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WELCOME TO TODAY'S HR/EMPLOYMENT WEBINAR

DECEMBER 14, 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 1 substantive CPD hour with the Law Society of Ontario.

10:00 a.m.	Opening Remarks
10:05 a.m.	The Top 10 Employment Law Decisions of 2022
10:45 a.m.	Q&A Period
10:55 a.m.	Concluding Remarks

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Top 10 Employment Law Decisions of 2022

1. *Currie v. Nylene,* 2022 ONCA 209

- The employee commenced an action for damages related to the termination of her employment without cause
- The employee was 58 years old at the time of dismissal and worked for the defendant for her entire working career in a very specialized manufacturing field
- The employee argued that due to the age, experience, training, and qualifications of the employee, the common law reasonable notice period should be twenty-six (26) months.

Currie v. Nylene, 2022 ONCA 209

- At common law, twenty-four (24) months is the unofficial "cap" for common law reasonable notice period
- As per *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, there must be "exceptional circumstances" for the notice period to exceed twenty-four (24) months
- Ontario Superior Court: Exceptional circumstances present in this case to justify a twenty-six (26) month notice period
  - Factors included: plaintiff's age (58 years old), highly specialized work skills in fiber production operation, limited work experience with one employer, plaintiff's limited education (high school) and skills not easily transferable which would make it hard for the employee to find a new job

Currie v. Nylene, 2022 ONCA 209

- Employer appealed – argued that the trial judge erred by exceeding the "maximum" reasonable notice period of twenty-four (24) months as there was no basis to justify a longer notice period.
- Ontario Court of Appeal: Upheld trial judge's decision
  - The facts that were provided to the trial judge provided substantial support for the finding that there were exceptional circumstances which warranted a twenty-six (26) month notice period
  - Given the plaintiff's age, limited education and skill set, the termination "was equivalent to a forced retirement."
- Trial judge correctly applied the *Bardal* factors to the reasonable notice analysis

Currie v. Nylene, 2022 ONCA 209

- Takeaway: *Currie* provides an example of a situation where courts will deviate from the accepted common law reasonable notice "cap" of twenty-four (24) months.
- Example of "exceptional circumstances" which resulted in a notice period of more than twenty-four (24) months.

2. *Taylor v. Hanley Hospitality Inc.*, 2022 ONCA 376

- Employee placed on temporary lay-off due to workplace closure during the 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 dismissal under the *ESA* but also at common law.
- Ontario court decisions of *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076 and *Fogelman v. IFG*, 2021 ONSC 2042 had previously determined that Regulation 228/20 did not prevent an employee from pursuing a claim for constructive dismissal at common law.

Taylor v. Hanley Hospitality Inc., 2022 ONCA 376

- In contrast to *Coutinho* and *Fogelman*, the Ontario Superior Court determined that there was no constructive dismissal at common law
- Court found that Regulation 228/20 was enacted to displace the common law with respect to constructive dismissal and layoffs, i.e. IDEL layoff not a constructive dismissal at common law
- Ontario Superior Court determined that *Coutinho* failed to properly interpret Section 8(1) of the *ESA* to mean that the *ESA* could not displace the common law.

Taylor v. Hanley Hospitality Inc., 2022 ONCA 376

- On appeal, the Court of Appeal set aside the trial decision 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.
- The case was sent back to the Superior Court to be re-adjudicated.

Taylor v. Hanley Hospitality Inc., 2022 ONCA 376

- 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.

Taylor v. Hanley Hospitality Inc., 2022 ONCA 376

- Employers should be aware that according to *Coutinho* and *Fogelman*, many temporary layoffs due to COVID-19 could be considered unlawful and entitle employees to wrongful dismissal damages.
- Employment law community continues to await guidance from the Ontario Court of Appeal on this issue.

3. *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310

- The appellant employee was a 30-year employee in a managerial role who was terminated for just cause following a single incident where he slapped a female co-worker on her buttocks.
- Trial decision concluded that the single incident caused a breakdown in the employment relationship that justified dismissal for cause.
- On appeal, the employee argued that the trial judge erred in law in concluding that there was just cause for the termination.

Render v. ThyssenKrupp Elevator (Canada) Limited, 2022 ONCA 310

- The Ontario Court of Appeal upheld the termination of the appellant employee for the single incident of misconduct – a significant departure from previous cases on just cause termination.
- Given the seriousness of the conduct, involving the non-consensual touching of the female co-workers buttocks, the seriousness of the conduct, the relationship between the parties involved, and the lack of remorse, the Ontario Court of Appeal upheld the just cause termination.

Render v. ThyssenKrupp Elevator (Canada) Limited, 2022 ONCA 310

- Although the employee's conduct was sufficient to establish just cause, the Ontario Court of Appeal found that the employee was entitled to termination pay pursuant to Section 54 of the *ESA* in the amount of eight (8) weeks.
- Court of Appeal found that the employee's conduct did not meet the "wilful misconduct" threshold, i.e. **"wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer"** as set out in sections 2(1)3 and 9(1)6 of the *Termination and Severance of Employment*, O. Reg 288/01, a Regulation enacted pursuant to the *ESA*.
- Therefore, the employee was entitled to termination pay pursuant to the *ESA* (no evidence in the record that employer had an annual payroll of at least $2.5 million, otherwise *ESA* severance pay would have been awarded as well).

Render v. ThyssenKrupp Elevator (Canada) Limited, 2022 ONCA 310

- "wilful misconduct" threshold is higher standard than just cause at common law
- "Wilful": The employer must show that the misconduct was intentional or deliberate and that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It involves an assessment of subjective intent.

Render v. ThyssenKrupp Elevator (Canada) Limited, 2022 ONCA 310

- The Court of Appeal concluded that the appellant's conduct did not rise to the level of wilful misconduct as the conduct was not **preplanned.** Rather, the appellant's conduct was done in the heat of the moment.
- **Takeaways:** single incident of sexual harassment can result in termination for just cause.
- **Case introduces "preplanned" element to *ESA* "wilful misconduct" standard**

4. *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451

- The employee brought an action claiming damages for wrongful dismissal following her without cause termination.
- Employee argued that termination provision was unlawful based on a *Waksdale* violation (i.e. if any part of the termination provisions offend the *ESA*, the entire termination scheme is unenforceable)

Rahman v. Cannon Design Architecture Inc., 2022 ONCA 451

- Ontario Superior Court (Justice Dunphy) found that the termination provisions complied with the *ESA* and concluded that they governed the plaintiff's termination.
- The court rejected the employee's argument that the termination for cause provisions violated the *ESA*
- Court found that the plaintiff had obtained independent legal advice about the offer of employment, the plaintiff was a "woman of experience and sophistication" and the parties' subjective intention was to comply with the *ESA* minimum standards.

Rahman v. Cannon Design Architecture Inc., 2022 ONCA 451

- The Court of Appeal overturned Justice Dunphy's decision and concluded that the with-cause termination provision did violate the *ESA* and as a result, the termination section in the plaintiff's contract was void.
- In particular, the Court of Appeal concluded that the employee's level of sophistication and the fact that she obtained independent legal advice are irrelevant when determining whether the termination language itself is enforceable

Rahman v. Cannon Design Architecture Inc., 2022 ONCA 451

- This decision is an application of the principles outlined in *Waksdale v. Swegon North America*, 2020 ONCA 391 where an unenforceable termination provision was found to invalidate the employment contract's entire termination scheme.

5. *Weilgosh v. London District Catholic School Board,* 2022 HRTO 1194

- In *Weilgosh*, the Human Rights Tribunal of Ontario (the "Tribunal") addressed the issue of whether it had jurisdiction to hear human rights matters raised in two applications involving unionized employees.
- The issue to be decided was whether the allegations made under the Ontario *Human Rights Code* fell within the exclusive jurisdiction of a labour arbitrator or whether the Tribunal had concurrent jurisdiction to adjudicate human rights complaints made by unionized employees directly against their employers.

Weilgosh v. London District Catholic School Board, **2022 HRTO 1194**

- *Weilgosh* addresses how the recent Supreme Court of Canada decision in *North Regional Health Authority v. Horrocks*, 2021 SCC 42 applies in Ontario.
- *Horrocks* held that the Manitoba *Labour Relations Act*, like the Ontario *Labour Relations Act*, granted exclusive jurisdiction to labour arbitrators over all disputes arising from collective agreements. However, other statutes may "carve into" that jurisdiction if this was the clear intent of the legislature.

Weilgosh v. London District Catholic School Board, 2022 HRTO 1194

- The Tribunal determined that it continues to have jurisdiction to adjudicate human rights complaints advanced by unionized employees, despite the Supreme Court of Canada decision of *Horrocks*.
- The Tribunal found that the broad language used in the Ontario *Human Rights Code* regarding certain deferral and dismissal powers (sections of 45 and 45.1 of the *Code)* indicated that the Ontario Legislature intended for overlapping jurisdiction (these sections contemplate scenarios in which there are concurrent proceedings)

Weilgosh v. London District Catholic School Board, 2022 HRTO 1194

- This case confirms that unionized employees in Ontario (who work for provincially regulated employers) continue to have the right to file a human rights complaint directly against their employer to the Tribunal; labour arbitrators also have jurisdiction to adjudicate human rights issues through the grievance arbitration process

6. *Bowen v. JC Clark Ltd.*, 2022 ONCA 614

- In this case, two portfolio managers commenced a wrongful termination action against the employer, claiming that they were owed $1.3 million in performance fees as a term of their employment.
- The managers entered into an agreement with a senior investment professional where the professional intended to share 50% of his management fees and 100% of his performance fees with them.
- The managers' subsequently entered into employment agreements with JC Clark, which provided that "at the total discretion of the Company, you may be eligible for a bonus at the end of each fiscal year depending on factors that include your personal performance and the profitability of the Company."

Bowen v. JC Clark Ltd., 2022 ONCA 614

- The Ontario Superior Court dismissed the managers' claim, finding that the investment professional had paid them the performance fees to which they were entitled and that they were not entitled to the share of the performance fees directly from JC Clark.
- In arriving at this decision, the trial judge determined that the managers signed employment agreements which did not provide for any performance fees that would be paid by JC Clark.

Bowen v. JC Clark Ltd., 2022 ONCA 614

- The Ontario Court of Appeal held that employers must exercise fair and reasonable discretion in awarding discretionary bonuses.
- What constitutes a fair and reasonable exercise of discretion is dependent on the factual context of the case.
- Distribution of discretionary bonuses can be determined by a variety of factors including: corporate performance, individual performance, attitude, teamwork, seniority, position within the company, and length of employment.

Bowen v. JC Clark Ltd., 2022 ONCA 614

- This case serves as a reminder for employers that discretion with respect to bonuses should be exercised in a fair and reasonable manner in the circumstances
- In determining whether to pay discretionary bonuses and the amount of any bonus, employers should consider objective criteria such as the employee's performance, position, and length of the employment.

7. *Lake v. La Presse,* 2022 ONCA 742

- The employee commenced an action for damages related to her termination without cause.
- After her termination, the plaintiff remained unemployed as of the date of the summary judgment motion, two years after her dismissal.
- While there was no dispute that the plaintiff was terminated without cause and that she was entitled to reasonable notice at common law, the main issues at the summary judgment motion were the length of the common law reasonable notice period and whether the plaintiff's notice period should be reduced for failure to mitigate.

Lake v. La Presse, 2022 ONCA 742

- In considering the *Bardal* factors, the motion judge fixed the reasonable notice period at eight months.
- On the question of mitigation, the onus was on the employer to establish that the plaintiff failed to mitigate
  - Two-part analysis: (1) Whether the plaintiff took reasonable steps, and (2) if such steps had been taken, would the employee have likely obtained comparable employment.
- The motion judge concluded that the employee's steps to mitigate her damages were not reasonable as she waited too long before beginning her job search, she "aimed too high" in seeking more senior roles, and she did not apply for less senior positions.
- Given this analysis, the motion judge reduced the notice period of eight months to six months to account for the plaintiff's failure to take reasonable steps to mitigate her damages.

Lake v. La Presse, 2022 ONCA 742

- The Court of Appeal reversed the trial judge's decision, holding that the judge erroneously faulted the plaintiff for not applying for positions that pay less than her previous role.
- Court of Appeal awarded an eight (8) months notice period – **with no deduction for failure to mitigate**
- An employee is only required to seek "comparable employment", i.e., comparable in status, hours, and remuneration to the position held prior to dismissal.
- The Court of Appeal determined that the trial judge erred in placing too much emphasis on the titles of positions for which the employee applied and failed to properly consider that these positions were similar to her previous work experience.

Lake v. La Presse, 2022 ONCA 742

- Takeaway: This case provides that employees are only obliged to seek "comparable employment" to mitigate their damages and are not required to seek out lesser-paying jobs (within reason).
- Employers have the burden to prove that an employee has failed to mitigate their damages
- Employers could locate job listings for comparable positions having regard to the position and compensation and send to employee (or their lawyer)

8. *Dagenais v. Pellerin,* 2022 ONCA 76

- This case addresses the question of the scope of vicarious liability of an employer for the wrongful acts of an employee in the course and scope of their employment.
- The employee had been instructed by his supervisor to travel to a job site two hours away. While travelling, the employee decided to stop at Tim Hortons for a coffee and to stretch. As the employee attempted to turn off the highway, he struck another vehicle.

Dagenais v. Pellerin, 2022 ONCA 76

- Test for Vicarious Liability (Salmond Test) – Employers are vicariously liable for:
  - Employee acts authorized by the employer;
  - Unauthorized acts so connected with the authorized acts that they may be regarded as modes of doing an authorized act.
- Claimants must show that they have a valid cause of action against an employee for a fault they committed within the scope of their employment.

Dagenais v. Pellerin, 2022 ONCA 76

- The Ontario Court of Appeal upheld the trial decision which found that the employer was vicariously liable for the motor vehicle accident.
- The Court of Appeal agreed with the trial judge's findings that the employer's authorization included the employee taking a coffee break and stretching his legs during the drive, as the small detour was not a "frolic of his own".

Dagenais v. Pellerin, 2022 ONCA 76

- Employers can be held vicariously liable for their employees' acts or omissions in certain circumstances
- Importance of insurance coverage for employers
- A finding of "acting in the course of employment" is dependent on the specific facts relating to each case – reviewing employee contracts along with the status of their insurance coverage could assist in minimizing employer risk.
- Define in employment contract what employee actions will not be considered "in the course of their employment."

9A. *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675

- The British Columbia Supreme Court considered whether placing an employee on unpaid leave due to a refusal to get vaccinated against COVID-19 in accordance with the employer's mandatory vaccination policy amounted to constructive dismissal.
- In *Parmar*, the employee was placed on indefinite unpaid leave for refusing to comply with the employer's vaccination policy. The employee brought a claim for constructive dismissal.
- Issue: Whether placing an employee on unpaid leave for failing to comply with a mandatory vaccination policy constitutes constructive dismissal.

9A. *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675

- Tribe Management provides condominium management services, which was deemed an "essential service" in British Columbia
- Employee was a Controller (accounting professional)
- The Court dismissed the plaintiff's constructive dismissal claim, finding that the mandatory vaccination policy was reasonable and lawful.
- The Court took judicial notice that COVID-19 is an easily transmissible, potentially deadly virus, and that vaccines are safe and effective. At the time the vaccination policy was implemented in 2021 during the height of the pandemic, the employer's decision to place the plaintiff on unpaid leave for failing to comply with the policy was reasonable.
- Policy stated that employees were required to be fully vaccinated (2 doses) by November 24, 2021

9B *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v. City of Toronto (August 26, 2022)*

- Similar to *Parmar*, this Ontario arbitral decision found that a mandatory COVID-19 vaccination policy implemented by the City of Toronto in 2021 was reasonable (i.e. putting an employee on unpaid leave if they refused to comply with the policy was reasonable)
- Although the vaccination policy was found to be reasonable, Arbitrator Derek Rogers found that the enforcement mechanisms in the policy, which included disciplinary suspensions and discharge for non-compliance, were unreasonable
- Policy required employees to be fully vaccinated (2 doses) by December 31, 2021

Parmar and *Toronto Firefighter*

- These cases provide that the requirement to be fully vaccinated with two doses as a condition precedent for employees to continue working was reasonable, and continues to be reasonable. Although disciplinary measures such as suspension and discharge were unreasonable, the employer was permitted to put employees who failed to comply on an unpaid leave.
- Note: These events occurred in 2021 during the height of the COVID-19 pandemic. However, these cases are still relevant and provide important precedents for mandatory vaccination policies in the context of another contagious and deadly COVID-19 variant or another pandemic caused by a different disease.

10: *Gracias v. Dr. David Walt Dentistry,* 2022 ONSC 2967

- The employee commenced an action for damages related to her termination without cause.
- While the termination without cause provision was likely enforceable, several provisions of the contract including its confidentiality clause and conflict of interest clause provided that a failure to comply would constitute cause for termination without notice or compensation in lieu of notice.
- The Ontario Superior Court also considered whether the employee was entitled to an increased notice period due to the COVID-19 pandemic.

Gracias v. Dr. David Walt Dentistry, 2022 ONSC 2967

- Offending contractual provisions:

  a) Conflict of Interest:

  "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."

  b) Confidential Information:

  "In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause."

10: *Gracias v. Dr. David Walt Dentistry,* 2022 ONSC 2967

- Regarding the employment contract, the Court reiterated the principle that in the absence of express and clear contractual language to the contrary, an indefinite-term employee is entitled to reasonable notice of dismissal or pay in lieu thereof at common law.
- Similar to *Henderson v. Slavkin et al.*, 2022 ONSC 2964, the Court found that unenforceable termination language found outside of the termination clause (eg: confidentiality clause and conflict of interest clause) still rendered the entire termination scheme unenforceable.

10: *Gracias v. Dr. David Walt Dentistry,* 2022 ONSC 2967

- In determining the appropriate notice period, the Court fixed the plaintiff's entitlements to notice of termination at three (3) months.
- In particular, the motion judge found that while the effect of the COVID-19 pandemic was harmful for the overall economy, its effect on particular sectors of the labour market varied (ex. high demand for health care workers)
- In this case, the motion judge found that there was a robust market for dental hygienists which did not justify a longer notice period.

10: *Gracias v. Dr. David Walt Dentistry,* 2022 ONSC 2967

- *Gracias* expands/clarifies the principles outlined in *Waksdale v. Swegon North America* (2020 ONCA 391) – termination language in other provisions of an employment contract, ex. conflict of interest or confidentiality, can render the entire termination scheme unenforceable
- Length of notice periods for employees will depend on the industry itself.

Questions?

Thank you.

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