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WELCOME TO TODAY'S HR/EMPLOYMENT WEBINAR

DECEMBER 13, 2023

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

10:00 a.m.	Introduction
10:05 a.m.	The Top 10 Employment Law Decisions of 2023
10:55 a.m.	What to Expect in 2024
11:25 a.m.	Break
11:40 a.m.	Q&A Period
11:55 a.m.	Conclusion

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Top 10 Employment Law Decisions of 2023

1(a) *Lynch v. Avaya Canada Corporation*, 2023 ONCA 696

Facts

- The Appellant, Avaya Canada Corporation ("Avaya") appeals the decision of a motion judge to award a 30 month notice period to a wrongfully dismissed employee
- Mr. Lynch worked as a professional engineer for Avaya
- Avaya terminated Mr. Lynch's employment due to restructuring; Mr. Lynch sued Avaya for wrongful dismissal.

1(a) *Lynch v. Avaya Canada Corporation,* 2023 ONCA 696

- At common law, unless there is an enforceable termination clause in their employment contract, an employee who is dismissed without cause is entitled to reasonable notice, or pay in lieu of reasonable notice, having regard to their age, years of service, character of employment and availability of similar work
- Purpose of common law reasonable notice, in theory, is to ensure that a wrongfully dismissed employee will continue to receive their salary until they secure alternate comparable employment

1(a) *Lynch v. Avaya Canada Corporation,* 2023 ONCA 696

Superior Court of Justice

- At summary judgment, the motion judge found that a 30 month notice period was appropriate – a notice period that exceeded the 26-month-notice period sought by the employee in his Statement of Claim.
- Prior to this decision, *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512 held that "exceptional circumstances" were necessary to justify a common law notice period of more than 24 months – in *Dawe*, the Court of Appeal overturned a 30 month reasonable notice award at trial
- The judge was not persuaded that Mr. Lynch failed to mitigate his damages, despite the fact that he did not apply for any jobs after being terminated.

1(a) *Lynch v. Avaya Canada Corporation,* 2023 ONCA 696

Superior Court of Justice

- The judge considered the following factors in determining that Mr. Lynch's circumstances were exceptional and justified an award of damages in excess of 24 months:
  - Mr. Lynch specialized in the design of software to control unique hardware manufactured by Avaya at its Belleville facility
  - It was uncontested that Mr. Lynch's job was unique and specialized, and that his skills were tailored to and limited by his very specific workplace experience at Avaya.
  - during his lengthy employment of 38.5 years, Mr. Lynch developed one or two patents each year for his employer;
  - Avaya identified Mr. Lynch as a "key performer" in one of his last performance reviews; and
  - although similar and comparable employment would be available in cities such as Ottawa or Toronto, such jobs would be scarce in Belleville where Mr. Lynch – who was approaching his 64th birthday – had lived throughout his employment.

1(a) *Lynch v. Avaya Canada Corporation,* 2023 ONCA 696

Ontario Court of Appeal

- Appeal dismissed; 30 month notice period upheld

1(b) *Milwid v. IBM Canada Ltd.*, 2023 ONCA 702

Facts

- Gregory Milwid was an employee of IBM Canada Ltd. for 38 years when he was terminated without cause in May 2020 with only 11 weeks of notice.
- He was 62 years old at the time of termination.
- At the time of termination, Mr. Milwid held a managerial position.
- Mr. Milwid commenced a wrongful dismissal action and brought a motion for summary judgment for damages during the reasonable notice period including salary, incentive compensation, pension, group health and other benefits.

1(b) *Milwid v. IBM Canada Ltd.*, 2023 ONCA 702

Superior Court of Justice

- The motion judge found that the respondent was entitled to 26 months of reasonable notice considering his age, lengthy service, the exclusivity of his employment with the defendant, the character of his employment and specialized nature of his work; court then adds 1 month due to timing of the termination (May 2020 – during the COVID-19 pandemic), for a total of 27 months
- In finding that this was an exceptional circumstance that warranted an award above 24 months, the judge relied on the employee's age, length of service, his managerial position, his compensation in an uncertain economy, and the technical/skilled nature of his skills geared towards the defendant's business.

1(b) *Milwid v. IBM Canada Ltd.*, 2023 ONCA 702

Ontario Court of Appeal

- The employer argued that the motion judge erred in basing her finding that there were exceptional circumstances that warrant a notice period over 24 months on the Bardal factors. The Court of Appeal rejected this submission as the evidence set out that the employee's skills were not transferrable because they related almost exclusively to the employer's products.
- The employer also argued that the motion judge erred in finding that an additional month of notice, bringing the total to 27 months' notice, was appropriate to reflect the circumstances of the COVID-19 pandemic. The Court of Appeal stated that there is no basis to interfere with the motion judge's decision in this regard.

1(a) Lynch and 1(b) Milwid

Key Takeaway

- Courts can order notice periods greater than 24 months if there are exceptional circumstances that warrant awarding a longer notice period.

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

Facts

- The employer in this matter alleged a contravention of settlement, claiming that the employee breached the confidentiality and non-disparagement terms of the Minutes of Settlement agreed upon by the parties.
- The employer filed an Application for Contravention of Settlement to the Human Rights Tribunal of Ontario

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

Facts (cont.)

- The parties settled the matter in mediation, and the Minutes of Settlement (MOS) contained confidentiality, mutual non-disparagement, and breach clauses.
- 15 months after the parties entered into MOS, the employer discovered a LinkedIn post made by the respondent, which the employer argued breached the confidentiality and non-disparagement clauses.

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

- "**Confidentiality:** The Applicant may disclose the terms of these Minutes of Settlement to [their] immediate family, legal and financial advisors, on the condition that they also agree to maintain strict confidentiality of these Minutes of Settlement. Upon inquiry by any person about the resolution of the Application or conclusion of the Applicant's employment with [the applicant corporation], the Applicant shall simply state that all matters have been resolved. The Applicant will make no mention of, or allude in any way whatsoever to, the receipt of money or the amount of money received from [the applicant corporation] in this Settlement."

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

- **"Breach:** The Applicant agrees that if [they breach] any of the obligations under this Settlement, and in particular the confidentiality obligation set out in paragraph 7 and the non-disparagement obligation in paragraph 8, above, [they] will be required to repay to the [corporate] Respondent the Settlement Payment paid to [them] under paragraph 2 of these Minutes of Settlement as liquidated damages, and will be responsible for any additional damages incurred by the [corporate] Respondent."

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

- **"Mutual Non-Disparagement:** The parties agree that the purpose of this Settlement is to resolve any issues the Applicant has with the Respondents on a confidential basis and without any disparagement of the parties. Accordingly, the parties agree to refrain from making any oral, written or electronic communications about each other that are untrue, defamatory, disparaging, or derogatory, or acting in any manner that would be likely to damage the opposite party's reputation in the eyes of customers, regulators, the general public, or employees, unless required by law. This non-disparagement includes but is not limited to any electronic communications through social media (such as Facebook, Twitter, Instagram, Youtube, Snapchat, etc.)"

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

- Employee's LinkedIn Post: "To all those inquiring, I have come to a resolution in my Human Rights Complaint against [the applicant corporation] and [the individual applicant] for sex discrimination."

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

Human Rights Tribunal of Ontario

- A plain language reading of the confidentiality clause reads that the respondent can share limited disclosure to a limited group. In the respondent's LinkedIn post, they expanded upon the language permitted by the exception, disclosing more than the plain language of the exception would suggest would be permissible.
- From the perspective of an objective, reasonable person, placing detailed information such as the contents of the respondent's post on LinkedIn serves to publicize it and create a reputationally damaging link between the parties. This is what the confidentiality and non-disparagement clauses were intended to prevent.

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

Human Rights Tribunal of Ontario

- Per *Tremblay v. 1168531 Ontario Inc.*, 2012 HRTO 1939, a remedy of a breach of confidentiality cannot be punitive.
- In this case, since the damages are in a liquidated damages provision in a freely entered into contract agreed and signed by represented parties, they are damages consistent with the intention of the parties and not punitive.

2. *L.C.C. v. M.M.*, 2023 HRTO 1138

Takeaway:

- Courts and Tribunals will generally enforce liquidated damages clauses, unless a punitive intention can be shown; starting point is that the liquidated damages represent a genuine pre-estimate of damages sustained in the event of a breach

3. *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255

Facts

- Employee (Mr. Pham) brought a claim for wrongful dismissal, after receiving notice of layoff followed by several extensions.
- Employee worked for the employer as a welder for almost 20 years; he was 51 years old at the time he was laid off.
- On March 23, 2020 (during COVID-19 pandemic), the employer's plant manager met with the employee to inform him of the layoff – he explained that it was temporary and that he hoped the appellant would be recalled by June 19, 2020.

3. *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255

Facts (continued)

- The employee was placed on temporary layoff and was provided with a letter advising that his benefits would continue during this time.
- On June 2, 2020, the layoff was extended for a period "up to 35 weeks." It was extended again on September 23, 2020, and again on December 9, 2020, until September 4, 2021.
- At the time the September 23, 2020 layoff was communicated to the employee, he was provided with a letter advising that his layoff was subject to Ontario Regulation 228/20 under the *Employment Standards Act, 2000*.
    - This regulation provides that an employee whose works hours were temporarily reduced for reasons related to COVID-19 was deemed to be on Infectious Disease Emergency Leave rather than terminated.

3. *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255

Superior Court

- The employer brought a motion for summary judgment to dismiss the claim on the basis that Mr. Pham agreed to the layoffs, or in the alternative, failed to mitigate his damages
  - Mr. Pham claimed that the employer neither sought nor received his consent to the layoffs.
- The Superior Court granted the employer's motion and dismissed Mr. Pham's claim
- Mr. Pham appealed

3. *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255

Court of Appeal

- Appeal allowed – trial judge's decision overturned
- Trial judge erred in equating Mr. Pham's silence during layoff periods with condonation
- There was no implied or express term in Mr. Pham's employment agreement permitting temporary layoffs
  - The fact that Mr. Pham's co-workers were previously laid off does not constitute an implied term permitting the employer to temporarily layoff other employees, including Mr. Pham

3. *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255

Takeaways

- An employee who did not actively object to a temporary layoff could still claim constructive dismissal
  - A letter explaining the layoff with the employee's signature does not necessarily mean that the employee has condoned the layoff (employee denied signing the letter in this case); receipt of the letter to be distinguished from consenting to the employer's terms
  - "I regret to inform you that (due to budgetary considerations and recent slowdown) it is necessary to put you on temporary layoff for a period of thirteen (13) weeks".
  - Layoff was "in accordance with [the employee's] work agreement"
- Having an express term in the employment contract regarding temporary layoffs can mitigate the risk of constructive dismissal claims arising from temporary layoffs

4. *Tan v. Stostac Inc.*, 2023 ONSC 2121

Facts

- The employee worked for the employer for nearly five years, where he acted primarily as depot manager.
- The employee's salary was $67,500, he was enrolled in the company's benefits plan and he received a Christmas bonus or gift every year.
- The employer gave the employee notice of termination on May 28, 2020, informing him he was laid off effective the following day – this occurred during the COVID-19 pandemic.
- The employee was unable to find a new job and applied for and received the Canada Emergency Response Benefit ("CERB").

4. *Tan v. Stostac Inc.*, 2023 ONSC 2121

Facts (continued)

- The plaintiff argued that the termination clause in his employment agreement violated the *Employment Standards Act, 2000*.
- The termination clause provided that the employer could terminate without notice or pay for "any just cause."
- The final sentence of the termination clause includes an *ESA* savings provision.

Tan v. Stostac Inc., 2023 ONSC 2121

- **Termination Clause:**

  "The Employer may end the employment relationship at any time without advanced notice and without pay in lieu of such notice for any just cause recognized at law.

  Subsequent to the probationary period, the Employee understands and agrees that employment may be terminated at any time by the Employer providing the Employee with two (2) weeks of notice, pay in lieu of notice or a combination of both, at the Employer's option, plus one additional week of notice (or pay in lieu) for each year of completed service to a maximum of eight (8) weeks. In addition, after completing five (5) years of continuous employment, severance pay pursuant to the *Ontario Employment Standards Act, 2000* may be payable upon termination of employment in accordance with the terms of the *Ontario Employment Standards Act, 2000*. Upon receipt of the above notice (and severance pay if applicable) the Employee agrees that no further amounts shall be owing to him/her on account of the termination of the Employee's employment under statute or at common law. The provisions of the *Ontario Employment Standards Act, 2000*, as they may from time to time be amended, are deemed to be incorporated herein and shall prevail if greater."

4. *Tan v. Stostac Inc.*, 2023 ONSC 2121

History

- In *Rossman v. Canadian Solar Inc.*, 2019 ONCA 992, the termination clause that was considered ambiguous was found unenforceable, notwithstanding the *ESA* savings provision.
- The Court in *Rossman* held that employees need to understand the terms of their employment with certainty.
- Savings provisions, i.e. language to attempt to save a termination clause that contains a breach of the *ESA* will not cure the breach; the clause will be unenforceable

4. *Tan v. Stostac Inc.*, 2023 ONSC 2121

History

- In *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, the "with cause" portion of the termination clause violated the *ESA* and as a result rendered the entire clause void and unenforceable – it did not matter that the employee was not terminated for cause.
    - The termination clause in *Tan v. Stostac Inc. is* similar to that in *Waksdale* – the contract states that the employee can be terminated for just cause, without notice, which may fall short of non-trivial wilful misconduct. (see Ontario Regulation 288/01 – Termination and Severance of Employment)

4. *Tan v. Stostac Inc.*, 2023 ONSC 2121

The Court's Decision

- The termination clause is not enforceable regardless of the attempt to incorporate a savings provision and therefore the employee was entitled to reasonable notice at common law.
- In consideration of the employee's *Bardal* factors, he was granted 7 months of notice (without any deduction for his CERB payments)

4. *Tan v. Stostac Inc.*, 2023 ONSC 2121

Takeaways:

- A termination clause, even with an *ESA* savings provision, will not cure an unenforceable termination provision.
- It is important that employment contracts, including termination provisions, are drafted clearly and unambiguously
- CERB payments will not be considered in mitigation calculations.

5. *Kopyl v. Losani Homes* (1998) (2023 Superior Court of Justice – Unreported)

Facts

- The employee (Kopyl) and the employer (Losani) had entered into a 1 year, fixed-term employment agreement
- The employment contract contained a clause that addressed "Termination for Cause" and a further clause that provided for "Termination on Notice."
- The termination clauses limited Kopyl's entitlement to pay upon termination and are void as being contrary to the *Employment Standards Act, 2000* – this was not a contested issue between the parties.
- The employment contract was for a one-year term with a base salary of $150,000.00 per annum plus benefits.
- Before the end of the 1 year term, Losani terminated Kopyl's employment.

5. *Kopyl v. Losani Homes* (1998) (2023 Superior Court of Justice – Unreported)

Facts (continued)

- The issue was whether the invalid termination provisions would also result in the unenforceability of the 1 year fixed term
- Employee argued that she should be entitled to receive the money to which she would have been entitled had the contract gone until end of term.
- Employer argued that the clause fixing the employment term to be one year was a "termination clause" and was in violation of the *ESA*, therefore entitling Kopyl to reasonable notice.

5. *Kopyl v. Losani Homes* (1998) (2023 Superior Court of Justice – Unreported)

The Court's Decision

- Fixed-term contracts do not necessarily offend any provision of the *ESA*, nor do they restrict any common law rights of an employee.
- Even when there are separate and distinct termination clauses that are void in a fixed contract, this does not void the contract in its entirety.
- Employee was entitled to the wages and benefits she would have earned had the contract with the employer lasted until the end of the fixed term.

5. *Kopyl v. Losani Homes* (1998) (2023 Superior Court of Justice – Unreported)

Takeaways

- A void termination clause in a fixed-term contract does not automatically void the entire contract.
- If fixed-term contracts do not contain an enforceable termination provision, the employee is entitled to the wages and benefits to which they would be entitled had the contract lasted until the end of the fixed term.
- Having termination clauses reviewed by an employment lawyer remains crucial to ensure they are not found contrary to the *ESA*.

6. *Giduturi v LG Electronics Canada Inc.*, 2023 ONSC 5476 (CanLII)

Facts

- In 2006, the employee commenced employment as a warehouse packer with LG Electronics Canada ("LG"). According to the employment agreement, the employee was entitled to group medical benefits, six days of paid sick leave annually, and a 5% bonus contingent on individual and company performance.
- The employee received an annual salary of $44,250.48, and his performance reviews consistently reflected positive feedback, with no reported performance issues.
- In January 2021, LG declared its intention to outsource warehouse operations to Pantos, a third party. During the announcement, the employee was assured that his job responsibilities, compensation, and seniority would remain unchanged under Pantos.
- Contrary to this assurance, when presented with a written employment contract, the employee was offered "at-will employment" and faced a significant reduction in his total compensation.

6. *Giduturi v LG Electronics Canada Inc.*, 2023 ONSC 5476 (CanLII)

Facts (cont.)

- The new contract included out-of-pocket expenses for group benefits, and there were no provisions for paid sick days.
- Upon expressing concerns about these changes, Pantos modified its offer by increasing the base salary to compensate for the absence of paid sick days and the delay in the merit increase that the Plaintiff would have received at LG.
- Despite these adjustments, the employee remained dissatisfied with Pantos, citing concerns about its professionalism, corporate profile, and communication style.
- Consequently, the employee chose to decline Pantos' offer, leading to the issuance of a formal termination letter from LG.

6. *Giduturi v LG Electronics Canada Inc.*, 2023 ONSC 5476 (CanLII)

The Court's Decision

- Although employees are generally required to mitigate their damages by accepting offers of comparable employment, the Court determined that the employee's refusal to accept the new offer did not constitute failure to mitigate – Pantos' offer was withdrawn before the employee's termination
- Employee was awarded 12 months of pay in lieu of notice

6. *Giduturi v LG Electronics Canada Inc.*, 2023 ONSC 5476 (CanLII)

Takeaways

- The *Giduturi* decision underscores the importance for employers to extend offers of employment that remain open for acceptance until after the completion of the sale transaction. This practice provides employees with the chance to mitigate their losses by accepting re-employment.
- In the context of asset sales, purchasers must exercise utmost care when dealing with employees. Any offers of re-employment extended to the vendor's employees should closely mirror, if not replicate, their previous terms of employment. Failing to adhere to this principle can expose the employer to wrongful dismissal damages.

7. *Shalagin v. Mercer Celgar Limited Partnership*, 2023 BCCA 373 (CanLII)

Facts

- The employee, a certified professional accountant (CPA), served as a financial analyst for Mercer Celgar Limited Partnership (the employer). After a decade of employment, the employer terminated the employer without cause in 2020.
- Subsequent to the termination, the employee sued for wrongful dismissal in the Supreme Court of British Columbia, along with filing employment standards and human rights complaints.

7. *Shalagin v. Mercer Celgar Limited Partnership*, 2023 BCCA 373 (CanLII)

Facts (cont.)

- Throughout the legal proceedings, the employee divulged numerous documents exposing the fact that, over his decade-long tenure with the employer, he had secretly recorded numerous (more than 100) conversations in the workplace
- These recordings encompassed one-on-one sessions, meetings with managers and human resources personnel, safety meetings, and conversations with colleagues.
- Upon discovering these recordings, the employer modified its defence in the wrongful dismissal action, asserting that the recordings exhibited a lack of trustworthiness incompatible with ongoing employment. The recordings were cited as after-acquired cause justifying the employee's dismissal.
- The trial judge ultimately ruled that Mercer had successfully established just cause (after-acquired cause) for termination.

7. *Shalagin v. Mercer Celgar Limited Partnership*, 2023 BCCA 373 (CanLII)

BCCA Decision

- The Plaintiff appealed to the British Columbia Court of Appeal, contending that the trial judge had erred in applying the just cause test.
- Court of Appeal upheld the trial decision.
- The trial judge correctly analyzed the relevant facts and circumstances in determining that there was after-acquired cause.

7. *Shalagin v. Mercer Celgar Limited Partnership*, 2023 BCCA 373 (CanLII)

BCCA Decision

- The Court of Appeal emphasized that the trial judge's nuanced perspective recognized the need for a context-sensitive evaluation of the employee's actions.
- Regarding the recordings, the Court of Appeal held that "the recording activity was underhanded and would be regarded by most employers as misconduct undermining the trust relationship between employers and employees." Furthermore, the Court of Appeal concluded that the recordings infringed upon the privacy interests of individuals recorded, as well as those discussed in the recordings.

7. *Shalagin v. Mercer Celgar Limited Partnership*, 2023 BCCA 373 (CanLII)

Takeaways

- Following the termination of an employee's employment without cause, an employer may have grounds to subsequently assert after-acquired cause if it comes to light that the employee surreptitiously recorded conversations with colleagues during their tenure.
- The relevant factors include the employee's stated reasons for making the recordings, the length of time during which the recordings occurred, the amount of recordings, the sensitivity of the information captured, and whether the recordings were made in violation of the employer's policies

8. *R. v. Greater Sudbury (City),* 2023 SCC 28 (CanLII)

Facts

- The City of Greater Sudbury (City) initiated a construction project involving road and water main repair and entered into a contract with a general contractor (the Contractor) to oversee its completion. The Contractor assumed the role of the constructor under the *Occupational Health and Safety Act* (OHSA).
- While the City was the owner of the construction project, it did not directly employ any workers engaged in construction activities on-site. However, it periodically dispatched its employees to the worksite for inspection purposes, quality control monitoring, and progress tracking.

8. *R. v. Greater Sudbury (City),* 2023 SCC 28 (CanLII)

Facts (cont.)

- Tragically, in September 2015, a member of the public suffered fatal injuries when struck by a grader (a machine to level the ground, used when constructing a road, for example) operated by an employee of the Contractor. The incident occurred as the pedestrian was crossing a street at a traffic light within a designated construction zone.
- Notably absent from the worksite were protective measures such as fencing to separate pedestrians from equipment, a paid duty police officer to manage traffic, and a signaler for the grader.

8. *R. v. Greater Sudbury (City),* 2023 SCC 28 (CanLII)

Facts (cont.)

- The Ministry of Labour brought charges against both the City and the Contractor for various violations of the OHSA. The City faced charges in the capacities of both a "constructor" and an "employer" under the OHSA.
- The Contractor pled guilty and received a fine of $195,000 along with a 25% victim surcharge. Conversely, the City pleaded not guilty, leading to a trial.
- During the trial, the City was acquitted at trial and this acquittal was subsequently upheld by the Ontario Superior Court of Justice.
- Subsequently, the Crown appealed this decision to the Court of Appeal, contending that the provincial offences appeal court judge had erred in determining that the City did not qualify as an "employer" for the purposes of the OHSA.

8. *R. v. Greater Sudbury (City),* 2023 SCC 28 (CanLII)

Court of Appeal

- In a unanimous decision, the Court of Appeal allowed the appeal, overturning the ruling of the provincial offences appeal court judge.
- It found the City accountable under section 25(1)(c) of the OHSA as an employer and referred the matter of the City's due diligence back to the provincial offences appeal court.
- Subsequently, the City sought an appeal from the Supreme Court – the City argued that it ought not to be considered an employer pursuant to the OHSA for the purpose of the 25(1)(c) charges

8. *R. v. Greater Sudbury (City),* 2023 SCC 28 (CanLII)

Supreme Court Decision

- The Supreme Court dismissed the appeal
- The court endorsed and applied the definition of "employer" as established in its seminal 1992 decision of *R. v. Wyssen*, 1992 CanLII 7598 (ON CA).
  - In that 1992 decision, the Court of Appeal for Ontario eschewed, not embedded, a control requirement for who qualifies as an employer. In doing so, the court endorsed the “belt and braces” approach of placing overlapping responsibilities on all workplace actors, regardless of their level of control, in order to best protect worker safety. Blair J.A., for the majority, considered the text, context and purpose of s. 1(1) in concluding that the definition of “employer” is broad, unconnected to control, and encompasses two types of relationships: (1) where a person employs workers; and (2) where a person contracts for the services of workers.

8. *R. v. Greater Sudbury (City),* 2023 SCC 28 (CanLII)

Supreme Court Decision (cont.)

- It determined that "control" was not part of the definition of "employer" with regard to the OHSA charges
- Furthermore, the Supreme Court of Canada concluded that nothing in the text, context or purpose of the OHSA requires the Ministry to establish control over the workers or the workplace to prove that the City breached its obligations as an employer under s. 25(1)(c) of the OHSA.
- The Supreme Court's equal division ruling (4-4) had the effect of upholding the decision of the Court of Appeal.

8. *R. v. Greater Sudbury (City)*, 2023 SCC 28 (CanLII)

Takeaways

- An "owner" of a construction project can also be considered an "employer" with obligations to ensure safety on the project, even in circumstances where it does not employ workers performing the actual construction work on the project
- Therefore, an "owner" may now be liable for health and safety matters over which it exercises no day-to-day oversight or control.
- Control is not part of the test to determine the employer(s) with regard to the OHSA

9. *Dornan v New Brunswick (Health)*, 2023 CanLII 10433 (NB LA)

Facts

- On August 25, 2021, Dornan was appointed as the interim CEO of Horizon Health Network, one of New Brunswick's two health authorities. This appointment was made until the provincial department of health completed its search for a new permanent CEO.
- Subsequently, on February 28, 2022, the Minister of Health extended the offer of the permanent CEO position to Dornan for a five-year term. After some negotiation of the terms, Dornan formally accepted the position, and the Minister of Health publicly announced his appointment on March 4, 2022.
- Commencing his role as the permanent CEO on March 7, 2022, Dornan inquired about the existence of a contract for him to review and sign on March 15, 2022. Although the written offer letter was dated March 4, 2022, it was sent to him on March 23, 2022.

9. *Dornan v New Brunswick (Health)*, 2023 CanLII 10433 (NB LA)

Facts (cont.)

- However, the offer letter contained a termination clause allowing the minister to terminate Dornan's employment without cause. In the first year of the agreement, termination would result in 12 months of severance pay in lieu of notice, with reduced severance pay during the subsequent four years of the term.
- Notably, the offer letter did not advise Dornan to seek advice from independent legal counsel before endorsing it.
- Dornan found this inclusion surprising, as there had been no prior discussion of a termination clause during the negotiations. Had he been aware of such a provision, he would not have agreed to the permanent position.
- Approximately three months later, a death in the emergency room of a Fredericton hospital triggered a media backlash. An investigation determined that the death was unrelated to Dornan's management of Horizon.
- Despite the circumstances, the province did not hold a private meeting with Dornan to discuss the termination decision. Instead, the dismissal was publicly announced.

9. *Dornan v New Brunswick (Health)*, 2023 CanLII 10433 (NB LA)

Adjudicator's Findings

- The central issue revolved around determining whether the oral discussions established a binding oral employment contract or if the enforceability rested with the subsequent written offer. Additionally, if the written offer held validity, the question arose as to whether the severance was restricted by the termination clause.
- The adjudicator concluded that the termination provision lacked enforceability because the employer did not provide Dornan with additional consideration for the new terms introduced in the written contract. Consequently, the previous oral agreement governed the employment relationship.
- Furthermore, the employer's act of announcing the director's termination at a public news conference, implying his responsibility for a tragic medical incident at a hospital, demonstrated bad faith and inflicted mental stress upon Dornan.
- Given the unenforceability of the termination clause, Dornan was deemed entitled to lost salary and various benefits, including a car allowance, pension, and health and dental benefits, for the remainder of his 5-year term. Additionally, in addition to severance, Dornan was granted $200,000 in aggravated damages.
- In total, Dornan was awarded approximately $2 million in damages.

9. *Dornan v New Brunswick (Health)*, 2023 CanLII 10433 (NB LA)

Takeaways

- This decision serves as a crucial reminder for both employers and employees regarding the legal validity of verbal agreements pertaining to employment terms, underscoring that such verbal arrangements can indeed be legally binding employment contracts.
- Furthermore, it is important to provide fresh consideration to employees when the employer modifies fundamental terms of their employment. Neglecting to offer fresh consideration can have adverse implications for employers relying on these changes.
- The award of aggravated damages in this case signals a clear indication of adjudicators' readiness to hold employers accountable for their conduct during employee terminations. It highlights the potential financial implications that employers may face directly as a result of their actions in termination scenarios.
- Given these considerations, employers are strongly advised to thoughtfully assess the reasons for termination and to approach the process with careful consideration, aiming to avoid potential legal consequences.

10. *Imperial Oil Limited v. Haseeb,* 2023 ONCA 364

Facts

- Haseeb, an international student, submitted an application to Imperial Oil for a position as an entry-level project engineer.
- Imperial made an offer to Haseeb, which was conditional on him providing proof of Canadian citizenship or permanent residency.
- Despite not meeting this condition, during the recruitment process Haseeb conveyed that he possessed eligibility for permanent work in Canada.
- Ultimately, Haseeb was granted a conditional offer of employment, contingent on him providing evidence of his permanent eligibility to work in Canada.

10. *Imperial Oil Limited v. Haseeb,* 2023 ONCA 364

Facts (cont.)

- Subsequently, Mr. Haseeb revealed that he did not hold permanent residency but would be eligible to work full-time anywhere in Canada for up to three years with a Post-Graduate Work Permit ("PGWP").
- Upon learning that Haseeb was not a permanent resident, Imperial rescinded the conditional job offer on the basis that Haseeb did not meet the job requirements.
- In response, Mr. Haseeb filed a human rights application, asserting that the permanent residency requirement amounted to discrimination based on citizenship, contravening the Ontario Human Rights Code (the "Code").

10. *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364

Findings of the OHRC Interim Decision, in *Haseeb v. Imperial Oil*, 2018 HRTO 957,

- But for the "permanence requirement", the Tribunal found that Haseeb had met all other conditions of the offer of employment and would have been able to accept the offer by the stipulated deadline.
- The Tribunal's found the "permanence requirement" to be discriminatory based on the grounds of "citizenship".
- Although the Code does not provide a specific definition of "citizenship," an examination of the three defenses outlined in section 16 of the Code suggests that the legislature envisioned any stipulation or consideration distinguishing individuals based on "Canadian citizenship," "permanent residence" status, or "domicile in Canada with the intention to obtain citizenship" as constituting discrimination.
- This holds true unless the requirement is mandated or sanctioned by law, or the specified criteria are satisfied for each of the three defenses.
- Imperial Oil's requirement amounted to a direct breach of the Code when it distinguished among job candidates who were eligible to work in Canada on the basis of citizenship and created categories of "eligible" and "ineligible" for progressing through Imperial Oil's screening process.

10. *Imperial Oil Limited v. Haseeb,* 2023 ONCA 364

OHRC Decision on Remedy in *Haseeb v. Imperial Oil,* 2019 HRTO 1174,

- The HRTO issued this subsequent decision to determine the remedy Haseeb was entitled to following Imperial Oil's human rights violations.
- Haseeb sought compensation for the harm caused to his dignity, feelings, and self-respect, as well as the wages he lost due to Imperial Oil's refusal to hire him on the grounds of his non-Canadian citizenship.
- Upon reviewing all the evidence, the HRTO concluded that, had it not been for Imperial Oil's discriminatory consideration of Haseeb's permanent eligibility to work in Canada, he would have been hired. This conclusion was based on his top ranking in the job competition and the actual offer of employment extended to him.
- The HRTO found that Haseeb should entitled to claim lost income for the period from when he would have commenced employment with Imperial Oil (March 2015) until May 2019, reflecting the salary disparity between his actual job and the one he would have held at Imperial Oil.
- The HRTO awarded Haseeb over $120,000 for lost income, injury to dignity, feelings and self-respect, and pre-judgment interest.

<u>The HRTO's reasoning was based on the following:</u>

- ✓ Imperial Oil's decision to reject Haseeb for an entry-level engineering position at the onset of his career was notably severe.
- ✓ As a young professional aspiring to work in the oil and gas sector, Haseeb's career aspirations were effectively thwarted by this decision.
- ✓ He mitigated the impact on his lost wages by accepting a lower-paying job during the time of Imperial Oil's discrimination.
- ✓ Given Haseeb's status as an immigrant to Canada with uncertainties about his legal standing, his vulnerability is accentuated.
- ✓ Importantly, there should be no reduction in Haseeb's monetary compensation based on any dishonesty in the job application process, as it was a response to Imperial Oil's discriminatory conduct.

10. *Imperial Oil Limited v. Haseeb,* 2023 ONCA 364

Divisional Court

Upon seeking a reconsideration of the HRTO decision from Imperial Oil, the Divisional Court overturned the HRTO ruling. In essence, the Divisional Court determined that the term "permanent residency" did not fit within the limited definition of "citizenship" as outlined in the Code. Consequently, Imperial Oil's hiring policy was deemed not to be in violation of the Code.

At the Court of Appeal, the following issues were considered:

- Was the Tribunal's decision that Haseeb had standing to file an application claiming discrimination in employment on the basis of citizenship reasonable?
- Was the Tribunal's finding of a *prima facie* claim of employment discrimination on the basis of citizenship reasonable?
- Was the Tribunal's finding that Imperial withdrew the job offer because Haseeb was not a Canadian citizen or a permanent resident, rather than solely because of his dishonesty in the job competition, reasonable?
- Was the Tribunal's decision that the defence under 16(1) of the Code was not available to Imperial reasonable?

10. *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364

Court of Appeal Decision

The Ontario Court of Appeal granted Haseeb's appeal and reinstated the HRTO's decision. Given that this was an appeal stemming from a judicial review decision, the Court primarily constrained its examination to the reasonableness of the HRTO's findings.

- The Court confirmed the Tribunal's finding that Imperial rescinded the job offer due to the appellant not being a Canadian citizen or permanent resident, deeming it reasonable. Despite the acknowledgment of the appellant's admission to misleading Imperial Oil during the job competition process about his eligibility to work in Canada permanently, the Tribunal maintained that the appellant's dishonesty, while established, was not the sole reason for his non-hire after he had established a prima facie case of discrimination.
- Furthermore, the Court concurred with the Tribunal's decision that the defense under s.16(1) of the Code was not available to Imperial Oil, deeming it reasonable. Imperial Oil had failed to raise the s.16 defense before the Tribunal and attempted to introduce it in its application for judicial review.

What to Expect in 2024

1. Bill 149 – Working for Workers Four Act, 2023
2. Order in Council 1622/2023 – Licensing for Temporary Help Agencies and Recruiters – deadline to have a license is moved from January 1, 2024 to July 1, 2024
3. Bill 79, Working for Workers Act, 2023 – Occupational Health and Safety Act is amended to increase maximum corporate fine from $1.5M to $2M

What to Expect in 2024

4. Future of confidentiality agreements/non-disclosure agreements (NDAs) in Ontario

5. February 1, 2024, Amendments to the Canada Labour Code (will apply only to federally regulated employers)

6. Canada Revenue Agency (CRA) confirms that severance agreements which contain a tax indemnity clause are not reportable transactions

Bill 149 – Working for Workers Four Act, 2023

If enacted (currently at second reading stage), the proposed Bill would bring about significant changes to employment legislation in Ontario, specifically affecting the recruitment and hiring procedures:

1. Employers would be prohibited from mandating Canadian work experience in job postings or application forms;
2. Employers would be required to divulge expected compensation range in job postings; and
3. Employers would be mandated to disclose the utilization of Artificial Intelligence (AI) in the hiring process.

Bill 149 – Working for Workers Four Act, 2023

Bill 149 also proposes to address what the provincial government says are persistent issues in the restaurant industry by:

- Prohibit unpaid "trial" shifts;
- Explicitly state that employers cannot deduct an employee's wages in instances of dine-and-dash, gas-and-dash, or theft of any other property;
- Specify the methods through which employers must distribute employee tips; and
- Mandate employers, following a tip pooling practice, to prominently display the policy in the establishment.

Bill 149 – Working for Workers Four Act, 2023

Bill 149 has proposed changes to the *Workplace Safety and Insurance Act, 1997* (WSIA) concerning injured workers

- Introducing "Super Indexing": Bill 149 aims to empower the possibility of augmenting Workplace Safety and Insurance Board benefits beyond the yearly inflation rate. This modification is poised to result in elevated compensation for injured workers.
- Enhanced Cancer Coverage for Firefighters: Under Bill 149, there is a proposition to enhance cancer coverage for firefighters and fire investigators. This involves reducing the requisite duration of employment necessary to qualify for presumed (automatic) compensation before being diagnosed with esophageal cancer from 25 to 15 years.

Order in Council 1622/2023 – Licensing for Temporary Help Agencies and Recruiters

- The Ontario *Employment Standards Act*, 2000 (ESA) underwent amendments to introduce fresh licensing prerequisites for recruiters and temporary help agencies (THAs). Under the new framework, recruiters and THAs operating in Ontario must secure a license to avoid potential penalties.
- Recently, the province announced a shift in the deadline for temporary help agencies and recruiters to obtain their respective licenses. The deadline, initially set for January 1, 2024, has been extended to July 1, 2024. This extension grants THAs and recruiters an additional six months to complete the license application process.
- Starting from July 1, 2023, temporary help agencies are eligible to initiate the license application process. As a part of this procedure, they are required to furnish a $25,000 irrevocable letter of credit payable to the Director of Employment Standards. This serves the purpose of securing funds for potential repayment of owed wages to employees, if such a need arises. Furthermore, licenses must undergo an annual renewal process.
- The province has been open to accepting license applications since July 2023, and any submissions made within this timeframe are still considered valid.

Order in Council 1622/2023 – Licensing for Temporary Help Agencies and Recruiters

- The ESA now specifies that if an employee's termination is due to the Director's denial, revocation, or suspension of a license for a Temporary Help Agency (THA) or recruiter role, the employment contract is not considered impossible to perform or frustrated; would be treated as a termination without cause
- Providing false or misleading information during a licensing application can result in penalties. For the first violation, the penalty is CA$15,000, and for subsequent violations within a three-year period, it increases to CA$25,000 and CA$50,000.

Working for Workers Act – Occupational Health and Safety Act amended to increase maximum Corporate Fine

- The *Working for Workers Act* increased the maximum fine that could be imposed on a corporation for an offence under the *Occupational Health and Safety Act* from $1.5 million to $2 million.
- This amendment came into force as of October 26, 2023. The fine increase will not be enforced on corporations that are alleged to have committed an OHSA offence before October 26, 2023.
- This gives Ontario the highest maximum corporate fines under workplace health and safety legislation in Canada.

Future of Confidentiality Agreements/ NDAs in Ontario

- NDAs are legally enforceable agreements between parties that are used to maintain confidential information.
- Ontario has been considering banning the use of NDAs where there is a case regarding workplace sexual harassment, misconduct, or violence.
- Ontario has previously banned the use of NDAs in cases of sexual misconduct involving post-secondary employees who are looking for work at a different institution.
- The Canadian Bar Association has voted in support of discouraging the use of non-disclosure agreements in cases of abuse and harassment.

February 1, 2024, Amendments to the Canada Labour Code (will apply only to federally regulated employers)

- The Code previously provided for two weeks of notice of termination or wages in lieu thereof
- Commencing February 1, 2024, there are amended termination requirements - the notice period will depend upon the employee's consecutive years of continuous employment with the employer
- These changes to the length of the notice period only affect individual terminations (not group terminations)

February 1, 2024, Amendments to the Canada Labour Code (will apply only to federally regulated employers)

New notice requirements will be as follows:

- At least 3 consecutive months = 2 weeks
- At least 3 consecutive years = 3 weeks
- At least 4 consecutive years = 4 weeks
- At least 5 consecutive years = 5 weeks
- At least 6 consecutive years = 6 weeks
- At least 7 consecutive years = 7 weeks
- At least 8 consecutive years = 8 weeks

CRA Confirms that Severance Agreements Which Contain a Tax Indemnity Clause are Not Reportable Transactions

- The mandatory disclosure rules in respect of reportable transactions apply when two legislated criteria are met:
    1. A transaction or series of transactions has at least one of three generic hallmarks: contingent fee arrangements, confidential protection or contractual protection
    2. It can reasonably be concluded that one of the main purposes of entering into the transaction or series of transactions is to obtain a tax benefit
- The CRA has now expanded the examples of acceptable contractual clauses that would not normally trigger these disclosure rules

CRA Confirms that Severance Agreements Which Contain a Tax Indemnity Clause are Not Reportable Transactions

- CRA has further clarified the following:
  - The contractual protection hallmark will not apply in a normal commercial or investment context in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly, and does not extend contractual protection for a tax treatment in respect of an avoidance transaction. Without providing an exhaustive list of examples, these can include:

    ...

    - Tax indemnities in employment agreements and severance agreements

Questions?

Thank you.

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