on employee bulletin boards and intranet
- ✓ Ensure you have proper employment contracts in place with carefully drafted termination clauses

# SEX, DRUGS & EMPLOYMENT LAW

**Presenter:**
**Alexandra Tratnik**

# OVERVIEW

- Recent cases on
  - Drug and alcohol testing
  - Sexual misconduct

# 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 policy.
- Iriving 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."*

# 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

# SEXUAL MISCONDUCT

- *Professional Institute of Public Service of Canada v. CEP*
  - Female cleaner employed by contractors complained H tried to kiss her. She pushed him away. He grabbed her buttocks.
  - Another cleaner experienced a similar incident.

# SEXUAL MISCONDUCT

- *Professional Institute of Public Service of Canada v. CEP*
  - H also spoke and gestured in a suggestive way, blew kisses.
  - At lunch or breaks, H often performed his "*sexy dance*"
  - Employer terminated H

# SEXUAL MISCONDUCT

- Arbitrator found H committed sexual assault and harassment. But the arbitrator re-instated H and substituted the dismissal for a lengthy suspension.
- The arbitrator reasoned:
  - Complainant did not want H fired.
  - Another cleaner was able to get H to stop when she threatened him with violence.

# SEXUAL MISCONDUCT

- Divisional Court found the arbitrator's decision was UNREASONABLE.
- Reasons relied on by the arbitrator "were irrelevant and represent a dangerous step backwards in the law surrounding the treatment of sexual misconduct in the workplace."

# INTERCOURSE – INJURY IN THE COURSE OF EMPLOYMENT?

- ***Comcare v. PVYM*, (2012) Australian case**
- during a business trip, a light fixture fell on a worker during intercourse
- original decision – benefits denied
- employee ultimately received workers' compensation benefits on appeal

# HELPFUL TIPS

- Ensure you have a policy for discrimination and harassment
- Set out the penalties (i.e. Termination for cause) for sexual harassment and assault
- Don’t let what may look like innocent banter of a sexual or otherwise discriminatory nature go unaddressed

# RESTRICTIVE COVENANTS

**Presenter:**
**L. Viet Nguyen**

# OVERVIEW

- Recent cases
- Helpful tips on the use of restrictive covenants

# OVERVIEW

- Non-solicitation clause – do not try to take customers or other employees

vs.

- Non-competition clause – do not work for a competitor for # months following the termination of employment

# OVERVIEW

- In general, courts found non-competition clauses unenforceable in the employment context.
- Covenants that restrain trade (including employment) are contrary to public policy because they interfere with individual liberty and the exercise of trade
- Non-solicitation clauses were generally found to be sufficient for most employees.

# FLASHBACK TO *ELSLEY*

- 1978 - Court of Appeal held:

  *The onus lies on the employer to show that*

  *(i) the covenant protects a legitimate interest of the employer*

  *(ii) the covenant is reasonable in terms of time, space and line of business*

  *(iii) a no compete is reserved for special circumstances where it is reasonable. Employer must show that a no-solicit clause would not suffice*

# DIMMER V. MMV FINANCIAL - 2012

- D accepted the 12-month non-competition clause upon hire
- D was Senior Vice President
- Employed for four years
- D let go March 15, 2010. Employer reminded D of his post-employment obligations including non-competition in the termination letter
- D complied with non-competition clause for 12 months

# DIMMER V. MMV FINANCIAL

- D sued for wrongful dismissal claiming he was entitled to reasonable notice (or damages)
- Court reviewed the *Bardal* factors – age, service, position and availability of similar employment to determine reasonable notice

# DIMMER V. MMV FINANCIAL

- The Court also looked at the length of the non-competition clause in determining reasonable notice
- The Court awarded 12 months' reasonable notice to a four year service employee

# LEVINSKY V. TD BANK

- L was employed with the bank for 11 years
- He resigned in 2010
- L sued TD for failing to pay his Restricted Shares Units which vested after three years
- L sued for payment of the 2007, 2008, 2009 shares or $1.6 million

# LEVINSKY V. TD BANK

- Share Plan provided:

  *A Participant's entitlement to a particular award will be forfeited without notice by the Bank if the Participant resigns from service prior maturity date of such award.*

# LEVINSKY V. TD BANK

- L argued the Plan clause was a restrictive covenant

# LEVINSKY V. TD BANK

- Court conducted a thorough analysis of the case law and held:
  - *Where an employee chooses to forgo a benefit to compete with the employer that is not necessarily a restraint on trade because the employee is not precluded from going elsewhere (Nortel Networks v. Jervis)*
  - *If the benefit depends on the continuation of service, it is not a restraint on trade*

# LEVINSKY V. TD BANK

- Court conducted a thorough analysis of the case law and held:
  - *If the employee already had a right to the benefit and they were disentitled because they went to work for a competitor this may be considered a restraint on trade and be struck down by the courts*

# PAYETTE V. GUAY INC.

- The latest word on restrictive covenants
- 2013 Supreme Court of Canada decision
- Courts will look at non-competition clauses different in a sale of a business

# PAYETTE V. GUAY INC.

- Guay bought P's business
- Purchase and Sale agreement contained a clause that prohibited P from having any connection to a business operating the crane rental industry anywhere in Quebec for 5 years from the date he ceased to be employed with Guay
- P became an employee of Guay

# PAYETTE V. GUAY INC.

- SCC decision
  - Court will consider context
  - Reasonableness of a non-competition clause is assessed with reference to its duration, geographic scope and scope of restricted activities
  - Clause should not go beyond what is necessary for the protection of a legitimate interest of the party in whose favour it was granted

# PAYETTE V. GUAY INC.

- SCC decision
  - P signed clause as part of a sale of business
  - P and Guay had lengthy negotiations and were equal parties when the non-competition clause was entered into
  - Highly specialized crane rental operations and most of the work was only in Montreal

# PAYETTE V. GUAY INC.

- SCC decision
  - Non-competition clause found to be reasonable

# HELPFUL TIPS

- Ensure restrictive covenants are properly signed with proper consideration
- Non-solicitation clauses will generally suffice for most employees

# HELPFUL TIPS

- For some employees that can cause real harm to the business if they were to leave, so draft reasonable non-competition clauses


i. Limit the **geographical scope** to what is necessary to protect the business (like GTA)

ii. Limit the **duration / time** (i.e. 6-12 mths)

iii. Limit **activities** to those connected with the position and potential harm to the business

# HELPFUL TIPS

- ***Context matters***: the courts are more likely to uphold restrictive covenants in a purchase and sale agreement or a commercial contract

# HELPFUL TIPS

- Consider deferred compensation or other incentives to keep employees from leaving and taking business with them (such as Levinsky v. TD Bank)

# TOP 10 PITFALLS OF HUMAN RIGHTS & EMPLOYMENT INVESTIGATIONS

**Presenters:**
**Flora Poon &**
**Meghan Ferguson**

# OVERVIEW

- Duty to investigate – it is the law
- Top 10 pitfalls of an investigation
- Duties of external investigators/representatives
- Best practices

# EMPLOYER'S DUTY TO INVESTIGATE

- Ontario *Human Rights Code*
  - 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. (s.5(1))

# EMPLOYER'S DUTY TO INVESTIGATE

- Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee. (s.5(2))

# EMPLOYER'S DUTY TO INVESTIGATE

## No reprisal

- **8.** Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.
- **9.** No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

# EMPLOYER'S DUTY TO INVESTIGATE

- ***Moffatt v. Kinark Child and Family Services, [1998] O.H.R.B.I.D. No. 19:***
  - Human rights jurisprudence has established that an employer is under a duty to take reasonable steps to address allegations of discrimination in the workplace, and that a failure to do so will itself result in liability under the Code...

# EMPLOYER'S DUTY TO INVESTIGATE

- It would make the protection under subsection 5(1) to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. … *(Moffat v. Kinark Child and Family Services)*

# EMPLOYER'S DUTY TO INVESTIGATE

- ... *The duty to investigate is a "means" by which the employer ensures that it is achieving the Code-mandated "ends" of operating in a discrimination-free environment and providing its employees with a safe work environment.* *(Moffat v. Kinark Child and Family Services)*

# EMPLOYER'S DUTY TO INVESTIGATE

- In *Laskowska,* Tribunal found 3 criteria are required for a discrimination/harassment free workplace:

# EMPLOYER'S DUTY TO INVESTIGATE

1) **Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training**:

- Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident?
- Was there a suitable anti-discrimination/harassment policy?
- Was there a proper complaint mechanism in place?
- Was adequate training given to management and employees;

# EMPLOYER'S DUTY TO INVESTIGATE

2) **Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action:**

- Once an internal complaint was made, did the employer treat it seriously?
- Did it deal with the matter promptly and sensitively?
- Did it reasonably investigate and act?

# EMPLOYER'S DUTY TO INVESTIGATE

3) **Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication**:

- Did the employer provide a reasonable resolution in the circumstances?
- If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment?
- Did it communicate its findings and actions to the complainant?

# EMPLOYER'S DUTY TO INVESTIGATE

- *Occupational Health and Safety Act* (s.32.0.1)

  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.

# EMPLOYER'S DUTY TO INVESTIGATE

- **32.0.6** (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).

# EMPLOYER'S DUTY TO INVESTIGATE

## Contents of a Workplace Harassment Program

(a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;

(b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and

(c) include any prescribed elements.

# OHSA WORKPLACE HARASSMENT

- "workplace harassment" means 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
- Broader than the Ontario *Human Rights Code* definition of harassment

# PITFALL 1: FAILING TO DEFINE THE COMPLAINT

Define the Complaint and Scope of the Investigation

- ✓ What is the concern
- ✓ Who is involved?
- ✓ List witnesses identified

# PITFALL 2: LACK OF THOROUGHNESS

- Investigations must be thorough
  - To be thorough evidence relevant to the complaint or witness's credibility must be examined
  - Relevant witnesses interviewed

# PITFALL 3: UNDUE INFLUENCE

- Witnesses should not be allowed to meet and discuss their version of events
- Instruct witnesses not to talk to each other about the events or the investigation

# PITFALL 3: UNDUE INFLUENCE

- Be careful of union or legal representatives dictating the evidence
- Managers, directors or any other employee should NOT be allowed to influence the investigation or its outcome

# PITFALL: UNDUE INFLUENCE

- Non-unionized workplace – there is no obligation to allow an individual to be represented by a lawyer or other person during the investigation
- Unionized workplace – look at the collective agreement to determine the individual's rights
- Anyone that interferes with the investigation should be warned and/or excluded

# PITFALL 3: UNDUE INFLUENCE

- ***C.R. v. Schneider National Carriers***
  - C.R. sued for wrongful dismissal
  - Terminated after she supposedly used profane language, displayed "herself in various stages of nudity" and "invited trainees into a submissive relationship"

# PITFALL 3: UNDUE INFLUENCE

- ***C.R. v. Schneider National Carriers***
  - C.R. successful in wrongful dismissal suit
  - Court found
    - The complainants had compared notes before lodging their complaints
    - Witnesses were interviewed in front of each other

# PITFALL 4: BIAS

# BIAS

- In favour of the employer or the client;
- Against chronic complainers;
- In favour of people that are “like” the investigator;
- In favour of the “easiest” decision;
- Easily swayed by management

# BIAS

- ***Elgert v. Home Hardware Stores Ltd.*** (2011 ABCA 112).
- The Court upheld a wrongful dismissal against Home Hardware that fired a 17-year supervisor for sexual harassment.

# BIAS

- ***Elgert v. Home Hardware Stores Ltd.*** (2011 ABCA 112).
- Found ‘biased’ investigation.
- 24-months pay in lieu of notice as damages
- $75k punitive damage award.

# ELGERT V. HOME HARDWARE

- The Court cited numerous problems with the employer's investigation, including:
  - The investigator had no previous experience conducting investigations;
  - The investigator was a friend of the Complainant's father;
  - The investigator had "already made up his mind" as to Elgert's guilt" before speaking to him;
  - The investigator only interviewed one of the two Complainants and hearsay witnesses.

# BEST PRACTICE


- Train the people who will do the HR/employment investigations
- If internal investigator, ensure autonomy in their investigation and no undue influence
- If external investigator, make sure their is NO conflict of interest or undue influence

# EXTERNAL INVESTIGATORS

- Sometimes able to be more neutral
- If a lawyer, bound by *Rules of Professional Conduct*
  - Maintain the integrity of the profession (incl. trustworthiness, public confidence in the profession)
  - Act in good faith with all persons
  - Avoid conflicts of interests
  - *Special responsibility to respect human rights laws in all professional dealings*

# PITFALL 5: NO INVESTIGATION

- Employers have a duty to investigate
- ...Even if rumours
- ...Even if chronic complainer
- ...Even if reluctant complainant

# PITFALL 6: FAILING TO COMMUNICATE STATUS OF INVESTIGATION

- Important to provide regular updates
  - When will investigation commence
  - Explain any delays
  - OHRC says aim for 90 days

# PITFALL 7: FAILURE TO CONSIDER RELEVANT EVIDENCE

- Interview all relevant witness
  - Have the parties (Complainant/Respondent) list potential witnesses...but also investigator should seek out relevant witnesses
- Review relevant documents
  - Remember the electronic documents
  - Access to email (Privacy Policy???)

# PITFALL 8: ALLOW FULL RESPONSE

- Respondent or anyone facing consequences from the investigation must know the allegations against them and be given a chance to fully respond

# PITFALL 8: ALLOW FULL RESPONSE

- Names of complainants?
- Copy of the Complaint?

# PITFALL 9: NO DOCUMENTATION OF THE INVESTIGATION

- Need to document, document, document
- Witness statements
- Copy of documents reviewed
- Investigation Report/Results

# PITFALL 10: NOT FOLLOWING POLICY

- Will be held to following the harassment/discrimination policy and program
- Reliability of the investigation
- Deviating not fatal to a termination

# LOOKING FORWARD
# EMPLOYMENT & IMMIGRATION

**Presenter:**
**Asher Frankel**


WHOA. MY FRIENDS HENRY AND CARLA ARE MOVING TO CANADA.
THEY SOUND INTERESTING.
THEY ARE.
SO ARE THEY *IN* THE WITNESS RELOCATION PROGRAM OR ARE THEY JUST FUGITIVES?
YOU SERIOUSLY CAN'T THINK OF ANY BETTER REASONS TO MOVE TO CANADA?
HIGH-YIELD SNOW FARMING?

# LOOKING FORWARD for HR in 2014

**Presenter:**
**Meghan Ferguson**

# ASK THE LAWYERS: HANDLING FOR CAUSE TERMINATIONS

**Presenter:**
**Larry Keown**

# TERMINATING FOR CAUSE

- Overview
- Best practices
- Scenarios

# TERMINATION FOR CAUSE

- Courts will require employer to show through clear and cogent evidence that it had cause to terminate an employee

# TERMINATION FOR CAUSE

- What is cause?...*depends on the context*
  - Serious misconduct
  - Theft
  - Dishonestly
  - Breach of trust
  - Insubordination
  - Incompetence
  - Excessive absenteeism

# TERMINATION FOR CAUSE

- Call the employee to a meeting
- Do not terminate in front of others
- Two management – HR and supervisor
- Arrangements for personal items to be packed up
- Security?

# TERMINATION FOR CAUSE

- Provide termination letter with brief reason ...but not too much detail
  - Example:
    This letter is to notify you that your employment with ABC Co. is terminated immediately for cause. You were found to have engaged in theft when you took the President's chocolate bar and undermined the trust necessary for the employment relationship to continue.


YOU'RE FIRED
but just look at this baby seal

# TERMINATION FOR CAUSE

- Option to resign?

# SCENARIO 1

- Gord has been an accountant for D&D Accounting Firm for 10 years

# SCENARIO 1

- Mr. Bee – Gord's boss – comes to you, the HR Manager, claiming there are discrepancies in financial statements prepared by Gord. He thinks Gord is involved in a money laundering scheme and wants him fired.
- Mr. Bee also says to you "You better call the police. I don't want clients to think we didn't take this seriously."

# SCENARIO 1 – GORD & MR BEE

- Should you terminate Gord for cause?

# SCENARIO 1 – GORD & MR BEE

- Should you call the police?

# SCENARIO 1

- Based on an actual case although the names and some information were changed
- *Pate (Estate) v. Galway-Cavendish and Harvey (Townships)* 2013 Ontario Court of Appeal

## PATE*(ESTATE) V. GALWAY-CAVENDISH AND HARVEY (TOWNSHIPS)*

- Pate was a building inspector with the Township
- Manager uncovered discrepancies with building permits
- Pate explained the discrepancies but the manager told P to resign or he was terminated for cause
- Pate refused to resign and was terminated for cause

## PATE*(ESTATE) V. GALWAY-CAVENDISH AND HARVEY (TOWNSHIPS)*

- The manager also handed the information over to the police.
- The Township exerted pressure on the investigating officers by calling OPP superiors.
- Four day criminal trial, a lot of local media attention, Pate was eventually acquitted three years after he was charged
- Pate had difficulty finding another job.

## PATE*(ESTATE) V. GALWAY-CAVENDISH AND HARVEY (TOWNSHIPS)*

- Pate sued for wrongful dismissal, bad faith, aggravated damages, punitive damages, and malicious prosecution.
- Trial judge found the Township did not have cause and failed to hand over exculpatory evidence to the police
- He died shortly after the wrongful dismissal suit

# PATE*(ESTATE) V. GALWAY-CAVENDISH AND HARVEY (TOWNSHIPS)*

- Case goes to the Ontario Court of Appeal on issue of malicious prosecution and punitive damages
- Pate finally awarded
  - $75,000 in wrongful dismissal (settlement)
  - $25,000 (Four months pay) for bad faith
  - $75,000 for aggravated damages
  - $1.00 for malicious prosecution (agreed by parties)
  - $450,000 in punitive damages!!!!

# SCENARIO 2

- Bobo Clown has been working for Hottie Inc. for 23 years. He is the top sales guy. Everyone loves him.
- On June 1, Bobo takes a top client out for lunch. He takes the Company car without authorization contrary to Hottie policy.
- The lunch is a liquid lunch.

# SCENARIO 2

- On the way back from lunch, Bobo is involved in a serious accident.
- The Company car is destroyed.
- Bobo suffers life threatening injuries.
- Hottie Inc. fires Bobo for cause.
- Bobo sues for wrongful dismissal. 24 months pay.

# SCENARIO 2 – BOBO V. HOTTIE INC.

**You be the *judge*.**

# DZIECIELSKI V. LIGHTING DIMENSIONS INC.

- 2012 Ontario Superior Court decision (Whitaker)
- D drove drunk after a lunch – 4 beers in 1 hour
- Took the company car without authorization
- Serious accident with life threatening injuries to D
- 23 years of service

# RELEVANT FACTORS

- Whether the employee was guilty of serious misconduct;
- Whether the employee's impugned behaviour or act was merely conduct with which the employer disagreed or "trifling causes" rather than transgressions or misconduct which any reasonable person could not overlook.

# RELEVANT FACTORS

- Whether the employee's misconduct was inconsistent with or prejudicial to the employer's business, and therefore in breach of an implied term of the employment agreement
- Whether the employee's misconduct was in breach of an express provision of the employment agreement (....policies?)

# RELEVANT FACTORS

- Whether the misconduct merely reflects the employee's poor judgement or inadvertence

# DZIECIELSKI V. LIGHTING DIMENSIONS INC.

Trial judge found:

- Guilty of serious misconduct
- Drunk driving, not just intoxicated at work
- Damage to property
- Plead guilty to a drunk driving offence

# DZIECIELSKI V. LIGHTING DIMENSIONS INC.

Trial judge found:

- Employee Handbook stated no consumption of alcohol while on business and could result in termination

# DZIECIELSKI V. LIGHTING DIMENSIONS INC.

- Conduct prejudicial to employer's business – employer could have been liable if others injured and might think less of the employer for not better controlling its employees
- D resisted taking responsibility saying at trial he was "not drunk"

# QUESTIONS

- Free to ask the *burning* HR questions on terminating an employee for cause

  OR

  Any other employment questions.

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