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HR/EMPLOYMENT WEBINAR

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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 **1.5 substantive CPD hours** with the Law Society of Ontario.

10:00 a.m.	Introduction
10:05 a.m.	Termination Clauses Update
10:20 a.m.	Case Law Update
10:35 a.m.	Recent Amendments to HRTO Procedure and the *ESA*
10:50 a.m.	What Can Employers Expect in 2026?
11:05 a.m.	Break
11:15 a.m.	Q & A Period
11:25 a.m.	Conclusion

Termination Clauses Update

Key Decisions About Termination Clause Enforceability

Wood v. Fred Deeley Imports Ltd., 2017 ONCA 158

- Ontario Court of Appeal determined that termination clauses must comply with the *ESA* at the time of signing. Employer's subsequent compliance with *ESA* does not cure an unenforceable provision.
- Courts must assess only the contract itself, not whether the employer's actions on termination complied with the *ESA*.
- Given the power imbalance in employment relationships, any ambiguity in termination provisions is generally interpreted in favour of the employee (*contra proferentem).*
- **Principle**: Termination clauses are strictly scrutinized; if they do not comply with the *ESA* minimums, or potentially would not comply in the future, they are void.

Key Decisions About Termination Clause Enforceability

Waksdale v. Swegon North America Inc., 2020 ONCA 391

- Termination clauses must be read together as a whole; if any part of the termination scheme violates the *ESA*, the entire termination scheme is void.
- The location of termination provisions clauses (i.e. where in the contract they can be found) is irrelevant– courts must assess the substance of clauses, not the form.

Key Decisions About Termination Clause Enforceability

Dufault v. The Corporation of the Township of Ignace, 2024 ONSC 1029, aff'd 2024 ONCA 915

- Court struck down a termination clause as unenforceable where the employer reserved the right to terminate employment without cause "at any time" at its sole discretion.
- The wording was inconsistent with *ESA* protections, as it implied the employer could, for instance, terminate an employee during a job projected leave
- Subsequent decision of *Li v. Wayfair Canada ULC* questioned whether such phrasing was necessarily fatal to clause's enforceability.
- **Principle**: Language suggesting unlimited employer discretion to terminate is risky and may void termination provisions.
- The decision was upheld by the Court of Appeal. As the "with cause" termination provision was unenforceable, per *Waksdale,* the entirety of the termination clause was unenforceable. The Court declined to comment on the enforceability of the "without cause" termination provision on its own.

Recent Decisions About Termination Clause Enforceability

Baker v. Van Dolder's Home Team Inc., 2025 ONSC 952

Facts:

- Mr. Baker's employment contract contained resignation, "without cause" termination, and "with cause" termination provisions.
- He was terminated without cause on May 24, 2023.

Recent Decisions About Termination Clause Enforceability

Baker v. Van Dolder's Home Team Inc., 2025 ONSC 952

The termination clauses are as follows:

Termination without cause: we may terminate your employment at any time, without just cause, upon providing you with only the minimum notice, or payment in lieu of notice and, if applicable, severance pay, required by the *Employment Standards Act*. If any additional payments or entitlements, including but not limited to making contributions to maintain your benefits plan, are prescribed by the minimum standards of the *Employment Standards Act* at the time of your termination, we will pay same. The provisions of this paragraph will apply in circumstances which would constitute constructive dismissal.

Termination with cause: we may terminate your employment at any time for just cause, without prior notice or compensation of any kind, except any minimum compensation or entitlements prescribed by the *Employment Standards Act*. Just cause includes the following conduct:

a. Poor performance, after having been notified in writing of the required standard;

b. Dishonesty relevant to your employment (such as misleading statements, falsifying documents and misrepresenting your qualifications for the position you were hired for);

c. Theft, misappropriation or improper use of the company's property;

d. Violent or harassing conduct towards other employees or customers;

e. Intentional or grossly negligent disclosure of privileged or confidential information about the company;

f. Any conduct which would constitute just cause under the common law or statute.

Recent Decisions About Termination Clause Enforceability

Baker v. Van Dolder's Home Team Inc., 2025 ONSC 952

Issue: Are the termination provisions of Mr. Baker's contract enforceable?

a) Is the **"without cause"** termination provision unenforceable because it allows termination "at any time"?

b) Is the **"with cause"** termination provision unenforceable because it failed to distinguish between the lower common law "just cause" standard and the higher statutory "wilful misconduct" standard that would result in an employee losing their entitlements under the *ESA*?

Recent Decisions About Termination Clause Enforceability

Baker v. Van Dolder's Home Team Inc., 2025 ONSC 952

Employee's Position	Employer's Position
• The "without cause" clause misstates the *ESA* by granting the employer the right to terminate "at any time," contrary to statutory protections (e.g., *ESA* ss. 53, 74). • The "with cause" clause is unenforceable because it disentitles employees to notice for conduct less serious than "wilful misconduct" under O. Reg. 288/01. • Relied on *Dufault v. Township of Ignace*, 2024 ONSC 1029; *Perretta v. Rand A Technology*, 2021 ONSC 2111; and *Rossman v. Canadian Solar*, 2019 ONCA 992. • Submitted that under *Waksdale v. Swegon* (2020 ONCA 391), if any termination clause is invalid, the entire termination scheme fails.	• Argued that the "without cause" provision was enforceable, citing *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593, which upheld a provision that simply referenced *ESA* limits. • Submitted that its "with cause" clause was distinguishable from *Perretta* because it explicitly preserved *ESA* minimum entitlements. • Contended that the contract, read as a whole, showed an intent to comply with the *ESA*

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Recent Decisions About Termination Clause Enforceability

Baker v. Van Dolder's Home Team Inc., 2025 ONSC 952

Decision: The Court held that both the "without cause" and "with cause" termination provisions were **unenforceable.**

- Per *Dufault*, the "without cause" provision was unenforceable as its language permitted termination "at any time" and suggested that the employer had unlimited discretion to terminate employment, contrary to employee *ESA* rights (ex. job protected leaves). Wording suggesting general *ESA*-compliance did not cure that defect.
- The "with cause" provision was unenforceable, since its definition of "just cause," which disentitled employees to the *ESA* minimum entitlements, fell short of the "wilful misconduct" standard prescribed in the *ESA*.
    - The saving phrase "except any minimum entitlement prescribed by the *ESA*" was not curative, as employees are not expected to know the difference between "just cause" under the common law, the contractual "just cause," and "wilful misconduct" under the *ESA*.
- While the Court acknowledged the employer's good faith intentions, compliance with the *ESA* is required; even well-intentioned drafting that may undercut *ESA* minimum entitlements will not be enforceable.

Recent Decisions About Termination Clause Enforceability

Baker v. Van Dolder's Home Team Inc., 2025 ONSC 952

Key Principles

- Termination clauses must comply with the *ESA* – and will be scrutinized by the courts
- Clauses granting employers the right to dismiss "at any time" or using contractual "just cause" standards that fall below "wilful misconduct," as defined by the *ESA* (Ontario Regulation 288/01 – Termination and Severance of Employment) will invalidate the entire termination scheme.
- Even employers acting in good faith may fail to meet the high standard set by *Wood*, *Rossman*, *Dufault*, and *Perretta*.

Recent Decisions About Termination Clause Enforceability

Bertsch v. Datastealth Inc., 2025 ONCA 379

Facts:

- Mr. Bertsch was hired as Vice-President at Datastealth Inc., with a base salary of $300,000.
- His employment lasted 8.5 months before he was terminated without cause. He received 4 weeks of pay in lieu of notice, which exceeded his minimum *ESA* entitlements.
- Bertsch sued for wrongful dismissal, claiming he was entitled to wrongful dismissal damages at common law
- The employer relied on a termination clause that limited entitlements strictly to *ESA* minimums.

Recent Decisions About Termination Clause Enforceability

Bertsch v. Datastealth Inc., 2025 ONCA 379

Termination Provision:

Termination of Employment by the Company. If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the Ontario Employment Standards Act, 2000 and its Regulations, as amended from time to time (the "ESA"), including but not limited to outstanding wages, vacation pay, and any minimum notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, or benefit continuation.

You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that all apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compe

Section 11(a), contained in the "General" provisions of the employment agreement, also provided:

If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owing under the Ontario Employment Standards Act, 2000, as amended from time to time, you shall instead receive your minimum entitlements owing under the Ontario Employment Standards Act, 2000, as amended from time to time.

Recent Decisions About Termination Clause Enforceability

Bertsch v. Datastealth Inc., 2025 ONCA 379

- **Motion Decision**: The termination provision was **enforceable** and did not violate the *ESA*.
- The Court of Appeal **upheld** the decision.
  - The clause was not ambiguous. Ambiguity requires more than competing interpretations; it must be genuinely capable of more than one reasonable interpretation.
    - Courts must ask how the agreement can be reasonably interpreted, not whether an uninformed employee might misinterpret it.
  - The words "with or without cause" were clear. The clause explicitly guaranteed *ESA* minimum entitlements and did not purport to contract out of the *ESA*.

Recent Decisions About Termination Clause Enforceability

Bertsch v. Datastealth Inc., 2025 ONCA 379

Key Principles:

- Clear *ESA*-compliant clauses are enforceable; courts will not "read in" ambiguity where the language is straightforward.
- Ambiguity requires reasonable competing interpretations, not speculative misunderstandings.

Recent Decisions About Termination Clause Enforceability

Bertsch v. Datastealth Inc., 2025 ONCA 379

Takeaways for Employers:

- Properly drafted termination clauses which limit employee to *ESA* minimum entitlements in the event of termination are enforceable; employee would have no entitlement to a common law notice period.
- Employers should avoid language suggesting unfettered employer discretion (i.e. “at any time”) and clauses that conflate the common law standard of “just cause” with the statutory “wilful misconduct.”

Recent Decisions About Termination Clause Enforceability

Li v. Wayfair Canada ULC., 2025 ONSC 2959

Facts:

- Song Li, age 45, was hired on January 23, 2023 as a Senior Product Manager at Wayfair Canada ULC.
- His **compensation package** included:
  - Base salary of $221,564 annually (~$18,463/month).
  - Benefits: $10,831/year ($903/month).
  - RRSP contributions: $8,862/year ($738/month).
  - Restricted Stock Units ("RSUs") scheduled to vest Feb 1, 2024 worth USD $73,017.
  - Claimed $1,470.49 in job search expenses.
- Li was terminated on October 17, 2023, after just under 9 months of service.
- He was paid one week salary and benefits, consistent with his ESA entitlement.
- No reference letter or outplacement services were provided.
- Li sought 5 months of reasonable notice; argued that the termination clause was unenforceable.

Recent Decisions About Termination Clause Enforceability

Li v. Wayfair Canada ULC., 2025 ONSC 2959

Employment Agreement:

- Termination provisions included:
  - **With Cause:** Employer could terminate "at any time for Cause without notice … unless expressly required by the ESA."
  - **Definition of Cause:** Elsewhere in the agreement (Joining Bonus section), "Cause" was defined as "wilful misconduct, disobedience, or wilful neglect of duty … that constitutes cause under the ESA."
  - **Without Cause:** After probation, termination permitted "at any time and for any reason" with ESA minimum notice, ESA termination pay, ESA severance (if applicable), and ESA benefit continuation.
- Restricted Stock Unit ("RSU") agreements (20 pages each, signed electronically in May and Sept 2023) were also relevant to compensation.

Recent Decisions About Termination Clause Enforceability

Li v. Wayfair Canada ULC, 2025 ONSC 2959

Employee's Position	Employer's Position
Termination clause was unenforceable because: • The "with cause" wording could mislead employees into believing misconduct short of the ESA's "wilful misconduct" standard (e.g., negligence) could justify termination without pay (*Render v. ThyssenKrupp*, 2022 ONCA 310). • The "without cause" clause suggested termination "at any time and for any reason," conflicting with ESA protections (e.g., reprisal, leave provisions, OHSA compliance). • Under *Waksdale* and *Rahman*, if one termination provision breaches the ESA, the entire scheme is unenforceable. • Relied heavily on *Dufault v. Township of Ignace* (2024 ONSC 1029; aff'd 2024 ONCA 915; leave denied SCC 2025), which voided similar provisions.	Clauses were distinguishable from *Dufault*: • "Cause" definition expressly tied to ESA's wilful misconduct standard. • "Without cause" clause expressly provided ESA-required entitlements (including termination pay, severance, and benefits). • Contract consistently referenced compliance with ESA—no contracting out. Asserted the contract was clear, enforceable, and unambiguous, falling squarely within *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571.

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Recent Decisions About Termination Clause Enforceability

Li v. Wayfair Canada ULC., 2025 ONSC 2959

Decision:

- The termination clause was **enforceable.**
- **"With Cause" Provision:** When read together with the "Joining Bonus" definition in the contract, "cause" was consistent with the *ESA* wilful misconduct standard. The phrase "unless expressly required by the *ESA*" preserved the employee's minimum rights.
- **"Without Cause" Provision:** Although the clause used the phrase "at any time and for any reason," the clause was saved by repeated references to *ESA* compliance. The specific inclusion of *ESA* entitlements, including termination pay, severance pay, and benefits, distinguished the case from *Dufault.*
- When the contract was read holistically, it complied with the *ESA*.

Recent Decisions About Termination Clause Enforceability

Li v. Wayfair Canada ULC, 2025 ONSC 2959

Key Principles:

- Clauses expressly tying "cause" to ESA's wilful misconduct standard are liekly enforceable.
- The phrase "at any time and for any reason" may not render the termination scheme unenforceable if the contract contains repeated references to *ESA* compliance.
- Courts may distinguish *Dufault* and *Baker* where contracts clearly embed *ESA* standards.

This case is currently under appeal and may be overturned.

Recent Decisions About Termination Clause Enforceability

Chan v. NYX Capital Corp, 2025 ONSC 4561

Facts:

- Mr. Chan was hired by NYX Capital Corp. (now Montcrest Asset Management) as Vice President – Acquisitions & Asset Management and Chief Compliance Officer, starting October 12, 2021, under a written Employment Agreement with a three-month probation clause.
    - The probation clause stated that the first three months of employment were probationary, and NYX could terminate employment at "any time and for any reason…without notice or pay."
    - The "without cause" termination provision likewise stated that the termination could occur "at any time."
    - The "with cause" termination provision permitted termination without pay for "cause" without mention of the statutory "wilful misconduct" standard.
- NYX terminated Mr. Chan on January 10, 2022—one day before the end of the contractual probationary period without notice
- Mr. Chan sued for wrongful dismissal – he argued that the termination clause (including the probationary language) was void under the *ESA* and that he was entitled to reasonable notice under the common law.
- NYX argued the probationary was enforceable and that it in good faith found Mr. Chan unsuitable for permanent employment.

Recent Decisions About Termination Clause Enforceability

Chan v. NYX Capital Corp, 2025 ONSC 4561

Decision:

- The termination clause was **unenforceable.**
  - *Dufault* rendered both the probationary and "without cause" termination provisions unenforceable. Both provisions granted NYX unfettered discretion to terminate employment "at any time", contrary to *ESA* protections for protected leaves and against reprisal.
  - The "for cause" termination provision was unenforceable as it permitted NYX to terminate employment without providing the *ESA* minimums – higher standard of 'wilful misconduct" is require to deprive employee of *ESA* entitlements
  - Additionally, the clause purported to release NYX from any claims relating to the termination of Mr. Chan's employment, apart from minimum *ESA* entitlements. However, certain claims arising from the termination of employment cannot be contracted out of, such as damages upon termination in reprisal for attempting to enforce *ESA* rights.
- As the entire termination clause was unenforceable for contravening the *ESA*, the probationary provision was void and Mr. Chan was entitled to reasonable notice under the common law.
  - After applying the *Bardal* factors, the Court granted Mr. Chan a three-month notice period.

Recent Decisions About Termination Clause Enforceability

Chan v. NYX Capital Corp, 2025 ONSC 4561

Key Principles:

- Language permitting an employer to terminate "at any time" and/or "for any reason" will likely contravene the *ESA*
- If employers seek to deprive an employee of their *ESA* entitlements, the termination provision must reference the statutory "wilful misconduct" standard.
- "Release" language in a termination clause cannot waive statutory rights, such as the right to claim damages upon termination for reprisal.
- A probationary clause is likely unenforceable if it forms part of a termination scheme that was struck down for contravening the *ESA*.

Recent Decisions About Termination Clause Enforceability

Current State of the Law on Termination Clauses

- Termination clauses should be clear and unambiguous when interpreted reasonably; any ambiguity will generally be interpreted in the employee's favour.
- Avoid phrases which suggest absolute employer discretion to terminate employment, such as "at any time" and "for any reason."
- Differentiate between the common law standard of "just cause" and the statutory standard of "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer"
- Termination provisions should explicitly state that employees will receive their minimum statutory entitlements under the *ESA* and its regulations.
- Termination provision in *Bertsch v. Datastealth Inc.*, 2025 ONCA 379 – was upheld by the Court of Appeal!

Recent Decisions About Termination Clause Enforceability

Current State of Termination Clauses

- Enforceable termination provision in *Bertsch*:

  Termination of Employment by the Company. *If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the Ontario Employment Standards Act, 2000 and its Regulations, as may be amended from time to time (the "ESA"), including but not limited to outstanding wages, vacation pay, any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.*

  You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.

  Section 11(a), contained in the "General" provisions of the employment agreement, also provided:

  If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owing under the Employment Standards Act, 2000 as amended from time to time, you shall instead receive your minimum entitlements owing under the Ontario Employment Standards Act, 2000, as amended from time to time.

Case Law Update

Case Law Update

Taylor v. Salytics Inc., 2025 ONSC 3461

Facts:

- Mr. Taylor was employed by Salytics Inc. for approximately eleven years, from July 1, 2013 to March 25, 2024, most recently as a Senior Technical Consultant earning $117,300 annually with benefits, bonus eligibility, and four weeks of vacation.
- His 2013 employment contract contained a "Termination" section that included a "for cause" termination provision, a "without cause" termination provision limited the employee to ESA minimums, and a provision permitting temporary lay-offs in accordance with the ESA.
- In February 2024, Salytics faced a 60% revenue decline and Taylor agreed to a temporary 20% reduction in hours and pay to avoid termination effective March 1, 2024. Taylor accepted on the basis that the reduction was temporary and would prevent termination of his employment.
- Three weeks later, on April 1, 2024, Salytics placed Taylor on a temporary lay-off with benefits continued but no salary for six months.
- Taylor commenced an application on July 19, 2024, arguing the lay-off was a constructive dismissal and sought damages equal to twelve months of pay in lieu of notice.

Case Law Update

Taylor v. Salytics Inc., 2025 ONSC 3461

Facts:

- Taylor commenced an application on July 19, 2024, arguing the lay-off was a constructive dismissal and sought damages for twelve months' pay in lieu of notice.
- In June and July, 2024, Salytics began to recall some employees.
- Taylor was sent a recall notice on September 6, 2024. Taylor would be returning to his original position, salary, and hours before the reduction took effect.
- On September 30, 2024, Taylor returned to working full-time at Salytics.
- Taylor was without income for a period of 6 months from April 1, 2024, to September 30, 2024.

Issue: Would an unenforceable termination scheme also render a temporary lay-off provision unenforceable?

Case Law Update

Taylor v. Salytics Inc., 2025 ONSC 3461

Employee's Position:

- Mr. Taylor took the position that the lay-off provision formed part of the termination clause in his employment contract.
  - Mr. Taylor pointed to the location of the lay-off provision under the "Termination" heading of his employment contract.
  - He further argued that at common law, a lay-off is a constructive dismissal and therefore a termination (*Pham v. Qualified Metal Fabricators*, 2023 ONCA 255 at para. 29).
- As other provisions in the termination clause contravened the *ESA*, the lay-off provision was likewise unenforceable.

Case Law Update

Taylor v. Salytics Inc., 2025 ONSC 3461

Employer's Position:

- Salytics argued that the temporary lay-off was expressly authorized by employment contract and was permitted under the *ESA*.
    - Exercising this contractual right did not amount to a unilateral change in the terms of Mr. Taylor's employment and did not constitute a constructive dismissal.
- The placement of the lay-off provision under the "Termination" heading was irrelevant, as courts must assess the substance and not the form of a provision (*Waksdale v. Swegon*, 2020 ONCA 391 at para. 10).
- Relying on subsection 56(4) of the *ESA*, Salytics submitted that a temporary lay-off is not a termination if it falls within statutory limits, and it further cited *Kopyl v. Losani Homes (1998) Ltd.*, 2024 ONCA 199, to argue that not every contractual limit on employment is a termination clause.
- On this basis, Salytics concluded that Mr. Taylor was not constructively dismissed.

Case Law Update

Taylor v. Salytics Inc., 2025 ONSC 3461

Decision:

- The Court dismissed Mr. Taylor's application and found that the lay-off clause was enforceable.
  - The location of a clause is irrelevant; the substance of the clause determines whether it is a termination clause (*Wksdalev. Swegon North America).*
  - A lay-off only amounts to constructive dismissal if there is no contractual authority to impose it (*Potter v. New Brunswick Legal Aid Services Commission*)
  - If a contractual lay-off provision exists and the lay-off complies with the *ESA* and does not exceed statutory limits per s. 56(4) of the *ESA.*
- Because the contract expressly permitted temporary lay-offs and the temporary lay-off was consistent with the *ESA*, the Court held that Mr. Taylor had not been constructively dismissed.
- The Court confirmed that he was not entitled to any damages.
- The Court awarded Salytics $15,000 in costs as the successful party.

Case Law Update

Taylor v. Salytics Inc., 2025 ONSC 3461

Takeaways for Employers:

- A temporary lay-off provision in an employment contract is separate from any termination provisions.
- The location of the clause within the contract does not determine its nature; courts will examine the substance of the clause rather than its form.
- Where a contract expressly authorizes temporary lay-offs and the provision complies with the *ESA*, a lay-off will not constitute constructive dismissal.
    - However, if a contract does not have an enforceable lay-off provision, a temporary lay-off will constitute a constructive dismissal and the employee will be entitled to reasonable notice.

Case Law Update

Boyer v. Callidus Capital Corporation, 2025 ONCA 79

Facts:

- Craig Boyer worked as an executive underwriter at Callidus Capital Corporation under an oral employment contract.
- In 2015, he announced plans to retire at the end of 2016 but left in September 2016, claiming the workplace had become toxic and amounted to constructive dismissal.
- He sued in 2017 seeking unpaid vacation pay, deferred bonuses, and the value of lost stock options.
- Callidus argued that Boyer resigned and counterclaimed for $150 million in damages for alleged mismanagement of three loans (XTG, Horizontal Well Drillers, Gray Aqua).
- The counterclaim was dismissed in 2023 under the anti-SLAPP provisions (s. 137.1 CJA), with the Court of Appeal noting Callidus admitted its damages claim was “baseless.”

Case Law Update

Boyer v. Callidus Capital Corporation, 2025 ONCA 79

Issues:

a) Was Boyer constructively dismissed from his employment, or did he voluntarily resign in September 2016?

b) Is Boyer entitled to accrued vacation, deferred bonuses, and stock options?

c) Can Callidus rely on the defence of just cause despite its counterclaim being dismissed, or is it barred by issue estoppel?

Case Law Update

Boyer v. Callidus Capital Corporation, 2025 ONCA 79

Employee's Position:

- Boyer argued he was constructively dismissed in the face of his planned retirement and remained entitled to vacation pay, deferred bonuses, and stock options.
- He submitted that Callidus' counterclaim had already been dismissed as meritless, which barred it from raising the same allegations as a just cause defence.
- Boyer was unaware of Callidus' "use it or lose it" vacation policy and modifications to the deferred bonuses and stock option plans which limited his entitlements upon retirement.

Case Law Update

Boyer v. Callidus Capital Corporation, 2025 ONCA 79

Employer's Position:

- Callidus argued Boyer voluntarily retired and was not dismissed.
- It asserted that Boyer had engaged in misconduct in managing the three loans, which justified dismissal for cause or, at minimum, disentitled him to bonuses and stock options.
- Callidus contended that the motion judge wrongly applied issue estoppel and should have considered its just cause defence separately from the dismissed counterclaim.

Case Law Update

Boyer v. Callidus Capital Corporation, 2025 ONCA 79

Decision:

- The Superior Court (aff'd in ONCA) found that Boyer had retired and not constructively dismissed, but still awarded him: $93,076.92 in unpaid vacation pay, $525,000 in unpaid and deferred bonuses (2014–2015), and $1.21 million for lost stock options.
    - Statutory rights to vacation pay under s. 38 of the *ESA* cannot be defeated by a just cause allegation raised after the fact
    - Callidus failed to provide evidence that Boyer was aware of the policy changes regarding his deferred bonuses and stock options and had agreed to them.
- Issue estoppel barred Callidus from relying on a just cause defence, as it relied on the same factual allegations of the dismissed counterclaim.
- Costs of $55,000 were awarded to Boyer.

Case Law Update

Boyer v. Callidus Capital Corporation, 2025 ONCA 79

Key Takeaways:

- Employers should ensure that employees are notified of, and agree to, important policy changes, particularly if they relate to an employee's compensation.
- Employees who retired, and were not terminated, remain entitled to contractual benefits, such as vacation pay, earned bonuses, and vested stock options, absent clear evidence that these rights were validly limited.
- Courts will enforce contractual rights of employees to benefits, even if the benefits are not expressly included in a written employment contract.
- Issue estoppel bars employers from raising a just cause defence based on the same factual allegations from a dismissed counterclaim.

Case Law Update

McFarlane v. King Ursa Inc., 2025 ONSC 3553

Facts:

- Joanna McFarlane joined King Ursa in 2019 and was rapidly promoted during the COVID-19 pandemic, ultimately becoming Executive Vice-President, Media & Analytics, with a salary of $300,000 and a 5% phantom share allocation.
- In July 2022, she went on maternity leave. During her absence, the company faced severe financial losses and twice asked her to extend her leave to reduce payroll costs.
- On April 3, 2023, shortly before her scheduled return, the company presented her with a letter agreement reducing her salary to $210,000 and demoting her back to Associate Partner and Vice-President of Media & Analytics.
- McFarlane rejected the new agreement, resigned on April 15, 2023, and filed a claim for constructive dismissal and also alleged discrimination.

Case Law Update

McFarlane v. King Ursa Inc., 2025 ONSC 3553

Issues:

a) Does the letter from April 3, 2023 constitute a constructive dismissal by imposing a demotion and salary reduction?

b) Did Ms. McFarlane fail to mitigate her damages by not seeking comparable employment?

c) What notice period and damages are appropriate given her age, tenure, and executive position?

d) Did King Ursa's conduct amount to discrimination under the Ontario *Human Rights Code*?

e) Should punitive or moral/aggravated damages be awarded?

Case Law Update

McFarlane v. King Ursa Inc., 2025 ONSC 3553

Employee's Position:

- McFarlane argued that the demotion and significant reduction in salary were unilateral changes to her fundamental terms of employment and therefore constituted constructive dismissal (*Farber v. Royal Trust Co.*, 1997 CanLII 387 (SCC)).
- She submitted that she took reasonable steps to mitigate her damages, including securing consulting work with Arterra Wines soon after her resignation.
- She sought damages equivalent to twelve months' notice, citing her senior role, executive status, and difficulty finding comparable work (*Humphrey v. Mene Inc.*, 2022 ONCA 531).
- She also alleged that the employer's actions were discriminatory based on her gender and maternity status and warranted punitive and moral damages.

Case Law Update

McFarlane v. King Ursa Inc., 2025 ONSC 3553

Employer's Position:

- King Ursa argued that Ms. McFarlane was not constructively dismissed but rather offered a legitimate adjustment reflecting the company's poor financial performance.
- It submitted that the demotion was not intended and arose from a template error, while the pay reduction was consistent with cuts other executives had accepted.
- The company argued that McFarlane failed to mitigate her damages, pointing to her evidence of networking and applications starting before her resignation.
- It maintained that any discrimination claim was unfounded, as the changes were motivated by financial necessity and not gender or maternity status.

Case Law Update

McFarlane v. King Ursa Inc., 2025 ONSC 3553

Decision:

- The Court found that the letter from April 3, 2023 constituted constructive dismissal because both a demotion and a significant salary reduction were imposed, each of which would independently constitute constructive dismissal.
  - King Ursa's evidence that the demotion in the letter was a "mistake" did not excuse its effect; a formal document lowering her role and compensation was coercive and damaging.
- The Court rejected the mitigation defence, finding no evidence that McFarlane failed to pursue comparable work or could have obtained equivalent employment.
  - The employer has the burden of proving that the employee could have secured comparable employment (*Red Deer College v. Michaels; Burton v. Aronovitch McCauley Rollo LLP*)
    - King Ursa failed to meet this burden and did not provide any evidence to show that Ms. McFarlane could have obtained an equivalent executive position.

Case Law Update

McFarlane v. King Ursa Inc., 2025 ONSC 3553

Decision:

- Damages were awarded based on a twelve-month reasonable notice period, totaling $290,615.81 after deducting earnings from consulting work.
- The Court dismissed the discrimination claim but awarded $40,000 in moral damages, finding that the demotion was insensitive and harmful to her professional identity.
    - The Court declined to aware punitive damages and concluded that there was insufficient evidence to show that Ms. McFarlane's sex or family status impacted King Ursa's actions.

Case Law Update

McFarlane v. King Ursa Inc., 2025 ONSC 3553

Key Takeaways:

- A demotion and substantial salary reduction imposed upon an employee's return from leave will almost always constitute constructive dismissal.
- Courts may award moral damages where employer conduct is careless or insensitive, even absent malice. Employers should exercise care when communicating changes to essential terms of an employee's position, particularly when an employee is in a vulnerable position, such as when returning from a protected leave.
- Employers cannot excuse contractual changes as "mistakes" once formalized in writing; the effect on the employee is what matters.
- The burden of proving a failure to mitigate is high and requires concrete evidence of comparable opportunities.
- Discrimination claims require proof of a nexus between protected grounds and the employer's actions; financial necessity alone will not establish discrimination.

Case Law Update

Bougiotis v. Manji, 2025 ONSC 2365

Facts:

- Mr. Manji was employed by CleanMark from October 2021 until April 2024, managing key clients Apple and Best Buy, which generated 50–60% of CleanMark's revenue.
- Upon termination without cause, he signed a full and final release in exchange for 8.67 weeks' pay and a reference letter.
- After his termination, he began a campaign of harassment against Ms. Bougiotis, his former supervisor, including calls, texts, and emails from multiple numbers and aliases.
- He also downloaded CleanMark's confidential client data and sent disparaging emails to Apple, Best Buy, and other clients threatening disclosure.
- His conduct escalated despite cease-and-desist letters, police warnings, and a court order restraining harassment.

Case Law Update

Bougiotis v. Manji, 2025 ONSC 2365

Issues:

- Are the Plaintiffs entitled to an interlocutory injunction restraining Manji from harassing Bougiotis and misusing CleanMark's confidential information?
- Are the Plaintiffs entitled to an Anton Piller order requiring the seizure and deletion of CleanMark's data from Manji's devices?
- Should costs be awarded on an elevated scale in light of the Defendant's conduct?

Case Law Update

Bougiotis v. Manji, 2025 ONSC 2365

Employer's Position:

- The Plaintiffs argued that Manji downloaded confidential information and used it to harass and defame them in violation of his contractual and common law duties.
- They submitted there was a strong prima facie case, the risk of irreparable harm to CleanMark's business and Bougiotis' mental health, and that the balance of convenience favoured injunctive relief (*RJR-MacDonald*, [1994] 1 S.C.R. 311).
- They argued that the Anton Piller criteria were met: strong case, serious damage, convincing evidence of possession of confidential data, and real risk of destruction (*Celanese v. Murray Demolition*, 2006 SCC 36).

Case Law Update

Bougiotis v. Manji, 2025 ONSC 2365

Former Employee's Position:

- Manji admitted retaining CleanMark's data and contacting Apple and Best Buy but denied harassment, claiming instead to act as a "whistleblower."
- He argued the Plaintiffs delayed in bringing their motion, undermining their claim of irreparable harm.
- He contended that the Anton Piller order was an unreasonable invasion of his privacy and violated his Charter rights under ss. 6 and 7.
- He threatened counterclaims and complaints against the Plaintiffs' counsel unless he received additional compensation and reference guarantees.

Case Law Update

Bougiotis v. Manji, 2025 ONSC 2365

Decision:

- The Court granted the interlocutory injunction and Anton Piller order.
  - The Plaintiffs established a strong prima facie case of misuse of confidential information, harassment, and breach of contractual and common law duties (*LAC Minerals v. International Corona*, 1989 SCC; *Clayburn v. Piper*, 1998 BCSC).
  - The Court rejected Manji's whistleblower defence, noting his client contacts came only after Bougiotis blocked him, making them retaliatory, not protective.
  - Irreparable harm was established through risk to CleanMark's reputation, business relationships, and Bougiotis' mental health.
  - Balance of convenience favoured CleanMark, as Manji had no right to confidential data and would suffer minimal inconvenience by surrendering devices.

Case Law Update

Bougiotis v. Manji, 2025 ONSC 2365

Decision:

- Manji was ordered to return and delete all confidential information, restrained from harassing Bougiotis, and required to surrender his laptop and other devices to an Independent Supervising Solicitor.
    - Given Manji's use of aliases, threats, and deceptive conduct, the Court inferred a real risk of destruction or dissemination of confidential data (*Capitanescu v. Universal Weld*, 1996 Alta. Q.B.).
- The Court held that the Charter does not apply absent state action and that Anton Piller orders authorize private parties, not government, to preserve evidence.
- Costs of $34,570.15 on a substantial indemnity basis were awarded to the Plaintiffs, given Manji's reprehensible and escalating conduct, which necessitated several motions and police intervention.

Case Law Update

Bougiotis v. Manji, 2025 ONSC 2365

Key Takeaways:

- Employers have powerful remedies available to them if employees breach their post-employment obligations, such as confidentiality and non-disparagement clauses.
- Courts will not hesitate to grant strong remedies like interlocutory injunctions and Anton Piller orders when an ex-employee weaponizes confidential information to harass an employer or its personnel.
- "Whistleblower" claims will be rejected where evidence shows retaliation, not public interest disclosure.
- Elevated costs will be imposed to sanction egregious, harassing, and bad-faith conduct.

Recent Amendments to the Human Rights Tribunal of Ontario Procedure and the *ESA*

Procedural Changes at the Human Rights Tribunal of Ontario

Mandatory Mediation

- As of **June 1, 2025,** all applications to the HRTO are subject to mandatory mediation
  - Previously, all mediations were voluntary and all parties had to agree to participate
- Mediation is already mandatory for civil litigation matters commenced in Toronto, Windsor, and Ottawa
  - Mediation must take place within 180 days, or approximately 6 months, after the defence is filed unless the court orders otherwise or the parties agree otherwise
- Procedure:
  - Mediations at the HRTO are free and parties are not required to have legal representation
  - Mediations are held over videoconference and are typically scheduled for half a day (3 hours)
  - A Member of the Human Rights Tribunal of Ontario will act as the mediator

Procedural Changes at the Human Rights Tribunal of Ontario

Mandatory Mediation

- Mediations are highly successful in resolving HRTO applications; the vast majority of matters settle at mediation and do not proceed to a hearing
  - If mediation fails, the HRTO will schedule a hearing
- All parties in attendance are required to agree to confidentiality terms (typically verbally); all information disclosed during mediation is confidential and parties cannot later rely on statements made at mediation as evidence if the matter is not settled
- Parties can request an exemption to mandatory mediation in exceptional circumstances

Other Procedural Changes

- Several forms have been updated; as of **June 15, 2025,** any filings with the previous versions of these forms will be rejected

ESA Amendments: Long-Term Illness Leave

- Effective **June 19, 2025**
- Requirements:
  - (a) The employee has been employed for at least 13 consecutive weeks; *and*
  - (b) The employee will not be performing the duties of their position because of a serious medical condition; *and*
  - (c) A qualified health practitioner issues a certificate stating the employee has a serious medical condition and setting out a period where the employee will not be working because of that condition.
- Maximum entitlement is 27 weeks in a 52-week period
- Employers must retain records for three years after the day on which the long-term illness leave expired

ESA Amendments: Information to New Employees

- Effective **July 1, 2025**
- Employers must provide new employees with the following information on their first day of work, or as soon as reasonably possible thereafter:
  - employer's legal name and any operating or business name;
  - employer's contact information, including its address, telephone number, and one or more contact names;
  - a general description of where the employee will generally work;
  - employee's starting hourly or other wage rate or commission;
  - the pay period and pay day; and
  - a general description of the employee's initial expected hours of work.
- Applies to employers with 25 or more employees

Digital Platform Workers' Rights Act, 2022

- Effective **July 1, 2025**
- Applies to gig workers and those working through app-based platforms such as ridesharing, food delivery, or courier services, and excludes taxi or limousine services
- An "operator" is defined as "a person that facilitates, through the use of a digital platform, the performance of digital platform work by workers."

Digital Platform Workers' Rights Act, 2022

- Key Provisions:
  - Workers are entitled to the minimum wage rate under the *ESA*, excluding tips and other gratuities
  - Operators must establish a recurring pay period and a recurring pay day and pay all amounts earned during each pay period no later than the pay day, including tips and other gratuities
  - Operators cannot withhold or deduct a worker's tips or other gratuities, unless authorized by the *DPWRA*
  - Operators must disclose certain information to workers, including information related to pay calculation, tips and gratuities, performance ratings, or work assignments

Digital Platform Workers' Rights Act, 2022

- Key Provisions:
  - Operators cannot remove a worker's access to the digital platform without a written explanation
    - In most cases, operators must also provide two weeks of written notice
  - All operator-worker disputes must be resolved in Ontario
  - Workers are protected from reprisal for inquiring about or exercising their rights under the Act
  - Cannot contract out of the Act to provide a lesser benefit to workers
  - Operators must retain workers' information for three years after the worker's access to the digital platform is terminated

What Can Employers Expect in 2026?

ESA Amendment: Placement of Child Leave

- Effective **TBD**
- Requirements:
  - (a) The employee has been employed for at least 13 consecutive weeks; *and*
  - (b) A child has been placed into an employee's custody, care, and control for the first time for the purposes of adoption; *or*
  - (c) A child arrives in an employee's custody, care, and control for the first time where the person who gave birth to the child was a surrogate
- Leave may begin up to 6 weeks prior to the expected date of placement to a maximum of 16 weeks
- Employers must retain records for three years after the day on which the placement of child leave expired

OHSA Amendment: Cleanliness in Washroom Facilities

- As of **July 1, 2025,** *OHSA* requires employers to maintain their washroom facilities in a clean and sanitary condition and to keep, maintain, and make available written records of cleaning the washroom facilities.
- Effective **January 1, 2026,** employers must post the required cleaning records:
  - (a) in a conspicuous place in or near the washroom facility where they are likely to come to their workers' attention; or
  - (b) electronically where workers can access them

ESA Amendment: Requirements for Publicly Advertised Job Postings

- Effective **January 1, 2026**
- Application:
  - Employers with 25 or more employees
  - "publicly advertised job postings", or external job postings advertised to the general public
    - This does **not** include:
      - General recruitment campaigns that do not advertise for specific positions
      - General "help wanted" signs that do not advertise for specific positions
      - Job postings available only to current employees
      - Job postings for work performed (a) outside of Ontario or (b) in and outside of Ontario if the work performed outside of Ontario is not a continuation of work performed in Ontario

ESA Amendment: Requirements for Publicly Advertised Job Postings

Requirements:

- Include expected compensation
  - Range should not exceed $50,000, unless the range exceeds or ends at $200,000, inclusive of non-discretionary bonuses and other monetary compensation
- Cannot require Canadian experience
- Disclose use of AI
  - Disclose AI in screening, assessing, and/or selecting applicants
- Disclose whether position is for an existing vacancy

ESA Amendment: Requirements for Publicly Advertised Job Postings

Requirements:

- Inform Interviewees about Interview Results
  - Employers must inform all applicants they interview of whether a hiring decision has been made within 45 days of their interview
  - Can be communicated in person, in writing, or through technology
- Retain copies of job post, applications, and interview information for 3 years

AI in the Hiring and Recruitment Process

- *Working for Workers Four Act, 2024* introduced the requirement for employers to disclose the use of AI in the hiring process for publicly advertised job postings, effective January 1, 2026
- Implications:
  - Consider how AI is making decisions; namely, what data is it relying on, and whether it is incorporating implicit biases into its decision-making (i.e. race, religion, gender, sexual orientation, age, etc.)
    - If a candidate believes that they have been discriminated against based on one of these grounds in the hiring process, employers may be subject to a human rights complaint.
  - Employers must ensure that their use of AI is in compliance with applicable regulations and legislation
  - Any AI tools should remain subject to human oversight

Impact of AI on Employment Law

- Employers should consider implementing policies that govern and address the use of AI tools in the workplace (i.e. ChatGPT, Perplexity, CoPilot, etc.)
- Policies may address the following issues:
    - what constitutes an AI tool;
    - permitted and/or restricted uses of AI in the workplace;
    - when should the use of AI be disclosed to clients, management, and/or coworkers;
    - accountability and who is responsible for ensuring that the products or information produced by AI is accurate;
    - how to protect client confidentiality and sensitive information when using AI tools;
    - required training for employees on the use of AI in the workplace; etc.
- For the legal profession particularly, there is also the risk of over-relying on AI and AI "hallucinations"
- Importance of human involvement and fact-checking any information provided by AI. This may be accomplished by using AI tools which cite sources of their information, such as Perplexity, and allow the user to determine the reliability of their sources.

Let's take a break!
See you in 10 minutes.

Questions?

Thanks for listening!

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