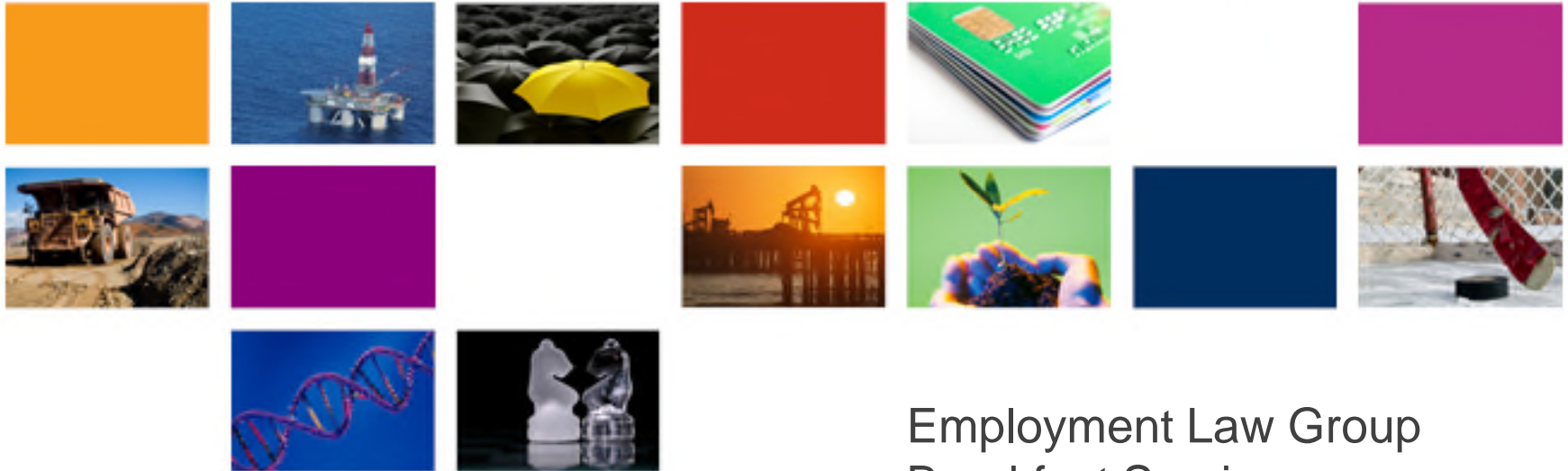


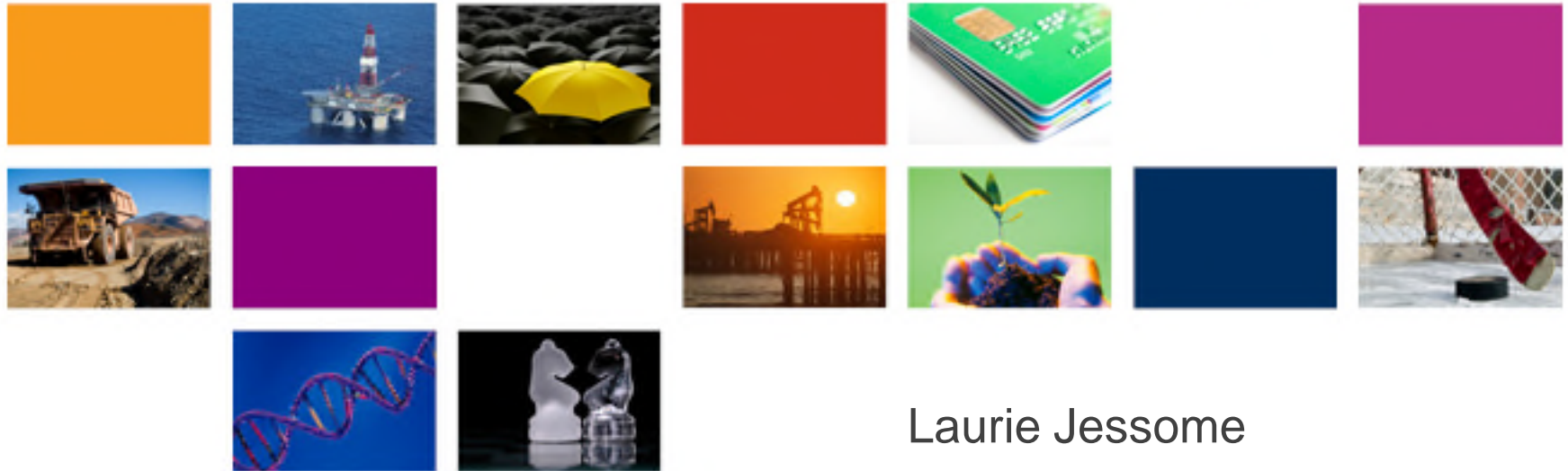
Ending the Employment Relationship



Employment Law Group
Breakfast Seminar

April 13, 2016

Reasonable Notice: Trends, Hot Topics and New Developments



Laurie Jessome
April 13, 2016

Reasonable Notice of Termination

- What does the term “reasonable notice” mean?
 - Common law concept
 - Implied term of every employment agreement
 - Can be displaced with an effectively drafted termination clause
 - Can never be less than the *Employment Standards Act*, 2000 (“ESA”) minimums

Bardal v. Globe & Mail Ltd.



- 1960 Ontario decision
- Classic formulation of the factors to be considered when calculating reasonable notice.
 - Age
 - Length of service
 - Character of employment
 - Availability of similar employment

Bardal is still regularly cited by courts at all levels across the country.

“Rule of Thumb”



- Some judicial decisions have referred to the “rule of thumb” – one month of notice per year of employment
- Concept specifically rejected by the Ontario Court of Appeal in *Minnott v. O’Shanter Development Co.* 42 O.R. (3d) 421 (CA)
- Largely inapplicable to employees with very short service or with specialized skills

2015 and 2016 in Review



- Conducted a search for all notice decisions in Ontario in 2015 and 2016
- Located 34 cases
- Reviewed for:
 - New trends
 - Notable outcomes
 - Changes to existing practices

Sales Employees



- Traditional assumption: sales employees have transferable skills which makes it easier for them to locate suitable alternative employment, resulting in shorter notice periods
- Not supported in 2015 and 2016 to date
 - *Matheson v. Erie Mutual Fire Insurance Co.* 2016 ONSC 704 – 16 year sales employee received 16 months of notice
 - *Wolfman v. Rocktenn-Container Canada LP* 2015 ONSC 1432 – 16 year sales employee also received 16 months of notice

Sales Employees



- *Peticca v. Oracle Canada ULC*, 2015 CarswellOnt 5450 – 19 year sales employee received 17 months of notice
- *Motion Industries (Canada) Inc. v. McCarthy*, 2015 ONCA 224 – 14 year sales employee received 16 months of notice
- *Dear v. Glamour Designs Ltd.*, 2015 ONSC 5094 – 9 year sales employee received 12 months of notice
- *Holland v. Hostopia.Com Inc.*, 2015 ONCA 762 – 7 year sales employee received 8 months of notice

Employees Aged 60+



- Assumption: employees who are terminated late in their career are entitled to longer notice periods because it will be more difficult for them to locate new employment
- This is a continuing trend
- Employees older than 60 consistently received notice periods that exceed the “rule of thumb”
 - *Leeming v. IBM Canada Ltd.* 2015 ONSC 1447 – 60 year old senior management consultant with 8 years of service received 10 months of notice

Employees Aged 60+



- *Markoulakis v. SNC-Lavalin Inc.*, 2015 ONSC 1081 – 65 year old civil engineer with 40 years of service received 27 months of notice
- *Tetra Consulting v. Continental Bank of Canada*, 2015 ONSC 4610 – 60 year old compliance officer with 2 years of employment received 8 months of notice
- *Dear v. Glamour Design* – 66 year old salesperson with 9 years of service received a year of notice

24 Month Maximum



- Assumption: there is a 24 month maximum on common law reasonable notice
- No longer valid
- Where there is extraordinarily long service and/or where the employee is above 60 years of age, courts will award notice periods in excess of 24 months
 - *Markoulakis v. SNC-Lavalin Inc.* – 27 months
 - *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79 – 26 months for each of two employees, one with 32 years of service and the other with 25 years of service

Employees with Short Service



- Assumption: employees with very short periods of service can receive notice periods that far outstrip the “rule of thumb”
- Still true
 - *Miller v. ABM Canada Inc.*, 2015 ONSC 1566 – an accountant with 1.5 years of service received a notice period of 2.5 months
 - *Buaron v. AcuityAds Inc.*, 2015 ONSC 5774 – a systems administrator with only 9 months of service received a notice period of 4 months

Bad Faith



- Can courts still award an extension of the notice period to compensate the employee for bad faith on the part of the employer?
- Technically, no
- The practice of awarding longer notice periods to employees who had been treated poorly at the time of termination (which came from *Wallace v. United Grain Growers* [1997] 3 SCR 701) has been soundly rejected by the Supreme Court of Canada in *Honda v. Keays* [2008] SCR 39

Bad Faith



- BUT SEE: *Strudwick v. Applied Consumer & Clinical Evaluations Inc.* 2015 ONSC 3408
 - Court awarded an employee with 15 years of service 24 months of notice
 - Court noted that the award would have been 20 months but for the employer's conduct.
 - Failed to properly complete a Record of Employment
 - Yelled at the employee
 - Failed to pay wages until ordered to do so by the Ministry

Specialized Employees and Upper Management

- Assumption: highly specialized employees and executives receive longer notice periods
- Still true
 - *Chen v. Purdue Pharma*, 2015 ONSC 1967 – Head of Business Development (\$225k/year) with 22 years of service received a 24 month notice period
 - *Fraser v. Canerector Inc.*, 2015 ONSC 2138 – Senior Executive (\$205k/year) with under 3 years of service received a notice period of 4.5 months.

Specialized Employees and Upper Management

- *Beatty v. Best Theratronic Ltd.*, 2015 ONCA 247 – Radiation Safety Officer for a nuclear medical equipment plant with 16 years of service received 16 months of notice
- *Lin v. Ontario Teachers' Pension Plan Board*, 2015 ONSC 3494 – investment professional (\$750k/year) with 8 years of service received a notice period of 15 months
- *Brooks v. Conference Board of Canada*, 2015 ONSC 4087 – Senior Manager with 2 years of service received a notice period of 6 months

Specialized Employees and Upper Management

- *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189 – Director of IT with 14 years of service received a notice period of 17 months
- *Tetra Consulting v. Continental Bank of Canada*, 2015 ONSC 4610 – Chief Compliance Officer with 2 years of service received 8 months of notice
- *Kurtz v. Carquest Canada Ltd.*, 2015 ONSC 7997 – Director of Operations with 5 years of service received an 8 month notice period

Other Cases of Note

- *Amone v. Best Theratronics Ltd.*, 2015 ONCA 63
 - Judge at the trial level determined the notice period based, in part, on how long the employee would need to be employed to qualify for an unreduced pension
 - Court of Appeal rejected that approach but found that the 22 month notice period awarded was appropriate in any event

Other Cases of Note

- *Vist v. Best Theratronics Ltd.*, 2015 ONSC 2619
 - Employee was terminated after 2.5 years of employment
 - Had previously been employed by Best Theratronics for 14 years
 - Four year break between periods of employment
 - Awarded 6 months of notice — court gave “some weight” to claim of continuous employment based on prior period of service

Other Cases of Note



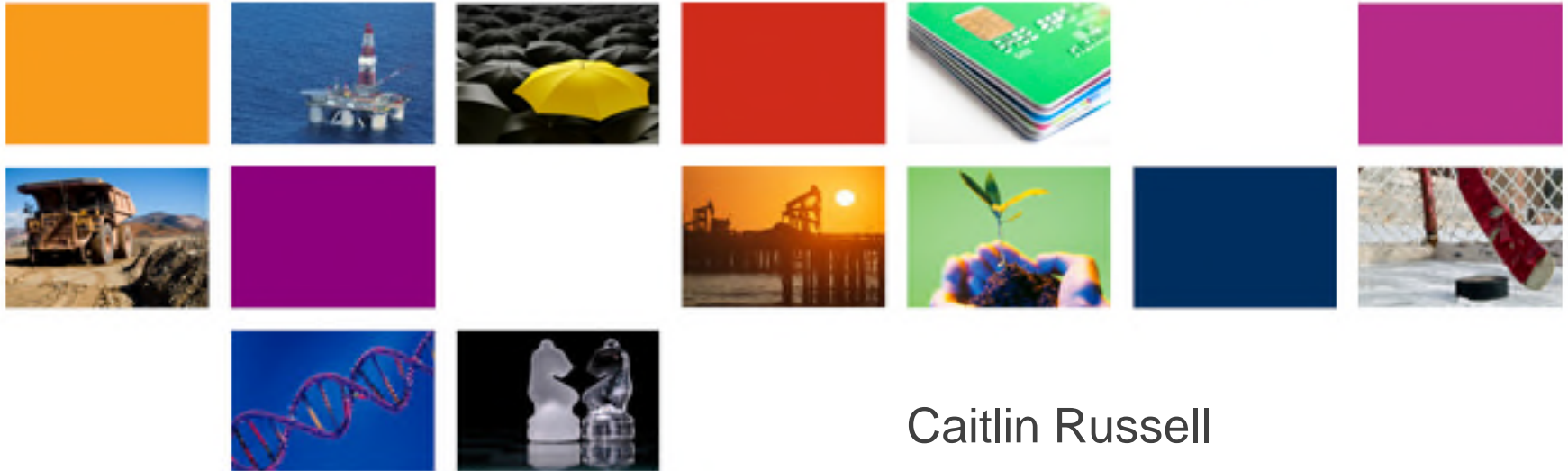
- *Kielb v. National Money Mart Co.*, 2015 ONSC 3790
 - General Counsel position earning \$175k/year plus significant LTIP entitlements
 - Employed for just over a year and then terminated — given his contractual entitlement to notice of termination — ESA only
 - Court upheld the agreement even though it was “draconian” and deprived the employee of his LTIP entitlements
- *Lalani v. Canadian Standards Assn*, 2015 ONSC 7634
 - “Active employment” does not continue past the end of the ESA notice period

Other Cases of Note



- *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801
 - Employer tried to argue that it should be permitted to give a shorter notice period because of its financial circumstances
 - Court rejected that position and held that an employer's financial circumstances are not a relevant factor when determining notice

Just Cause for Termination



Caitlin Russell
April 13, 2016

What Amounts to Termination “For Cause”?

- Just cause = “capital punishment” of the workplace
- Key question: whether the employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship
- Contextual and fact-specific inquiry:
 - Determine the nature and extent of the misconduct
 - Consider the surrounding circumstances
 - Decide whether dismissal is a proportional response



Key Considerations:

(1) What is the nature of the misconduct?

“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer’s business, or if he has been guilty of wilful disobedience to the employer’s orders in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee.”

Key Considerations:

(2) What are the relevant surrounding circumstances?

- Is the conduct sufficient to justify terminating for cause?
Consider surrounding circumstances:
 - The type of conduct
 - Employee's position
 - Employee's history and seniority
 - The industry of the employer
 - Whether the employee knew the conduct was wrong
 - Employee's response to allegations of misconduct
 - Conduct after misconduct/ during investigation
 - Condonation of employer

Key Considerations:

(3) What are the alternatives to dismissal?

- Must be able to show that lesser discipline would not be sufficient to address the misconduct
- Consider alternatives:
 - Progressive discipline
 - Termination without cause

Key Considerations:

(4) Proof



- The employer bears the evidentiary burden of proving on the balance of probabilities (i.e., that it is more likely than not) that it had just cause to terminate the employee
- Can you prove it?
 - Conduct appropriate investigations
 - Seek legal advice before making any decisions
 - Remember duty of good faith in termination
 - Risks associated with unsupported allegations

Difficult Cases: Poor Performance



- To prove just cause relating to poor performance, an employer will need to show:
 - Standards of performance were clearly communicated
 - Provided adequate training and support
 - Standards were reasonable
 - Warning was given
 - Reasonable time was given to correct performance

AND

 - Employee failed to meet the standards

Difficult Cases: Insubordination/Insolence



- To prove cause for one insubordination/insolence, an employer will need to show:
 - Serious, willful and deliberate disobedience of a direction
 - Direction was known to the employee
 - Direction was consistently enforced
 - Direction was within the scope of duties
 - Employee was aware of penalty
 - Direction was lawful and reasonable
- AND
- No reasonable excuse

Recent Decisions: Just Cause?



- **Emotional Outbursts, Difficult Personality**
- *Armstrong v Lendon*, 2015 ONSC 3004
 - Legal secretary for 26 years
 - Demand for raise and bonus
 - Emotional outbursts in the work place

Recent Decisions: Just Cause?



- **Conduct Outside of the Workplace**
- *George v Cowichan Tribes*, 2015 BCSC 513
 - Executive Director of child and family services agency
 - Long service employee, unblemished discipline record
 - Altercation outside of workplace related to family incident
 - Complaint filed with employer

Recent Decisions: Just Cause?



- **Confidential Information, Positions of Trust**
- *Steel v Coast Capital Savings Credit Union*, 2015 BCCA 127
 - Long service employee, helpdesk analyst, banking industry
 - Single incident of unauthorized access to confidential information
 - Breach of workplace policies
- See also: *Agostino v Gary Bean Securities Ltd*, 2015 ONCA 49

Recent Decisions: Just Cause?



- **Dishonesty, Intention to Deceive**
- *Campbell v. Harrigan Rentals and Equipment Rentals*, 2013 BCSC 1813 (Canlii)
 - Financial Controller, 14 years of service
 - Misuse of gas card and expenses
 - Unauthorized salary advances
- See also:
 - *Tsakiris v. Deloitte & Touche LLP*, 2013 ONSC 4207
 - *Roe v British Columbia Ferry Services Ltd*, 2015 BCCA 1

Recent Decisions: Just Cause?



- **Health and Safety Breaches**
- *Balzer v. Federated Co-Operatives Ltd.*, 2014 SKQB 32
 - Propane Coordinator, 6 years service
 - No prior safety incidents
 - Received training on safety procedures
 - One safety incident; failure to report incident
- See also: *Capson v. Amcor Packaging Canada Inc.*, 2013 NBQB 212

Recent Decisions: Just Cause?



- **Poor Performance/Insubordination**
- *Simpson v. Global Warranty Management Corporation*, 2014 ONSC 724
 - Warranty claims adjuster, 7 years service
 - Incidents of poor performance going back to 2009
- See also: *Staley v. Squirrel Systems of Canada, Ltd.* 2013 BCCA 201

Recent Decisions: Just Cause?



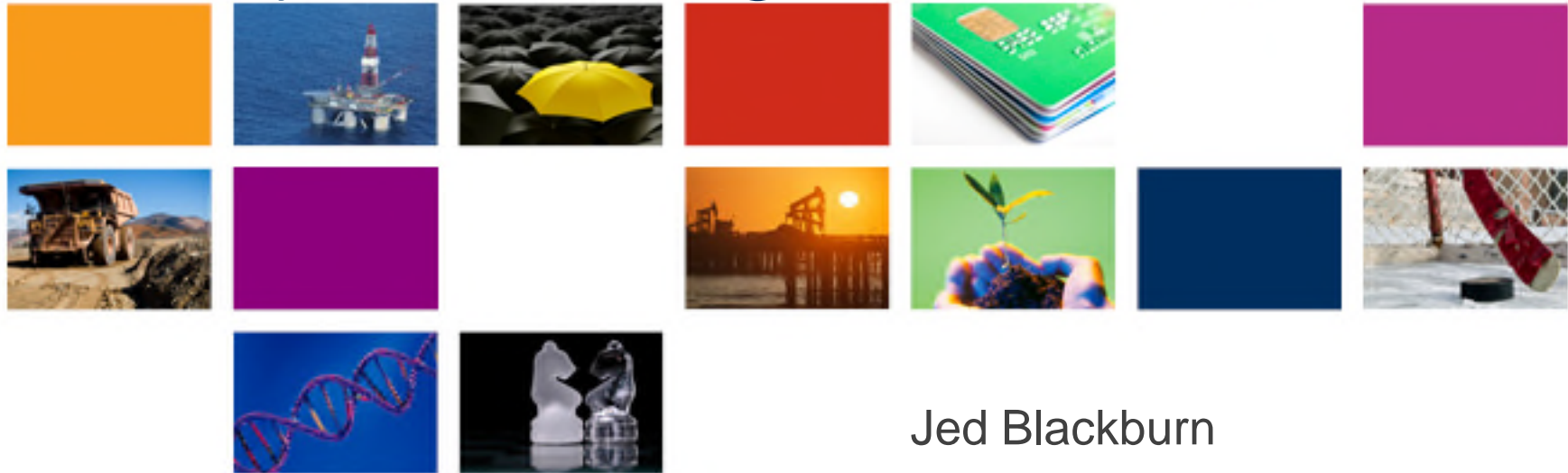
- **Violent Behaviour, Threats**
- *Phanlouvong v. Northfield Metal Products (1994) Ltd.*, 2014 ONSC 6585
 - Labourer, 16 years service
 - No prior disciplinary issues
 - Violent incident with co-worker
- See also: *Bellehumeur v Windsor Factory Supply Ltd*, 2015 ONCA 473

The Take-Aways



- High threshold for just cause
- Contextual analysis remains essential
- Industry and position are relevant
- Honest mistakes won't amount to just cause
- Fraud or intention to deceive is necessary
- Safety breaches won't always amount to just cause
- Poor performance and insubordination remain difficult

Enforcing Post-Employment Obligations



Jed Blackburn
April 13, 2016

Sources of Post-Employment Obligations

- Express Contractual Terms
- Fiduciary Duties
- Obligations at Common Law
 - General duty of good faith and fidelity
 - Confidential information and trade secrets

Contractual Obligations



- Common Contractual Terms:
 - Confidentiality and Non-Disclosure
 - Non-Competition
 - Non-Solicitation
- Consideration
- Not one size fits all

Contractual Obligations – Confidentiality



- Confidentiality and Non-Disclosure
 - Identify confidential information
 - Covenant not to use or disclose
 - Return all information on request, termination, resignation
- Benefits/risks
 - Scope
 - Time

Contractual Obligations – Restrictive Covenants



- Restrictive covenants constitute restraints of trade that are *prima facie* unenforceable
- Restrictive covenants vs. liquidated damages?
 - *Rhebergen v Creston Veterinary Clinic Ltd.*, 2014 BCCA 97
 - Functionalist vs. formalist approach

Contractual Obligations – Restrictive Covenants



- General requirements to be enforceable
 - Legitimate propriety interest
 - Reasonableness:
 - Time
 - Geographic scope
 - Activity
 - Clear, certain, and not vague
 - Public interest concerns

Contractual Obligations – Restrictive Covenants

- Non-Competition
 - Determine whether necessary
 - Reasonableness – time, geography, activity
 - Certainty

Contractual Obligations – Restrictive Covenants

- Non-Solicitation
 - Employees
 - Customers

Contractual Obligations – Restrictive Covenants



- Key Takeaways:
 - Tailor to individual circumstances
 - Determine what protections are strictly necessary
 - Danger of overreaching
 - Ambiguity will be fatal

Considerations on Termination



- Breach of the Employment Contract
- Entire Agreement Clauses
- Releases

Post-Employment Concerns



- Misuse or disclosure of confidential information
- Solicitation of clients
- Solicitation of employees
- Usurping business opportunities
- Other competitive actions

Strategies for Enforcing Contractual Provisions – Initial Steps

- Reminder letter upon termination
- Cease and desist letter
- Letter to new employer
- Risks

Strategies for Enforcing Contractual Provisions – Third Parties

- Potential claims against new employer
 - Inducing breach of contract
 - Unlawful interference with economic relations
 - Conversion
 - Conspiracy
 - Vicarious liability
- Reducing risk of claims re: new employees
 - Disclosure/representations in employment contract

Strategies for Enforcing Contractual Provisions – Injunctive Relief

- Injunctions
 - Extraordinary relief – granted where it is “just or convenient”
 - Interlocutory vs. final
- Relief
 - Enforcing restrictive covenants
 - Ex parte orders
 - Third parties

Strategies for Enforcing Contractual Provisions – Injunctive Relief

- Onus on employer to demonstrate:
 - Strong *prima facie* case
 - Irreparable harm
 - Balance of convenience
- Evidentiary issues
- Risks
 - Undertaking regarding damages
 - Costs

Strategies for Enforcing Contractual Provisions – Action for Damages

- Action for damages
 - Lost profits
 - Nominal damages
 - Punitive damages
- Practical considerations

Strategies for Enforcing Contractual Provisions – Alternative Approaches

- *BlackBerry Ltd. v. Marineau-Mes*, 2014 ONSC 1790
 - Twist on “wrongful resignation” case
 - Obtained declaration forcing employee to work six month notice period

Enforcing Common Law Rights – Duty of Good Faith

- *RBC Dominion Securities Inc. v Merrill Lynch Canada Inc.*, 2008 SCC 54
 - No express restrictive covenants and not fiduciaries
 - \$1.5 million award upheld against the former branch manager for breach of implied duty of good faith
 - Additional damages awarded for failure to give reasonable notice of resignation and punitive damages
- Limitations on recovery
 - Competition during the notice period

Enforcing Common Law Rights – Breach of Confidence



- Confidential information / duty of confidence
- Test for breach of confidence
 - Information conveyed to the employee was confidential
 - Communicated to the employee in confidence
 - Misused by the party to whom it was communicated
- Limitations

Enforcing Fiduciary Duties



- Who is a fiduciary?
 - Key employee test
 - Narrow
 - Directors, officers, or senior managers
 - Vulnerability test
 - Broader
 - *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134

Enforcing Fiduciary Duties



- Obligations of fiduciaries
 - Refrain from usurping business opportunities the employer has been pursuing
 - Refrain from soliciting former customers or clients for a reasonable period after termination
- Available remedies
 - Accounting
 - Lost profits

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Questions?

