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WELCOME TO TODAY'S HR/EMPLOYMENT WEBINAR

SEPTEMBER 21, 2022

This program has been approved for continuing professional development (CPD) hours under Section A of the Continuing Professional Development (CPD) Log of Human Resources Professionals Association (HRPA).

This program has been approved and qualifies for 2 hours of substantive CPD hours with the Law Society of Ontario.

TOPICS

I. Infectious Disease Emergency Leave (IDEL) – Update and Considerations for Employers

II. Electronic Monitoring of Employees in Ontario – Requirements for Employers

III. Can Language in Confidentiality and Conflicts of Interest Clauses render a Termination Clause Unenforceable? - *Henderson v. Slavkin et al.,* 2022 ONSC 2964

IV. Do Unionized Employees still have the right to pursue Human Rights Complaints? - *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42

9:00 a.m.	Opening Remarks
9:05 a.m.	I. Infectious Disease Emergency Leave (IDEL) – Update and Considerations for Employers
9:25 a.m.	II. Electronic Monitoring of Employees in Ontario – Requirements for Employers
9:45 a.m.	Break
10:00 a.m.	III. Can Language in Confidentiality and Conflicts of Interest Clauses render a Termination Clause Unenforceable? - *Henderson v. Slavkin et al.,* 2022 ONSC 2964
10:20 a.m.	IV. Do Unionized Employees still have the right to pursue Human Rights Complaints? - *Northern Regional Health Authority v. Horrocks*, 2021 SCC
10:40 a.m.	Q&A Period
10:55 a.m.	Concluding Remarks

Infectious Disease Emergency Leave (IDEL) – Update and Considerations for Employers

DSF Devry Smith Frank *LLP*
Lawyers & Mediators

Marty Rabinovitch, *B.A.H., LL.B.*
416-446-5826 | marty.rabinovitch@devrylaw.ca

Temporary Layoff under the ESA

- Under Section 56(2) of the *Employment Standards Act, 2000* (ESA) a temporary layoff can last:
  - (a) Not more than 13 weeks of layoff in any period of 20 consecutive weeks; OR
  - (b) More than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks of layoff in any period of 52 consecutive weeks, where:
    - The employee continues to receive substantial payments from the employer; OR
    - The employer continues to make payments for the employee's benefit under a legitimate group or employee insurance plan or retirement or pension plan; OR
    - The employee receives supplementary unemployment benefits; OR
    - The employee would be entitled to receive supplementary unemployment benefits but isn't receiving them because they are employed elsewhere; OR
    - The employer recalls the employee to work within the time frame approved by the Director of Employment Standards; OR
    - The employer recalls the employee within the time frame set out in an agreement with an employee who is not represented by a trade union;

Temporary layoff – common law

- There is no common law right to a temporary layoff
- Would need to have temporary layoff provision in employment contract
- Unilateral layoff by an employer would be generally considered substantial change in employee's employment and would likely constitute constructive dismissal at common law.

Infectious Disease Emergency Leave (IDEL)

- May 2020: Government of Ontario passed legislation to implement IDEL to allow employees to take unpaid job-protected leave for reasons related to the COVID-19 pandemic (sections 50.1(1.1) and 50.1(1.2) of the *ESA*)
- Leave entitlements for COVID-19 retroactive to January 25, 2020
- Only non-unionized employees can be deemed to be on unpaid infectious disease emergency leave

Infectious Disease Emergency Leave (IDEL)

- Non-unionized employees deemed to be on unpaid infectious disease emergency leave any time the employee is not performing their duties because their employer has temporarily reduced or temporarily eliminated their hours of work for reasons related to COVID-19 – see O. Reg. 228/20 – Infectious Disease Emergency Leave)

Infectious Disease Emergency Leave (IDEL)

- April 29, 2021: Ontario Government amended ESA to require employers to provide eligible employees with up to three days of paid infectious disease emergency leave for reasons related to COVID-19 (up to $200.00/day – see section 50.1(1.11) of ESA)
- Paid leave retroactive to April 19, 2021; continues until March 31, 2023
- Eligible employers can apply to be reimbursed for these payments through the Workplace Safety and Insurance Board (see sections 50.1.1(2) and 50.1.1(3) of ESA)

Infectious Disease Emergency Leave (IDEL)

- **Uncertainty in the law:**
  - Section 7 of IDEL Regulation 228/20: Temporary reduction or elimination of an employee's work hours and/or wages due to COVID-19 will not constitute constructive dismissal during the COVID-19 period **(which ended on July 30, 2022)**
  - As per Government of Ontario: "These rules affect only what constitutes a constructive dismissal under the ESA. These rules do not address what constitutes a constructive dismissal at common law" – see https://www.ontario.ca/document/your-guide-employment-standards-act-0/covid-19-temporary-changes-esa-rules
  - Employees whose hours of work or wages have been reduced due to COVID-19 on deemed (unpaid) IDEL
  - uncertainty as to whether employees on deemed IDEL would be considered constructively dismissed at common law

Infectious Disease Emergency Leave (IDEL)

- **IDEL O.Reg. 228/20: "Constructive Dismissal"** (Section 7(1))
  - The following does not constitute constructive dismissal if it occurred during the COVID-19 period:
    - a) A temporary reduction or elimination of an employee's hours of work by the employer for reasons related to COVID-19
    - b) A temporary reduction in an employee's wages by the employer for reasons related to COVID-19.
- For common law to be altered by statute, there needs to be express language in the statute to that effect – see section 8(1) of ESA – ESA does not affect civil remedy of employee against employer

Current Case Law on Deemed IDEL

- *Coutinho v. Ocular Health Centre Ltd.* 2021 ONSC 3076
- *Fogelman v. IFG*, 2021 ONSC 4042
- *Taylor v. Hanley Hospitality Inc.*, 2021 ONSC 3135
- *Taylor v. Hanley Hospitality Inc.*, 2022 ONCA 376

Coutinho v. Ocular Health Centre Ltd., 2021 ONSC 3076

- Employee placed on temporary lay-off due to workplace closure during COVID-19 pandemic. Plaintiff commenced an action claiming damages for constructive dismissal at common law.
- Defendant employer argued that IDEL Regulation 228/20 should apply not only to constructive dismissals for the purposes of the *ESA* but also at common law
- Ontario Superior Court asked to consider whether the IDEL Regulation prevented an employee from advancing a claim for constructive dismissal at common law

Coutinho v. Ocular Health Centre Ltd., 2021 ONSC 3076

- **Ruling: Plaintiff can pursue claim for constructive dismissal at common law**
  - Scope of Section 7 of Regulation 228/20 must be interpreted with Section 8(1) of the *ESA* which provides that "no civil remedy of an employee against his or her employer is affected by this Act"
  - Regulation did not prevent plaintiff from pursuing a claim for constructive dismissal at common law
  - Plaintiff entitled to treat company's unilateral imposition of the layoff as a termination at common law and therefore, the employee had right to sue for constructive dismissal

Fogelman v. IFG, 2021 ONSC 2042

- Similar to *Coutinho*, the plaintiff commenced an action claiming damages for constructive dismissal at common law.
- Ontario Superior Court found that IDEL Regulation 228/20 did not preclude the plaintiff's common law claim of constructive dismissal
- The Court referenced the Ontario Ministry of Labour's online publication which notes that the IDEL regulation does not address what constitutes constructive dismissal at common law

Taylor v. Hanley Hospitality Inc. 2021 ONSC 3135

- In contrast to *Coutinho* and *Fogelman*, the Ontario Superior Court determined that there was no constructive dismissal at common law.
- Court concluded that Regulation 228/20 was enacted to displace the common law of constructive dismissal with respect to deemed IDEL
- Court concluded that *Coutinho* failed to properly interpret Section 8(1) of the ESA and that the IDEL provisions did alter the common law

Taylor v. Hanley Hospitality Inc. 2022 ONCA 376

- On appeal, the Court of Appeal set aside the motion judge's order on other grounds
- Court of Appeal declined to consider the impact of the ESA and the Regulation on the common law doctrine of constructive dismissal in its decision
- The case was sent back to the Superior Court

Current State of the Law

- Court of Appeal's refusal to address whether Section 50.1 of the *ESA* and Regulation 228/20 leaves the law unclear
- Currently, the law on the issue is governed by *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076 and *Fogelman v. IFG*, 2021 ONSC 2042
  - Section 50.1 of the ESA and the IDEL Regulation 228/20 do not displace the employee's common law right to assert constructive dismissal

Current State of the Law

- Employers should be aware that in accordance with *Coutinho* and *Fogelman*, many temporary layoffs due to COVID-19 could constitute constructive dismissal at common law and entitle employees to wrongful dismissal damages
- Issue will not be resolved until the Court of Appeal decides the issue

Current State of the Law

- As of July 31, 2022, the ESA's regular rules around constructive dismissal resumed
  - Significant reduction or elimination of an employee's hours of work or wages may be considered a constructive dismissal under the ESA, even if it was done for reasons related to COVID-19
- Employees who are still not at work by July 31, 2022 and are on "deemed" IDEL leave may have a claim for constructive dismissal

Current State of the Law

- **Options for Employers as of July 31, 2022:**
  - Bring employees back to work (better late than never? employee already constructively dismissed?)
  - Terminate employees who were on deemed IDEL and provide a severance package
  - Put employees on temporary layoff under the ESA (retroactively)
  - Do nothing – "let sleeping dogs lie" (employee found work elsewhere? not interested in returning to work?)

Current State of the Law

- Employers should check with any employees who were on deemed IDEL to see if they want to return to work or whether they found employment elsewhere before making their decision

Current State of the Law

- Paid Infectious Disease Emergency Leave will continue until **March 31, 2023.**
  - Employees are entitled to up to three days total during the period in which paid infectious disease emergency leave is available
- Although paid IDEL leave has been extended, employees are not entitled to additional days specific to 2023
- This leave is available for all employees who are covered by the ESA and meet the eligibility criteria

Current State of the Law

- Under Section 50.1.1 of the *ESA*, employers may apply to the Workplace Safety and Insurance Board (WSIB) for reimbursement within 120 days of the date the employer paid the employee or by July 29, 2023, whichever is earlier.
- Reimbursement may be the lesser of $200.00 per day or the wages the employee would have earned for three days for each employee who takes paid IDEL

Current State of the Law

- An application for reimbursement shall include the following:
  - A completed application form approved by the WSIB
  - An attestation confirming that the employer made a payment to the employee for paid leave
  - A record of the payment made to the employee
  - Information about claims filed with the WSIB under the *Workplace Safety and Insurance Act, 1997*
  - Any other information required by the WSIB

Thank you.

marty.rabinovitch@devrylaw.ca

416-446-5826

DSF Devry Smith Frank *LLP*
Lawyers & Mediators

Graeme R. Oddy, *B.A., J.D.*
416-446-5810 | graeme.oddy@devrylaw.ca

Electronic Monitoring of Employees in Ontario – Requirements for Employers

The Basics: Who, When, Where, Why, Etc.

- **Why it matters:** Electronic monitoring is more important than ever!
  - COVID-19 brought working from home to the forefront of many workplaces
  - Many employers have legitimate interests in monitoring their employees
  - Technological improvements

- **How the amendments were made:** The *Employment Standards Act* (the "*ESA*") was amended on April 11, 2022, by Bill 88, also known as the "Working for Workers Act," to address electronic monitoring of employees. The relevant sections of the ESA can be found at Part XI.1, s. 41.1.1.

- **Who is affected:** Employers with **more than 25 employees** will be required to have a written policy which addresses electronic monitoring of employees and provide copies of the policy to your employees.
  - Employees at multiple workplaces count towards the total. For example: if you have 3 workplaces with only 9 employees at each location, you will still need a written policy.

The Basics, Cont'd.

- **When:** The size of the workforce is considered as of January 1 in each year.
  - Employers who had 25 employees (as of January 1, 2022) have until **October 11, 2022** to have a written policy in place.
  - You have 30 days to provide the policy – so it needs to be provided to employees by November 10, 2022
  - Starting in 2023, employers with more than 25 employees as of January 1 must have the written policy in place **before March 1** of that year and provided to employees by March 31.
  - If any changes to a policy are made, copies of the new written policy must be distributed **within 30 days**

Contents of the Policy

- The new legislation requires that the written policy set out the following:
  - Whether or not electronic monitoring will take place at all
  - How the monitoring will occur (e.g.: Keyboard/mouse tracker; Location/GPS)
    - Unfortunately, "Electronic Monitoring" itself is not defined…
    - The Ontario government has published some guidance to accompany the legislation: see https://www.ontario.ca/document/your-guide-employment-standards-act-0/written-policy-electronic-monitoring-employees:
      - "All forms of employee monitoring done electronically"
      - Why does the lack of clarity matter?
  - In what circumstances monitoring may take place (e.g. While working from office, home, or both? Personal devices, work devices, or both?)

Contents of the Policy, Cont'd.

- The policy must also set out:
  - The purposes for which the information obtained may be used
  - Date of the policy and date of any revisions
  - "Any other information as may be prescribed" – signaling potential for change via future legislation or jurisprudence

- Guidance is clear that employers can have separate policies which apply to different groups of employees.
  - Larger workforce probably means there is utility to multiple policies
  - May help you streamline your data collection by only monitoring various employees in the ways you want and need to

What Does This Mean For Employers? Common Questions

Q: **How is an employer required to provide the policy to its employees?**

A: Employers are required to provide the policy as:

i. a printed copy;
ii. an attachment to an email, if the employee can print a copy of the attachment; or
iii. a link to the document online, if the employee can access the document electronically, has a printer, and knows how to use both a computer and a printer

Q: **Can employees complain, or file an employment standards claim, with the Ministry about the policy?**

A: Yes, but only regarding the employer's requirement to provide a copy of the policy to employees.

- Employment standards officers cannot investigate the contents or scope of the policy

Questions Cont'd.

Q: **How can I use the information gathered via electronic monitoring?**

A: The statute itself does not limit your use of the data gathered – s. (7)

- Information gathered may be relied on for terminations for cause, just cause, wilful misconduct, disobedience, etc.
- You actually may use the information beyond how it's set out in the policy

BUT… bear in mind your use of the data will still need to remain compliant with both the employment contract, and with the common law.

Use of Electronically–Gathered Data

1. If your employment contract contains provisions related to electronic monitoring, then those provisions are going to take precedence over whatever your policy says.

2. If you're going to collect data and use it against an employee, and employee doesn't like it, you're in a far better position if you've advised them beforehand of the scope and of the potential outcomes
    - Reasonable expectation of privacy?
    - Extensive and transparent policy can get ahead of issues raised by employee

Big Questions Cont'd.

3. Remain mindful of what may be improper… it may be tempting to go overboard with your monitoring and how you potentially use that information. Be careful!
   - The Ontario Court of Appeal has recognized the tort of "**Intrusion Upon Seclusion**"; basically a claim that someone has invaded your privacy
   - First recognized in Jones v. Tsige, 2012 ONCA 32
     i. conduct must be intentional or reckless
     ii. invasion into private affairs without lawful justification
     iii. reasonable person would view the invasion as offensive, and causing distress, humiliation, or anguish
   - This and subsequent cases indicate that the intrusion can extend to banking/financial records, medical records, images
   - The case law is clear that the common law has to be responsive to changes in technology

Closing Thoughts

- Focus of the ESA amendment is on transparency, but…
  - As employers, your focus should be ensuring you are compliant with the employment contract, compliant with common law, and that your conduct is reasonable.

- Use of information also still has to be lawful – not just compliant with the common law or ESA but with other relevant legislation
  - To to the extent that you are affected by privacy legislation – the *Freedom of Information and Protection of Privacy Act* (FIPPA), the *Personal Health Information Protection Act* (also PHIPA), *Personal Information Protection and Electronic Documents Act* (PIPEDA), etc. applied to you before, then that legislation still applies to you

More Closing Thoughts

- Consider whether you're aware of all the monitoring software/hardware in place
  - HR staff and those who end up drafting the policy may consider working with IT team to get full picture
- Think carefully about what counts as monitoring…
- Reminder: the policy requirement comes into force on October 11, 2022!
- DSF more than happy to assist!

Thank you!

graeme.oddy@devrylaw.ca

416-446-5810

DSF Devry Smith Frank *LLP*
Lawyers & Mediators

David Heppenstall, *B.Comp, J.D.*
416-446-5834 | david.heppenstall@devrylaw.ca

Can Language in Confidentiality and Conflicts of Interest Clauses render a Termination Clause Unenforceable? (Yes)

Henderson v Slavkin et al, 2022 ONSC 2964

Topics

1. Employment Contracts Background
2. Wrongful Dismissal
3. Unenforceable Termination Language
4. Restrictive Covenants
5. *Henderson v Slavkin et al*, 2022 ONSC 2964

(1) Employment Contracts Background

- The employment contract is not a routine commercial contract, it is governed by the *Employment Standards Act* and by the common law (*i.e.*, court decisions, or what is known as "judge made law").

(1) Employment Contracts Background

- Modern employment contracts require the legal hallmarks of any contract:
  - **Offer** and **acceptance** to exchange **service** (not "servitude"*) for *consideration*, in enforceable terms, made with a view to establish a legal relationship.

    * *Archer v Society of Sacred Heart of Jesus*, [1905] OJ No 141 (Ont CA)
  - Consideration is a legal term of art which describes that which is **given or promised** in order to make a legally binding contract. *Kiss v Palachik*, [1983] 1 SCR 623
    - Typically, consideration in employment contracts is the employee promising to provide service while the employer promises to provide wages and benefits.

(1) Employment Contracts Background

- If employers want to **significantly amend** the contract, they may not impose changes unilaterally. Employers need agreement from employee.

  Francis v Canadian Imperial Bank of Commerce, [1994] OJ No 2657 (Ont CA)

  - Employers cannot threaten to terminate an employee's employment if the employee refuses to agrees to the new terms (*n.b.*, if the employee continues working anyway, that is not an "agreement").

    Hobbs v TDI Canada Ltd, [2004] OJ No 4876 (Ont CA)

(2) Wrongful Dismissal

- Wrongful dismissal law has evolved to protect employees.
- Employers are entitled to terminate employees without cause provided that the employee is either given notice or payment in lieu of notice.
  - Examples of without cause terminations include restructuring, insufficient work, *et cetera*.
- The **Notice Period** is an amount of time, or a level of compensation, to assist a dismissed employee find comparable work.
  - At common law, the Notice Period is "reasonable notice," which varies with the circumstances. *Machtinger v HOJ Industries Ltd*, 1992 CanLII 102 (SCC) – history of the development of the law
  - The Notice Period is also a statutory entitlement pursuant to the *Employment Standards Act*.

(2) Wrongful Dismissal

- The entitlements specified in the *Act* are the employee's **minimum** entitlements.
- An employment contract may specify an entitlement upon termination without cause, so long as entitlement is equal to or greater than the minimum standards in the *Act*.
- Neither the employer nor the employee can contract out of the *Act*.

(2) Wrongful Dismissal

- Statutory minimum entitlement to notice under the *Act*:
  - Under 3 months ..... None
  - 3 months to under 1 year ..... 1 week
  - 1 year to under 3 years ..... 2 weeks
  - 3 years to under 4 years ..... 3 weeks
  - 4 years to under 5 years ..... 4 weeks
  - 5 years to under 6 years ..... 5 weeks
  - 6 years to under 7 years ..... 6 weeks
  - 7 years to under 8 years ..... 7 weeks
  - 8 years or more ..... 8 weeks
- If the contract specifies a notice period which is *less* than the minimum, it is **null and void**. *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986

(3) Unenforceable Termination Language

Waksdale

- If a "with cause" termination provision in the contract is unenforceable, the entire termination scheme of the contract likely will be unenforceable.
  Waksdale v Swegon North America Inc, 2020 ONCA 391
  - Employee would therefore be entitled to the greater common law notice period where terminated "without cause."
  - *E.g.*, a "no notice if just cause" provision renders all termination provisions in a contract invalid.
    Rahman v Cannon Design Architecture Inc, 2022 ONCA 451
- A finding of unenforceability of the entire termination scheme cannot be saved by a severability clause.

(3) Unenforceable Termination Language

- The Supreme Court of Canada denied leave to appeal re: *Waksdale*, therefore it is the binding authority in Ontario.
- The "Rule of *Waksdale*" has been followed in many subsequent cases:
  - *Sewell v Provincial Fruit Co Limited*, 2020 ONSC 4406; *Ojo v Crystal Claire Cosmetics Inc*, 2021 ONSC 1428; *Perretta v Rand A Technology Corporation*, 2021 ONSC 2111; *Pavlov v The New Zealand and Australian Lamb Company Limited*, 2021 ONSC 7362; *Gracias v Dr David Walt Dentistry*, 2022 ONSC 2967; *Rahman v Cannon Design Architecture Inc*, 2022 ONCA 451

(3) Unenforceable Termination Language

- In order to be disentitled from entitlements under the "wilful misconduct" standard in the Act, the employee must do something deliberately and knowingly wrong.
  Render v ThyssenKrupp Elevator (Canada) Limited, 2022 ONCA 310
  - This threshold to meet is higher than the test for "just cause."
  - Employer must demonstrate that the employee purposefully engaged in conduct that they knew to be serious misconduct.
- "An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer."
  - O Reg 288/01: Termination and Severance of Employment, s 2(1) ¶ 3 under the *Employment Standards Act*

(4) Restrictive Covenants

- Restrictive covenants are provisions in the employment contract which restrain the employee's freedom — for example, their freedom to trade.
  - "Enforceable only if they are reasonable between the parties and with reference to the public interest."
    JG Collins Insurance Agencies Ltd v Elsley, [1978] 2 SCR 916

(4) Restrictive Covenants

Examples:

- Non-competition with employer
  - Generally unenforceable under both the common law and under recent amendments to the *Act*. With the exception of a case where the business is sold, the common law is very friendly to employees.
- Non-solicitation of employer's clients or customers
  - Likely unenforceable if the non-solicitation period is beyond one year after the employment contract ends.
- Confidentiality.

(4) Restrictive Covenants

- Employees must maintain the confidentiality of the employer's trade secrets and confidential information as part of employee's duty to act with "**good faith and fidelity**."
- Exploiting confidential information to solicit clients is never permitted.
  - There is *no distinction* between a departing employee taking a physical list of your clients and committing that same list to memory.
    2158124 Ontario Inc v Pitton, 2017 ONSC 411

(4) Restrictive Covenants

- The duty of confidentiality applies throughout the term of employment, during any period of working notice, *and after the employment ends*.
  - Upon cessation of employment an employee may immediately go into competition with their former employer—so long as they do not misuse confidential information.
    RBC Dominion Securities Inc v Merrill Lynch Canada Inc, 2008 SCC 54

(4) Restrictive Covenants

- What if a restrictive covenant includes termination language?

(5) *Henderson v Slavkin et al*, 2022 ONSC 2964

- In 2015, Rose Henderson, a receptionist at a dental office, was asked by her employers to sign a new employment contract. (Previously, she had no written contract).
- The new contract she signed contained a provision limiting her entitlements only to those under the *Employment Standards Act*.
  - The termination scheme in the contract raised no concerns.
  - However, the contract's confidentiality clause and the conflict of interest clause provided that a failure to comply with these clauses would constitute cause for termination without notice or compensation in lieu of notice.

(5) *Henderson v Slavkin et al*, 2022 ONSC 2964

Termination clause

Your employment may be terminated without cause for any reason upon the provision of notice equal to the minimum notice or pay in lieu of notice and any other benefits required to be paid under the terms of the *Employment Standards Act,* if any. By signing below, you agree that upon receipt of your entitlement under the *Employment Standards Act*, no further amount shall be due and payable to you, whether under the *Employment Standards Act*, any other statute or common law.

The plaintiff argued that this clause is not clear enough. But, the court found "no inconsistency between the termination clause and the *ESA* provisions which could give rise to any ambiguity in the plaintiff's right to continue to receive benefits pursuant to the *ESA*."

(5) *Henderson v Slavkin et al*, 2022 ONSC 2964

✗ Conflict of Interest clause

You agree that you will ensure that your… personal interests do not… conflict with the Employer's interests… . A conflict of interest includes… :

a) Private or financial interest in an organization with which does business [*sic*] or which competes with our business interests; — Incomplete sentence, one would have to guess as to what words are missing

b) A private or financial interest… in any concern or activity of ours of which you are aware or ought reasonably to be aware; — Overly broad, unspecific, ambiguous

c) Financial interests include the financial interest of your… relative, a private corporation of which the [*sic*] you are a shareholder, director or senior officer, and a partner or other employer; — Overly broad, unspecific, ambiguous

d) Engage in unacceptable conduct, [*e.g.*,] soliciting patients for dental work, which could jeopardize the patient's relationship with us. — Overly broad, unspecific, ambiguous

A failure to comply with this clause above constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice. — This described conduct falls short of the standard for disentitlement under the *ESA* where the employee must be guilty of wilful misconduct or wilful neglect of duty.

(5) *Henderson v Slavkin et al*, 2022 ONSC 2964

Confidentiality clause

You recognize that in the performance of your duties, you will acquire detailed and confidential knowledge of our business….

You agree that you will not in any way use, disclose, copy, reproduce, remove or make accessible to any person or other third party, either during your employment or any time thereafter, any confidential information relating to our business…. For clarity, confidential information includes, without limitation, all information … which relates to the business….

In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause. — **This clause also fails to stipulate that any misconduct must be wilful and not trivial to support a with cause termination without notice, as required by the *ESA*.**

(5) *Henderson v Slavkin et al*, 2022 ONSC 2964

- The Court found that the clause in the conflict of interest and confidential information provisions that provided that a failure to comply would constitute cause for termination without notice or compensation in lieu of notice were not in compliance with the *Act*.
  - For both of these provisions, what constitutes a breach is overly broad and ambiguous to the extent that it exceeds the concept of wilful misconduct under the *Act*.
  - It is a "*Waksdale* Problem," but found outside of the termination scheme.
- Rose Henderson was awarded common law notice.

(5) *Henderson v Slavkin et al*, 2022 ONSC 2964

- The basic principles forming the framework for the determination of the enforcement of a termination clause:
  Wood v Fred Deeley Imports Ltd, 2017 ONCA 158

1. Employees have less bargaining power than employers when employment agreements are made;
2. Employees are likely unfamiliar with employment standards in the *ESA* and thus are unlikely to challenge termination clauses;
3. The *ESA* is remedial legislation, and courts should therefore favour interpretations of the *ESA* that encourage employers to comply with the minimum requirements of the Act, and extend its protection to employees;
4. The *ESA* should be interpreted in a way that encourages employers to draft agreements which comply with the *ESA*;
5. A termination clause will rebut the presumption of reasonable notice only if its wording is clear, since employees are entitled to know at the beginning of an employment relationship what their entitlement will be at the end of their employment; and
6. Courts should prefer an interpretation of the termination clause that gives the greater benefit to the employee.

(5) *Henderson v Slavkin et al*, 2022 ONSC 2964

- The Court's decision in *Henderson* should be a cautionary lesson for employers. It holds that a single clause that deals with termination anywhere within an employment contract can threaten the enforceability of a termination provision or scheme if that clause is not in compliance with the *Employment Standards Act*.

(5) *Henderson v Slavkin et al*, 2022 ONSC 2964

Key Takeaways

- If any clause within the termination scheme is unenforceable, the entire termination scheme will likely be unenforceable. — *Waksdale*
- Now, if any clause anywhere in the contract relates to termination and is unenforceable, the same rules apply and the entire termination scheme will likely be unenforceable. — *Henderson*
- Employment contracts should regularly (annually) be reviewed by an employment lawyer to ensure compliance with developments in the law.
  - Recall: offer new *consideration* with new contracts; *e.g.*, a raise, *et cetera*.

Further Reading

"Ontario Court of Appeal Finds Termination Clause Unenforceable Due to Illegal Conflict of Interest and Confidentiality Clauses"

https://devrylaw.ca/ontario-court-of-appeal-finds-termination-clause-unenforceable-due-to-illegal-conflict-of-interest-and-confidentiality-clauses/

Thank you.

david.heppenstall@devrylaw.ca

416-446-5834

DSF Devry Smith Frank *LLP*
Lawyers & Mediators

Timothy Gindi, *J.D.*
416-446-3340 | timothy.gindi@devrylaw.ca

Do Unionized Employees still have the right to pursue Human Rights Complaints? - *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42

Life before Horrocks

- Unionized employees were able to pursue human rights claims through a grievance, submitted by their union, in the Labour Relations Board
- Prior to the Horrocks decision, it was assumed that unionized employees could choose to pursue a human rights complaint independently through the Human Rights Tribunal
- …Until (arguably) the Horrocks decision

FACTS OF THE CASE

- Horrocks was suspended from work for attending while inebriated
- Horrocks disclosed to her employer that she had an alcohol addiction
- The employer required her to enter into an agreement that she abstain from alcohol and engage in treatment
- Horrocks refused the agreement and was subsequently terminated
- After her termination, Horrocks' union filed a grievance and her employment was reinstated on substantially the same terms which Horrocks refused to sign prior to her termination
- After reinstatement, Horrocks was terminated again for alleged breach of the terms.
- Horrocks filed a discrimination complaint with the Manitoba Human Rights Tribunal

PROCEDURAL HISTORY

- The Employer disputed the adjudicator's jurisdiction to hear the complaint stating that a previous SCC decision (*Weber v. Ontario Hydro [1995] 2 SCR 929*), stood for the proposition that a labour arbitrator had exclusive jurisdiction to hear labour disputes arising from a collective agreement, including human rights complaints
- The adjudicator at the Manitoba Human Rights Tribunal disagreed stating that the essential character of the dispute was an alleged human rights violation. The adjudicator then went on to consider the merits of the case

Procedural History continued…

- The Employer applied for a judicial review of the decision on the basis that the adjudicator should not have heard the case for want of jurisdiction
- The judicial review judge found an error in the adjudicator's characterization of the essential character of the dispute, and set her decision aside
- The Court of Appeal in Manitoba allowed Horrocks' appeal, stating that the adjudicator had jurisdiction to hear the case, and remitted the matter to the reviewing judge to determine whether the adjudicator's decision on the merits of the complaint was reasonable
- The matter was then appealed to the Supreme Court of Canada

Decision of the SCC

- In a 6-1 decision, the Supreme Court of Canada stated that the adjudicator did not have jurisdiction to hear the human rights complaint
- The Court stated that the Human Rights legislation of Manitoba did not allow for concurrent jurisdiction of the Human Rights Tribunal
- The SCC therefore stated that the exclusive jurisdiction to hear all employment disputes based on the Manitoba labour legislation was that of a labour arbitrator, and the dispute could not be heard by the Manitoba Human Rights Tribunal
- The SCC said that whether a dispute can be heard in the Human Rights Tribunal will depend on the facts. The central question was "whether the dispute, viewed with an eye to its essential character, arises from the collective agreement"
- While this does not necessarily mean that every unionized employee dispute will fall under the sole jurisdiction of a labour arbitrator, a tribunal/court will have to engage in a 2 step analysis:

Decision of the SCC continued

The First step is that a Tribunal or Court will have to examine the relevant legislation to determine whether it grants the arbitrator exclusive jurisdiction and if so, over what matters.

If it is determined that an arbitrator has exclusive jurisdiction, then the next step is to determine whether the dispute falls within the scope of that jurisdiction. This will require analysing the collective agreement, and accounting for the factual circumstances underpinning the dispute.

Decision of the SCC continued

- In this case, the Court examined two pieces of legislation from Manitoba, and found that because Manitoba's labour legislation had a "mandatory dispute" clause in the legislation, the legislator's intent was to ensure that all unionized employee disputes be heard by a labour arbitrator.
- Furthermore, although the Manitoba Human Rights Code had broad, inclusive language to hear Human Rights disputes, it was not enough to support a finding that the tribunal holds concurrent jurisdiction.

Application to Ontario

- The case that the SCC heard was in Manitoba, but it now begs the question, will cases in Ontario be dealt with in a similar fashion?
- For years unionized employees brought human rights complaints in the Ontario Human Rights Tribunal. Should that now come to an end?

- Section 78(1) of the Manitoba Labour Relations Act states:

Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties thereto, or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation.

Application to Ontario

- Section 48(1) of the Ontario Labour Relations Act states:
- **Arbitration**
- *Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.*

Application to Ontario

- It is important to note that the provisions are similar, and that both provisions have the wording that the Labour Board shall resolve "all differences" between the parties, which is what the SCC specifically cited and discussed at para 5.
- However, keep in mind that the SCC said at paragraph 33 that an expression of legislative intent can still confer concurrent jurisdiction. The Court went on to say:

Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention.

- The Court went on to give examples such as the Canada Labour Code and the Canada Human Rights Act

Application to Ontario

- Justice Karakatsanis, in her dissent, gave examples of deferral clauses which were present in other statutes, but not Manitoba's (see para 119)
- She uses Ontario (as well as BC) as examples of such deferral clauses – specifically, S. 45.1 of the Ontario Human Rights code.
- S. 45 of the Ontario Human Rights Code states:

The Tribunal may defer an application in accordance with the Tribunal Rules

- S. 45.1 states that: *The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.*

Lam v. Neumann, 2022 ONSC 2600 (CanLII)

- Justice Perell of the Ontario Superior Court held that as per Horrocks, labour arbitrators have exclusive jurisdiction over human rights allegations brought by unionized employees when the dispute arises from a collective agreement. (para 40)
- The Court in this decision ultimately held that the Superior Court did not have jurisdiction over the human rights claims of the plaintiff in this case who was a member of the union (para 41)
- However, it is worth noting that no decision from the Human Rights Tribunal has addressed Horrocks yet, and specifically has not addressed S. 45 of the Ontario Human Rights Code

Application to Ontario (In My View)

- Notwithstanding the decision in Lam v. Neumann– it appears that Horrocks will not bar a unionized employee in Ontario from pursuing a human rights complaint independent of their union, and outside of the Labour Relations Board.
- At first glance however, it is easy to see why someone may interpret this decision in a way that they would believe they no longer can apply to the Human Rights Tribunal if they are a unionized employee.
- While the legislative scheme in Manitoba barred Ms. Horrocks from having her case decided on the merits alone, it does not appear that the Horrocks decision will bar Ontario unionized complainants. (In my opinion)
- However, I do pause to note that the Horrocks decision as not yet been considered in the Ontario Human Rights Tribunal.

Thank you.

timothy.gindi@devrylaw.ca

416-446-3340