

HR/Employment Webinar: ***Leaves and Terminations***

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HR/Employment Webinar: ***Leaves of Absence***

Presented by:

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Leaves of Absence

Statutory Leaves

- Employment Standards Act
 - Pregnancy & Parental Leave
 - Family Medical/family caregiver/Family Responsibility leaves

Medical Leaves

- Under the Act and Under Human Rights Code



Job Protected Leaves of Absence

Employees on leave have several rights:

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



Statutory Leaves - Pregnancy/Parental

Pregnancy leave for pregnant mothers:

- 17 weeks unpaid pregnancy leave + 61 weeks unpaid parental leave.

Parental leave for others:

- 63 weeks unpaid leave



Statutory Leaves - Pregnancy/Parental

Eligibility for Pregnancy and Parental Leave

- 13 weeks worked prior to leave

Notice for starting Pregnancy and Parental Leave

- At least 2 weeks notice by employee.
- Employee can change notice date with 2 weeks notice



Frequently Asked Questions

- Can partners take the same time off?
- When can a mother start her leave?
- Do we have to bring that employee back after leave?
- What if the employee doesn't want to come back?
- Do we need medical documentation?
- What if an employee is sick before leave?
- What happens to vacation while the employee is on leave?

Statutory Leaves - Sick and Medical

Sick Leave

- Worked at least 2 weeks. 3 unpaid days, illness, injury and medical emergency

Family Responsibility Leave

- Worked at least 2 weeks. 3 unpaid days, illness, injury and medical emergency of family member

Family Medical Leave

- 28 weeks in 52 week period. Caring for family member at risk of dying within 26 weeks.

Family Caregiver Leave

- 8 weeks per calendar year to care for a family member with a serious medical condition.

Critical Illness Leave

- 17 weeks to care for a critically ill adult or 37 weeks for a minor child.

Medical Leaves - Beyond Statutory

Medical Leave is Protected under the Human Rights Code

Review your Leave & Group Benefits Policies

- How many paid sick/PTO days are offered?
- Is Short Time Disability offered as part of your group benefit plan?
- Is the employee totally disabled?

Medical Leaves

Doctor's notes and documentation

- Ensure the employee is under the care of a qualified doctor
- Use a Medical Request Form (include the job description)
- Medical documentation is important for leave as well as to indicate if modified work is needed.

Act in good faith

- Be empathetic
- Keep communication open
- Confidentiality



Medical Leaves - No STD

If you do not have an STD plan as part of your group benefits

- Issue the Record of Employment (ROE)
- The employee can apply for benefits through Service Canada
 - 17 weeks up to Dec 18, 2022
 - 26 weeks after Dec 18, 2022 **(NEW!)**

Review your benefit policies and ensure employees are aware

- LTD generally terminates at age 65
- The tax treatment of LTD benefits
- When supplemental benefits will end

Supplementing Leaves - Employer Top Up

Supplemental Plans “Top Up” for Pregnancy/Parental and Sick leaves do not have to be registered with Service Canada

Supplemental payments do not need to be deducted from Employee’s EI benefits if:

- The EI benefit and Top Up do not exceed the employees normal weekly earnings.
- The payment is not used to reduce some other accumulated employment benefit such as banked vacation credits.

Leave Request Form

Important to have on the leave request form:

- Start of leave
- Expected end date
- The expected due date for a pregnancy leave request
- Status fulltime/parttime
- Contact information (best way to contact on leave)
- Reason for the request (nothing specific to medical diagnosis)
- How benefit premiums will be paid
- Any special notes on benefit coverage
- Coordination of supplemental income “Top Up”

Leave Request Form - Con't

Coordination of supplemental wage replacement (Top Up)
Sample Language for the Leave Request Form.

When an employee is on a leave of absence, they are required to apply for any available wage replacement programs such as Federal Insurance Act Benefits, such as EI, or Canada Pension Plan benefits (if applicable). It is the employee's responsibility to notify [Name, Email Address and contact info] of the total amount they are receiving from such programs while on leave. An employee cannot be paid more than 100% of their regular pay while on leave. The company must be informed so any top up salary provided does not exceed normal gross earnings. You are responsible for reporting any top up payments to Service Canada on your government benefit application.

HR/Employment Webinar: *Terminations*

Presented by:

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Terminations: *Employment Agreement*

- Will you limit notice to Employment Standard minimums?
- Will you provide a fixed term notice entitlement or predetermined formula based on years of service?
- Be clear on when STD/LTD ends vs Health and Dental



Terminations: *Employer Responsibilities*

Can an Employer ask an Employee to quit?

- *No, but you can have an open conversation inviting discussion about an "exit" plan if the employee expresses desire to leave, while ensuring ESA is adhered to*
- *But, assess each situation uniquely to assess risk*



Terminations: *Employer Responsibilities*

- Provide written notice letter
- Provide Record of Employment (ROE)
- Most Common ROE Codes:
 - Code A: Shortage of Work (layoff)
 - Code E: Quit
 - Code M: Dismissal
 - Code K: Other





Sample Termination Letter

Dear Employee Name:

This letter is to confirm that your employment with [insert Company Name], in the position of [Job Title] will end effective **[Date]**.

Notice of Termination

Per the Ontario Employment Standards Act, you will be paid **[Insert #] weeks “pay-in-lieu of notice”** in recognition of your service. Your [Insert #] weeks pay-in-lieu of notice will be paid via [insert if direct deposit or another payment method], along with your final pay (for work up to and including [Date], on [Date]. [Insert if Ontario Severance pay applies].

In addition to the [insert #] weeks termination pay, you have the option of receiving **[insert #] additional weeks** of additional pay conditional upon you signing a Full and Final Release by [insert time and date], a copy of which is attached. If you choose to not sign the Release, you will receive only your [insert #]) weeks Employment Standards Act “pay-in-lieu of notice” listed above.

Vacation Pay

You are also entitled to your accrued, unused vacation up to and including your last day of employment [insert last date], and on your [insert #] weeks of Employment Standards Act pay-in-lieu-of notice. This will be paid with your final pay on [insert pay date].

Group Benefits

Your Group Benefits through [insert] insurance will terminate on [Date]. [Insert STD/LTD termination date if different from Health and Dental] [Insert Life conversion info if they can convert to a private plan]

Return of Property

As part of this separation notice, it is imperative that you please return any company-owned items to [insert] on [insert date].

Record of Employment

Your Record of Employment (ROE) will be emailed [or insert “mailed” if applicable] to your personal email. You may use your ROE to apply for employment insurance benefits (if applicable) at your local Service Canada office, or apply online [insert link].

Ongoing Confidentiality Obligations

We remind you that all confidentiality and non-disclosure Agreements signed upon hire are in full effect.

Should you have any questions, I encourage you to call me directly at [insert contact info].

Regards,

Terminations: *Employer Responsibilities*



- Choose working notice or pay-in-lieu of notice (1-8 weeks minimum notice under employment standard laws)
- Lump sum severance pay applicable in Ontario and Federally only
- Consider common law

Terminations: *Employer Responsibilities*

Adhere to the Employment Standards Act

- Minimum standards

Consider common law

- Increases notice periods via legal precedents
- Always consider employee's situation



Terminations: *Employer Responsibilities*

- Pay vacation & maintain benefits
- Do not alter any conditions of employment



Terminations: *Employer Responsibilities*

Consider if it is a “for cause” termination?

- No common law entitlements required
- Example: employee commits fraud, theft, willful misconduct
- Very difficult to prove “just cause” terminations

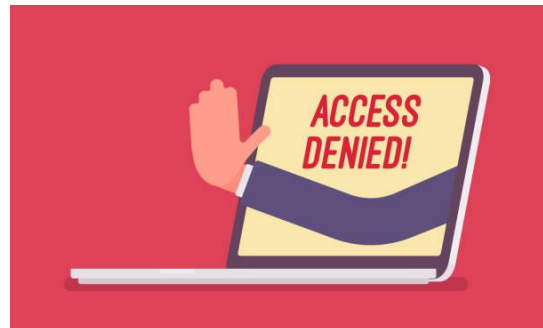
Terminations: *Meeting Preparation*

- Time/place?
- Who will be at the meeting?
- Are you prepared to get them home?
- Communication to other team members?
- Are they allowed to say goodbye to colleagues?



Terminations: *System Considerations*

- Consider timing of communication with IT
- When will system access be cut off?
- Who are their emails being forwarded to?
- How will employees access pay stubs and T4s?
- Equipment return



Terminations: *Meeting*

- Be direct and brief
- Provide termination letter at the end
- Acknowledge emotions but do not over share
- Provide useful information and reminders



Terminations: *Group Benefit and RRSP Considerations*

- Salary continuance vs lump sum payment
- Life insurance transfer
- RRSP transfer



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Thank you for listening!

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WELCOME TO TODAY'S HR/EMPLOYMENT WEBINAR

APRIL 12, 2023

This program has been approved for 1.25 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 hour and 15 minutes of substantive CPD hours with the Law Society of Ontario.

10:00 a.m.	Opening Remarks
10:05 a.m.	Navigating Leaves of Absences (Stacy Glass, HR Options)
10:25 a.m.	Conducting Employee Terminations (Kathryn Benson, HR Options)
10:45 a.m.	Break
11:00 a.m.	2023 Case Law Update (Marty Rabinovitch)
11:20 a.m.	Q&A Period
11:30 a.m.	Concluding Remarks

2023 Case Law Update

1. *Croke v Vupoint Systems Ltd*, 2023 ONSC 1234

- The employee was employed as a systems technician by the employer and regularly interacted with customers in their homes to provide telecommunication installation services. The employer had signed supply agreements with Bell Canada (“Bell”) which stated that Vupoint was required to comply with Bell’s policies.
- Bell implemented a mandatory COVID-19 vaccination policy which applied to its installers.
- To ensure compliance with Bell’s vaccination policy, the defendant implemented its own COVID-19 vaccination policy requiring all employees to provide proof of vaccination (2 doses – policy introduced on September 8, 2021).
- Employees who did not provide proof of vaccination would be prohibited from performing work with certain customers.
- Bell provided more than 99% of Vupoint’s business.
- No mention of consequences for failure to comply with Vupoint’s policy.

1. *Croke v Vupoint Systems Ltd*, 2023 ONSC 1234

- The plaintiff refused to provide proof of vaccination and as a result, the employer terminated his position due to frustration of contract. The plaintiff commenced an action for wrongful dismissal.
- The plaintiff argued that the employer failed to warn employees of the consequences of non-compliance with the vaccination policy and it was therefore unreasonable for the employer to terminate his employment in these circumstances due to frustration of contract.
- The employer argued that the plaintiff's employment was frustrated because the employee was unable to perform any services as a result of Bell's implementation of the mandatory vaccination policy.

1. *Croke v Vupoint Systems Ltd*, 2023 ONSC 1234

- The Court rejected the employee's claim and concluded that he was not entitled to notice of termination since his employment was terminated due to frustration of contract.
- Implementation of vaccination policies meant that the plaintiff could not perform any work for the defendant unless he was vaccinated. By refusing to provide proof of vaccination, the plaintiff lacked the necessary qualifications to perform his duties.

1. *Croke v Vupoint Systems Ltd*, 2023 ONSC 1234

- Principle of frustration as per *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58:
 - Frustration occurs when a situation arises for which the parties made no provision in the contract and performance of the contract becomes “a thing radically different from that which was undertaken by the contract.”
- On the issue of frustration and radical change, the Court made the following findings:
 - Employment relationship was altered due to Bell’s mandatory vaccination policy which was not contemplated by the parties at the start of the relationship.
 - Change in employment relationship was due to Bell’s actions – employer was required to comply with Bell’s policies in accordance with the supply agreement between Bell and Vupoint.

1. *Croke v Vupoint Systems Ltd*, 2023 ONSC 1234

- Takeaway: First Canadian court decision to determine that an employee's refusal to comply with a COVID-19 vaccination policy can amount to frustration of contract.
- Significantly, this decision involved a vaccination policy imposed by a third party – no jurisprudence (yet) involving frustration of contract where the employer first introduced a vaccination policy.

2. *Celestini v Shoplogix Inc.*, 2023 ONCA 131

- The employee signed an employment agreement in 2005 to perform the role of Chief Technology Officer (CTO) which involved duties focused on transferring product and corporate knowledge within Shoplogix Inc.
- The employee continued as CTO until 2017 when the employer dismissed him without cause.
- The employee commenced an action for wrongful dismissal and argued that the termination provisions in the 2005 employment agreement were unenforceable because there had been material changes in his employment duties, although the employee's job title had not changed.

2. *Celestini v Shoplogix Inc.*, 2023 ONCA 131

- The motion judge granted summary judgment in favour of the employee and found that the employee's duties had materially changed in the following ways:
 - The employer and employee had entered into a bonus agreement for management-level employees, altering the employee's bonus structure.
 - The employee's workload and responsibilities increased substantially beginning in 2008 to include new responsibilities such as managing sales and marketing, directing managers and staff, travelling to pursue international sales, handling infrastructure responsibilities, and soliciting investment funds.
- Given these changes, the motion judge found that the employee's new responsibilities were "substantial and far exceeded any predictable or incremental changes to his role that reasonably would have been expected when he started as CTO in 2005".

2. *Celestini v Shoplogix Inc.*, 2023 ONCA 131

- On appeal, the Court of Appeal affirmed the motion judge's decision.
- **Changed substratum doctrine:** An employee's termination clause may become unenforceable if the employee's duties and responsibilities have changed significantly over time.
- A change in the employee's title is not required for the changed substratum doctrine to apply – there must be substantive change in an employee's duties and responsibilities.

2. *Celestini v Shoplogix Inc.*, 2023 ONCA 131

- Employment contract may oust the changed substratum doctrine if the contract expressly provides that the other provisions continue to apply, even if the employee's position, responsibilities, salary, or benefits change (para. 35)
- Termination provisions found to be unenforceable because the employee's duties changed.
- 18 month common law reasonable notice period awarded.

2. *Celestini v Shoplogix Inc.*, 2023 ONCA 131

- Employers should be aware that according to *Celestini*, a substantive change in an employee's duties and responsibilities in the period after the employment contract was signed may render the employment contract unenforceable.
- Employers should ensure that their employment contracts contain appropriate language to oust the changed substratum doctrine.
- If this language is not included in the original contract, then have employee sign new contract if their job duties will change substantially to ensure continued enforceability.

3. Park v Costco Wholesale Canada Ltd., 2023 ONSC 1013

- 20-year employee was terminated without notice after he had twice deleted a website that he created for the employer's use.
- It was a Google cloud-based website that was used for internal file sharing.
- The employee argued that his deletion of the website did not justify the employer's decision to terminate his employment for cause.
- The employer argued that the employee's deletion of the website was wilful and intentional, and together with the plaintiff's insubordinate behaviour, amounted to wilful misconduct and just cause.

3. Park v Costco Wholesale Canada Ltd., 2023 ONSC 1013

- In *Park*, the Court relied on the test established in *McKinley v. BC Tel* to determine whether an employee's dishonest conduct gives rise to just cause for dismissal:
 - Whether the employee engaged in misconduct that is incompatible with the fundamental terms of the employment relationship.
 - This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.
- Application of the standard consists of determining the nature and extent of the misconduct, considering the surrounding circumstances, and deciding whether dismissal for just cause was a proportional response to the employee's actions.

3. Park v Costco Wholesale Canada Ltd., 2023 ONSC 1013

- The Court found that the employee's conduct was sufficient to establish just cause termination on the following grounds:
 - The employee's deliberate deletion of the website amounted to damage or destruction of the employer's property, contrary to the employment agreement
 - The employee's acts of misconduct including failing to notify the employer of the website deletion and sending misleading and inflammatory emails to management amounted to acts of misconduct.
 - The employee breached the significant level of trust and authority placed in him by the employer, since the employee had significant security access and ability to modify the employer's website and systems.
- Justice Bell found that terminating the employee's employment for cause was a proportionate response to his misconduct.

3. Park v Costco Wholesale Canada Ltd., 2023 ONSC 1013

- “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.

3. Park v Costco Wholesale Canada Ltd., 2023 ONSC 1013

- The Court also found that the employee's conduct also met 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*.
- The deliberate deletion of the website and intentionally misleading and insubordinate emails constituted conduct that was not trivial and was not condoned by the employer which amounted to wilful misconduct.
- "This was not conduct that was merely careless, thoughtless, or inadvertent. Mr. Park's conduct was not trivial, and it was not condoned by Costco. Mr. Park was, colloquially, **"being bad on purpose."** I find that his conduct amounted to wilful misconduct that meets the test for just cause for summary dismissal. (para. 90)

3. Park v Costco Wholesale Canada Ltd., 2023 ONSC 1013

- **Takeaway:** Just cause more likely to exist where deliberate misconduct has occurred. While the threshold for just cause to terminate an employee's conduct remains high (even higher for wilful misconduct), they are not insurmountable in appropriate cases, particularly where there are multiple acts of misconduct.

4. *Cecchetto v Canada (Attorney General)*, 2023 FC 102

- The applicant's Employment Insurance (EI) application was denied due to his failure to comply with his employer's "vaccinate or test" policy (pursuant to Directive 6, enacted by the Chief Medical Officer of Health in accordance with the *Health Promotion and Protection Act*).
- Canada Employment Insurance Commission found that this amounted to misconduct.
- Since the applicant's behaviour amounted to misconduct, he was not entitled to EI benefits.
- Social Security Tribunal (SST) upheld the Commission's decision. SST Appeal Decision upheld the SST's decision. Applicant sought judicial review at the Federal Court.

4. *Cecchetto v Canada (Attorney General)*, 2023 FC 102

- The applicant argued that the decision from the Social Security Tribunal did not address the legality of requiring employees to undergo medical procedures where the efficacy and safety of the procedures have not been established.
- In order for an action to be considered misconduct, the actions must be performed consciously, deliberately or intentionally. In the context of EI eligibility, employees do not have to act with malicious intent in order for an act or omission to be characterized as misconduct.

4. *Cecchetto v Canada (Attorney General)*, 2023 FC 102

- The Federal Court dismissed the applicant's judicial review application, since there was no basis to find the Social Security Tribunal's decision unreasonable.
- Court reiterated that employees who lost their jobs due to misconduct were not entitled to receive EI benefits.
- The employee was dismissed from his employment because he knowingly failed to follow the employer's vaccination policy and his dismissal was due to misconduct.

4. *Cecchetto v Canada (Attorney General)*, 2023 FC 102

- The Federal Court determined that the question of safety and the efficacy of the COVID-19 vaccine or antigen tests is not an issue for the Court to determine.
- **Takeaway:** Affirms the test for misconduct to determine employee eligibility for EI – employee must consciously and deliberately fail to follow employment policies or rules to engage in misconduct. The failure to abide by an employer's vaccination policy can amount to employee misconduct.

5. Teljeur v Aurora Hotel Group, 2023 ONSC 1324

- The plaintiff was working as the general manager of a resort when he was terminated without cause after the employer decided to retain an outside management company to manage the resort.
- In addition to seeking damages for wrongful dismissal, the employee sought moral damages for the employer's breach of duty of good faith in relation to the employee's termination.
- The employee recorded the termination meeting, which was later relied upon by the court in its decision to award moral damages.

5. Teljeur v Aurora Hotel Group, 2023 ONSC 1324

- The Court considers the following factors in determining whether to award moral damages (also known as aggravated damages):
 - Where an employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed;
 - The employer engaged in conduct that was untruthful, misleading, or unduly insensitive in the course of a dismissal;
 - Whether it is within the reasonable contemplation of the employer that the manner of dismissal would cause the employee mental distress;
 - The wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings normally accompanying a dismissal; and
 - The grounds for moral damages must be assessed on a case by case basis.

5. *Teljeur v Aurora Hotel Group*, 2023 ONSC 1324

- The Court held that in addition to an award of 7 months' pay in lieu of notice, the employee was also entitled to moral damages in the amount of \$15,000.00 due to the following conduct of the employer:
 - The employer failed to provide the employee written notice of termination despite the employee's numerous requests, in contradiction of Section 54 of the *Employment Standards Act*, 2000;
 - The employer failed to deliver the employee's ESA entitlements within seven days of the day the employee's employment ended;
 - The employer failed to abide by promises made at the termination meeting to reimburse the employee's business expenses and to provide eight weeks of severance pay; and
 - The employer encouraged the employee to resign from his employment at the termination meeting.

5. Teljeur v Aurora Hotel Group, 2023 ONSC 1324

- The Court found that while the plaintiff was upset at the employer's threat to call the police should the plaintiff return to the employer's property, the employer was within its rights to control access to its business premises – it is not a factor that would justify a claim for moral damages.
- The award for moral damages needs to reflect the actual damages suffered by the plaintiff.

5. *Teljeur v Aurora Hotel Group*, 2023 ONSC 1324

- **Takeaways:** An employee's recording at a termination meeting can be relied upon by the courts to adjudicate an employee's claim for moral damages.
- To avoid moral damages awards, employers must ensure that they fulfil all statutory obligations, keep promises made to employees during and after termination and comply with all statutory and other requirements throughout the termination process.

Questions?

Thank you.

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