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Health and safety and wrongful dismissal updates

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

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Bill 149, Working for Workers Four Act, 2023 – What you need to know

Claire Browne

Bill 149, Working for Workers Four Act, 2023

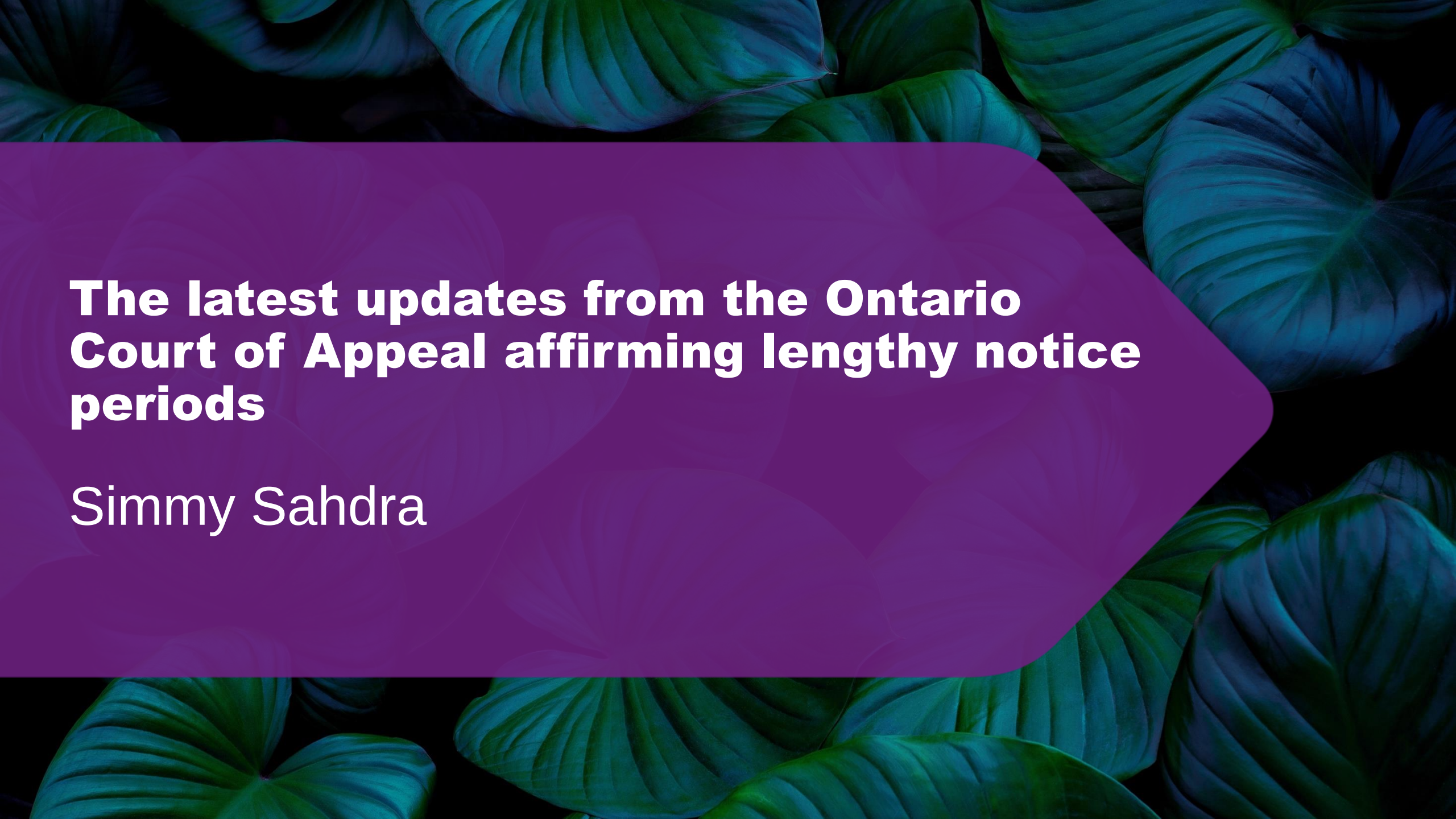
- Introduces the following amendments to the Employment Standards Act, 2000 (Ontario):
  - New requirements and prohibitions regarding the content of publicly advertised job postings
  - Identifies permitted methods of paying an employee’s tips and other gratuities
  - Clarifies the statutory requirements with regard to paying out vacation pay

Publicly advertised job postings

- Employers who advertise a publicly advertised job posting must:
  - Include information about the expected compensation for the position in the posting
  - Include a statement disclosing the use of “artificial intelligence” – if the employer uses artificial intelligence to screen, assess or select applicants for the position
- Employers who advertise a publicly advertised job posting are prohibited from including any requirements related to Canadian experience in the posting
- Employers shall retain copies of every publicly advertised job posting (and associated application form) for three years after access to the posting by the general public is removed

Employee tips and other gratuities

- An employer shall pay an employee’s tips or other gratuities, by:
  - Cash
  - Cheque payable only to the employee
  - Direct deposit (in accordance with the requirements set out in the ESA)
  - Any other prescribed method of payment
- Employer shall post and keep posted policies, if any, in place with respect to the sharing in tips or other gratuities distributed (i.e. employer, director or shareholder of the employer)
- Employer shall retain a copy of every written policy on sharing in tips or other gratuities that is required to be posted for three years after the policy ceases to be in effect



The latest updates from the Ontario Court of Appeal affirming lengthy notice periods

Simmy Sahdra

Rising trends in notice periods for wrongful dismissal

Wrongful dismissal: Unfair or unjust termination of employment without adequate notice or compensation.

Notice periods: Legally mandated time or compensation given to an employee upon termination.

Recent trends: Noticeable increase in notice periods, especially in cases involving long-term, specialized employees.

***Lynch v. Avaya Canada Corporation*, 2023 ONCA 696**

Background: Professional engineer terminated due to restructuring after 39-year tenure (age 64).

Decision: 30-month notice period.

Key factors: Length of service (39 years), age (64 years old), highly specialized with unique set of skills, availability of employment in his location given niche specialized area.

Milwid v. IBM Canada Ltd., 2023 ONCA 702

Background: Managerial employee terminated without cause due to impacts of COVID-19.

Decision: 27-month notice period.

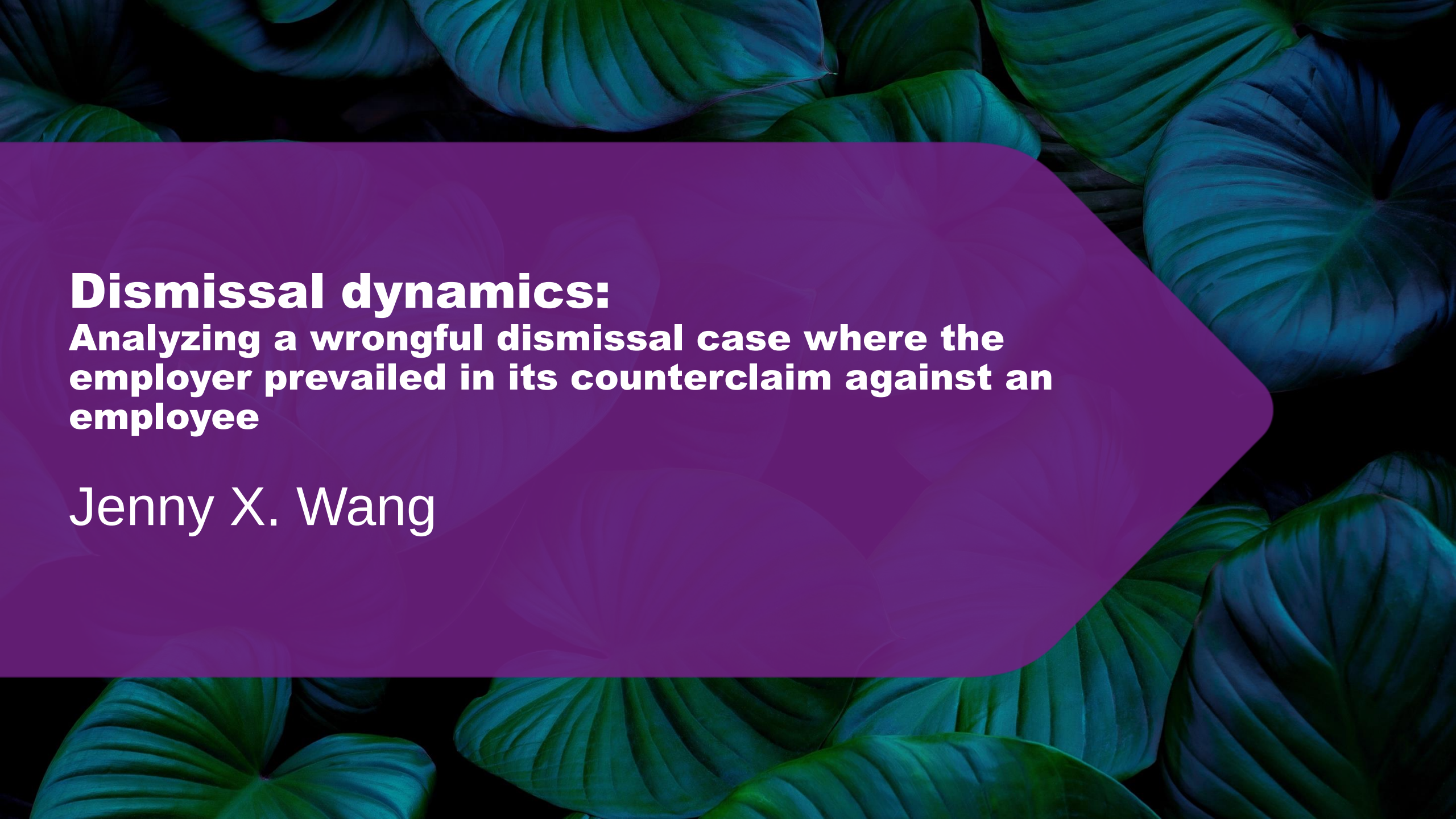
Key factors: Age, length of service, non-transferable skills, economic impact of COVID-19

Key takeaways: Implications for employers

Key takeaways: awareness of factors leading to longer notice periods is crucial to inform dismissal, severance, and settlement decision-making.

Employer strategies: Implement clear termination clauses, regular performance reviews, and maintain flexibility in workforce planning.

Risk mitigation: Stay updated with legal trends, consult the Employment and Labour group here at Dentons, and proactively manage employee roles and expectations.



Dismissal dynamics:

Analyzing a wrongful dismissal case where the employer prevailed in its counterclaim against an employee

Jenny X. Wang

Breen v Foremost Industries Ltd.

Employee personally liable for over $500,000 in damages

- Employee was the President and CEO and oversaw all Foremost Group businesses. Mr. Breen's wrongful dismissal claim was dismissed.

- Foremost Group's counterclaim succeeded. Mr. Breen was personally liable for:
  - $168,974.89 USD and $310,250 CAD in compensatory damages
  - $50,000 CAD in punitive damages
  - Costs of the action.

Breen v Foremost Industries Ltd.

Mr. Breen's employment obligations.

- Mr. Breen was required to consult with the Foremost Income Fund Board and obtain approval on:
  - all non-arm's length arrangements involving himself;
  - currency hedging on all significant contracts with payment in a foreign currency;
  - any contract that contained "red flag" terms;
  - any matter that was material and unusual or out of the ordinary; and
  - compensation matters such as bonuses or changes to compensation programs.
- Pursuant to his employment agreement Mr. Breen also had to comply with all Foremost Group's policies, practices, and procedures as a condition of his employment and to avoid and disclose any and all potential conflicts of interest.

Breen v Foremost Industries Ltd.

Termination of Mr. Breen for just cause.

- Mr. Breen was terminated for his:
  - failure to follow Foremost business control policies and procedures including without limitation in relation to the Transneft Contract;
  - misrepresentation of business information to the Fund Board;
  - unresponsiveness to corrective instructions in respect of the foregoing;
  - lack of candour in dealing with the Fund Board on these issues;
  - general non-performance of his employment obligations or incompetence;
  - breach of his fiduciary obligations including his duties to act honestly, in good faith, and with a view to the best interests of Foremost Group; and
  - breach of his employment agreement and Foremost Group policies.
- After-acquired cause: diversion of agency fees of Foremost Group's Russian operations, and the recipient of monetary gifts from a subordinate.

Breen v Foremost Industries Ltd.

Misconduct leading to counterclaims.

- The Foremost Group counterclaimed against Mr. Breen for:
  - the wrongful authorization of bonus to the Vice President Finance.
  - his receipt of three monetary “gifts”.
  - diversion of agency fees in relation to its Russian operations.
  - the currency loss arising from a failure to obtain hedge on the Transneft transaction

Breen v Foremost Industries Ltd.

Wrongful authorization of bonus to the Vice President Finance.

- The Foremost Group had various pools of commission bonuses:
  - Pool A and Pool B: pools were connected to specific formulas for sales performance.
  - Pool C: discretionary in nature to award individuals who supported the sales teams.
  - Annual discretionary bonus pool
- Mr. Breen authorized a Pool C bonus of $20,000 to the VP Finance contrary to instructions of the Fund Board.
- Mr. Breen not personally liable because:
  - No personal benefit.
  - Can be considered as seeking to retain a valuable employee.

Breen v Foremost Industries Ltd.

Receipt of 3 monetary “gifts”.

- Mr. Chernyk oversaw Foremost Group’s Russian operations and could be a recipient of Pool C bonuses.
- Mr. Chernyk incorporated various entities, including Alpheus Ltd. Mr. Breen was the sole shareholder and director of 849 Ltd.
- Mr. Breen awarded Mr. Chernyk Pool C bonuses in 2011 and 2013 that could be traced from Foremost Group companies to Mr. Chernyk’s companies to 849 Ltd.
- In 2012, Mr. Breen authorized a payment to Alpheus Ltd. who then paid 849 Ltd for consulting services that weren’t rendered.
- Mr. Breen took steps to conceal and cover up the existence of these payments.
- Mr. Breen used his position as President and CEO to receive the monetary “gifts” for his own benefit through embezzlement, misappropriation or defalcation while acting in a fiduciary capacity:
  - The 2011 gift of $25,974.89 USD;
  - The 2012 gift of $30,000 USD; and
  - The 2013 gift of $110,250 CAD.

Breen v Foremost Industries Ltd.

Diversion of agency fees.

- There were 4 specific transactions:
  - The 2011 payment from a Foremost company to Alpheus Ltd. in the amount of $78,000 USD
  - The 2012 payment from a Foremost company to Alpheus Ltd. in the amount of $35,000 USD
  - The 2013 payment from a Foremost company in the amount of $150,000 USD to Polakis Sarris and onwards to Gulf Islands (and others); and
  - The 2014 January payment from a Foremost company in the amount of $282,818 USD to Sky Towers c/o Polakis Sarris.

  Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties.
- Mr. Breen did not have the knowledge element to be either reckless or willfully blind.
- Mr. Breen did not breach the standard of care. He was ordinarily negligent.
- Mr. Breen was personally liable for the amounts to Alpheus Ltd, but not for the amounts to Polakis Sarris.

Breen v Foremost Industries Ltd.

Failure to obtain hedge on the Transneft transaction.

- Mr. Breen authorized and oversaw a transaction without involving either the Fund Board or legal counsel.
- It is not enough that the employee did not perform as well as the employer expected. To obtain judgment against the employee, the employer must prove:
  - the terms of the contract explicit or implied between them (Mr. Breen was obligated to implement a hedge and discuss same with the Fund Board);
  - the breach of the term or terms by the employee (Mr. Breen failed to do so); and
  - the damages claimed were occasioned by or a direct consequence of such breach (significant devaluation of the ruble).
- The “business judgement rule” defense did not apply.
- Mr. Breen was not responsible for the geopolitical reasons leading to the depreciation of the ruble and therefore was only liable for $200,000 CAD.

Breen v Foremost Industries Ltd.

Punitive damages.

- Things a court will consider with respect to the proportionality of punitive damages include:
  - whether the misconduct was planned and deliberate;
  - the intent and motive;
  - whether this conduct occurred over a lengthy period;
  - whether there were attempts to conceal or cover up the misconduct;
  - the person’s awareness that what they were doing was wrong; and
  - whether the person profited from their misconduct.
- Awarded $50,000, the amount sought.

The Supreme Court of Canada's split decision in *R. v. Sudbury*: Employer liability under OHS laws

Adrian Miedema

Facts

- City contracted with paving company to be “constructor” under OHSA and repair water main
- During work, paving company employee struck and killed pedestrian
- Ministry of Labour charged City as employer under OHSA

Ontario OHSA definition of “employer”

“employer” means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

Decisions

- Trial judge: Sudbury not “employer”
- First appeal: agreed with trial judge
- Ontario Court of Appeal: City liable as employer, “control” not factor
- SCC: “on equal division” 4-4, appeal dismissed

Precedential effect of split decision

- Decision of four judges who would have dismissed appeal not “binding” but “entitled to great respect” (SCC, 1931)
- Effectively, employers must pay attention to both Ontario Court of Appeal and SCC decisions

What does this mean?

- If company hires contractors, company is “employer” of contractors under OHSA
- For example, an owner of a construction project who contracts with construction company
- Even company that does not “control” work of subcontractor is “employer” of subcontractor employees
- So, company can be charged with offence under OHSA involving accident to contractor even if company does not control contractor’s work or employees
- Company can assert lack of control as part of due diligence defense

What does this mean?

- R. v. Seeley & Arnill Aggregates Ltd. (1993)
  - For some offences under OHSA, accident itself proves “actus reus” of charge
  - E.g.: charge of failing to ensure worker work fall protection when exposed to fall hazard of more than three metres. If worker fell more than three metres without fall arrest, “actus reus” automatically proven
  - Due diligence therefore becomes crucial

Guidance from SCC on due diligence

- SCC provided guidance re “due diligence”
  - Company’s degree of control is relevant
  - Did company pre-screen contractor re its expertise and safety record and capacity to comply with OHSA?
  - Did the company inform contractor of hazards?
  - Did company monitor quality of contractor’s work?
  - Could company have foreseen the accident?
  - Did company delegate control to constructor (or contractor) because of its own lack of skill etc.?
  - Did company evaluate contractor’s ability to comply with OHSA?
  - Did company effectively monitor and supervise contractor’s work?

Does this decision apply outside Ontario?

- Depends on definition of “employer” and scope of duty in the particular act
- Federally: SCC notes that CLC duty “to inspect “every workplace controlled by the employer”.
  - “Thus, Parliament explicitly decided that the employer’s duty should be triggered by the employer’s control over the workplace.”
- Provinces: definitions of employer vary

So, what should we do when hiring contractors?

- Pre-screen for expertise and safety record
- Inform contractor in writing of known hazards
- If accurate, state in contract that contractor hired for expertise that company does not have
- Require contractor to control work and ensure safety
- Monitor contractor’s safety practices
- Remember: your own safety record is even more important now

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Thank you

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