

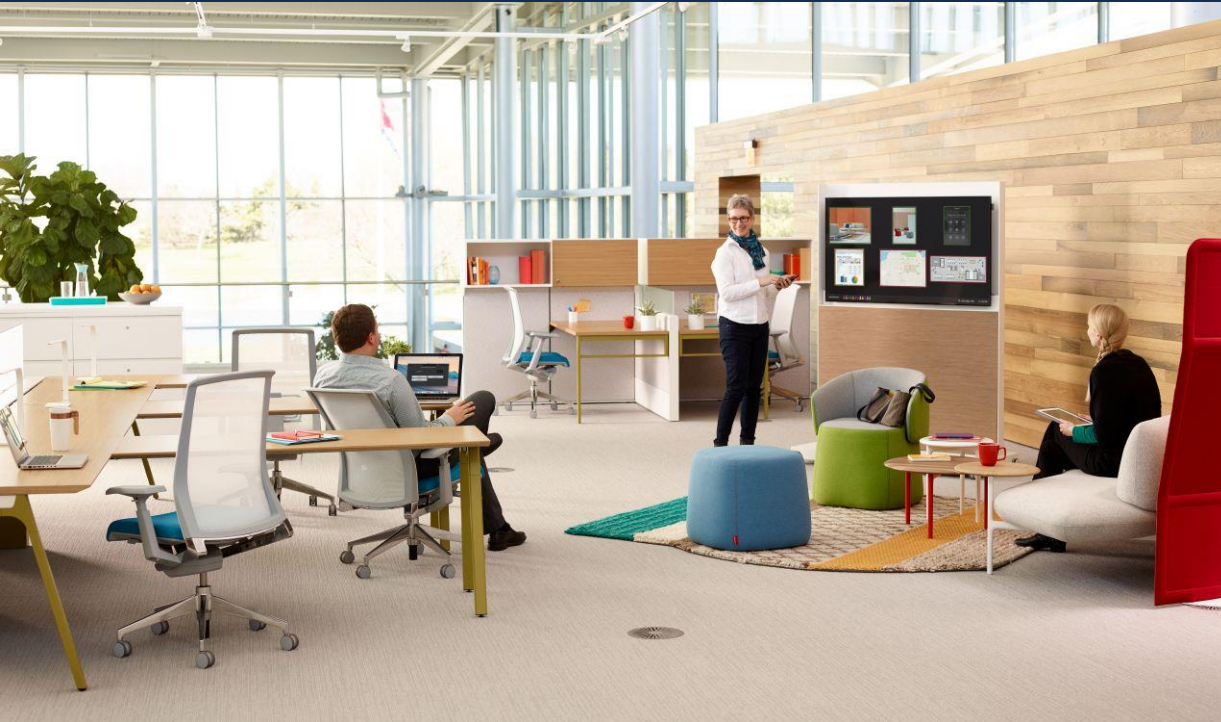


Devry Smith Frank *LLP*
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HR / Employment Seminar

October 26, 2017



Christopher
Statham

Proposed Changes to Ontario's Labour and Employment Laws: An Overview of the *Fair Workplaces, Better Jobs Act*

Bill 148: Key changes to the ESA, 2000

- The *Employment Standards Act, 2000* is the minimum standards legislation that governs both unionized and non-unionized employees.
- Most of the proposed changes are favourable to employees, in an effort for the government to eliminate or alleviate the impacts of precarious work.



RESPONSE TO THE CHANGING WORKPLACES REVIEW

- The first-ever independent review of the ESA and the *Labour Relations Act*
- More than 30 per cent of Ontario workers in “precarious work” in 2014
- In precarious work, it is hard to earn a decent income or enjoy decent working conditions.



THE CHANGING WORKPLACES REVIEW

- Recommendations were aimed at creating better workplaces in Ontario, where there are decent working conditions and widespread compliance with the law.

"A society where decent labour standards are observed and respected in the vast majority of workplaces, and where rights to meaningful collective bargaining are acknowledged and not undermined, would ideally result in an economy based on a sound and ethical foundation and workplaces that are productive and fair. Overall, our society would be a better place and we would all benefit."

ESA: Minimum wage Raise

- Between Jan 1, 2018
→ Jan 1, 2019:
 - - general minimum wage: \$14.00/hour
 - - student hourly wage: \$13.15/hour
 - - liquor server's wage: \$12.20/hour
 - - homemaker's wage: \$15.40/hour
- Between Jan 1, 2019
→ Oct 1, 2019:
 - - general minimum wage: \$15.00/hour
 - - student hourly wage: \$14.10/hour
 - - liquor server's wage: \$13.05/hour
 - - homemaker's wage: \$16.50/hour
- October 1, 2019 onwards:
 - - To be determined under the Act and the Ministry



ESA: automatic presumption that a worker is an employee

- NEW: Employers to be prohibited from treating, for the purposes of the Act, a person who is their employee as if they were not an employee under the Act (s. 5.1(1))
- NEW: The burden of proof to prove that a worker is not an employee lies on the employer or alleged employer (s. 5.1(2))

ESA: automatic presumption that a worker is an employee

- Purpose is to prohibit employers from misclassifying employees as “independent contractors” and thereby deny that they are entitled to protections under the ESA
- Employers that misclassify could be subject to penalties, including prosecution, public disclosure of a conviction and monetary penalties

ESA: automatic presumption that a worker is an employee

- * note: the ESA definition of an “employee” has remained the same, with the small exception of s.1(c) changing from:
- (c) a person who receives training from a person who is an employer, as set out in subsection (2), or
- → to →
- (c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer’s employees, or

ESA: Requests for changes to schedules or Work location

- - Under the new section 21.2(1) an employee who has been employed for at least three months would be able to submit a request, in writing, to the employer requesting changes to the employee's schedule or work location
- - under s.21.2(2) an employer must discuss the request with the employee and notify the employee of the employer's decision within a reasonable time
- - if the employer grants the request → must specify the date the changes will take effect and their duration
- - if the employer refuses the request → the employer must include reasons for the denial

ESA: TEMPORARY HELP AGENCIES

- - definitions of “assignment employee”, “client”, “temporary help agency”, “termination of assignment pay” are to be added
- **NEW: Termination of assignment pay for temporary help agencies**
- 74.10.1 (1) A temporary help agency shall provide an assignment employee with one week’s notice or pay in lieu of notice if,
 - (a) the assignment employee is assigned to perform work for a client;
 - (b) the assignment had an estimated term of three months or more at the time it was offered to the employee; and
 - (c) the assignment is terminated before the end of its estimated term.

ESA: expanding the “3 hour rule”

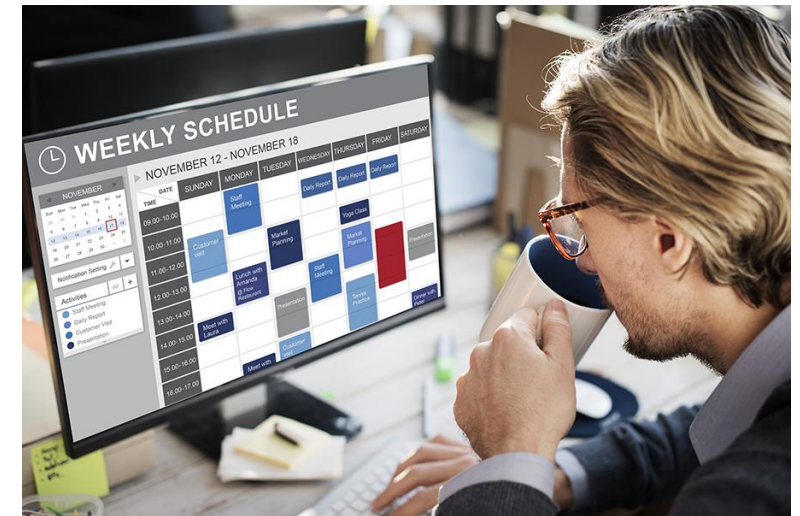
- - s. 21.3: the “3 hour rule” included in the ESA (rather than regulations) and its application expanded
- i.e. an employer shall pay an employee a minimum of 3 hours (at regular pay) if the employee:
 - a) regularly works more than 3 hours per day;
 - b) is required to work; and
 - c) works less than 3 hours, despite being available to work longer.
- (except if due to fire, lightning, power failure, storms or similar causes)

ESA: expanding the “3 hour rule”

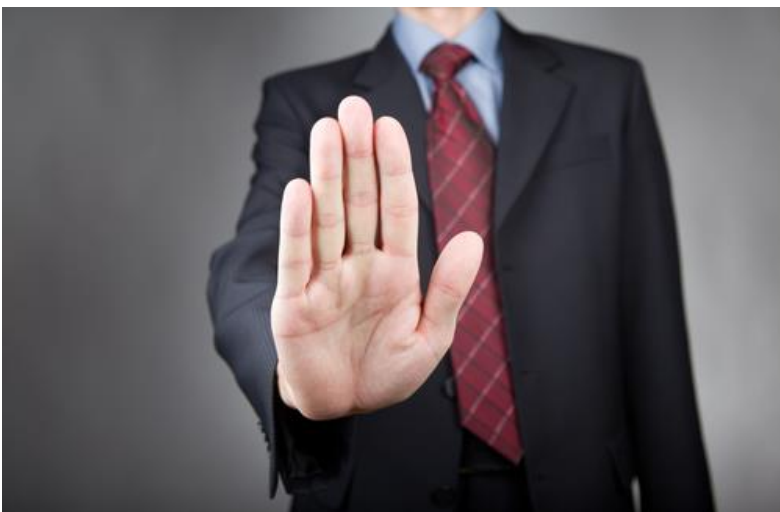
- - s. 21.6 if an employer cancels a shift within 48 hours before the employee was to commence working shall pay 3 hours of wages at the employee’s regular rate
 - Note: shortening (up to a minimum of 3 hours) or lengthening a shift does not trigger this provision
 - (except if due to fire, lightning, power failure, storms or similar causes)
 - Collective agreements prevail over this section

ESA: Minimum payments for being “on call”

- Under s. 21.4(1) if an employee is on call and is not called into work or works less than 3 hours, the employer shall pay wages equal to 3 hours of work at the employee’s regular pay rate
- - this provision will be triggered only once every 24 hours (i.e. if an employee is on call multiple times in 24 hours, the provision is only triggered once)
- - a collective agreement can override this provision



ESA: Right to refuse



- S. 21.5 An employee has the right to refuse an employer's request to work or be on call on a day they were not otherwise scheduled to work if the request is made less than 96 hours before the proposed shift
- - an employee who refuses the demand must notify the employer of the refusal as soon as possible
- - a collective agreement can contract out of this provision

ESA: Overtime PAY

- S. 22(1.1): If an employee has two different regular pay rates, overtime will be calculated based on 1.5x the regular pay rate for the type of employment which the employee is performing during overtime



ESA: public holidays

- **Public holiday pay to be calculated as:**
 - **Total amount of regular wages earned in the pay period immediately preceding the public holiday ÷ number of days the employee worked in that period**
- - Simplify the formula for calculating public holiday pay so that employees are entitled to their average regular daily wage.
- Other elements of the public holiday provisions would also be simplified.

ESA: vacation with pay



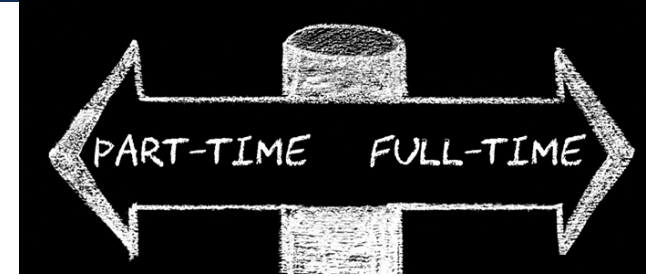
- S.33 Vacation pay to be amended to give an employee a right to:
- - a right to **two (2) weeks paid vacation** if the employee's period of employment is less than 5 years (with pay = 4% of wages)
- - a right to **three (3) weeks paid vacation** if the employee's period of employment is five years or more (with pay = 6% of wages)
- *Note: The purpose of this change is to bring Ontario's laws into line with the national average

Esa: Equal pay for equal work



- - if an employee believes that he or she is being paid at a **rate of pay less than** the rate paid to an **employee of the other sex** (absent differences in seniority, merit, systematic measurement of earnings by quantity or quality of production, or any other factor other than sex) the employee **can request a written review** of their rate of pay from the employer under s.42(6) and the employer must either:
 - a) adjust the pay accordingly; or
 - b) provide a written response to the employee with reasons for the disagreement

ESA: part-time and full-time workers should be paid the same



- - add definitions to the ESA for “difference in employment status”
- s.42.1: no employer shall pay different rates when:
 - a) an employee is performing substantially the same kind of work in the same establishment;
 - b) the performance requires substantially the same skill, effort and responsibility, and
 - c) their work is performed under the same working conditions
- (unless the difference in pay is based on a seniority system, merit system, a system that measures earnings by quantity or quality of production, or any other factor than sex or employment status)

ESA: temporary help employees cannot be paid less than other employees

- Similar to differences in sex and employment status,
- (except when the difference is made on the basis of any other factor than sex, employment status or assignment employee status)
- 42.2 (1) No temporary help agency shall pay an assignment employee who is assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client when,
 - (a) they perform substantially the same kind of work in the same establishment;
 - (b) their performance requires substantially the same skill, effort and responsibility; and
 - (c) their work is performed under similar working conditions.
- - under s.42.2(6) if an employee believes that they are being paid less due to their temporary help status, they can request a written response where the employer must either a) increase their pay accordingly or b) provide a written response for the disagreement

ESA: leaves of absences (PAID)

- the ESA to include a definition of “personal emergency leave pay”
 - An employee is entitled to **two (2) days of paid leave and eight (8) days of unpaid personal emergency leave** under each section per year
 - Personal emergency leave is available for:
 - 1. A personal illness, injury or medical emergency
 - 2. The death, illness, injury or medical emergency of an individual described in subsection (2) (such as spouses, grandparent, dependent relative, etc.)
 - 3. An urgent matter that concerns an individual in subsection (2)
 - 4. Sexual or domestic violence, or the threat of sexual or domestic violence, experienced by the employee or an individual described in subsection 2

ESA: leaves of absences (PAID)

- Paid leave days must be taken before unpaid leave days
- The employer can request reasonable evidence of the employee's entitlement to take the leave

ESA: personal emergency leaves (Unpaid)

- - Entitlements to unpaid medical care leave of absences to be expanded from 8 weeks to 27 weeks

ESA: personal emergency leaves (Unpaid)

- - (unpaid) “crime-related child death or disappearance leave” to be changed to “child death leave and crime-related child disappearance leave”
- - Child death leave to be expanded to 104 weeks if a child of the employee dies
 - (does not apply if the employee is charged with a crime in relation to the death of his or her child or if it is probable that the child was a party to a crime in relation to his or her death)
 - The employee must provide a written plan to the employer indicating which weeks the employee will take the leave as soon as possible
 - The employee can change his or her child death leave plan with 4 weeks notice or consent of the employer
 - The employer can request for reasonable evidence of the employee’s entitlement to leave

ESA: personal emergency leaves (Unpaid)

- - Crime-related child disappearance leave to be 104 weeks if the employee has been employed for at least six consecutive months and it is probable the child's disappearance was the result of a crime
 - Similar criteria and plans are required

ESA: Removal of the requirement to notify the employer before making a complaint

- - employees will no longer have to notify their employers before making a complaint under the ESA



ESA: notice of contravention

- - Notices of Contravention and Recognitions will be permitted to be publicized in a greater manner, such as on the internet (s. 27)



Tips

- The definition of “tip or other gratuity” has been expanded to prevent employers from collecting tips meant for their staff.



How will this work?

- The province plans to hire up to 175 more employment standards officers and launch a program to educate employees and small and medium sized businesses about their new rights and obligations under the ESA.

Conclusion

- - Stay tuned!
- - Bill 148 was carried on the second reading on October 18, 2017 and has been referred to the Standing Committee on Finance and Economic Affairs



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Thank you!

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Employee's Entitlement to a Bonus Payments

By: Larry W. Keown



- Bonuses are one of the most highly litigated issues in employment law.
- We will look briefly at:
 - 1) entitlement to bonuses - integral vs discretionary,
 - 2) recent *Paquette* decision of C.A. – the requirement to be “actively employed” to earn a bonus, and
 - 3) the calculation of bonuses.

(1) Integral vs. Discretionary

- Bonuses that are:
 - an **integral part of the compensation of the employee** are generally considered to be payable as part of any termination notice payment;
 - **discretionary** are not payable.
- Case by case factual analysis of the employment agreements and the history of bonus payments.

Fraser v Canerector Inc, 2015 ONSC 2138, aff'd by Div. Court 2016 ONSC 6071

- Mr. Fraser – originated acquisitions and managed them
- \$205,000 annual salary
- “permitted” to participate in the bonus plan – no actual plan/policy
- No formula, no floor, no ceiling, 100% of salary or nil
- Determined by the owner and his daughter – and confidential
- Bonus history:
 - First (part) year - \$50,000
 - Second year - \$75,000
 - Third year - \$175,000
 - Fourth year (termination year) – zero
- Held: is a discretionary bonus

- “Actively Employed”
 - *Employment agreements are always the overriding and first place to analyze an employee’s right to a bonus.*
 - *many bonus plans require an employee to be “actively employed” in order to be eligible.*
 - *where there is a termination and a lump sum payment, the employee is not “actively employed” on the relevant bonus date.*
 - ***Bernier v Nygard (2013)***
 - *Eligible for a bonus provided employed on Nov. 30th*
 - *terminated Dec. 2012.*
 - *2012 bonus paid*
 - *12 months reasonable notice awarded by the Court – and 2013 bonus held to be payable*

–***Paquette v Terago Networks Inc***, 2015 ONSC 4189

- *Bonus payable to employees “actively employed by Terago on the date of the bonus payout if meet personal and corporate objectives”*
- *Bonuses were paid Feb of each year*
- *Terminated Nov 25, 2014*
- *Trial Judge (Perell) Held: 17 months of notice but no bonus payable. The language of the contract required “actively employed” and not active here*
- *Ont CA: reversed and awarded bonus payment*

Keys from *Paquette*:

1. Where an employer elects to not give working notice, (and pay lump sum instead) all benefits that the employee would have received if they had worked the notice period, must be continued, including bonus payments
2. Bonus agreements that require an employee be “actively employed” is not enough to sufficiently displace the employee’s entitlements
3. This arguably pushes the law beyond *Bernier*

Kielb v National Money Mart Company, 2015 ONSC 3790

- Court found that the bonus was an integral part of the compensation but....
- “Any bonus is entirely at the discretion of the Company, does not accrue and is only earned and payable on the date it is provided to you. For example, if your employment is terminated, with or without cause, on the day before the day on which a bonus [is payable] you hereby waive any claim to that bonus or any portion thereof. You also hereby waive any claim to constructive dismissal based on the fact that a bonus is not paid...”
- Upheld the provision
- This case was pre-Paquette and the notice period was only 8 weeks in this case.

- Any bonus agreement or policy must be made known to the employee, otherwise the limitation provision is invalid.
 - *Poole v Whirlpool Corporation*, 2011 ONCA 808, affirming 2011 ONSC 4100; *Grace v Reader's Digest Assn (Canada) Ltd*, 1995 CanLII 7287 at para 64

Calculating Bonus Entitlements

–Paquette also upheld the approach used in *Bernier Personal* **Three (3) Year Average.**

–2011 bonus \$27,814

–2012 bonus \$31,832

–2013 bonus \$27,932

–Awarded \$29,193

Average of Comparators

- Look at the bonus received by other employees at the employer
 - *Bain v UBS*, 2016 ONSC 5362 at para 133

THE END

- “Bonus” case – *Lin v. Ontario Teachers’ Pension Plan*
 - Released by C.A at the same time as *Paquette*
 - Employer sought to amend the bonus plan to make it harder to claim entitlement
 - Employees refused to sign and no additional consideration given by the employer
 - HELD: not binding and in any event see *Paquette*



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Thank you!

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The Legalization of Marijuana in Canada: Advice for Employers



By: Justin Winch

AGENDA:

- Current and future legal status of marijuana
- Impairment at work
 - Issue: Measuring impairment
- Random drug and alcohol testing
- Duty to Accommodate
- Coverage under medical benefits plans
- Best practices

Current legal status of marijuana

- The possession, production and trafficking of marijuana are prohibited under the *Controlled Drugs and Substances Act* EXCEPT where authorized by exemptions (such as medical marijuana)
- PRESCRIBED medical marijuana is legal and regulated by the *Access to Cannabis for Medical Purposes Regulation (ACMPR)*

- If individuals demonstrate a **medical need** and have the **authorization of their health care practitioner**, they can:
 - 1. register to grow their own marijuana
 - 2. designate a registered grower
 - 3. buy marijuana from a licensed Health Canada-approved producer
- **Recreational marijuana continues to be illegal until July 1, 2018**

Future legal status of marijuana

- On July 1, 2018, recreational use of marijuana will become legal
- The proposed legislation would allow adults 18 and over to:
 - Possess up to 30 grams of dry or fresh cannabis;
 - Share up to 30 grams of dry or fresh cannabis with other adults;
 - Buy dry cannabis or cannabis oil from a provincially regulated retailer; and
 - Grow up to 4 plants in their personal residence for personal use
- There would be legislation prohibiting the sale to minors and driving while impaired

Impairment at Work

- As non-medical marijuana is currently an illegal substance, it is prohibited at work
- Once legalized, marijuana should be treated in substantially the same way as alcohol: employers have the right to prohibit the use of marijuana during work hours and prohibit attendance at work while impaired

- **Because there is no accurate test for marijuana and no government-set guidelines on what constitutes “impairment,” “impairment” will always be at issue**
 - **Systems for controlling potency will need to be based on consistent quality and a known dosage**



Issue: Measuring Impairment

- Many courts have upheld that there must be actual impairment on the job in order to justify remedial action
 - See *Entrop v Imperial Oil*, 2000 CanLII 16800 (ON CA)
- However, marijuana builds up in the body so tests don't show impairment— just that someone has used it sometime in the past
 - The level of marijuana's key ingredient, THC, does not accurately correspond to "impairment"
- While the physical effects of other drugs (e.g. alcohol) are easy to detect, that isn't true of cannabis
- Cannabis can be ingested inconspicuously in the workplace through foods such as brownies and cupcakes

Employer Random Drug Testing

- By default, an employer should assume that Canada does not permit pre-employment or random testing for drug or alcohol use or impairment
 - Privacy interests will usually, but not always, outweigh occupational health and safety interests
- The SCC decision *CEP Local 30 v Irving Pulp & Paper*, 2013 SCC 34, shows that random drug testing will not be upheld unless an employer shows actual evidence of a substantial safety problem

Random Testing: Safety-Sensitive Environments

- The threshold for random testing is very high: even in “highly safety-sensitive” or “inherently dangerous” workplaces, the employer must establish that it faces “enhanced safety risks” (ex. evidence of a substantial substance abuse problem in the workplace) to justify intruding into employee privacy

Non-Random Testing in Safety-Sensitive Environments

- An employer may require an employee to undergo testing for impairment when:
 - There is “reasonable cause” to believe the employee is under the influence of drugs or alcohol while on duty; or
 - The employee was involved in a workplace accident or incident (including a “near miss”)
- In very limited and highly dangerous positions, pre-employment testing (after the offer of employment but before work is commenced) may be allowed
 - However, failing of the test gives rise to accommodation, not automatic disqualification

Random Drug Testing in Non-Safety Sensitive Environments

- Random testing is not likely to be justifiable
- Random testing could only be implemented for employees who agree to it as part of accommodation after returning from a substance abuse program

Non-Random Testing in Non-Safety Sensitive Environments

- A policy that calls for testing based on reasonable cause or following a **significant** workplace incident may be justified if the employer can demonstrate the testing is a *bona fide* occupational requirement
 - i.e. the policy is rationally connected to the work, it is imposed in good faith to achieve that purpose and it is reasonably necessary in the circumstances; and
 - the test is the only legitimate way to investigate and resolve the workplace issue
- However, privacy concerns and the risk of discrimination due to perceived disability will often prevail

Duty to Accommodate Medical Marijuana Use

- There is a clear duty to accommodate individuals with a prescription for medical marijuana under human rights legislation—it should be treated like any other disability
 - Employers can and should require:
 - Medical proof of the prescription;
 - A sufficient medical indication that the employee actually has to ingest marijuana during working hours; and
 - Sufficient detail regarding the frequency, volume and method of ingestion relating to the prescribed medical use

Duty to Accommodate Recreational Marijuana Use

- Employers will continue to maintain the right to prohibit impairment on the job, particularly in safety-sensitive positions
- Caution: Once recreational marijuana becomes legal, employees can purport to consume recreational marijuana for medicinal purposes
 - Requiring medical evidence of a disability and having a clear drug and alcohol policy will become critical



Accommodation to the Point of Undue Hardship

- An employer need only accommodate a disability or perceived disability to the point of undue hardship
 - A prescription for medical marijuana does not entitle an employee to be impaired at work;
 - A prescription for medical marijuana does not entitle an employee to compromise his or her safety or the safety of others;
 - A prescription for medical marijuana does not entitle an employee to smoke it the workplace– smoke-free laws apply to smoking marijuana as it applies to regular cigarettes;
 - A prescription for medical marijuana does not entitle an employee to unexcused absences or late arrivals; and
 - The employer is, however, required to find suitable accommodation for disabled employees
 - E.g. immediate removal of the employee from the workplace for the day with safe transportation home, referral to paid counselling, providing more frequent breaks, implementing alternative schedules, etc.

Employer Best Practices

- **Policies** (drug and alcohol)
 - Include a duty to disclose any use of marijuana in the workplace;
 - Modify policies to specifically deal with marijuana dependency;
 - Require a qualified proof of prescription and necessary medical ingestion at work;
 - Establish a framework for testing impairment, including triggering circumstances, testing methods or a mandatory medical examination
- **Obligation to accommodate**
- **Train employees on the policy and supervisors on how to recognize impairment**
 - Make the consequences of non-compliance with the policy clear

Case Law

- Courts are increasingly upholding terminations that result from a failure to self-identify use under an employer's drug policy (where, if done so, the employer would accommodate the employee) or refusal to take a drug test when there was a compelling reason to order it
 - E.g. see *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30
- The case law on the enforcement of drug and alcohol policies is extremely mixed



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TERMINATION FOR CAUSE IN THE AGE OF SOCIAL MEDIA

Dismissal, Off-Duty Conduct,
and Solutions for Employers

By: Alexandra Tratnik



INTRODUCTION

- Termination for cause
- Regulation of off-duty conduct and social media
- Recent examples from the case law

TERMINATION FOR CAUSE

- Employers typically have two means of ending the employment relationship:
- **Termination with Notice:** employer terminates the relationship, employee paid for the 'notice period' or is given working notice
- **Termination for Cause:** employer terminates the relationship without notice, employee walks away with nothing

TERMINATION FOR CAUSE

- The general test for 'just cause' comes from *McKinley*¹ which puts the onus on the employer to establish:
 - That the employee breached a fundamental component of the employment relationship; and,
 - That the breach warrants termination of the relationship
- **Contextual Approach** - court examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the misconduct in order to assess whether it is reconcilable with sustaining the employment relationship

1. *McKinley v BC Tel*, 2001 SCC 38 at 48-57

TERMINATION FOR CAUSE

- More serious, repeat conduct from an employee lends itself better to a finding of 'just cause'
- Where theft, misappropriation or serious fraud is found, court is more likely to find that 'just cause' exists
- Key principle is **proportionality**, any discipline for an employee must match the misconduct

TERMINATION FOR CAUSE

Low Severity

High Severity

Low Freq

One-off mistakes, minor lapses
in judgement**For-Cause Unlikely**e.g. Employee charged with a
serious crime**Depends on how serious**

High Freq

Repeated errors in non-critical
workplace behaviour**Depends, Cumulative Cause**Major, repeated lapses in judgment;
serious, offensive behaviour**For-Cause More Likely**

Cumulative Cause

- Where there are multiple 'incidents' in an employee's behaviour, employers must demonstrate that the accumulated series of events:
 - Together constitute a fundamental breach of the employment relationship; and
 - Were accompanied by warnings from which it may be implied that a employee's job was in jeopardy
- Reason for this is to give employees the chance to correct deficient behaviour

OFF DUTY CONDUCT AND 'JUST CAUSE'

- Courts and arbitrators have found that an employee's 'off-duty' conduct can lead to workplace consequences, which include termination for cause³
- Modifies the onus on the employer; has to show:
 - Conduct has a real and material connection to the workplace; and that,
 - A reasonable person would conclude that the employment relationship has been damaged to the point that employment is impossible or untenable⁴

3. *Millhaven Fibres Ltd v OCAW, Local 9-670 (1967)*, Union-Management Arb Cas 328 (Ont Arb) (unreported)

4. *Ottawa-Carleton District School Board v OSSTF*, District 25, 2006 CarswellOnt 8752 (Ont Arb) at 16

DISCIPLINE AND OFF DUTY CONDUCT

- The employer must show, among other things, that⁵:
 - The behaviour harms the employer's reputation/product
 - The behaviour renders the employee unable to perform their duties
 - The behaviour leads to the refusal or inability of other employees to work with the him or her; and/or,
 - The employee has been found guilty of a serious breach of the *Criminal Code/Human Rights Code/Employers' Workplace Policy(ies)*

5. *Ottawa-Carleton District School Board v OSSTF*, District 25, 2006 CarswellOnt 8752 (Ont Arb) at 15

OFF DUTY CONDUCT AND 'JUST CAUSE'

- Not necessary for employers to show that all of those conditions exist, rather that the degree of the behaviour warrants the termination without notice
- Courts will consider a variety of factors, including:
 - Length of service
 - Level of the position held (management held to higher standard)
 - Whether the employer has a policy on the use of social media or off-duty conduct

WHAT DOES THIS LEAVE US WITH?

- To terminate an employee 'for cause' as a result of off-duty conduct, the employer must show:
 - **Work-Related:** Employee's off-duty conduct is materially related to the workplace
 - **Fundamental Breach:** The conduct breached a fundamental component of the relationship (reputational damage, etc.)
 - **Termination Warranted:** Given the severity of the conduct, termination 'for cause' is warranted

Toronto (City) and IAFF, Local 3888 (Bowman), Re

Behaviour

Firefighter of 2 ½ years tweets racist and sexist things to followers

Profile picture displays him in TFS uniform

EE thought that the tweets were private, until reported on in the National Post

Breach

Behaviour directly undermined the reputation of the TFS

EE's tweets were used in a newspaper article about how fire services were not welcoming to women, clear reputational harm

Warranted

ER : Reasonable person would conclude that human rights violations were very serious misconduct and injurious to the ER's reputation

EE : No criminal act, lesser penalty warranted

Decision

Workplace-Related Cause Established Dismissal Warranted

EE had been 'reckless in his use of the Twitter account and responsible for the consequences of his Twitter communications'

Kim v. International Triathlon Union

Behaviour

Senior manager posts negative comments about her boss and co-workers to personal Facebook and Twitter

ER had informal conversations with EE about content of posts

No formal social media policy

Breach

Reputational harm done to the union by the posts, fallout in the workplace after publicly criticizing supervisors

Warranted

ER : EE's actions destroyed the trust between parties, made impossible to manage

EE : No clear expectations that conduct was unacceptable, not offensive or demeaning, merely personal

Decision

Workplace Related
NO Cumulative Cause
Dismissal NOT
Warranted

ER had failed to properly warn employee about conduct

Mackinnon v. Helpline Inc.

Behaviour

16 year management
EE speaks with
reporter about
organization, makes
disparaging comments
about senior
management on social
media

EE had been told by
the ER's Board that
communications were
unacceptable

Breach

Behaviour directly
undermined the
reputation of the
company, workplace
relations between
supervisors and EE

Warranted

Communications
were not widely
disseminated, did not
cause harm to the ER.
No opportunity for EE
to respond to
allegations—ER
terminated
immediately

Decision

Work Related
NO Cause
Dismissal NOT
Warranted

ER did not adequately
or appropriately
investigate the
incidents prior to
termination

Tenaris Algoma Tubes Inc. and USWA, Local 9548 (D.), Re

Behaviour

Male crane operator complains about female co-worker on Facebook, without using her name, but identifying her through a unique physical characteristic.

Variety of sexually explicit and nasty insults

Breach

ER alleged that the behaviour directly undermined the reputation of the company, and made it impossible for the EE to work with female staff

EE terminated, filed grievance in response

Warranted

Nature of the comments were 'vicious and humiliating'.
Comments not made in the 'heat of the moment' but afterwards when EE had time to consider his words

Decision

**Work Related
Cause Established
Dismissal Warranted**

EE sexually harassed co-worker. Nature of comments were serious enough to warrant termination over a lesser penalty

KEY TAKE-AWAYS

- Create a social media policy that is communicated and understood by employees
- Use 'progressive discipline' for employees - only the most serious of offences should warrant immediate termination for cause (conviction of certain crimes, harassment, etc.)
- Have a thorough discipline procedure that investigates, relies on facts and gives the employee a chance to respond to the allegations of misconduct



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Thank you!

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Termination Clauses: A Tale of Two Different Lines of Cases

By: Marty Rabinovitch



What Are Termination Clauses?

- If a contract is silent about key terms in an employment relationship (such as notice), the **default** in Canada is that the employee is entitled to rights under the **common law**
- A **termination clause** is a clause that **rebutts the legal presumption** of the common law and replaces it with another entitlement that has been agreed to by the parties (which is usually less than the common law but **must be equal to or greater than what is set out in minimum standards legislation**, i.e. the Ontario *Employment Standards Act*, 2000 or federal *Canada Labour Code*)

Many termination clauses are found by the Courts to be unenforceable – it is important to seek legal advice from an experienced employment lawyer!

- Termination Clauses can include:
 - A formula for calculating the notice period based on the employee's years of service OR a fixed notice period;
 - An employee's entitlement to benefits and severance pay;
 - Employee's entitlement to variable compensation (ex. bonuses and stock options)
 - Language which limits the employee's entitlement to their minimum entitlements under employment standards legislation

Duty to Mitigate

- If the parties have successfully contracted out of the common law, there is no duty to mitigate if the contract is silent with respect to mitigation
 - *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425
 - see also *Howard v. Benson Group Inc.*, 2016 ONCA 256 (duty to mitigate does not apply in the case of fixed term contracts that do not have mitigation clauses)

Mistakes and Drafting Errors that will Invalidate a Termination Clause:

1. A termination clause is inserted into a contract, without fresh consideration being provided to the employee
2. The clause contains ambiguous terms, which would be interpreted against the drafting party, usually the employer
3. The termination clause provides less notice than required under minimum standards legislation (i.e. the Ontario *Employment Standards Act, 2000* or federal *Canada Labour Code*)
4. The termination clause does not mention an employee's entitlement to statutory benefits, or the employee's "entitlements" under employment standards legislation
5. Federally regulated employees who meet certain criteria can attempt to avoid the effect of termination clauses by initiating an unjust dismissal complaint under the *Canada Labour Code*
6. A termination clause that may breach the ESA in the future may be unenforceable (the case law is conflicting)

Effect of Invalidating Termination Clause

- If a termination clause is found to be unenforceable, the employee's rights revert back to their common law entitlements (which are typically more costly for an employer)
 - The difference can be substantial: an employee can receive a maximum of 8 weeks of termination pay under the *ESA*, plus up to 26 weeks of severance pay, yet receive 24 months of notice at common law

1. No Consideration

- As per *Braiden v La-Z-Boy Canada Limited*, 2008 ONCA 464 at para 61 a court will only enforce a termination provision placed into an existing contract by establishing that:
 1. it clearly communicated the change in the employment contract to the employee;
 2. the employee was aware that they were giving up their legal right to reasonable notice of dismissal; and
 3. consideration flowed to the employee in exchange for forfeiting that right.
- Consideration = pay increase, additional paid vacation, etc.
- Continued employment **does not constitute new consideration**

2. Ambiguity

- The common law entitlements can only be displaced by clear and unambiguous language
 - Reaffirmed in *Wood v Fred Deely Imports Ltd*, 2017 ONCA 158 at para 40
- Where the language could be interpreted in more than one way, the court will adopt the interpretation most favourable to the employee
 - *Ceccol v Ontario Gynastic Federation*, 2001 CanLII 8589 (ON CA)
- For example, in *Bellini v Ausenco Engineering Alberta Inc* the court found the following clause ambiguous about whether the parties intended the statutory minimums to apply or whether it was a statement that the applicable notice would be consistent with the legislation; the court applied the common law
 - “If it becomes necessary for us to terminate your employment for any reason other than cause, your entitlement to advance working notice or pay in lieu of such notice, will be in accordance with the provincial employment standards legislation”

3. Not Compliant With Statutory Minimums

- If an employment contract contains a termination clause that provides entitlements upon termination other than reasonable notice, that entitlement must be equal to or greater than the statutory minimums
 - *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986
- In Ontario, the statutory minimums are governed either by the provincial *Employment Standards Act, 2000* or the federal *Canada Labour Code*
- The court will not re-interpret the clause to bring it into compliance with statutory minimums

4. Failing to Explicitly Mention Statutory Benefits Continuation

- The courts have been divided about whether a termination clause is invalidated because it does not mention the statutory requirement to continue benefits during the notice period (see *ESA* s.60 & s.61)

Approach #1: Employee-friendly *Sifton* line of cases

- In *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508 ("*Sifton*") the court voided a termination clause that did not provide for the continuation of benefits during the notice period, despite the termination clause otherwise providing the employee with their statutory entitlements
 - The termination clause did not explicitly provide for the continuation of benefits and indicated that the exhaustive summary of entitlements (including termination and/or severance pay) was "in satisfaction of all claims and demands against the [employer] which may arise out of statute or common law with respect to the termination of [the employee's] employment."

- the judge in *Sifton* arrived at his decision on the basis that employers attempting to contract out of the common law need to abide by ALL minimum standards, including adequate notice (or pay in lieu) and mandated benefits continuation (which is an integral part of an employee's compensation)

Wood v Fred Deeley Imports Ltd., 2017 ONCA 158

- This February 2017 decision of the ONCA upholds the *Sifton* line of cases
 - The contract said nothing about benefits (and severance pay) and had a clause that stated the company was not obligated to make any payments that were not set out in the paragraph
- The “all inclusive” language of the termination clause distinguished this case from the *Roden* line of cases
- Contracting out of even one of the employment standards and not substituting it with a greater benefit renders a termination clause void and unenforceable
- Enforceable termination clauses must reflect notice (or pay in lieu) separately from severance pay, as notice can be fulfilled via working notice but severance pay must be paid out
- Voluntary benefit payments made by the employer after the termination could not remedy the otherwise unenforceable termination clause

Approach #2: Employer-friendly *Roden/Oudin* line of cases

Roden v. Toronto Humane Society, 2005 CanLII 33578 (ONCA)

- The court upheld a termination clause that did not explicitly provide for benefit continuation but provided an employee with the minimum amount of notice “or **payment** in lieu thereof as required by the applicable employment standards legislation.”
- The court interpreted the clause to mean payment ≠ salary (as the contract distinguished between “salary,” “pension contributions,” and “car allowance”), and therefore did not exclude benefit entitlements
 - *note: subsequent cases have found this interpretation ambiguous and therefore interpreted it against the employer using the *contra proferentem* rule; see *Howard v Benson Group*, 2015 ONSC 2638

Oudin v Centre Francophone de Toronto, 2016 ONCA 514 reaffirming 2015 ONSC 6494

- The termination clause did not explicitly provide for benefits continuation and included “all-inclusive” language that the employee’s only entitlements were limited to what was explicitly provided
 - method taken: look to see the parties’ intention and then determine whether that intention illegally contracts out of minimum standards legislation
 - Look at a contract’s context to determine intention
 - The employer’s practice after termination was examined to determine the party’s intention at the signing of the contract

North v. Metaswitch Networks Corporation, 2017 ONCA 790

- **October 16, 2017** decision of the Ontario Court of Appeal
- Termination clause entitling employee to minimum *ESA* entitlements
- Offending part of the termination clause was “any payments owing to you shall be based on your Base Salary”, because employee was also entitled to commissions, which constitute wages; depriving employee of wages is a contravention of the *ESA*
- Court found the termination clause to be unenforceable
- In line with the *Sifton* approach; suggests that this approach is preferred to the *Roden/Oudin* approach

5. Initiating an Unjust Dismissal Complaint under the *Canadian Labour Code* (“CLC”)

- A Tribunal appointed pursuant to the CLC is not bound by the terms of a termination clause
 - *Luney v. Day & Ross Inc.*, 2015 ONSC 1440 at para. 15

6. Potential Violation in the Future Invalidates Clauses?

- In the B.C. decision *Shore v Ladner Downs*, 1998 CanLII 5755 (BCCA) the court held that a clause that could potentially violate statutory minimums in the future was “void from the beginning” despite currently complying with the legislation
 - i.e. the clause stated that the employee could be terminated with 30 days notice → the employee had only be employed for 9 months when he was dismissed (which means he was entitled to 1 week’s notice)
 - Had the employee continued to be employed for a longer time, this provision would eventually be voided
- In Ontario:
 - *Slepenkova v. Ivanov*, 2007 O.J. No. 4708 (registration required), affr’d 2009 ONCA 526; *Wright v. Young and Rubicam Group of Companies (Wunderman)* 2011 ONSC 4720; *Garreton v Complete Innovations Inc.*, 2016 ONSC 1178 have cited this decision with approval
 - *Ford v. Keegan*, 2014 ONSC 4989; *Garreton v Complete Innovations Inc.*, 2016 ONSC 1178 have rejected the decision

Termination Clauses must be carefully drafted to be enforceable – seek assistance from a lawyer!



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