

YEAR END WRAP UP

An Employer's Guide to the Year's Most Compelling Legislative and Employment Law Developments

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Session Overview

- You will receive an overview of the most important developments from 2013 to present
- For each topic you will receive:
 - Highlights of the important features of the development
 - A “bottom line” analysis of the impact of the development on your workplace

Employment Law Update

Deductibility of Income Replacement Benefits from Termination Entitlements

- Double recovery?
- Disability benefits
 - *Sylvester v. British Columbia* (1997 – SCC)
- Pension benefits
 - *Waterman v. IBM Canada Limited* (2013 – SCC)
 - Distinguished *Sylvester*
- Nature and purpose of the benefits
- Intention of the parties

Waterman v. IBM Canada Ltd. **(2013 – SCC)**

Facts

- Waterman, age 65 with 42 years service, terminated due to corporate restructuring and provided 2 months notice
- Following termination, began receiving full pension benefits under employer-funded defined benefit pension plan
- Waterman had no intention of retiring, declined severance package and sued IBM for wrongful dismissal
- Awarded an additional 18 months at trial with no deduction of pension benefits paid during the notice period
- Employer appeal dismissed by BCCA and SCC

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Waterman v. IBM Canada Ltd. **(2013 – SCC)**

SCC Findings

- Pension benefits are not deductible from wrongful dismissal damages
- Pension benefits not an indemnity for loss of earnings, but form of retirement savings
- Even though IBM made all the contributions, Waterman's entitlement was earned through his years of service
- Employment contract did not prohibit receiving both pension and employment income
- Broader policy considerations – allowing deduction could provide economic incentive to employers to dismiss pensionable employees

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Practical Implications

- *Waterman* decision is consistent with previous case law
 - Courts have generally refused to deduct pension benefits from wrongful dismissal damages during the reasonable notice period
- Deductibility is a matter of contract interpretation
- SCC suggested employers may be able to provide express provision for deductibility of benefits in employment contracts

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General Motors of Canada Ltd v. Johnson (2013 – ONCA)

Facts

- 8 year employee alleged racism from colleague
- GM conducted 3 separate investigations which did not find evidence of racial discrimination
- Employee disagreed and went on 2 year medical leave claiming disability arising from discriminatory treatment
- Refused to return to work in same workplace as colleague
- After offer of alternate employment, GM concluded employee had resigned
- Employee sued for constructive dismissal and trial judge awarded \$160,000 in wrongful dismissal, special and *Wallace* damages
- Trial judge ruled that conduct of GM and certain employees created a poisoned work environment

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General Motors of Canada Ltd v. Johnson (2013 – ONCA)

Findings

- Court found that the evidentiary record did not support finding of racism
- Claims of poisoned work environment must meet following legal tests:
 - Plaintiff must provide evidence that, to the objective reasonable bystander, would support same conclusion
 - Serious wrongful behaviour that creates a hostile or intolerable work environment must usually be persistent or repeated
- Constructive dismissal test is no less stringent yet not supported by a single incident
- Court overturned the trial judge's decision

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Practical Implications

- Confirms high threshold for establishing a poisoned work environment and constructive dismissal
- Onus is on the plaintiff to substantiate claim of poisoned work environment
- Thorough investigations are key
- Take all workplace human rights complaints seriously and fully document entire process

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Chevalier v. Active Tire & Auto Centre (2013 – ONCA)

Facts

- Chevalier, manager of automotive and tire centre with 33 years service, laid off due to economic reasons
- Chevalier commenced wrongful dismissal action 2 weeks later
- Employer quickly rescinded layoff notice, apologized and offered Chevalier his job back on same terms
- Chevalier declined and alleged work environment had become poisoned
- Employer admitted layoff was a constructive dismissal but alleged Chevalier failed to mitigate his damages by refusing to return to work

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Chevalier v. Active Tire & Auto Centre (2013 – ONCA)

Findings

- Trial decision upheld
- Reasonable person test
- Relied on SCC 2008 decision in *Evans*
- Offer included same salary, benefits and responsibilities
- Relationship had not become acrimonious – conduct of employer had not been objectionable, intent to improve Chevalier's performance
- Refusal to return to work was unreasonable and Chevalier failed to mitigate his losses
- \$57,500 in costs to the employer (\$50,000 at trial; \$7,500 CA)

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Practical Implications

- Dismissed employees must make reasonable efforts to mitigate their damages
- Onus is on the employer to prove failure to mitigate
- Offer to return should be on same terms and conditions that existed at time of layoff
- Provide for ability to temporarily layoff in employment contract to avoid potential for constructive dismissal

Damages Update

Wilson v. Solis Mexican Foods Inc. **(2013 – Ont. S.C.J.)**

Facts

- Employee with 16 months service dismissed without cause and given 2 weeks' pay
- Employee suffered temporary back problems and sought accommodations to return to work after short absence
- Employer insisted on complete recovery prior to return
- Employer terminated employee based on claim of “organizational changes”

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Wilson v. Solis Mexican Foods Inc. **(2013 – Ont. S.C.J.)**

Findings

- Under 2008 changes to OHRC (s. 46.1) – courts permitted to award damages for violations of Code rights
- Awarded \$20,000 for violation of human rights
- Also awarded 3 months reasonable notice and legal costs
- Judge concluded Wilson's physical disability (ongoing back ailment) was a significant factor in the termination

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Practical Implications

- Temporary ailments and illnesses are considered disabilities under human rights
- Duty to accommodate to the point of undue hardship
- Potential for more discrimination claims coupled with wrongful dismissal
- Reminder that disability must not be factor in decision to terminate

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Pate Estate v. Galway-Cavendish and Harvey (Township) (2013 – ONCA)

Facts

- Complex litigation (criminal prosecution, wrongful dismissal litigation, appeals and re-trials)
- Pate, building inspector, terminated for allegedly failing to remit permit fees
- Employer contacted police and Pate charged criminally
- At criminal trial, revealed Township's investigation was flawed
 - Township failed to inform police of existence of exculpatory evidence
- Pate acquitted of all criminal charges
- Pate filed a civil action seeking damages for wrongful dismissal, loss of reputation, malicious prosecution, punitive and aggravated damages

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Pate Estate v. Galway-Cavendish and Harvey (Township) (2013 – ONCA)

Findings

- Court of Appeal reduced punitive damages from \$550,000 to \$450,000
 - Trial judge erred in determining quantum
 - What amount was rationally required to meet objectives of “retribution, deterrence and denunciation”
- Upheld finding Township was liable for malicious prosecution
 - Township knowingly withheld exculpatory evidence from police
 - Police could not reasonably be expected to find this evidence in their investigation

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Practical Implications

- When conducting investigations important to provide procedural fairness – provide employees with particulars and allow opportunity to respond
- Neutral investigation is critical
 - Trained 3rd party investigator familiar with the law and employer’s procedures and policies
- Proper investigation that meets procedural fairness will significantly limit employer’s legal liability when imposing discipline for employee misconduct

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Fair v. Hamilton-Wentworth District School Board (2013 – HRTO)

Facts

- Employee worked as Supervisor responsible for the Board's asbestos removal projects
- Stressful position, fear in making mistake and being held personally liable under the OHSA
- Employee developed anxiety disorder and went on LTD
- After 2 years, LTD provider determined employee capable of gainful employment and terminated benefits
- Employee not fit to return to previous position
- Employer determined it could not accommodate employee and terminated employment

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Fair v. Hamilton-Wentworth District School Board (2013 – HRTO)

Findings

- Employee fulfilled obligation to co-operate fully in the accommodation process
- Employer failed to “actively, promptly and diligently” canvass possible solutions to accommodate and offer alternative work
- Decision on remedy following 2012 decision
 - Reinstatement to suitable employment
 - Training to prepare for return to work
 - Calculation of 10 years worth of lost wages (\$419,238.89)
 - Employer pension contributions/additional costs to buy back service
 - Out-of-pocket medical/dental expenses since 2004
 - \$30,000 for injury to dignity, feelings and self-respect
- Judicial review to be heard week of February 23rd

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Practical Implications

- Important to manage human rights complaints as quickly as possible
- Example of significant liabilities where procedural duty to accommodate not met
- Must explore all possible options for accommodation including job vacancies
- Employer's responsibility to clarify ambiguous medical information

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R. v. Metron Construction Corporation (2013 – ONCA)

Facts

- In December 2009, 4 Metron workers were killed when a swing stage collapsed and fell 14 floors
- Separate charges and fines were ordered against Metron and the owner
- Metron liable for acts of its site supervisor who was aware, or ought to have been aware of the unsafe working conditions at the time of the accident

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R. v. Metron Construction Corporation (2013 – ONCA)

Findings

- Metron was fined \$200,000 plus an additional 15% Victim Fine Surcharge for criminal negligence under Bill C-45
- The owner was fined a total of \$90,000 plus a 25% Victim Fine Surcharge for violations under the OHSA
- The Crown filed an appeal of the judge's decision, seeking a \$1,000,000 fine against Metron
- ONCA increased fine to \$750,000

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Practical Implications

- Provide up to date safety training and maintain training records
- Courts and the Crown will ensure that serious penalties are imposed for workplace accidents

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Legislative Update

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OHS Awareness and Training (O. Reg. 297/13)

- New regulation in force July 1, 2014
- Requires completion of mandatory basic OHS awareness training for workers and additional training for supervisors
- Time frame for completion:
 - Workers – as soon as practicable following July 1st
 - Supervisors – within 1 week of supervisor performing work as a supervisor following July 1st

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Workers Training – Minimum Content

- Duties and rights of workers under OHSA
- Duties of employers and supervisors under OHSA
- Roles of H&S representatives and JH&SC under OHSA
- Roles of Ministry, the WSIB and designated entities under s. 22.5 of the OHSA
- Common workplace hazards
- WHMIS requirements regarding information and instruction on controlled products
- Occupational illness, including latency

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Supervisors Training – Minimum Content

- Duties and rights of workers under OHSA
- Duties of employers and supervisors under OHSA
- Roles of H&S representatives and JH&SC under OHSA
- Roles of Ministry, the WSIB and designated entities under s. 22.5 of the OHSA
- How to recognize, access and control workplace hazards and evaluate those controls
- Sources of information on OHS

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OHS Awareness and Training (O. Reg. 297/13)

- Exemptions:
 - Completed awareness training with either current or previous employer
 - Must provide proof and employer must verify comparable training
 - Current supervisors who completed a supervisor awareness training before regulation comes into force do not have to complete the worker awareness training
- Record of Training, Employer Obligations:
 - Maintain record training was completed and record of exemption
 - On request of worker or supervisor, required to provide written proof of completion of training/exemption (up to 6 months after ceases employment)

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MOL Compliance Resource Tools

- Online training tools, eLearning module
- Printed workbooks and employer guides
- <https://www.labour.gov.on.ca/english/hs/training/index.php>
- MOL is developing additional resources

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Minimum Wage – ESA, 2000

- Minimum Wage Advisory Panel released its report December, 2013
- Government announced on January 30, 2014 it was raising minimum wage
- Increases effective June 1, 2014:
 - General Minimum Wage – increased from \$10.25 to \$11.00
 - Student Minimum Wage – increased from \$9.60 to \$10.30
 - Liquor Servers Minimum Wage – increased from \$8.90 to \$9.55

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Employment Standards Act, 2000 New Proposed Leaves

- Bill 21, the *Employment Standards Amendment Act (Leaves to Help Families) 2013* introduced March 5, 2013
- Provides job-protection for 3 new categories of unpaid leaves of absence:
 - Family Caregiver Leave – up to 8 weeks
 - Critically Ill Child Care Leave – up to 37 weeks
 - Crime-Related Child Death and Disappearance Leave
 - Death of child – up to 104 weeks
 - Disappearance of child – up to 52 weeks
- 3rd reading December 3, 2013

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Bill 146 – Stronger Workplaces for a Stronger Economy Act, 2013

- Introduced December 4, 2013
- Amends a number of employment-related statutes:
 - *Employment Protection for Foreign Nationals Act (Live-In Caregivers and Others), 2009*
 - *Employment Standards Act, 2000*
 - *Labour Relations Act, 1995*
 - *Occupational Health and Safety Act*
 - *Workplace Safety and Insurance Act, 1997*
- Various effective dates for proposed amendments

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Bill 146 – Proposed ESA Amendments

Wage Claims:

- Extends limitation periods from 6/12 months to 2 years
- Removes \$10,000 cap on MOL orders for unpaid wages

Compliance Measures:

- Requires employers to provide copy of MOL poster to each employee
- Permits ESOs to require an employer to conduct a “self-audit” and report results to the ESO

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Bill 146 – Temporary Help Agencies

- Shared liability for unpaid wages and workplace injuries

ESA:

- Makes clients of temporary agencies jointly and severally liable for unpaid wages (regular wages and overtime) to assignment workers
- Requires both agency and client to maintain records of hours worked by each assignment employee

WSIA:

- Assigns workplace injury costs to temporary help agency clients
- Reporting obligations on client – notify WSIB within 3 days of learning of assignment employee's injury

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Bill 146 – Other Amendments

OHSA

- Expands definition of “worker” – to include unpaid workers such as co-op students and interns

LRA

- Reduces “open period” in construction industry from 90 to 60 days

Employment Protection for Foreign Nationals Act (Live-In Caregivers and Others), 2009

- Extends its application to all foreign nationals employed or attempting to find employment in Ontario

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Accessibility for Ontarians with Disabilities Act, 2005 (AODA)

- AODA enacted in 2005
- Goal: Make Ontario totally accessible by 2025
- Applicable to EVERY employer in Ontario (even if there is only 1 employee)
- AODA and Standards – 5 general areas
 1. Customer Service
 2. Transportation
 3. Information and Communications
 4. Employment
 5. Built Environment

Customer Service Standard

- Effective January 1, 2008
- Designated public sector organizations – January 1, 2010
- Private and not-for-profit organizations – January 1, 2012
- Private and not-for-profit organizations (20 or more employees)
 - File accessibility reports – December 31, 2012

Integrated Accessibility Standards Upcoming Compliance Deadlines

- Compliance deadlines range from January 1, 2013 to January 1, 2021
- Obligations depend on status of employer:
 - Government of Ontario and Legislative Assembly
 - Large designated public sector organizations (50+ employees)
 - Small designated public sector organizations (1-49 employees)
 - Private and not-for-profit organizations (50+ employees)
 - Private and not-for profit organizations (1-49 employees)

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Integrated Accessibility Standards You Should Already be in Compliance

- January 1, 2012
- Information and Communications
 - Emergency and public safety information
- Employment
 - Workplace emergency information

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AODA Wizard Tool

- Ministry of Community and Social Services developed an on-line wizard for organizations to determine their compliance obligations
- <https://www.appacats.mcscs.gov.on.ca/eadvisor/start.action>

Integrated Accessibility Standards Employment Standard Compliance Deadlines

Employment Standard	Private/NFP (50+)	Private/NFP (1-49)	Large Public (50+)	Small Public (1-49)
Recruitment	January 1/16	January 1/17	January 1/14	January 1/15
Employee accommodation		(*some exceptions – individual accommodation plans and RTW process)		
Returning to work process				
Performance management career development and redeployment				

Questions?