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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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