



# **In Case You Missed It: Summertime Decisions and Practical Takeaways**

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# What's on the Agenda?

- Introduction – What a Summer!
- Cases in Review
- Practical Takeaways
- Questions

# Introduction – What a Summer!

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- Significant decisions released across Canada
- Decisions from many sources: appeal courts, trial decisions, even the Small Claims Court!
- Focus on Ontario decisions
- Short summaries of decisions





# Termination and Lay-off Clauses

# The *Baker* and *Li* Appeal Decision

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- Two appeals in one decision
- Court of Appeal clarified the enforceability of termination provisions in employment agreements
- Before this decision, there was confusion as decisions on similar issues reached opposite conclusions
- This meant that it was difficult for employers to know, at a glance, whether the termination provision of an employment agreement was enforceable

# The *Baker* Decision

- The facts in *Baker*:
  - The employee worked as a Controller
  - Employment agreement used questionable language in its termination provision
  - “At any time,” contracting out of minimum entitlements?
  - The employee was terminated without cause and sued for wrongful dismissal
- The lower court found that the termination provision was unenforceable because of the “at any time” language



# The *Li* Decision

- The facts in *Li*:
  - The employee worked as a Senior Product Manager
  - Employment agreement also used questionable language in the termination provision: “at any time and for any reason”.
  - The employee was terminated without cause and also sued for wrongful dismissal
- The lower court found that the termination provision was enforceable; the employee’s entitlements were limited on termination





## ***Baker and Li*** at the Court of Appeal

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- The Court of Appeal overturned the decision in *Baker* and maintained the decision in *Li*
  - Both termination provisions were enforceable
  - References to minimum entitlements in employment standards legislation showed an intention to comply with the law
  - Both employees' entitlements were limited by their agreements
- **Bottom Line:** Many older and more ambiguous termination provisions may be enforceable; but always a good idea to confirm with counsel.

# *Taylor v Salytics Inc*

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- Court of Appeal decision regarding lay-off language in employment agreements
- The employee was laid off pursuant to his employment agreement, which placed the lay-off language within the termination provisions
- The employee sued for constructive dismissal
  - At common law, employers do not have a unilateral right to lay-off employees
  - Employment standards legislation deems certain lay-offs to be dismissals depending on their length
- The lower court held that the employee was not constructively dismissed

# Taylor at the Court of Appeal

- The Court of Appeal maintained the lower court's decision
  - Placement of the lay-off language in the termination provision did not make the employee's lay-off a termination
  - Employment standards legislation supports the notion that not all lay-offs are terminations
  - The employee was not constructively dismissed
- **Bottom Line:** Including lay-off language in employment agreements can help preserve your common law rights



# Practical Takeaways

- Both decisions are rare, *big* wins for employers – common sense prevails
- Employers have some flexibility in drafting termination provisions, particularly if there is an objective and obvious intention to comply with minimum entitlements under employment standards legislation
- Reference to and reliance upon employment standards legislation can bolster the enforceability of termination provisions and limit liability (e.g., reproducing language from the *ESA* verbatim)
- Counsel may help clarify if there is confusion on employment contracts

# Incentive Awards and Damages

# *Wigdor v Facebook Canada Ltd*

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- Court of Appeal decision about equity compensation in wrongful dismissal
- The employee founded a consulting company that Facebook later purchased, becoming a Facebook employee
  - Part of his employment agreement with Facebook entitled him to equity (RSUs) in Facebook
  - RSU agreements included forfeiture language; to be forfeited on termination unless there was a breach of applicable law
- The employee was terminated and sued for wrongful dismissal, claiming entitlement to unvested RSUs
- The lower court found wrongful dismissal, that the employment agreement violated employment standards legislation, but that the employee had no claim to the unvested RSUs



# Wigdor at the Court of Appeal

- The Court of Appeal allowed the appeal
  - The Court treated the RSUs as an element of the employee's compensation
  - Forfeiture language upon termination of employment was void
  - The Court increased the employee's damages by more than USD\$4.7 million
- **Bottom Line:** Much needed clarification regarding the treatment of equity compensation upon termination; forfeiture language might not be enough...

# *McElgunn v Vermillion Energy Inc*

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- King's Bench appeal of a private arbitrator's decision
- Employment terminated without cause after nine years of service
- Pursuant to the employment agreement, the parties proceeded first to private arbitration
  - The arbitrator found that the employee was wrongfully dismissed and owed a 10-month notice period
  - However, the arbitrator dismissed the claim for damages relating to equity compensation
  - The employee would have been entitled to a share award, but for her termination
- The employee appealed the arbitrator's decision to the Court of King's Bench



# *McElgunn* at the King's Bench

- The Court of King's Bench allowed the appeal
  - The employee was entitled to the equity compensation denied by the private arbitrator
  - The terms governing equity compensation were overly onerous to the employee and ambiguous
  - As such, the employee was entitled to equity compensation vesting during her notice period
- **Result:** The 10-month notice period awarded by the arbitrator remained, with the employee also receiving a further \$184k. in lieu of equities vesting during the notice period

# *Khatib v GoEasy Ltd*

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- Superior Court decision regarding equity compensation on termination and a novel approach to awarding damages
- The employee participated in the employer's incentive programs and received equity compensation through the long-term program
- The contracts governing equity compensation for the long-term program did not remove entitlement upon termination or during reasonable notice period
- The employee was terminated on a without cause basis
- The employee commenced a wrongful dismissal action seeking damages in lieu of reasonable notice as well as incentive program entitlements

# *Khatib* at the Superior Court

- The Court found in favour of the employee and awarded damages for equities vesting after the reasonable notice period
  - Employment agreement implicitly allowed pro-rata bonuses for the short-term program
  - Damages under the long-term program allowed because of limited restricting language
- **Result:** The employee was owed 8 months' reasonable notice and compensation in lieu of short-term and long-term



# Practical Takeaways

- Incentive awards and equity compensation cases are highly technical and involve more “moving parts” than other decisions
- Plan and program document language is critical in litigation and care should be taken in ensuring that these documents are fair, reasonable, and enforceable
- Courts have shown themselves as willing to get creative when determining what to award wrongfully dismissed employees

# Frustration and Constructive Dismissal

# *Hill v B&B Towing*

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- Court of Appeal decision concerning frustration of employment based on disability
- The employee was on long-term disability leave for 2.5 years
- The employee was later informed that his role was eliminated and that, on return, he would be placed in a new role at a lower rate
  - The employee resigned and claimed constructive dismissal
  - The employer took the position that the employment relationship was frustrated as the employee could not perform the duties of his pre-leave position
- Lower court found for the employee, awarding reasonable notice damages for 22 months



# Hill at the Court of Appeal

- Mixed success at the Court of Appeal
  - The employment relationship was not frustrated
  - Frustration only limitedly available: employee must not be able to return to work within a reasonable period of time and employers must accommodate to the point of undue hardship
  - The evidence was inconclusive about the employee's ability to perform his pre-disability position or that the employer would experience undue hardship
  - **BUT** the Court reduced damages with respect to certain employee benefits
- **Bottom Line:** Frustration remains an often theorized, rarely practical means of ending an employment relationship

# *Cressey Construction Corp v Parolin*

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- BC Court of Appeal decision in which an employee's right to work from home was revoked
- The parties did not have a written employment agreement
- The employee worked from home from the start of the pandemic and had childcare obligations; she continued working remotely until a new manager directed her to return to work
  - Denied a desired salary increase and had her position reclassified
  - Employee resigned her employment claiming constructive dismissal
- The lower court found that the employee was constructively dismissed, awarding 19 months of reasonable notice

# *Parolin* at the Court of Appeal

- BC Court of Appeal upheld the lower court's decision
  - The employee's flexible work and WFH became an implied term of her employment
  - Requiring full-time and in-office attendance without reasonable notice was a unilateral change to employment
  - The employee was constructively dismissed
  - Employee mitigated her losses somewhat through her entrepreneurial pursuits
- **Bottom Line:** Substantial changes to an employee's working conditions, especially without an agreement in writing, can be costly



# *Gugulyn v Alberta*

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- Alberta Court of Appeal decision about constructive dismissal and mitigation
- The employee held a high-ranking position in the provincial government, but was transferred to a new position without his consent
- This new position required skills and education that the employee did not have
  - The employee objected to the transfer, but was ignored
  - News of the transfer communicated to other members of the department
  - The employee resigned his employment alleging constructive dismissal
- The lower court found constructive dismissal, awarding 23 months' notice, which was reduced to 17 months for failing to reasonably mitigate



# *Gugulyn* at the Court of Appeal

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- Both the employer and employee appealed, both appeals dismissed
  - The employer argued that the employee should have accepted the transfer; denied
  - The employee argued that the notice period should not have been reduced; also denied
  - A person in the employee's position would not have accepted the transfer, but the employee could have found comparable employment within 17 months
- **Bottom Line:** Directed organizational or department transfers can be acceptable, but employers must exercise caution

# Practical Takeaways

- Employers should exercise heightened caution when working with employees taking time away from work because of a disability
- Successfully accommodating employees can be tricky, particularly when an employee is off work for an extended period
- There may be heightened risk when making unilateral changes to an employee's terms and conditions of employment
- The risk of constructive dismissal may be lessened if the employment agreement gives the employer additional rights to manage the workplace



# Workplace Investigations and Cause for Dismissal

# *Wilsher v Olympic Wholesale*

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- Superior Court decision concerning a just cause termination
- Employee with 17 years' service whose employment was terminated for time fraud
- Employer investigated the employee's practice of "topping up" his direct reports' time cards
- Investigation into the employee was flawed, carried out in a biased and intimidating manner
- Employer refused to provide the employee with references upon termination, affecting his mitigation

# *Wilsher* at the Superior Court

- Superior Court found that the employee was wrongfully dismissed and that he was entitled to bad faith damages
  - Employer's investigation unfairly targeted the employee
  - Topping up practice widespread within company
  - Employee's replacement was later dismissed for the same conduct
- **Result:** 19 months of reasonable notice plus 14 months in bad faith damages because of the employer's conduct



# *McCarthy v Bison Transport Inc*

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- Superior Court decision concerning termination for repeated failure of a drug and alcohol policy
- Employee worked as a long-haul trucker operating in Canada and the US; American regulations required employees to submit to random drug tests
- Employer had no tolerance policy regarding employee use of drugs and alcohol, the employee was aware of this policy, and had failed a drug test before
- Following a second failed drug test, the employee was dismissed for cause
- Employee sued for wrongful dismissal, claiming aggravated, punitive, and human rights damages



# *McCarthy* at the Superior Court

- Superior Court dismissed all of the employee's claims
  - Employee's recurrent breaches of the drug and alcohol policy gave cause for termination
  - Drug and alcohol policy was reasonable, appropriate, and the consequences for non-compliance proportionate
  - Employee previously was warned about non-compliance, having previously failed a drug test
- **Result:** No wrongful dismissal or other damages awarded

# Practical Takeaways

- The risks involved in workplace investigations may be reduced by approaching the investigation neutrally and with a view to discovering the facts
- If an employer intends to rely on a workplace policy to discipline an employee (up to dismissal), they should be careful in communicating the policy to employees and the consequences for breaching it

# Agreements and the Contents Thereof

# *Pringle v Zenova Group*

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- Court of Appeal decision regarding jurisdiction
- The employer was incorporated in England, but contracted for work with individuals in Ontario
- The plaintiff had an independent contract agreement, which the employer terminated
  - The plaintiff brought an action for wrongful dismissal in Ontario
  - In return, the employer brought a motion to stay the action because of a clause in the independent contractor agreement
- Motion judge granted the stay and further held that the employee was an independent contractor



# *Pringle* at the Court of Appeal

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- Court of Appeal allowed the appeal
  - The employee was, at law, actually an employee and not a contractor
  - Ontario law governed because the employee performed work in the province
  - The independent contractor agreement breached applicable employment standards law, rendering clauses void
- Reversing the motion judge's decision, the action could continue in Ontario
- **Bottom Line:** The courts are willing to apply Ontario law broadly and employers should be aware of the consequences

# *Yadav v Ahangama*

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- Ontario Small Claims Court decision on the dismissal of a probationary employee
- The employee was hired as a law clerk and terminated without cause 10 days after commencing his role
- The employer determined, in the course of the employee's short stint, that he did not have the necessary skills for his position
- The employee brought an action for wrongful dismissal; employer argued that since the employee was probationary, it could dismiss him at any time:
  1. without cause
  2. without providing reasonable notice or pay in lieu

# Yadav at Small Claims Court

- Small Claims Court held that the employee was wrongfully dismissed
  - Probation allows employers to engage in good faith evaluation of employees and dismiss if the employee does not meet their standards
  - Employees should be given a reasonable opportunity to test their skills and work with others; must be aware of how the employer is assessing their skills
  - Employers must act fairly when deciding to terminate a probationary employee
- **Result:** Employee awarded 3 months' notice for wrongful dismissal



# *Nexus Solutions v Krougly*

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- Court of Appeal decision concerning ownership of works created in the course of employment
- Employee secretly developed software while employed that competed directly with his employer
- Employee resigned in order to market the software he developed
- Former employer brought an action against the employee seeking copyright over the software, alleging it was developed “in the course of” employment
- The lower court denied the copyright claim, finding that the employer did not significantly contribute to the creation of the software and that the employee developed the software outside of working hours



# Practical Takeaways

- Contracts, contracts, contracts! Often the best way to limit liability and preserve your workplace rights
- As always, contracts should remain onside of the minimum entitlements that employees have under statute
- Courts generally do not look fondly at employers who attempt to circumvent the obvious (e.g., employee status)



# In Summary...

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- Employment law is usually slower-paced, what we've seen this past summer is uncommon
- The impact of many of these decisions will be felt for months to come, and it may be best to get ahead of some of them
- Courts seem more willing than ever to challenge perceptions on the trajectory of the law: could this be a new employer-friendly frontier?

# Questions?

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