2020 Hindsight: Update of Employment Related Legislation and Caselaw

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AGENDA

1	*Waksdale* and its Effect on Enforceable Termination Provisions
2	*Matthews vs Ocean Nutrition*
3	Reasonable Notice Becoming Reasonable Again?
4	COVID-19 Issues Update

Enforceable Termination Language in Your Employment Contracts

An update following the decision in *Waksdale v Swegon North America Inc.*, 2020 ONCA 391.

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Waksdale v Swegon North America Inc. 2020 ONCA 391.

- Employee worked for employer for approximately ten months
- Employer terminated employee without cause and paid two weeks' severance as required by the "without cause" termination provisions in the contract
- Employee sued for wrongful dismissal

- Employee acknowledged “without cause” termination clause was valid, but argued that “with cause” termination clause was invalid (even though it was not used by the employer) and the latter rendered the entire contract invalid

- “With cause” termination provision included grounds for “with cause” termination which were different than those in the Ontario *Employment Standards Act*

The Ontario legislation states that employees who are dismissed due to “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer” are not entitled to statutory severance

The Employer had not terminated with cause, and did not rely on the “with cause” termination provision

The contract contained a severability clause, which stated that if any one provision was found to be unenforceable, that did not render unenforceable other clauses in the contract

- At trial, the judge agreed with the Employer and gave judgment for the Employer
- On appeal, the Ontario Court of Appeal reversed the trial judgment, finding that the employment contract had to be considered “as a whole” and that the two termination provisions could not be considered “piecemeal”
- The Court also held that a determination as to validity was to be made at the time the agreement was executed, not at the time of termination. Thus, it didn’t matter whether the Employer had relied upon the “with cause” termination provision or not, and that did not affect validity

- The Court declined to apply the severability clause in the contract, on the basis that the contract was void under statute, and could not be saved by a severability clause
- We understand that the case has been appealed to the Supreme Court of Canada, but for now it represents the law in the province of Ontario

Effect on British Columbia law?

Decisions of the Ontario Court of Appeal are not binding on BC courts, but are persuasive

A BC court may follow the case

How should the “with cause termination provision” in your contract of employment be worded?

The Supreme Court Has Spoken

Discussion around wrongful dismissal damages and bonuses in the case of *Matthews v Ocean Nutrition Canada Ltd*., 2020 SCC 26.

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The Last Word (For Now) on Bonuses

Matthews v. Ocean Nutrition Canada Limited, 2020 SCC 26:

- Claim concerned an EE who was dismissed after 18 years as a chemist. As a senior executive, he was part of ER's LTIP plan which would result in a sizeable bonus in the event the business was sold.
- As a result of mistreatment by new CEO, the EE resigned in June, 2011. The business was sold in July 2012 (13 months later), and he sought the LTIP bonus he would have otherwise received but for his resignation ($1.1 million).

LTIP STATED:

… **this Agreement shall be of no force or effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause**.

[The LTIP] … shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation **or any severance calculation**.

- At trial, the Court included bonus as part of award on the basis that he ought to have received 15 months' notice

- The NS Court of Appeal disagreed on the basis of the express exclusion

- The SCC restored the trial award and in so doing held that wrongfully (or constructively) dismissed EE's are entitled to compensation for the loss of opportunity to earn a bonus or other incentive payments.

The SCC held that the exclusion language did not apply because, for the purposes of assessing damages, the EE did not cease to be employed until after the notice period expired:

> “[F]or the purpose of calculating wrongful dismissal damages, the employment contract is not treated as “terminated” until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee’s common law entitlement.”

- As a result of this decision, ERs are advised to ensure that contracts use explicit language to avoid bonus obligations arising after dismissal/ resignation. It is not enough to reference “active employment”.
- Express reference to all manner of termination (with or without cause, with or without notice, resignation, wrongful dismissal, constructive dismissal, et cetera) is likely necessary to have any prospect of avoiding obligations.
- ERs may also consider language contemplating dismissal with pay in lieu of notice and stipulating the amount (ensuring compliance with statutory minimum).

Hrynkiw v. Central City Brewers & Distillers Ltd. 2020 BCSC 1640

- 56 year old EE dismissed after 6.5 years of service as CFO. ER argued (unsuccessfully) that it had cause for dismissal.
- ER ordered to pay $118,000 in lieu of 12 months' notice; $33,000 in accrued bonuses; $15,000 in accrued vacation pay; and $35,000 in aggravated damages.
- The aggravated damages were premised on ER "advancing and maintaining meritless allegations of serious misconduct".

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Movassaghi v. Harbourfront Wealth Management Inc. 2020 BCSC 579

- EE was dismissed after it was learned that he had forged a client's signature to authorize moving the client's investments from his former ER to his new ER.
- In assessing whether the ER had proven just cause, the Court noted:

a	The EE did not personally gain from the misconduct;
b	The client had indicated a desire to move her investments;
c	EE never denied the misconduct and cooperated with the investigation;
d	It was an isolated incident.

Notwithstanding the mitigating factors, the Court found that ER was justified in dismissing EE for just cause:

> “Cornerstones of (the) industry are trust and acting with a client’s consent. Forging a client’s signature is fundamentally inconsistent with both of those. Not reporting the forgery until after the client complained is inconsistent with both of those. In an industry where clients put their trust in financial services firms, Harbourfront must be able to put trust in its employees. Harbourfront employees are given autonomy on the “front end” to run their practices. Autonomy requires trust…”

Reasonable Notice Becoming Reasonable Again?

The return of the short notice period *in George v Laurentian Bank Securities*, 2020 ONSC 5415.

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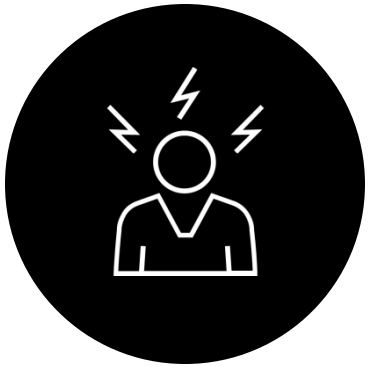
Where Are We Now?

- BC precedents are consistent that proportionally longer notice periods are appropriate for employees in their first 3 years of employment: *Saalfeld v Absolute Software Corporation*, 2009 BCCA 18
- See, for example:
  - *Greenlees v Starline Windows Ltd.,* 2018 BCSC 1547
    - 6 mos work/ 6 mos notice
  - *Pakozki v B&B Heavy Civil Construction Ltd.,* 2018 BCCA 23
    - 1 yr work/ 5mos notice

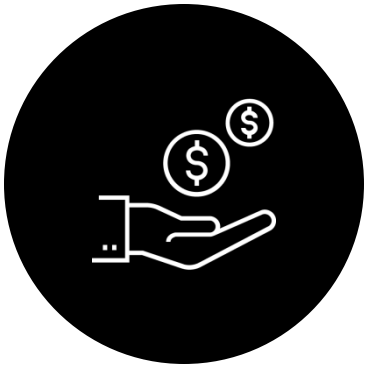
George v Laurentian Bank Securities, 2020 ONSC 5415

Mr. George had been an employee of Laurentian Bank Securities.

DATE OF HIRE:	November 5, 2018
AGE:	58 years old
TITLE:	Vice President, Equity Trading
SALARY:	$100,000 base, benefits + bonus



Mr. George was dismissed without cause on March 26, 2019 (5 months of service)

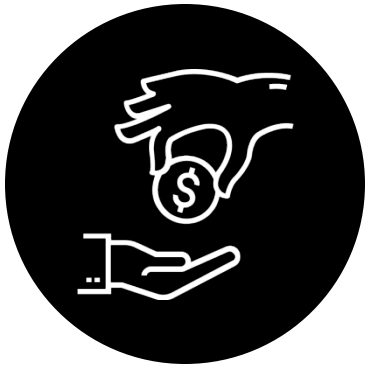


On termination, Laurentian Bank gave Mr. George 3 weeks of termination pay and 2.5 weeks of benefit continuation

Mr. George was still unemployed at trial date

Court's Findings

- Mr. George was neither a senior manager, nor an executive to warrant a higher notice period, despite his title of "Vice President, Equity Trading"
- His age (58) warranted higher notice period as his job opportunities less promising than younger employee with similar qualifications
- Mr. George was entitled to 2 months pay and a continuation of his benefits, less what had already been received



Key Takeaways

- This decision may be persuasive in BC
- COVID-19 pandemic, in this case, was not a factor considered to increase notice period
- Titles are not everything. The Court will consider the position's responsibilities
- Reasonable notice analysis must consider all factors
- Are we heading towards more "reasonable notice?"

Reasonable Notice and COVID-19

- EE claims for increased notice period during pandemic
- Is ER insurer for reemployment?
- Alternatively, should notice period be reduced due to economic slowdown?
- *Michaela v. St. Thomas of Villanova School*, 2015 ONCA 801
  - "Difficulty in securing replacement employment should not have effect of increasing the notice period unreasonably" (para. 20)
  - But will not be basis to reduce the notice period

COVID-19 Issues Update as of September 2020

Statutory benefits; deduction of CERB payments; and using CEWS as payment in lieu.

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Key Statutory Programs to Know About

Canada Emergency Wage Subsidy

Canada Emergency Rent Subsidy
(pending legislation)

Employee Benefits

- CERB has Ended -> New Simplified EI Program
- Canada Recovery Benefit
- Canada Recovery Sickness Benefits
- Canada Recovery Caregiving Benefit

Benefits and Termination

- Use for supplementing working notice period

- Severance will delay employee entitlement
- No express statutory obligation of ER to withhold over payment as with EI

COVID-19 Leave or Termination

COVID-19 Leave: medical; quarantine/ isolation; care (child or parent)

No time limit to leave

Not termination of employment at this time

Can refuse to return to work?

WorkSafeBC Decision (CD2020129 - 06/30)

- Bartender did not feel comfortable coming to work
- Dismissed for work performance and behaviour
- Claim discriminatory action
- Simple refusal to show up for work did not engage unsafe work protection
- Simply saying, “health and safety” not sufficient; must raise concerns with manager and remain to review

Overtime and COVID-19

- There will be claims
- *Fresco v. CIBC*, 2020 ONSC 75
  - An employee required or permitted to work in excess of the standard hours of work entitled to overtime (s.174 CLC)
  - The Court held burden is not on the employee to ask for permission, but on the employer to intervene and prevent employee from working the overtime hours
  - If employer knows or ought to know that employee is working overtime but fails to take reasonable steps to prevent will be liable to pay
- Reasonable steps: clear policy requiring advance notice in writing; training of workers and managers; enforcement by employer

Questions?

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