## 2022 EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

# A YEAR IN REVIEW


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**DECEMBER 8, 2022**

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# LAND ACKNOWLEDGEMENT

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# LEGAL DISCLAIMER

- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details.
- For specific advice, please consult qualified legal counsel before making any decisions or taking any action.
- As things evolve, your best course of action could also evolve. Follow up to date and reliable sources for your information.

# AGENDA

1. Major Developments in the Law
2. People Behaving Badly
3. COVID-19's Impact on the Law
4. The Unrelenting Attack on Termination Clauses
5. The Look Forward
6. Questions

# MAJOR DEVELOPMENTS

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# MAJOR DEVELOPMENTS

- **Right to Disconnect**
  - S. 21.1.2 of the Employment Standards Act, 2000 now provides:
    - An employer that, on January 1 of any year, employs 25 or more employees shall, before March 1 of that year, ensure it has a written policy in place for all employees with respect to disconnecting from work that includes the date the policy was prepared and the date any changes were made to the policy.
    - Gowling WLG - On Demand Webinar (28 March 2022)

# MAJOR DEVELOPMENTS

- **Electronic Monitoring**
  - Section 41.1.1 (1)  of the Employment Standards Act, 2000 now provides:
    - An employer that, on January 1 of any year, employs 25 or more employees shall, before March 1 of that year, ensure it has a written policy in place for all employees with respect to electronic monitoring of employees.
    - Gowling WLG – On Demand Webinar (19 May 2022)

# PEOPLE BEHAVING BADLY

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# BEHAVIOUR THAT IS DELIBERATE & PREPLANNED

***Render v. ThyssenKrupp Elevator (Canada) Limited*****,** 2022 ONCA 310.

- Mr. Render was terminated for cause after slapping a female co-worker on her buttocks.
- Threshold for **just cause** under the common law: the employee's conduct was serious, meaning that careless, thoughtless, or inadvertent conduct would meet this threshold.
- Threshold for **wilful misconduct** under the ESA: the employee purposefully/planned conduct that they knew was serious misconduct.

# SEXUAL HARASSMENT NOT AN INDEPENDENT TORT AGAINST EMPLOYERS

***Incognito v. Skyservice Business Aviation Inc.*****,** 2022 ONSC 1795.

- Incognito brought a claim for damages against Skyservice Business Aviation's VP of Sales for sexual harassment and sexual assault **and** against Skyservice for vicarious liability for sexual harassment.
- No independent tort of sexual harassment in Ontario.
- Incognito cannot sue in court for a breach of the Ontario *Human Rights Code* unless there is a connection with another independent civil action.
- **Query**: what about constructive dismissal claims?

# WSIB COVERAGE: CLAIMS FOR WRONGFUL DISMISSAL CAN STILL BE LITIGATED

***Morningstar v. WSIAT*, 2021 ONSC 5576 (Divisional Court).**

- In 2019, WSIAT ruled that an employee could not sue for constructive dismissal arising from workplace bullying and harassment.
- Divisional Court concluded that civil suit for constructive dismissal not statute-barred.
- Further developments are needed to assess whether aggravated and exemplary damages will be permitted in this context.

# HARASSMENT INVESTIGATIONS: ADHERENCE TO STRICT PROTOCOLS & PROCEDURES

***Hucsko v. A.O. Smith Enterprises Limited*, 2021 ONCA 728.**

- Mr. Hucsko, a 62-year-old, was terminated for cause after 20 years of service, due to four separate incidents involving sexualized comments towards a female co-worker.
- Investigation concluded that Mr. Huscko did make inappropriate comments.
- Mr. Huscko refused to apologize.
- Trial judge found it was a “choice” as to which employee to terminate.
- Ontario Court of Appeal found that his lack of understanding of the seriousness of his conduct and his refusal to apologize for his inappropriate actions constituted cause.

# EMPLOYER'S BAD BEHAVIOUR DURING TERMINATION

***Humphrey v. Mene Inc***., 2022 ONCA 531.

- Humphrey was the Chief Operating Officer; terminated when she was 32 years of age; seems to have been terminated after she asked for a salary increase.
- Employer engaged in "reprehensible" litigation conduct.
- Others told of her termination before her; allegations of cause that were completely unsustainable.
- Nasty and abusive emails.
- Employee awarded $50,000 aggravated and $25,000 damaged in addition to regular wrongful dismissal damages and costs.

# COVID-19’S IMPACT ON THE LAW

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# *INFECTIOUS DISEASE EMERGENCY LEAVE*: THE LAW REMAINS UNCLEAR

***Taylor v. Hanley Hospitality Inc.***, 2022 ONCA 376.

- Employees who take IDEL are not entitled to notice or severance under the ESA;
- Legislation clarifies does not impact the employee's rights at common law.
- Taylor laid off from her job at Tim Horton's in March 2020 without pay.
- Subsequently recalled;
- Employee argued constructive dismissal at common law.
- <u>It is still very unclear whether an unpaid layoff or deemed Infectious Disease Emergency Leave (IDEL) constitutes a constructive dismissal at common law.</u>
  - In short, the law is as murky as it has been since the start of COVID-19 over two years ago.

# AN EMPLOYER'S WELCOME FOR MANDATORY VACCINATION POLICIES

***Parmar v. Tribe Management Inc*.,** 2022 BCSC 1675.

- Ms. Parmar, a senior finance manager, claimed she had been constructively dismissed from her employment. Ms. Parmar refused to comply with Tribe Management's mandatory vaccination policy. As a result, Ms. Parmar was placed on an unpaid leave of absence.
- **British Columbia Supreme Court:** Non-compliance with the policy was not based on medical or religious exemptions, it was purely based on personal beliefs.
  - The court took **judicial notice** of the dangers of COVID-19, and the efficacy of vaccines.
  - The employment contract expressly contemplated adherence to workplace policies.
  - Mandatory vaccination reflected the "prevailing approach at the time."
- **Caution:** It remains to be seen whether courts in different jurisdictions will apply similar reasoning.

# COVID-19 “BUMP UP”

***Pavlov v. The New Zealand and Australian Lamb Company Limited*****,** 2021 ONSC 7362.

- 47 year old Director of Marketing and Communication, nearly 3 years service. Terminated on May 28, 2020.
- Awarded 10 months of reasonable notice. Why? Court said the following about the availability of similar employment:
  - “*At the time of Pavlov’s dismissal, the initial effects of the global pandemic were being experienced by industries of all sorts, including those associated with international importing and distribution. It is a reasonable inference to draw from the evidence and the timing of the dismissal that the effects and uncertainties of the pandemic were obstacles to Pavlov’s efforts to obtain alternate employment. These obstacles would, or should, have been known to NZAL Co. at the time of Pavlov’s dismissal*.”
- Justice Stewart did not indicate how much of a bump was attributed to the pandemic.

# THE UNRELENTING ATTACK ON TERMINATION CLAUSES, POST *WAKSDALE*

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# THE IMPORTANCE OF CLEAR & ENFORCEABLE TERMINATION CLAUSES

***Rahman v. Cannon Design Architecture Inc*.,** 2022 ONCA 451.

- The employee, Ms. Rahman, was employed as a Senior Architect, Principal and Office Practice Leader for over four years.
- Ms. Rahman was sophisticated and there was clear mutual intent to comply with the minimum standards of the ESA.
- **Ontario Superior Court:** A contractual provision in an employment agreement which denies entitlements upon termination for just cause does not amount to an attempt to contract out of the ESA because, among other things, the employer and employee had equal bargaining power in negotiating the employment agreement in question and shared a mutual intention not to contract out of the ESA.
- **Ontario Court of Appeal:** Waksdale principal applies even when employee is sophisticated and has ILA.

# UNENFORCEABLE LANGUAGE ANYWHERE MAY INVALIDATE ENTIRE EMPLOYMENT AGREEMENT

***Henderson v. Slavkin et al*.,** 2022 ONSC 2964.

- Ms. Henderson executed an employment agreement after starting employment when her original employers started contemplating retirement from the practice of oral surgery.
- All employees were given new employment contracts;  Ms. Henderson never had a written employment contract prior to this.
- Ms. Henderson terminated years after her signing of the new employment agreement.
- She claimed that the agreement was unconscionable, contrary to the ESA.
- The Ontario Superior Court concluded that the termination provision itself was valid.
- Two clauses (conflict-of-interest and confidentiality) contained termination language referring to termination without notice for conduct that would not disentitle someone from ESA notice or pay in lieu.

# THE IMPORTANCE OF UNAMBIGUOUS TERMINATION CLAUSES

***Bryant v Parkland School Division*, 2022 ABCA 220.**

- Three employees, between 1999 to 2004, were hired to work primarily in information technology. In 2013, all three employees were dismissed without cause – each received 60 days' notice.
- Termination Clause: "This contract may be terminated by the Employee by giving to the Board thirty (30) days or more prior written notice, and by the Board upon giving the Employee sixty (60) days **or more** written notice."
- **Alberta Court of Appeal:** "[D]ifferent principles apply to the interpretation of employment contracts as opposed to other commercial contracts."
  - A "reasonable interpretation is that the employer intended the notice period to be in accordance with common law standards, subject to a minimum notice period of 60 days." The words "or more" created uncertainty.

# PRIOR NOTICE MAY "NEGATE" EMPLOYEE ENTITLEMENTS

***Battiston v. Microsoft Canada Inc.*****,** 2021 ONCA 727.

- Mr. Battiston was employed with Microsoft for approximately 23 years.
- Mr. Battiston received stock options for 16 years pursuant to Stock Award Agreement and accepted terms and conditions via click through agreements.
- The Court held that Mr. Battiston made the "conscious decision not to read the agreement" and therefore he was bound to the agreement as he was properly notified of its terms.
- [9] By misrepresenting his assent to [Microsoft], he put himself in a better position than an employee who did not misrepresent, thereby taking advantage of his own wrong.

# EMPLOYER MUST EXERCISE DISCRETIONARY BONUSES FAIRLY

***Bowen v. JC Clark Ltd*.,** 2022 ONCA 614.

- Two employees, Mr. Bowen and Mr. Wiseblatt, were portfolio managers at JC Clark, a hedge fund company.
- Two years after the merger, both employees were terminated without cause – they were given two weeks' salary plus $577 in lieu of notice.
- In response, both employees commenced a wrongful termination claim, seeking over $1.3 million in performance fees.
- The only issue on appeal was whether the employees were entitled to a higher percentage of performance fees. The impugned performance fees agreement set out that the Senior Professional of the hedge fund had the discretion to share his 40 per cent of any fees earned by the fund with the portfolio managers.
- **Ontario Court of Appeal:** The discretionary nature of the clauses does not bring with it unfettered discretion.

# THE LOOK FORWARD



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# THE LOOK FORWARD

1. **Wage/Hours/Class Action**
2. **Federally Regulated Employers**

   Sick Days / Pay Equity
3. **Workplace Investigations**


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# THANK YOU FOR ATTENDING

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