

## Breakfast Seminar Series 2016 Employment Law Year End Wrap Up

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## Session Overview

- **Employment Law Update**
  - Must a termination provision refer specifically to benefits to limit entitlements to *ESA* minimums only?
  - What are the risks of using fixed-term contracts?
  - What is the test for establishing family status discrimination in Ontario?
  - What are the risks of playing hardball when terminating employees?
  - When must employers give reasons for without cause terminations?

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## Session Overview

### ▫ **Employment Law Update**

- When will courts refuse to uphold restrictive covenants?
- How can employers ensure contracts are valid and enforceable?
- When will employers be liable to pay bonuses during periods of reasonable notice?
- Can employees contract out of their right to sue their employers in negligence for a workplace accident?
- Can federal sector employers dismiss employees without cause?
- What are the current trends in damages awards?

## Session Overview

### ▫ **Legislative Update**

- The Changing Workplaces Review
- *ESA* amendments to protect tips
- New protections for child performers
- Changes to police record checks
- Preventing sexual harassment
- Changes to EI waiting period
- Changes to support first responders
- *AODA* 2017 compliance deadlines

# Employment Law Update

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## *Oudin v. Centre Francophone de Toronto*, 2016 ONCA 514

### **Facts:**

- Oudin, a project manager, terminated without cause after 13 years
- Termination provision referred only to minimum notice prescribed by the *ESA*, but not to benefits

### **Superior Court Finding:**

- No attempt to contract out of *ESA* entitlements
- Contract upheld as valid

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## *Oudin v. Centre Francophone de Toronto*, 2016 ONCA 514

### **Court of Appeal Finding:**

- Appeal dismissed
- No attempt to contract out of *ESA*
- Parties had agreed that *ESA* would be respected
- Motion judge's interpretation entitled to deference

## *Oudin v. Centre Francophone de Toronto*, 2016 ONCA 514

### **Practical Implications:**

- As the Motion Judge observed, “the law is nowhere near as clear as we wish it would be on this point”
- When drafting contracts, employers should be aware of the changing case law on limiting employee entitlements to the minimum statutory requirements
- Better safe than sorry

## *Howard v. Benson Group Inc.,* 2016 ONCA 256

### **Facts:**

- Employee terminated after nearly 2 years in to a 5-year term contract
- Contract provided:
  - Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the *Employment Standards Act* of Ontario.

### **Superior Court Finding:**

- Clause ambiguous and unenforceable
- Employee entitled to common law reasonable notice of termination

## *Howard v. Benson Group Inc.,* 2016 ONCA 256

### **Court of Appeal Finding:**

- Where no provision for early termination of fixed-term contract, employee entitled to damages for wages that would have been paid to end of term
- No obligation to mitigate where no provision to that effect

*Howard v. Benson Group Inc.,*  
2016 ONCA 256

**Practical Implications:**

- Use fixed-term employment agreements cautiously and sparingly
- Ensure early termination provisions are enforceable
- Beware of the possibility of double-dipping, where an employee need not mitigate and finds new work

*Misetich v. Value Village Stores Inc.,*  
2016 HRTO 1229

**Facts:**

- Applicant claimed employer discriminated on the basis of family status by requiring her to work evening, weekend and on call shifts, which she claimed conflicted with her eldercare obligations to her mother
- Applicant refused to provide supporting information about mother's health needs
- Applicant did not attend scheduled shifts and was terminated for job abandonment

## *Misetich v. Value Village Stores Inc.,* 2016 HRTO 1229

### **HRTO Finding:**

- Rejected *Johnstone* test for family status discrimination
- “[...] *the employee will have to do more than simply establish a negative impact on a family need. The negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee’s work.*”
- Application dismissed

## *Misetich v. Value Village Stores Inc.,* 2016 HRTO 1229

### **Practical Implications:**

- *Johnstone* test remains the law for employers governed by the *Canadian Human Rights Act*
- For provincially-regulated employers, the usual test for discrimination applies to family status discrimination
- Employers must be flexible in considering ways to accommodate employees’ family-related needs
- Employees must cooperate fully in the accommodation process and provide pertinent information required to canvass solutions

## *Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725

### **Facts:**

- 58-year-old regional sales manager terminated with 8 years' service
- Employer offered 5 months' notice, including 1 month working notice
- Employer asserted just cause, failed to provide ROE, and failed to pay statutory minimums in an attempt to lower severance amounts

## *Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725

### **Superior Court Finding:**

- Employee entitled to 12 months' notice
- Employer's actions were reprehensible, warranting punitive damages of \$50,000 for "bad faith"
- No aggravated damages due to lack of medical evidence

## *Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725

### **Practical Implications:**

- Employers may put themselves at risk by playing hardball in negotiations with employees
- Act reasonably and in good faith at time of termination
- Do not allege cause unless you have it

## *Mezin v. HMQ*, 2016 ONSC 5171

### **Facts:**

- Plaintiff alleged wrongful dismissal, breach of duties of honesty and good faith, breach of *Human Rights Code*, and infliction of mental distress
- Defendants denied “any and all allegations,” claiming to have had performance concerns
- Plaintiff served Demand for Particulars, then motion pursuant to Rule 25.10 to order particulars

## *Mezin v. HMQ*, 2016 ONSC 5171

### **Superior Court Finding:**

- Defendants ordered to provide particulars of alleged misconduct to allow Plaintiff to meet case
- Order for particulars is discretionary
- In the circumstances, test for ordering particulars met

## *Mezin v. HMQ*, 2016 ONSC 5171

### **Practical Implications:**

- Employers accused of violating statutory prohibitions against termination of employment must be prepared to demonstrate they were not motivated by prohibited factors...even where the termination is without cause
- Employer bears onus of demonstrating what it alleges; in this case, performance concerns

## Restrictive Covenants

- Employers may seek to enforce restrictive covenants against former employees by way of injunction or by claiming breach of contract
- Courts have confirmed they will not uphold clauses that essentially seek to prevent competition
  - *Donaldson Travel Inc. v. Murphy*, 2016 ONCA 649
  - *Benson Kearley and Associates Insurance Brokers v. Valerio*, 2016 ONSC 4290

## *Donaldson Travel Inc. v. Murphy*, 2016 ONCA 649

### **Facts:**

- Employer commenced action against former employee for breach of employment contract
- Restrictive Covenant provided:
  - *[Employee] agrees that in the event of termination or resignation that she will not solicit or accept business from any corporate accounts or customers that are serviced by [Employer], directly, or indirectly*

### **Superior Court Finding:**

- Provision not enforceable against employee
- Based mainly on “or accept business,” clause restricted competition and was not simply a non-solicit clause

*Donaldson Travel Inc. v. Murphy,*  
2016 ONCA 649

**Court of Appeal Finding:**

- Motion decision upheld
- Restrictive covenant was in fact a non-competition clause, which, notably, contained no temporal limitation
- Clause unreasonable and unenforceable

*Donaldson Travel Inc. v. Murphy,*  
2016 ONCA 649

**Practical Implications:**

- Courts will not sever offending portions of a clause to remove offending words and create a legally enforceable agreement
- Non-solicit clauses that amount to non-competition clauses will not be upheld, particularly if reasonable limitations on scope, time, and location are not included

## *Buaron v. AcuityAds Inc., 2015 ONSC 5774*

### **Facts:**

- Employee was recruited from a competitor
- Key terms of employment discussed in interview and confirmed in letter
- Letter did not reference employer's standard employment contract
- After resigning old position, employee received full contract with severely limited termination provision
- Terminated without cause 9 months later and paid in accordance with contract

## *Buaron v. AcuityAds Inc., 2015 ONSC 5774*

### **Superior Court Finding:**

- Comprehensive contract not enforceable; common law governed
- Employment contract was formed when letter setting out key terms received
- No new consideration was given to vary existing agreement
- Reference to contracts in covering email was not clear indication that relationship was to be governed by comprehensive agreement
- Awarded 4 months' notice and costs

## *Buaron v. AcuityAds Inc., 2015 ONSC 5774*

### **Practical Implications:**

- Ensure that any discussions prior to employment are not so detailed as to constitute an enforceable contract
- Advise potential employees that offers are conditional upon execution of a formal employment agreement
- Avoid brief offer letters; rather, set out all terms and conditions in **one** document

## *Paquette v. TeraGo Networks Inc., 2016 ONCA 618*

### **Facts:**

- 49-year-old Director terminated without cause
- Employee brought summary judgment motion to determine reasonable notice period and other issues, including compensation for lost bonus

### **Motion Judge Finding:**

- Awarded a 17-month reasonable notice period
- Concluded employee not entitled to bonus during notice period because, while he was notionally employed, bonus plan required that he be “**actively** employed” at the date of the bonus pay out

*Paquette v. TeraGo Networks Inc.,*  
2016 ONCA 618

**Court of Appeal Finding:**

- If a bonus was an integral part of the employee's compensation, damages for reasonable notice will usually include bonuses they would have received if they had continued employment during the notice period
  - Exception: if the bonus plan "**specifically** limited or restricted that right"
    - An "active employment" requirement is an insufficient limit

*Paquette v. TeraGo Networks Inc.,*  
2016 ONCA 618

**Practical Implications:**

- An "active employment" requirement alone is insufficient to exclude liability for bonuses during the reasonable notice period
- To effectively exclude liability for bonuses, clear and unambiguous contractual language is required, as is consistency with the bonus plan

## *Fleming v. Massey, 2016 ONCA 70*

### **Facts:**

- Employer held a go-kart race at which the employee was injured
- Employees had signed waivers releasing employer from any liability for all damages associated with participation for any cause
- Employee brought action for damages

### **Superior Court Finding:**

- Action dismissed on basis of waiver

## *Fleming v. Massey, 2016 ONCA 70*

### **Court of Appeal Finding:**

- Appeal allowed
- Employee had statutory right under *WSIA* to sue employer
- Public policy demanded that uninsured employees not be permitted to contract out of *WSIA* protections
- Waiver voided by *WSIA*

## *Fleming v. Massey*, 2016 ONCA 70

### **Practical Implications:**

- Note that employee was not covered by WSIB
  - If he were, would not have been permitted to sue employer
- Contracts that waive/limit liability for workplace injury will not be valid **where no WSIB coverage**
- In such cases, consider voluntary WSIB coverage

## *Wilson v. AECL*, 2016 SCC 29

### **Facts:**

- Administrator with no disciplinary history and 4.5 years' service dismissed without cause
- Provided with 6 months' pay on termination
- Filed *Canada Labour Code* s. 240 unjust dismissal complaint, claiming dismissal was a reprisal

## *Wilson v. AECL, 2016 SCC 29*

### **Supreme Court of Canada Finding:**

- Overturned lower court findings: the *CLC* does **not** allow dismissal without cause for non-unionized employees employed for more than 12 consecutive months
- Federally-regulated employers therefore require legal just cause to terminate employment for such employees
- Remains to be answered whether employers also need just cause to terminate employees employed for less than 12 months

## *Wilson v. AECL, 2016 SCC 29*

### **Practical Implications:**

- **Federally-regulated** employers cannot terminate employees with at least 12 months' service without just cause
- Just because an employee is on probation does not mean they can simply be terminated

# Remedies Update

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## Human Rights Damages in Civil Claims for Wrongful Dismissal

### ***Strudwick v. Applied Consumer & Clinical Evaluations Inc.,*** **2016 ONCA 520**

- ONCA nearly doubled initial damages award
  - Notice period: 24 months
  - Human rights damages: \$40,000
  - Damages for intentional infliction of mental distress: \$35,294
  - Aggravated damages: \$70,000
  - Punitive damages: \$55,000
- TOTAL: \$247,850.79, reduced to \$240,000 to account for limits imposed by Statement of Claim

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## Reinstatement as Human Rights Remedy

### ***Hamilton-Wentworth District School Board v. Fair,* 2016 ONCA 421**

- Upheld HRTO remedy decision, which awarded:
  - Reinstatement to suitable employment
  - Loss of wages from date of termination to date of reinstatement, including pension contributions and accounting for tax, EI and CPP implications
  - General damages: \$30,000
  - Interest from November 2004

## Calculating Common Law Reasonable Notice

- *Bardal* factors to be considered:
  - Character of employment
  - Length of service
  - Age
  - Availability of similar employment, having regard to experience, training, and qualifications

## Lengthening Notice Periods

### ***Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79**

- Dependent contractors awarded 26 months' reasonable notice in "exceptional circumstances"
  - Ages (63 and 61)
  - Lengths of service (32 and 25 years)
  - Character of positions (supervisory)

## Significant Amendments to Employment Legislation

## The Changing Workplaces Review

- An independent review commissioned by the Ontario Government to seek recommendations for legislative change to employment and labour laws in Ontario
- The Interim Report released July 27, 2016 set out a number of options to overhaul:
  - The *Employment Standards Act, 2000*, and
  - The *Labour Relations Act*
- Emond Harnden filed submissions in response in October 2016

## ESA Amendments to Protect Tips

- Bill 12, *Protecting Employees' Tips Act, 2015*
- In force as of June 10, 2016
- Amends *ESA* to prohibit employers from withholding, making deductions from, or causing employees to return tips or other gratuities

## New Protections for Child Performers

- Bill 17, *Protecting Child Performers Act, 2015*
- In force as of February 5, 2016
- Protections for child performers in live and recorded entertainment
- Enforcement mechanisms in *ESA* and *Occupational Health and Safety Act*

## Changes to Police Record Checks

- Bill 113, *Police Record Checks Reform Act, 2015*
- Not yet in force
- Creates standardized process by which police reference checks are requested, conducted, obtained
- Limits disclosure of certain information (e.g. mental health records, non-conviction records, records from police carding checks)
- Individual checked has final say whether to disclose results to potential employer

## Preventing Sexual Harassment

- Bill 132, *Sexual Violence and Harassment Action Plan Act, 2016*
- In force as of September 8, 2016
- New requirements to prevent and investigate sexual harassment in the workplace
- Addition of “workplace sexual harassment” to current definition of “workplace harassment”
- Obligation to create and administer policy on sexual harassment, in addition to harassment
- Requirement to investigate **all** complaints of workplace harassment
- Inspector may order employer to retain an independent investigator, at employer’s expense

## Changes to EI Waiting Period

- As of January 1, 2017, EI waiting period reduced from 2 weeks to 1 week
- For all EI benefits:
  - Regular
  - Special (sickness, maternity, parental, compassionate care, parents of critically ill children)
  - Self-employed special benefits
  - Fishing
- No change to total number of weeks of EI benefits payable

## Changes to Support First Responders

- Bill 163, *Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder)*, 2016
- In force as of April 6, 2016
- Amends *Workplace Safety and Insurance Act* and *Ministry of Labour Act*
- Presumption that PTSD diagnosed in first responders is work-related
- Onus on employer to rebut that presumption

## AODA: 2017 Compliance Deadlines

- January 1, 2017:
  - Large organizations and not-for-profits (50 or more employees) must make new or redeveloped spaces accessible
  - Small organizations and not-for-profits (1-49 employees) must:
    - Make public information accessible when asked
    - Make employment practices accessible
- December 31, 2017:
  - All employers with 20+ employees must file an online Accessibility Compliance Report



Questions?



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