
Termination of Employment: New Risks and Best Practices

The webinar will begin at 9:00 a.m. EST – March 8, 2023



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Agenda

■ Employment Contract Considerations

- Recent caselaw on the enforceability of termination clauses
- When will ancillary terms jeopardize a termination clause?

■ The Duty to Mitigate

- An update on the duty to mitigate
- Risks associated with the termination of a fixed term employment contract

Agenda

■ Damages for “Bad Faith” Claims

- ❑ What should (and should not) be included in the termination letter
- ❑ How to minimize the risk of reputational damage to an employee post-termination
- ❑ When will delay in the payment of statutory entitlements increase an employer’s potential liability?

■ Post-Termination Income

- ❑ The impact of Canada Emergency Relief Benefit (CERB) payments on a damage award

Employment Contract Considerations



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Employment Contract Considerations

- An employment contract can:
 - Be an effective tool to limit an employee's entitlement to notice on termination of employment
 - Provide certainty and clarity to both parties
- Caselaw has historically focused on whether “without cause” termination language is valid and enforceable

Employment Contract Considerations

- However, in recent decisions, courts have ruled that even valid and enforceable “without cause” language will be void if other termination language in the contract does not meet or exceed the minimum statutory entitlements (e.g., Ontario *Employment Standards Act, 2000*)

Employment Contract Considerations

Waksdale v Swegon North America, 2020 ONCA 391

- Employee was terminated without cause
- “Without cause” language limited employee to ESA (Ontario) minimums only
- “Just cause” language stated employee not entitled to any notice or pay in *lieu* if terminated for cause, and outlined conduct that would constitute cause

Employment Contract Considerations

Waksdale v Swegon North America, 2020 ONCA 391

- Parties agreed that just cause provision was invalid because it did not comply with the ESA
 - There are circumstances where an employee's conduct constitutes "just cause" at common law but the employee is still entitled to termination and severance pay because conduct does not meet "wilful misconduct" standard
- Without cause provision did not violate the ESA

Employment Contract Considerations

Waksdale v Swegon North America, 2020 ONCA 391

- Employee argued the invalid just cause provision invalidated the otherwise enforceable without cause provision
- Court agreed - employee entitled to pay in *lieu* of reasonable notice

Employment Contract Considerations

Rahman v Cannon Design Architecture, 2022 ONCA 451

- Employee terminated without cause
- As in *Waksdale*, contract had a valid without cause provision and a just cause provision that disentitled employee to any notice or pay in *lieu*
- Relying on *Waksdale*, employee argued the invalid just cause provision rendered the without cause provision void

Employment Contract Considerations

Rahman v Cannon Design Architecture, 2022 ONCA 451

- Trial court rejected *Waksdale* approach and noted the “broader context” had to be considered
 - Sophisticated parties, represented by counsel
- “No basis” to imply the phrase “just cause” imported a standard below wilful misconduct in the ESA - upheld both termination provisions

Employment Contract Considerations

Rahman v Cannon Design Architecture, 2022 ONCA 451

- Court of Appeal disagreed and followed *Waksdale*
- Termination language, not circumstances in which it was negotiated, determines if provision complies with ESA
- Just cause provision will violate ESA if it does not account for higher standard of wilful misconduct

Employment Contract Considerations

Henderson v. Slavkin et al., 2022 ONSC 2964

- Employee terminated without cause
- Contract had a valid without cause provision
- Two additional, separate contractual terms (conflict of interest and confidentiality) both stated a breach would constitute just cause without notice or pay in *lieu*

Employment Contract Considerations

Henderson v. Slavkin et al., 2022 ONSC 2964

- Court held there could be circumstances where a breach of either provision would not constitute “wilful misconduct” under the ESA
- As such these provisions were void and, per *Waksdale*, invalidated the without cause provision

Employment Contract Considerations

Nader v University Health Network, 2022 ONCA 856

- Employee terminated without cause
- Contract entitled employee to twelve months’ “salary” on termination without cause
 - Critically, “salary” was not defined
- Employee argued the twelve-month payment should include an amount in *lieu* of his annual bonus

Employment Contract Considerations

Nader v University Health Network, 2022 ONCA 856

- Court agreed and included bonus in calculation of damages
 - Bonus was a substantial and integral part of the employee's overall compensation
 - Employee would have earned bonus had he not been terminated

Employment Contract Considerations- Takeaways

- An employment contract will be interpreted as a whole
 - If any language contemplates termination for cause without minimum ESA entitlements, all termination language will likely fall
- Drafting precision is **key**
 - Failure to do so will generally be interpreted in the most employee friendly-way

Employment Contract Considerations- Takeaways

- Review employment contracts regularly to ensure they comply with the ever-changing case law
- Sherrard Kuzz can assist - reach out for help!

Duty to Mitigate



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Duty to Mitigate

Tarras v Municipal Infrastructure Group, 2022 ONSC 4522

- Employment contract for fixed term of three years
- Employee terminated without cause one year into term
- Contract had early termination language but it was unenforceable, per *Waksdale*, because it provided no notice for “just cause” termination

Duty to Mitigate

Tarras v Municipal Infrastructure Group, 2022 ONSC 4522

- Employee claimed damages equivalent to the remaining two years' of the contract as pay in *lieu* of notice
- Court confirmed a fixed term contract without enforceable early termination language obligates employer to pay employee **to the end of the term**
- No duty to mitigate

Duty to Mitigate

Summers v Oz Optics Limited, 2022 ONSC 6225

- Employee terminated without cause
- Was not offered re-employment assistance and remained unemployed eight months
- Sent resume to 30 relevant employers, used Indeed, and networked with contacts
 - Attended five interviews but received no offers

Duty to Mitigate

Summers v Oz Optics Limited, 2022 ONSC 6225

- At trial, employer argued employee failed to mitigate and filed as evidence job postings it claimed employee ought to have pursued
- Employer had burden to prove employee did not conduct a reasonable job search
- Court held employer did not meet this burden

Duty to Mitigate

Summers v Oz Optics Limited, 2022 ONSC 6225

- Job search must be reasonable, but standard is not perfection
- No expert evidence the postings were suitable or would have likely resulted in employment
- Damage award was not reduced for a failure to mitigate

Duty to Mitigate

Lake v La Presse, 2022 ONCA 742

- General manager in charge of a sales team terminated when office closed five years into employment
- Remained unemployed two years later, despite being provided outplacement services

Duty to Mitigate

Lake v La Presse, 2022 ONCA 742

- Employer argued employee failed to appropriately mitigate:
 - ❑ Delayed job search for more than four months
 - ❑ Failed to use outplacement services for two months
 - ❑ Applied for higher - level positions than previous role
- Trial judge agreed - discounted eight-month notice period by two months

Duty to Mitigate

Lake v La Presse, 2022 ONCA 742

- Court of Appeal disagreed and reversed trial judge's finding on the failure to mitigate
- Held the duty to mitigate required the employee to seek 'comparable employment', *i.e.* work similar in status, hours and remuneration

Duty to Mitigate

Lake v La Presse, 2022 ONCA 742

- Employer failed to lead evidence jobs applied for were unsuitable
 - Instead, too much emphasis placed on job titles - no evidence led about the nature of the work to suggest it was not suitable alternative employment
- No obligation to take a lower-paid role

Duty to Mitigate - Takeaways

- Burden to demonstrate failure to mitigate is high but there are steps an employer can take:
 - Provide outplacement counselling
 - Provide a positive reference letter (if possible) to assist in the job search
 - Research comparable positions with a focus on the nature of the job and not just the title

Duty to Mitigate - Takeaways

- ❑ Forward available positions to employee for their consideration
- ❑ Retain search results and all communication with employee or their counsel to provide as evidence at trial
- If entering into a fixed term contract, ensure termination language is enforceable and allows for early termination
- Reach out to any member of the Sherrard Kuzz team

Damages for “Bad Faith” Conduct



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Damages for “Bad Faith” Conduct

- Increasingly, employee claims include allegations of “bad faith” conduct
- Seek aggravated or punitive damages beyond damages for reasonable notice
- Bad faith damage awards on the rise
- In some cases, employer conduct not particularly egregious

Damages for “Bad Faith” Conduct

Chu v China Southern Airlines, 2023 BCSC 21

- Employee commenced claim after terminated for cause
- Also claimed damages for the bad faith conduct of employer in the manner of termination and its litigation conduct
- Court awarded employee **\$150,000** in aggravated and punitive damages

Damages for “Bad Faith” Conduct

Chu v China Southern Airlines, 2023 BCSC 21

- Aggravated damages are awarded when employer fails to act in good faith in the manner of dismissal and causes mental distress
- Court held employer knew employee was in a vulnerable position as a 68-year old with limited work opportunities
- Awarded \$50,000 in aggravated damages

Damages for “Bad Faith” Conduct

Chu v China Southern Airlines, 2023 BCSC 21

- Court found bad faith conduct included:
 - ❑ Unfair, humiliating discipline
 - ❑ Employee was demoted and pay reduced in attempt to force employee to resign
 - ❑ Employer publicly tarnished employee’s reputation
 - ❑ Employer refused to provide a ROE

Damages for “Bad Faith” Conduct

Chu v China Southern Airlines, 2023 BCSC 21

- Court also awarded \$100,000 in punitive damages
- Punitive damages are awarded in exceptional cases if a wrongful act is so malicious and outrageous it deserves punishment
- Warranted due to employer’s conduct post-termination and in the litigation

Bad Faith and the Manner of Termination

Chu v China Southern Airlines, 2023 BCSC 21

- Employer had:
 - ❑ Made serious false allegations against employee in public forum making it difficult for him to obtain employment
 - ❑ Engaged in “hardball” tactics during litigation designed to cause a substantial delay
 - ❑ Failed to comply with a court order

Damages for “Bad Faith” Conduct

Pohl v Hudson’s Bay Company, 2022 ONSC 5230

- Position eliminated and employee terminated without cause after 28 years of employment
- Employee claimed aggravated and punitive damages in addition to reasonable notice
- Court awarded \$45,000 in aggravated (moral) and \$10,000 punitive damages

Bad Faith and the Manner of Termination

Pohl v Hudson's Bay Company, 2022 ONSC 5230

- Employer walked the employee out immediately after termination meeting - this was held to be humiliating and embarrassing to the employee, and unnecessary given the reason for termination

Damages for “Bad Faith” Conduct

Pohl v Hudson’s Bay Company, 2022 ONSC 5230

- Employee had been provided with an offer of alternative employment in a lower position the court ruled was designed to “extinguish” employee’s existing rights
- Employer made ESA related payments in installments and not in a lump sum and did not comply with request for a lump sum payment for two months post-termination

Damages for “Bad Faith” Conduct

Pohl v Hudson’s Bay Company, 2022 ONSC 5230

- Employer delayed issuing ROE for two months and when ROE was issued it incorrectly stated reason for termination
- Court held the failure to pay wages in accordance with the ESA and the failure to issue a timely and correct ROE justified \$10,000 punitive damages award

Damages for “Bad Faith” Conduct

Russell v The Brick Warehouse LP, 2021 ONSC 4822

- Employee terminated without cause
- Claimed damages for reasonable notice as well as aggravated damages related to employer’s conduct in the termination
- Court awarded employee \$25,000 in aggravated damages

Damages for “Bad Faith” Conduct

Russell v The Brick Warehouse LP, 2021 ONSC 4822

- Conduct giving rise to “bad faith” damages:
 - ❑ Termination letter failed to advise employee would be paid out ESA minimums if he did not accept the gratuitous offer
 - ❑ Failed to advise of continuation of benefits
 - ❑ Inadvertently delayed paying out correct amount of termination and severance pay to employee’s RRSP

Damages for “Bad Faith” Conduct

Moffat v. Prospera Credit Union, 2021 BCSC 2463

- Employee terminated without cause
- Claimed reasonable notice damages and aggravated and punitive damages for bad faith conduct during termination
- Awarded equivalent of 2.5 months’ salary in punitive damages

Damages for “Bad Faith” Conduct

Moffat v. Prospera Credit Union, 2021 BCSC 2463

- Conduct giving rise to punitive damage award:
 - Termination letter offered employee only two weeks of notice (or pay in *lieu*) which was less than her contractual or common law entitlement
 - Also required employee to sign release and agree to a 12-month non-solicitation clause as a condition of payment

Damages for “Bad Faith” Conduct

Moffat v. Prospera Credit Union, 2021 BCSC 2463

- These two terms were inadvertent mistakes, corrected by the employer once raised by employee counsel
- Court still awarded punitive damages to deter employers from similar mistakes in the future

Damages for “Bad Faith” Conduct - Takeaways

- Avoid “trumping up” a case for cause
- Treat employee with respect post-termination
 - Reconsider termination practices to evaluate if they may unnecessarily demean or embarrass an employee
- Be mindful of comments made about employee (and reasons for termination) to others, including the public

Damages for “Bad Faith” Conduct- Takeaways

- Mistakes and inadvertent errors will not shield employer from liability
- Ensure termination letter and post-termination conduct comply with ESA requirements and are accurately drafted
- Appreciate, in some cases, the court will look dimly on hard ball litigation tactics

Post-Termination Income



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Post-Termination Income

- Post-termination income is generally deducted from any wrongful dismissal damages award
- Since COVID-19, various lower-level courts have considered if Canada Emergency Response Benefit (“CERB”) payments should be treated as mitigation income
- Decisions have gone both ways

Post-Termination Income

Yates v Langley Motor Sport Centre Ltd, 2022 BCCA 398

- Employee laid off due to COVID-19 pandemic
- She was not recalled and was deemed terminated
- During the layoff, she received CERB totaling \$10,000

Post-Termination Income

Yates v Langley Motor Sport Centre Ltd, 2022 BCCA 398

- Trial judge deducted CERB from damages for wrongful dismissal
- Court of Appeal disagreed and held that this amount should **not** be deducted from post-termination income
 - Policy considerations supported idea that any “windfall” that resulted ought to go to worker, not employer

Post-Termination Income - Takeaways

- Decision in *Yates* was the first appellate level decision to consider this issue
 - Has since been followed by Alberta Court of Appeal
- Reasonable to expect this settles the issue
- CERB amounts will not be deducted from any wrongful dismissal damages going forward

Questions?



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