

Annual Employment Law Update

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Overview

- Each year there are amendments to legislation and case law decisions that impact your obligations, rights, and powers as an employer
- The purpose of today's webinar is to review a sampling of key legislative amendments and case law developments
- This webinar acts as a compliment to the issue specific seminars and webinars that we hold throughout the year
- This webinar touches on issues that impact all employers (unionized or not), for unionized employers, please note we hold a labour law update webinar in March each year
- This webinar should not be relied on in lieu of legal advice, and you should always consult with your employment lawyer to understand your legal options and obligations

Agenda

1. Legislative Amendments
 - i. Mediation Now Mandatory for Human Rights Complaints
 - ii. Long-Term Illness Leave
2. Caselaw Update
 - i. **Dufault, Jones, Li, and Chan** – Whether “At Any Time” Renders an Employment Agreement Unenforceable
 - ii. **Abbasbayli v. Fiera Foods Company** – Time Theft Establishes Cause
 - iii. **Horne v. Public Service Alliance of Canada** – Specific Job Posting Can Be Allowed
 - iv. **Preston v. Cervus Equipment Corporation** - Full and Final Release Precludes an Employee from Bringing Additional Claims against the Employer
 - v. **Johnstone v. Loblaw** – Settlement Terms are Binding
 - vi. **Metrolinx v. Amalgamated Transit Union Local 1587** - Employers can have a Duty to Investigate Claims of Harassment for Off-Duty Conduct When It Impacts the Workplace
 - vii. **Smith v. Lyndebrook Golf Inc.** - Fixed-Term Contracts Require Early Termination Provisions
 - viii. **Adrain v. Agricom International Inc.** - Failure to Work During a Period of Working Notice Leads to a Reduced Notice Period
 - ix. **Carroll v. Oracle Canada ULC** - Failure to Pay Statutory Entitlements at the time of Termination Leads to an Award of Punitive Damages

1) Legislative Amendments:

i) Mediation Now Mandatory for Human Rights Complaints

- Backlogs in obtaining trial and hearing dates in Ontario has been problematic for some time
- One way in which Courts and Tribunals can attempt to reduce backlogs is by requiring the parties to attend a mediation at the outset of a matter
- Mediation has been mandatory for many years for all civil claims issued in Toronto, Ottawa and Windsor
- In Small Claims Court matters, parties are required to attend a Settlement Conference, which acts as an informal mediation
- Mandatory Mediation has proven especially successful with respect to obtaining settlements in wrongful dismissal claims
- As a result, in wrongful dismissal claims the parties usually agree to attend a mediation right after pleadings have closed
- In human rights complaints, however, mediation has not been mandatory, it has only been voluntary

1) Legislative Amendments:

i) Mediation Now Mandatory for Human Rights Complaints

- This year, however, the Human Rights Tribunal of Ontario (“HRTO”) implemented a significant change to how human rights complaints will be dealt with
- To that end, effective June 1, 2025, all human rights complaints issued are now subject to mandatory mediation

1) Legislative Amendments:

i) Mediation Now Mandatory for Human Rights Complaints

- Now when a human rights complaint is filed:
 - The application will first undergo a preliminary review by the HRTTO to confirm the matter is within the HRTTO's mandate;
 - The HRTTO will then schedule a mandatory mediation;
 - Following the Mediation, parties must submit either a Form 25 (Confirmation of Settlement) or confirm that they wish to proceed with the Application;
 - If neither of the above is done, the Application may then be administratively dismissed; and
 - If the mediation is not successful, and if the parties confirm they wish to proceed, the matter then proceeds directly to a hearing

1) Legislative Amendments:

i) Mediation Now Mandatory for Human Rights Complaints

- It is the HRTO's hope that by making Mediation mandatory more complaints will settle at the outset and, therefore, reduce the current significant hearing backlog at the HRTO
- With respect to this, given the current backlog, it is common for hearings not to take place until more than 2 years after the Application was filed

1) Legislative Amendments:

ii) Long-Term Illness Leave

- The employment landscape in Ontario has been altered by a series of legislative amendments to the *Employment Standards Act, 2000*, and other statutes
- Currently before the Ontario legislature is the *Working for Workers Seven Act*, which will likely pass before the end of the year
- Before that there was the *Working for Workers Six Act, 2024*, which introduces a new job-protected leave for up to 27 weeks for long-term illness

1) Legislative Amendments:

ii) Long-Term Illness Leave

- As a result of this amendment and as of June 19, 2025, an employee qualifies for long-term illness leave without pay if:
 - The employee has been employed for at least 13 consecutive weeks;
 - The employee will not be performing the duties of the employee's position because of a serious medical condition; and
 - A qualified health practitioner issues a certificate that states the employee has a serious medical condition and the certificate sets out the period the employee will not be working.
- It is important to note that “serious medical condition” is not defined by the Act

1) Legislative Amendments:

ii) Long-Term Illness Leave

- Responding to leave requests remains one of the more complicated areas of day-to-day HR issues
- This is in part due to the overlapping and sometimes seemingly diverging obligations under the *ESA* and the Human Rights Code
- Employer should ensure that they are not unprepared and have a clear policy on long-term leave requests
- Further employers should ensure that their management staff know how to properly communicate with employees in regard to long-term leave requests

2) Caselaw Update

i) Whether “At Any Time” Renders an Employment Agreement Unenforceable

- The enforceability of a termination clause is the most litigated issue in employment law
- Recently, there has been a focus on whether the language “at any time” within a termination provision would render it unenforceable
- There are now conflicting decisions over whether this language would render the termination provision unenforceable
- In Dufault v. Township of Ignace, the Court held that an “at any time” clause — particularly when tied to employer “sole discretion”
- The court reasoned that the clause *could* allow termination during protected leaves or in reprisal situations
- The employee was therefore entitled to common law notice
- The Ontario Court of Appeal dismissed the employer’s appeal without addressing the clause wording, leaving the legal issue unresolved

2) Caselaw Update

i) Whether “At Any Time” Renders an Employment Agreement Unenforceable

- In Jones v. Strides Toronto, the Court upheld an “at any time” clause, distinguishing *Dufault* on the basis that discretion language was not present
- The court dismissed this argument, ruling “I find that the *Dufault* decision does not stand for the proposition that the words ‘at any time’ divorced from ‘sole discretion’ are improper in an employment contract”, and that the clause permitting dismissal “at any time” did not violate the *ESA*

2) Caselaw Update

i) Whether “At Any Time” Renders an Employment Agreement Unenforceable

- In Li v. Wayfair Canada ULC, the employment contract again contained a without cause termination clause which stated that he could be dismissed “at any time and for any reason” upon him being provided with his minimum entitlements under the *ESA*
- The court ruled that the clause did not violate the *ESA* when read as a whole

2) Caselaw Update

i) Whether “At Any Time” Renders an Employment Agreement Unenforceable

- In Chan v. NYX Capital Corp., the employment contract contained a probationary period clause stating that the company could dismiss him “at any time and for any reason at its discretion” within the first 3 months of his employment
- Further, the contract also included termination clauses providing that the employee could be dismissed “at any time” without cause upon being provided with his minimum entitlements under the *ESA*, or “at any time” for cause without any notice or pay in lieu of notice
- Ultimately, the court ruled that these termination clauses violated the *ESA* in multiple respects
- In reaching this decision, the court cited *Dufault* and *Baker* for the proposition that this type of language violates the *ESA*
- The Court also concluded that the for cause language was an *ESA* violation as the threshold under the Act is “willful misconduct”

2) Caselaw Update

i) Whether “At Any Time” Renders an Employment Agreement Unenforceable

- These cases create a clear lack of consistency, leaving employers and employees unclear as to whether termination clauses permitting dismissal “at any time” are unenforceable for violating the *ESA*
- Going forward, employers should strongly consider updating their employment offers and employment agreements to remove any “at any time” language
- This evolving caselaw also reaffirms the best practice of updating an employee’s employment agreement with each promotion or substantial bonus

2) Caselaw Update

ii) Time Theft Establishes Cause

- Several major employers have recently moved toward mandatory in-office work citing concerns that remote work may increase time theft
- While employers may believe time theft is tied to remote work, courts recognize that time theft can occur in-person as well
- Helpfully, in the decision of *Abbasbayli v. Fiera Foods Company*, the Court confirmed that time theft — when supported by a proper investigation — can justify dismissal for cause

2) Caselaw Update

ii) Time Theft Establishes Cause

- In that case, the employee of 13 years terminated after employer discovered falsified punch-in/out records via time card logs and video surveillance
- The employee denied wrongdoing and alleged he was being framed
- The employer conducted a thorough workplace investigation and gave an opportunity for the employee to respond
- The Court upheld termination for cause, finding that time theft and dishonesty during the investigation “went to the heart of the employment relationship”

2) Caselaw Update

ii) Time Theft Establishes Cause

- This case highlight that with a proper investigation (which includes allowing the employee to respond to the allegations and allowing the employee to express remorse) an employer can dismiss an employee for cause

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2) Caselaw Update

iii) Specific Job Postings Can Be Allowed

- Sometimes, for a of reasons, employers will advertise opportunities for a specific group of people (e.g. women)
- In Horne v. Public Service Alliance of Canada, the employer had posted a women-only job opportunity
- The employer was seeking to address that women remain underrepresented in professional and management roles, based on analysis and data
- A discrimination claim was brought by a union
- The employer relied on section 14 of the Code, which provides complete protection for bona fide special programs designed to address historical and systemic disadvantage

2) Caselaw Update

iii) Specific Job Postings Can Be Allowed

- The Tribunal determined that the position was permitted, as it was part of a documented special program addressing systemic disadvantage under the Human Rights Code
- Employers should keep this exception in mind if they are intending to take action to address systemic barriers or discrimination, which in turn could be perceived to be discriminatory

2) Caselaw Update

iv) Full and Final Release Precludes an Employee from Bringing Additional Claims against the Employer

- The importance of obtaining a Full and Final Release when reaching a settlement with a terminated employee was highlighted in the recent Ontario Court of Appeal decision ***Preston v. Cervus Equipment Corporation***
- In this case, an employee was terminated on a without cause basis
- At the time of termination, the Plaintiff had vested stock options worth approximately \$76,000.00
- The employer's stock option plan stipulated that upon any termination of employment, all vested stock would automatically be redeemed
- The employee retained counsel and issued a wrongful dismissal claim
- The employee, however, made did not include the vested stock options in the claim, notwithstanding the fact he had received no payment for his stock options when the Claim was issued
- The parties settled the action and executed Minutes of Settlement
- The terminated employee also executed a Full and Final Release

2) Caselaw Update

iv) Full and Final Release Precludes an Employee from Bringing Additional Claims against the Employer

- The Release specifically released the employer from all further liability, including any liability related to stock options
- After the Full and Final Release had been executed by the Plaintiff, he requested that the employer provide him with payment for the stock options
- The employer refused the employee's request, relying on the Full and Final Release the Plaintiff had executed
- As a result of the non-payment of the stock options, the settlement only netted the Plaintiff approximately \$7,000.00
- In response, the employee brought a Summary Judgment Motion relating to the stock options
- The Court granted the employee's motion and ordered the employer to pay the amount of the stock options

2) Caselaw Update

iv) Full and Final Release Precludes an Employee from Bringing Additional Claims against the Employer

- The employer appealed and the Summary Judgment decision was overturned by the Ontario Court of Appeal
- The Court of Appeal held that the Judge on the Summary Judgment Motion had made an error by failing to acknowledge that the Full and Final Release specifically released any claims for stock options
- The Court of Appeal also held that the Judge on the Summary Judgment Motion should not have considered the economic benefits of the settlement, as the Plaintiff was not under a disability and had been represented by Counsel
- This decision highlights the need for parties to ensure that all matters have been fully addressed included in the settlement documents prior to signing the settlement documents

2) Caselaw Update

iv) Full and Final Release Precludes an Employee from Bringing Additional Claims against the Employer

- This decision also highlights the benefits that employers receive when requiring a Release to be a term of the settlement
- If an employer fails to obtain a Release, it may inadvertently wind up funding a terminated employee's litigation

2) Caselaw Update

v) Settlement Terms are Binding

- In a similar recent Ontario decision, ***Johnstone v. Loblaw***, the Court confirmed that once the terms of a settlement have been reached, they cannot be altered or added to by a party
- In this case, after the Plaintiff's employment was terminated on a without cause basis he retained counsel and the parties entered into settlement negotiations
- After a counteroffer was made by Loblaw, the Plaintiff's counsel wrote to counsel for Loblaw stating, in part:
 - I can confirm receipt of instructions to accept your most recent proposal, subject to mutual agreement on the supporting documentation that I would suggest you prepare for our review

2) Caselaw Update

v) Settlement Terms are Binding

- Loblaw's counsel then prepared Minutes of Settlement which reflect the terms contained in its last offer, as well as a Release
- Rather than signing the Minutes of Settlement and the Release, the Plaintiff attempted to add three additional terms to the settlement
- Loblaw refused to add these, stating the additional terms had not been raised during the negotiations and also had not been part of its last offer which the Plaintiff had accepted
- As a result, the Plaintiff commenced a claim
- The Court dismissed the Plaintiff's claim holding that the three additional items raised by the Plaintiff were an attempt to change essential terms of the Agreement

2) Caselaw Update

v) Settlement Terms are Binding

- This decision highlights the importance to both employers and employees in ensuring that all matters which they wish to be part of a negotiated settlement have been addressed to their satisfaction before confirming the matter has settled

2) Caselaw Update

vi) Employers can have a Duty to Investigate Claims of Harassment for Off-Duty Conduct When It Impacts the Workplace

- In *Metrolinx v. Amalgamated Transit Union Local 1587*, five employees participated outside of work in a private WhatsApp groupchat on their personal devices
- In the groupchat the employees, amongst other things, made derogatory and sexist comments about other employees, including comments relating to other employees' actions in the workplace
- One of the targeted employees received screenshots of these messages while she was at work
- The employee reported the groupchat screenshots to management
- The employee, however, indicated that she did not wish to have the matter investigated
- Notwithstanding this, the employer did conduct an investigation

2) Caselaw Update

vi) Employers can have a Duty to Investigate Claims of Harassment for Off-Duty Conduct When It Impacts the Workplace

- At the end of the investigation, the employer terminated the five employees for cause on the basis of sexual harassment
- The Union grieved the terminations
- The Arbitrator allowed the grievances and ordered that all five employees were to be reinstated with full back wages
- The employer appealed the Arbitrator's decision to the Ontario Divisional Court
- The Arbitrator's decision was overturned by the Divisional Court
- In particular, the Divisional Court held that the Arbitrator had failed to consider the employer's obligations under the *Occupational Health and Safety Act* ("OHSA") to investigate workplace harassment

2) Caselaw Update

vi) Employers can have a Duty to Investigate Claims of Harassment for Off-Duty Conduct When It Impacts the Workplace

- The Divisional Court also held that the Arbitrator had incorrectly concluded that the off-duty conduct did not have an impact on the workplace given that the screenshots had been sent to the employee while at work, the screenshots were referencing work-related matters as well as other employees, and the screenshots had also impacted the employee while at work
- The Divisional Court further held that the employer had a duty to investigate and discipline as appropriate even when the impacted employee chooses not to make a complaint
- The Union appealed the Divisional Court's decision to the Ontario Court of Appeal
- The Court of Appeal dismissed the Union's Appeal

2) Caselaw Update

vi) Employers can have a Duty to Investigate Claims of Harassment for Off-Duty Conduct When It Impacts the Workplace

- In dismissing the Union's Appeal, the Court of Appeal stated that "an employer's duty to investigate is not just a duty owed to the victim, but to all employees, who have a right to work in an environment free from demeaning and offensive comments"
- This decision highlights the fact that employers can have a duty under OHSA to investigate harassment complaints even when no complaint is filed
- This decision also shows that off-duty conduct can be subject to discipline when it negatively impacts the workplace

2) Caselaw Update

vii) Fixed-Term Contracts Require Early Termination Provisions

- Employers often think that providing an employee with a Fixed-Term Employment Agreement as opposed to an Agreement of indefinite hire can reduce, or even eliminate, an employer's termination liabilities
- Using Fixed-Term Employment Agreements, however, can lead to unintended negative consequences for employers
- For instance, when an employer is happy with the employee's performance, it can forget to enter into a new employment agreement with the employee prior to the end of the Fixed-Term Agreement
- If this happens, the employer then loses all of the benefits and protections it had in the Fixed-Term Agreement
- Further, not including an early termination provision in a Fixed-Term Employment Agreement can lead to increased termination liabilities for an employer

2) Caselaw Update

vii) Fixed-Term Contracts Require Early Termination Provisions

- In *Smith v. Lyndebrook Golf Inc.*, the employer entered into a six-month Fixed-Term Employment Agreement with a seasonal employee
- The employee was terminated on a without cause basis after one month
- The employee then brought a wrongful dismissal claim
- The Court held that as the Fixed-Term Agreement did not provide for early termination, the employee was entitled to receive pay in lieu of notice for five months, which was the balance of the fixed-term
- Also, as the Agreement had no early termination provision, the Court held that the duty to mitigate did not apply to the terminated employee
- Therefore, the employer was required to pay the five months even if the terminated employee found another job during the notice period
- This case highlights the fact that if it is not properly drafted, a Fixed-Term Employment Agreement can increase, rather than reduce, an employer's termination liabilities

2) Caselaw Update

viii) Failure to Work During a Period of Working Notice Leads to a Reduced Notice Period

- In *Adrain v. Agricom International Inc.*, an employee with over 30 years tenure was provided 13 months working notice of termination
- In an effort to obtain a longer notice period the employee retained counsel who sent demand letters and ultimately issued a claim
- In response, and after the employee had worked 1.5 months of the 13-month working notice period, the employer terminated the employee's employment
- The Court held that sending demand letters and issuing a claim did not provide the employer with just cause to terminate
- The Court, however, also held that not continuing to work during the working notice period constituted a repudiation of the employment contract on the part of the employee

2) Caselaw Update

viii) Failure to Work During a Period of Working Notice Leads to a Reduced Notice Period

- As a result of the employee's failure to work out the balance of the working notice period, the employee's notice period was reduced by the 11.5 months which were remaining in the working notice period
- This decision highlights the need for employees to continue to work during a working notice period even if the employee is entitled to a longer notice period than what the working notice provides
- As there is a two-year limitation period for issuing wrongful dismissal claims, employees may choose to wait until the working notice is over before issuing a claim

2) Caselaw Update

ix) Failure to Pay Statutory Entitlements at the time of Termination Leads to an Award of Punitive Damages

- In ***Carroll v. Oracle Canada ULC***, the Plaintiff, an employee with approximately 3.5 years tenure was terminated due to a company downsizing
- At the time of termination, the employee earned a base salary of \$180,000.00
- The employee, however, was also entitled to earn commissions
- In fact, the employee earned significantly more in commissions than he earned in base salary
- A negotiated settlement was not reached and Carroll brought a wrongful dismissal claim
- At the time of termination, Oracle purported to pay out Carroll his statutory entitlements
- Oracle did not, however, pay Carroll the \$57,740.75 he was owed in commissions at the time of termination

2) Caselaw Update

ix) Failure to Pay Statutory Entitlements at the time of Termination Leads to an Award of Punitive Damages

- Instead, Oracle only paid the commissions 8 months after the termination and after a claim had been issued
- As part of its Judgment, the Court awarded Carroll punitive damages of \$57,740.75, an amount equal to the unpaid commissions
- This decision reinforces the fact that earned commissions are considered wages and must be paid to a terminated employee even if no settlement is reached and even if a wrongful dismissal claim is issued
- This decision is also one of a number of recent decisions where Courts have awarded punitive damages when employers have failed to fully provide terminated employees with their entitlements under the Ontario *Employment Standards Act, 2000* at the time of termination

Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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