

EMPLOYEE TERMINATIONS

Comprehensive legal information, advice and strategic know-how
you require to manage dismissals

April 23 - 24, 2012 | St. Andrew's Club and Conference Centre | Toronto



PROGRAM CO-CHAIRS

Darragh Meagher

City of Toronto - Legal Services

John W. Saunders

Hicks Morley Hamilton Stewart Storie LLP

Minimize risk and reduce liability by learning how to handle dismissal situations involving:

CONSTRUCTIVE & WRONGFUL DISMISSAL • SOCIAL MEDIA • JUST CAUSE • INVESTIGATIONS
DOWNSIZING • CONTRACTORS • STD & LTD • SEVERANCE • DAMAGES • MULTIPLE CLAIMS

Benefit from answers to critical questions:

- Which way is the pendulum swinging - towards Employers or Employees?
- Post-*Bill 168* - what necessitates automatic termination?
- Will the new *Summary Judgement Rule* expedite justice in employment cases?
- Post-*Wronko* and *Teamsters*: How far does the duty to mitigate extend?
- When is it safe to terminate an employee on leave?
- Who has the power to award damages - and on what grounds?
- What constitutes a fair, enforceable employment contract?
- When multiple claims are filed - when is issue estoppel triggered?
- Why are the "wrong" employees leaving voluntarily?
- What will an employee hear from his/her lawyer?

Media Partner



Dear Colleague:

Today's employers and employees have high expectations of their advisors. As a result, the in-house human resources professional, the Union representative and the outside expert must deliver advice that is timely, accurate and practical. Termination strategies must be cost effective and minimize exposure to liability. For private sector employers, the strategy must protect their proprietary interests. In a union environment, the rules of engagement for terminating employees provide different challenges.

In today's wired world, employees can readily access employment/labour law information and are more willing to bite back, even when they leave voluntarily. **The objective of this conference is to prepare you by presenting, in one place, and over two information-packed days, a complete guide to structuring, carrying out and defending dismissal claims.**

Each termination must be planned as if it might go to trial. This requires that we, as advisors, be up-to-the-minute on the newest trends in employment litigation and labour arbitration; accordingly **Insight Information** has assembled a faculty of experts recognized for their work on recent leading cases.

To assist in your understanding of how missteps may lead to multiple claims, this program covers a comprehensive roster of issues - from the crafting of the initial employment contract to the best way to manage the termination conversation and it closes with insights into what employees will hear from their lawyers. You will also discover how the new *Summary Judgment Rule* has been applied to an employment case, how to conduct fair investigations, new obligations under *Bill 168*, where damages are being awarded, how severance is calculated in 2012, and how to find out why good employees are leaving your organization.

We are extremely excited by this conference which presents excellent value and encourage you to invest a few minutes in reviewing the agenda and the faculty of experts below.

We look forward to seeing you in April.



Darragh Meagher
Director, Employment Law Section
City of Toronto - Legal Services



John W. Saunders
Partner
Hicks Morley Hamilton Stewart Storie LLP

CLE Accreditation: This program qualifies for 12 substantive hours and can be applied towards the 9 of the 12 hours of annual Continuing Professional Development (CPD) required by the Law Society of Upper Canada.
Please note that these CPD hours are not accredited for the New Member Requirement.

FACULTY

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WHO SHOULD ATTEND

This program has been designed for HR and Labour Relations Professionals and Union representatives from all industries

- Vice Presidents, Directors & Managers of:
 - Human Resources
 - Labour Relations
 - Employee Relations
 - Benefits, Compensation and Payroll
- Union Presidents, Business Agents, Stewards and Committee Members
- In-house Counsel
- Chief Operating Officers
- Employment and Labour Lawyers
- Administrative Law Practitioners
- HR and Labour Relations Consultants
- Benefits and Pension Consultants

8:00

Registration and Continental Breakfast

8:30

Welcoming Remarks from Insight Information

8:35

Co-Chairs' Opening Remarks

Darragh Meagher

Director, Employment Law Section
City of Toronto - Legal Services

John W. Saunders

Partner
Hicks Morley Hamilton Stewart Storie LLP

8:45

Beginning with the End in Mind: Crafting Employment Contracts That Stand Up in Court

Susan Crawford

Partner
Crawford Chondon & Partners LLP

- The pros and cons of using employment contracts
- Steps to improve the chances that the employment contract will be found to be enforceable: consideration, duress and other "pitfalls" to avoid when entering into an employment agreement
- Non-compete and non-solicitation clauses - what is enforceable? When does over-reaching void the intent of the contract? In a global economy, what is reasonable from a geographic perspective? *Chem Trend Limited Partnership v. Tom Mason*
- Bonus clauses and share option agreements - using appropriate language to avoid unnecessary liability at the point of dismissal
- Termination clauses - how to draft fair, enforceable clauses to limit liability
- Obligations when offering new employment contracts to existing employees

9:40

Different Faces of Constructive and Wrongful Dismissal: How Courts and Arbitrators are Viewing Each

M. Christine O'Donohue

Partner
Miller Thomson LLP

Christine was counsel on Wronko, a recent decision that addressed the amendment of a fundamental term of an express employment contract.

- What happens when existing employees refuse to sign mid-term contracts yet continue to work?
- Constructive dismissal vs. workplace change - what weight is given to change in location, duties and/or reporting functions?
- Duty to mitigate - lessons learned from *Wronko*
- Continuing to work after being constructively dismissed - acceptance or mitigation?

- Ramifications of *Wronko, Evans vs. Teamsters* and other significant constructive dismissal cases
- Resignation or dismissal: When does "I quit" not mean "I resign"? Lessons from *Chan* and other cases

10:30

Networking Coffee Break

10:45

A Tweet Too Far: Terminations Due to Perceived Improper Use of Social Media

William Gale

Partner
Grosman, Grosman & Gale LLP

- Social Media: is it the new, lawless Wild West or are rules evolving?
- Whose medium is it anyway?
- When do employees' comments outside office hours on their private Social Media account impact their obligations to their employers?
- When are comments on employees Social Media accounts so serious as to amount to cause for dismissal?
- The developing case law, both civilly and through arbitration
- Use of Social Media as a discovery tool
- Post-termination obligations of departing employees to refrain from using Social Media to exact revenge, including issues such as defamation, privacy or company confidential/proprietary information

11:30

Is it Possible to Find Just Cause? Hallmarks of a Good Investigation

John W. Saunders

Partner
Hicks Morley Hamilton Stewart Storie LLP

- Bullying and misconduct on and off duty - what constitutes a termination?
- How have termination obligations changed post-*Bill 168*? *Kingston (City) v. Canadian Union of Public Employees, Local 109*, [2011]
- "An addiction made me do it..." - when is enough - enough?
- Limitations of Norwich orders - *Community Living Fort Frances and District v. TBayTel* [2011]
- How to decide whether to use an internal or external investigator
- Interviewing witnesses and protecting privilege
- Dealing with the "he said" and "she said" scenario and assessing credibility
- Solicitor-client privilege vs. Union access to investigation report - *North Bay General Hospital v. Ontario Nurses' Association* [2011]
- Weighing the evidence
- Reaching a conclusion and writing the report

12:30

Networking Luncheon

1:30

Downsizing Smartly: Effective Termination Strategies

David A. Whitten

Partner
Whitten & Lublin

- Planning analysis: Pros/cons of which method works best
 - all at once versus over a period of time
- Countering the fallout - communication strategies
- How to structure the offering - voluntary vs. involuntary, formula vs. no formula, options
- Mutual terminations
- Class actions
- Survivors: How to maintain morale after downsizing

2:20

Networking Refreshment Break

2:40

Contracts (Fixed Term) and Contractors: Termination Issues

Abdul-Basit Khan

Partner
Blake, Cassels & Graydon LLP

- **Fixed Term Contracts**
 - Liabilities on early termination
 - What do you owe if you don't renew?
 - Repeat renewals - the indefinite "fixed term" contract
 - What happens if the employee continues working beyond the term?
 - Performance protection clauses to build into the contract
- **Dependent Contractors**
 - The emergence of a third category of workers
 - Liabilities on termination
 - Case in point: *McKee v. Reid's Heritage Homes Ltd.*

3:30

Leaves, Leaves, Leaves... The Rules for Terminating Employees on Leave

Shana French

Partner
Sherrard Kuzz LLP

- Job abandonment vs. frustration of contract - when is it safe to terminate an employee on leave?
- What information do you need?
- What if the employee will not supply medical information?
- What happens when an employee advises of a leave just as you are planning the termination?
- Can you terminate an employee while on maternity or parental leave?
- Can you downsize employees on STD and LTD?
- Do we have to wait to terminate until the leave concludes?
- Benefit obligations to employees *Brito v. Canac Kitchens*

4:30

Conference Adjourns for the Day

APRIL 24, 2012

8:00

Continental Breakfast

8:30

Expediting Justice: How the New Summary Judgment Rule Applies to Employment Cases

Ian R. Dick

Partner
Hicks Morley Hamilton Stewart Storie LLP

- Introduction to Rule 20 of the *Rules of Civil Procedure*
 - miracle cure or snake oil
- How does Rule 20 apply to employment cases - theory v. practice
- Efforts to make Rule 20 work (2010 Amendments) - you can lead a horse to water but you can't make it grant summary judgment
- The Ontario Court of Appeal clarifies matters - the recent decision in *Combined Air Mechanical Services*
- What the future holds - procedural panacea or same old same old

9:15

Severance Obligations: How to Creatively Reduce Costs Without Taking a Hardball Approach

Lior Samfiru

Partner
Samfiru Tumarkin LLP

- How are severance entitlements calculated?
- Do senior employees get more severance? The impact of the *Di Tomaso v. Crown Metal Packaging Canada* decision on severance entitlements of less senior employees
- Manners of providing termination entitlements
- Dealing with benefits, overtime, commissions, bonuses and vacation pay entitlements
- Leveraging lump payments to reduce severance obligations
- Ways to pay out the severance to mitigate the costs (all at once, over a period of time)
- Working notice - how effective is it? How can it be used to reduce severance costs?
- Ensuring enforceability of Releases
- Duty of confidentiality

10:15

Networking Coffee Break

10:30

Damages: Who Can Claim Them, In What Forum, What Do You Get?

Mark D. Contini

Partner
Mathews, Dinsdale & Clark LLP

Lewis Gottheil

Director, Legal Department
CAW Canada

- **Arbitrators' powers to award damages:**
 - The power to award punitive damages
 - The power to award damages in lieu of reinstatement at the behest of the trade union
 - Calculation of damages in lieu of reinstatement
 - Mental distress damages - when they are available and how they should be calculated
 - Can arbitrators award damages for future economic loss? If so, how should they be calculated?
 - What is the impact of Arbitrator Shime's award in *PSAC 0004 v. Greater Toronto Airport Authority*?
- **Damages awarded by Human Rights Tribunals:**
 - The grounds upon which they are awarded
 - Calculation of damages amount

11:30

Why are Employees Terminating Their Employment With Your Organization? How to Get Honest Appraisal Info You Can Rely On

Lora Fontana

Director, Employee and Labour Relations
City of Hamilton

Mike Salveta

President, HR and Payroll Solutions
Pivotal Integrated HR Solutions

Losing good employees is costly for an organization. Exit interviews provide a helpful tool to identify why the "wrong" employees are choosing to leave and provide you with an opportunity to pinpoint areas where your organization can improve. But how do you get honest answers from departing employees? And when is the best time to conduct an exit interview? Highlights of this session include:

- Benefits of face-to-face vs. telephone vs. online exit interviews
- When to conduct exit interviews to obtain the most valuable information - upon departure or several months later?
- Is six months later waiting too long?
- How to conduct anonymous online surveys
- Results from anonymous interviews - do they differ?
- Answers that require follow up

12:15

Networking Luncheon

1:15

The Termination Conversation: A Coaching Guide For Managers

Helen C. Daniel

Solicitor, Law Division
Ontario Power Generation Inc.

Darragh Meagher

Director, Employment Law Section
City of Toronto - Legal Services

- Tips for *When, Where, and how to answer Why*

- Liability that can come from termination conversations that don't go as scripted
- What tools do managers need?
- Importance of rehearsal
- Why is it important for the manager to do the termination as opposed to an HR rep?
- Allowing goodbyes vs guarding and escorting employees out
- Communicating the decision to your workforce

2:20

Networking Refreshment Break

2:30

When Employees Bite Back - How Dismissals and Resignations Become Dangerous and Costly

Melanie D. McNaught

Partner
Filion Wakely Thorup Angeletti LLP

- Wrongful hiring (false representation of hiring opportunities)
- Unresolved complaints (human rights, workplace harassment, workplace violence)
- Disgruntled resignations - today's angry quit becomes tomorrow's constructive dismissal
- Unexpected claims (overtime, vacation, pay increases)
- Variable compensation - representations and claims
- Long-term incentive plans
- References - duty of care and negligence
- Enforcing restrictive covenants and fiduciary obligations - measures available

3:30

Claims in Multiple Forums: What Your Employee Will Hear From His/Her Lawyer

Barry Kuretzky

Partner
Kuretzky Vassos Henderson LLP

- Why terminated employees want to sue their employers
- When to fight, when to settle - what criteria are used to establish this analysis?
- Will the cost outweigh the benefits?
- Potential forums - court or arbitration, HR Tribunal, ESA, WSIB?
- When is "issue estoppel" triggered?
- What sort of employment will a dismissed employee be obligated to accept?
- Do employees have to return to the employer that dismissed them?
- Before an arbitrator, what constitutes a credible job search?
- False assumptions and mistakes dismissed employees make

4:15

Conference Ends

