

Labour and Employment Annual Fall Update

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Employment Contracts: Troubles and Tips

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Employment Contracts: Troubles and Tips

- A. Termination Provisions
- B. Consideration
- C. Lay-offs/Suspension
- D. Fixed Term Contracts

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A. Termination Provisions

Trouble/Tip:

1. Ambiguity
2. Failure to maintain all forms of compensation during *ESA* notice period
3. Potential future violations of the *ESA*
4. Failure to expressly exclude common law notice

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B. Consideration

Holland v. Hostopia.com Inc. (2015 – Ont. C.A.)

2-page offer letter signed before
start date

No termination provision

6-page contract signed 9 months
later

Termination provision: ESA minimums

Result: 6-page contract unenforceable

Tips:

- Get those contracts signed early
- Be careful with preliminary offers

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C. Layoffs/Suspensions

Trouble:

- No “automatic right” to:
 - lay off employees in Ontario
 - suspend employees without pay

Tip:

- If you want those rights – put it in the contract

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D. Fixed Term Contract

Troubles:

1. Early termination
2. End of term termination

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D. Fixed Term Contract (cont.)

Early termination

- *Howard v. Benson Group* (2016 – Ont. C.A.)
 - 5 year contract; terminated after 23 months
 - ESA provided (2 weeks or \$2,300)
 - C.A.: Employee entitled to 37 months (\$185,000)

Tip:

- Proper termination clause

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D. Fixed Term Contract (cont.)

End of Term Termination

- Fixed term contract \neq no obligation to provide notice or severance

Tip:

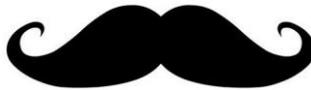
- Be aware of consequences of extending term 90 days or beyond 12 months
- Termination clause in contract

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Differing “Disabilities”

Insurance Definitions vs. Accommodation Obligations



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Overview

A. Human Rights Code

B. Workplace Safety Insurance Act

C. Private Disability Insurance

D. Take-aways

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A. Human Rights Code

- Definition of “disability” set out in the *Code* and includes:
 - any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes...
 - an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*

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A. Human Rights Code

- Must accommodate to point of “undue hardship”
- Procedural Duty - to determine whether employee can be accommodated
- Substantive Duty – to assign accommodated work within the employee’s abilities

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B. Workplace Safety Insurance Act

- Mandatory for many employers
- Provides benefits for accidental injuries/illnesses arising out of and in the course of an employee’s employment
- *WSIA* includes accommodation obligations independent from the *Human Rights Code*

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B. WSIA

Independent Accommodation Obligations

- *Section 40* – Duty to co-operate in return to work
- *Section 41* – Obligation to re-employ
- *Subsection 41(6)* – Duty to accommodate to the point of undue hardship

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B. WSIA

- Compare issues on which *WSIB* may make a determination re:
 - Employer's ability to re-employ
 - Employer's co-operation in return to work exercise
 - Employee's restrictions and limitations (and cause)
- Vs.
 - Non-economic loss
 - Coverage for treatments
 - Duration/nature of re-training program

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B. WSIA

Human Rights Tribunal

- May defer if there are other legal proceedings dealing with the substance of the application
- May dismiss if another proceeding has *adequately* dealt with the substance of the application
- If Employee does not challenge a WSIB decision, may still proceed at HRTO

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C. Private Disability Insurance

Contractual Definition of “Disability”

- E.g. Total Disability means:
 - (a) The **complete and continuous inability** of the insured Employee to perform **the regular duties of his own occupation** as a result of illness or injury, during the Elimination Period and for the following 24 months;

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C. Private Disability Insurance

Contractual Definition of “Disability”

- Total Disability means:
 - (b) Thereafter, a **state of continuous incapacity**, resulting from illness or injury, which **wholly prevents the insured Employee from performing the regular duties of any occupation** for which he is reasonably qualified, or may so become, by training, education or experience

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C. Private Disability Insurance

- Insurer’s definition of disability is independent of definitions under the *Code* or *WSIB*
- Insured employee may have additional duties (e.g. receive appropriate treatment, co-operate)
- Insurer may make recommendations, but Employer has duty to accommodate
- Employer must seek own information to fulfill procedural and substantive duties

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D. Take-aways

- Cannot necessarily rely on a WSIB decision to satisfy accommodation obligations
- Insurance companies may make recommendations, but accommodation obligation remains with the employer, independent of insurer's assessment

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Human Rights and Wrongful Dismissal Damages

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Wrongful Dismissal Damages

Long service/older employees

- Unofficial cap of reasonable notice of 24 months for high level and long service employees
- More than 24 months only in exceptional circumstances
- But...

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Wrongful Dismissal Damages

The cap is slipping

Hussain v. Suzuki Canada (2011)

- 65 year old junior supervisor + 36 years' service = 26 months

Markoulakis v. SNC-Lavalin Inc. (2015)

- 40 years service, Senior Civil Engineer earning \$129,272, 65 years old
- Found to be exceptional facts
- 27 months

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Wrongful Dismissal Damages

The cap is slipping

Keenan v. Canac Kitchens (2016 - CA)

- Two dependent contractors, 63 and 61 years of age with 32 and 25 years of service respectively
- No finding of exceptional circumstances - upheld the trial decision of 26 months each

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Wrongful Dismissal Damages

Effect of evidence of intention to retire

Keenan v. Windsor Raceway (2014)

- 71 year old supervisor, 43 years of service
- Received *ESA* entitlements only on SJ motion because some evidence that employee intended to retire
- Purpose of reasonable notice not to reward long service

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Wrongful Dismissal Damages

The perils of fixed term contracts

Howard v. Benson Group Inc. (2016-CA)

- Five-year fixed term contract – employee terminated after 23 months
- Court of Appeal awarded damages for balance of contract and no obligation to mitigate
- Parties to a fixed term contract can provide for early termination and specify a term of notice or payment in lieu thereof

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Wrongful Dismissal Damages

What does it cost to get it wrong?

Strudwick v Applied Consumer & Clinical Evaluations Inc., (2016-CA)

- The 56 year old plaintiff with 15 years' service became deaf, was treated badly and ultimately terminated
- 20 months' notice and \$20,000 in human rights damages awarded at trial
- The Court of Appeal increased the award to \$40,000, plus
- Intentional Infliction of Mental Distress (\$35,000)
- Aggravated Damages (\$70,000)
- Punitive Damages (\$55,000)
- AND...\$40,000 in costs below and \$20,000 on the appeal

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Wrongful Dismissal Damages

How does an employer mitigate the risk?

Tips

- Use employment contracts with clear and simple language
- Any ambiguity will be interpreted against the drafter
- *ESA* minimums must be complied with
- All remuneration and benefits must be continued for the statutory notice period
- Employment agreements must be drafted with care and reviewed periodically throughout the employment relationship

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Human Rights Damages

General damages

- "Compensation for injury to dignity, feelings and self-respect"
- Court of Appeal in *Strudwick* on general damages – no cap

Main factors:

- The objective seriousness of the conduct; and
- The effect on the applicant

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Human Rights Damages

Special damages

Can be very significant - *Hamilton-Wentworth District School Board v Fair* (2016-CA)

– \$419K in lost wages (9 years)

- No limiting concept such as “reasonable notice”

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Human Rights Damages

Human Rights Tribunal general damages

“General Damages” Awards 2008-2016 - High End

2008	\$30,000
2009	\$40,000
2010	\$35,000
2011	\$40,000
2012	\$40,000
2013	\$37,000
2014	\$45,000
2015	\$150,000
2016 to date	\$30,000

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Human Rights Damages

OPT v Presteve Foods Ltd. (2015)

Egregious sexual harassment/assault

- Applicant 1: Awarded \$150,000
- Applicant 2: Awarded \$50,000
- Highest damage award from the HRTO to date

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Human Rights Damages

Court human rights general damages

- First case was in 2013
- Since then there have been six decisions released from the Superior Court of Justice in 2015 and 2016
- The general range has been \$5,000 to \$40,000

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Human Rights Damages

Bray v. Canadian College of Massage and Hydrotherapy (2015-SCC)

- \$20,000

Nason v. Thunder Bay Orthopaedic Inc. (2015)

- \$10,000

Strudwick v. Applied Consumer & Clinical Evaluations Inc. (2016)

- Damages increased from \$20,000 to \$40,000

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Human Rights Damages

Arbitration human rights general damages

National Grocers Co v United Food and Commercial Workers Unions, Local 1000A (Brown Grievance)

- The employer terminated instead of arranging an IME
- The Arbitrator found a breach of the *Code*
- Award: \$25,000 in general damages

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Human Rights Damages

How does an employer mitigate the risk?

Tips

- Need a positive attitude towards human rights as part of your workplace culture
- Up to date policies
- Appropriate training (opportunity now through AODA)
- Don't wait for a complaint – address issues promptly and seriously – investigate if required
- Get advice early (much cheaper than later!)
- Insurance legal costs indemnity

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Vicarious Liability

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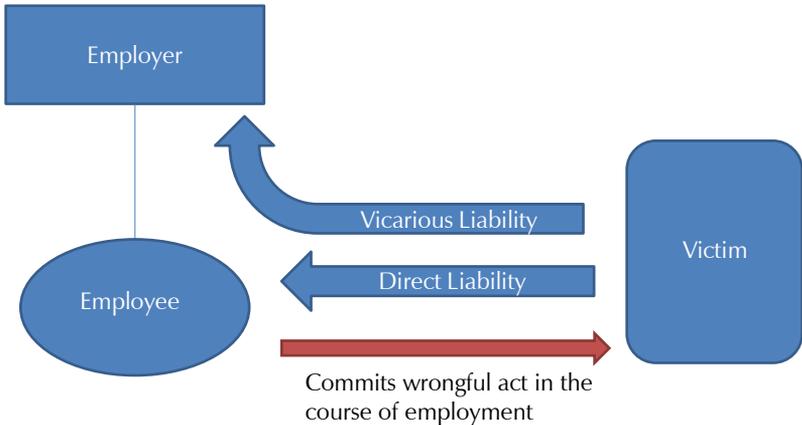
Agenda

- 1) What is vicarious liability?
- 2) The two factors to consider
- 3) Examples of vicarious liability and minimizing risk

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What is vicarious liability?



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Two factors to consider

- 1) The relationship between the wrongdoer and the employer is sufficiently close (aka **“employee” vs “independent contractor”(IC)**)
- 2) The wrong committed was sufficiently connected to the wrongdoers assigned tasks (aka **“in the course of employment”**)

(K.L.B. v. British Columbia)

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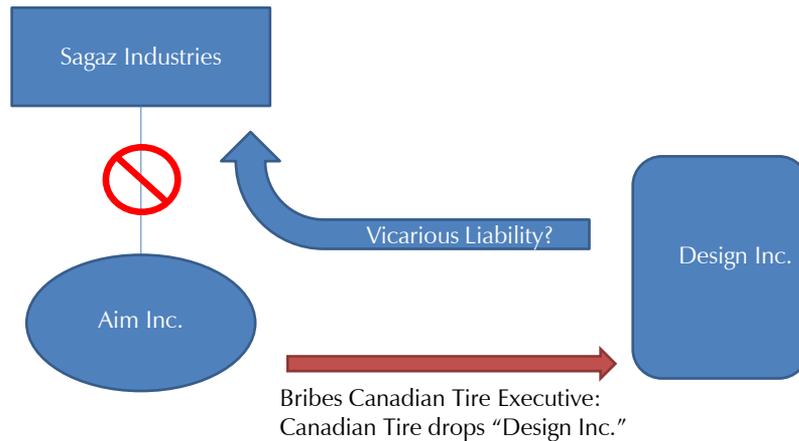
1) IC or Employee? (*Sagaz Industries Canada Inc.*)

- Intention of the parties
- Level of control over worker activities
- Ownership/provision of tools/equipment
- Does worker hire their own helpers?
- Degree of financial risk taken by the worker
- Opportunity for profit

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1) IC or Employee? (*Sagaz Industries Canada Inc.*)



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2) "In the course of employment" (*Bazley v. Curry*)

- Opportunity to abuse
- Did wrongful act further employer's aims?
- Friction/Confrontation/Intimacy
- Extent of power
- Vulnerability of victim

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2) “In the course of employment” (*Bazley v. Curry*)

A child at a youth care facility was sexually assaulted by an employee

Court found vicarious liability:

- Intimate private control over children
- Parental relationship and power
- “The employer's enterprise created and fostered the risk”
- Not an accident of time and place
- Special opportunities for exploitation

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Education

Wrongful acts of teachers have resulted in vicarious liability to schoolboards



Langstaff v. Marson; Doe v. Avalon East School Board

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Breaches of Privacy

Employees extracting confidential information from servers can result in vicarious liability to employers



Jones v Tsige; Evans v. Bank of Nova Scotia

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Human Rights Code

46.3 (1) any act or thing done or omitted to be done **in the course of his or her employment** by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be **deemed** to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

-exceptions: harassment in employment (s. 5(2)) and sexual harassment (s. 7)

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Key is to minimize risk

- Define the scope of a new hire
- Meticulous reference checking
- Is employee dealing with money or in contact with a vulnerable population?
- Monitoring and restrictions
- Employees should separate personal life and business life
- Maintain up-to-date anti discrimination & harassment policies and staff training

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Bill 132 – Navigating the new workplace harassment requirements

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“It’s Never Okay: An Action Plan to Stop Sexual Violence and Harassment”



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Bill 132

***Sexual Violence and Harassment Action Plan Act
(Supporting Survivors and Challenging
Sexual Violence and Harassment)***

Omnibus legislation

OHSA

etc...

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Sept 8, 2016



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You must have updated:

- **workplace harassment policies + procedures**
- **training**

that address sexual harassment

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“workplace harassment” means

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or

(b) workplace sexual harassment

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“workplace sexual harassment” means,

(a) engaging in a course of ... because of

sex

sexual orientation

gender identity

gender expression

where the course of ...

(b) making an unwelcome sexual advance

+ in a position to confer, grant or deny a benefit

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Develop + maintain a written program

- promise **confidentiality** unless disclosure is necessary for the purposes of investigating for taking corrective action is otherwise required by law
- how both will be informed of results
 - + **any corrective action**

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An inspector can order an employer to retain an external investigator

- specify knowledge, experience or qualifications
- require a written report



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In court...

Boucher v. Wal-Mart and Pinnock (2014)



Wal-Mart

\$200 K aggravated
\$100 K punitive (jury said \$1 million)

Pinnock

\$100 K intentional infliction mental suffering
\$10 K punitive (jury said \$150 K)

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At the HRTO...

range = \$12 K to \$150 K



OPT and MPT v. Presteve Foods (2015)

OPT \$150 K

MPT \$ 50 K

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At the OLRB...



Jurisdiction is limited to whether

- have a policy
- reprisal

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Through the WSIB...



Operational policy manual

“an acute reaction to a sudden + unexpected traumatic event at work”

- mixed decisions
- currently before Ontario Ombudsman

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