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WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

Navigating the haunting issues in Canadian employment law

October 25, 2024

Grow | Protect | Operate | Finance

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Job abandonment horror: What to do when your employee ghosts you

Jennifer Thompson

What is job abandonment?

“Abandonment occurs when the employee unequivocally, through their words or actions and viewing the circumstances objectively, abandons the contract of employment....

Whether there has been abandonment will depend on all the circumstances. The test is whether, viewing the circumstances objectively, a reasonable person would have understood from the employee's words and actions, that she or he had abandoned the contract of employment”

Stonham v. Recycling Worx Inc,
2023 ABKB 629, at paras. 84-85.



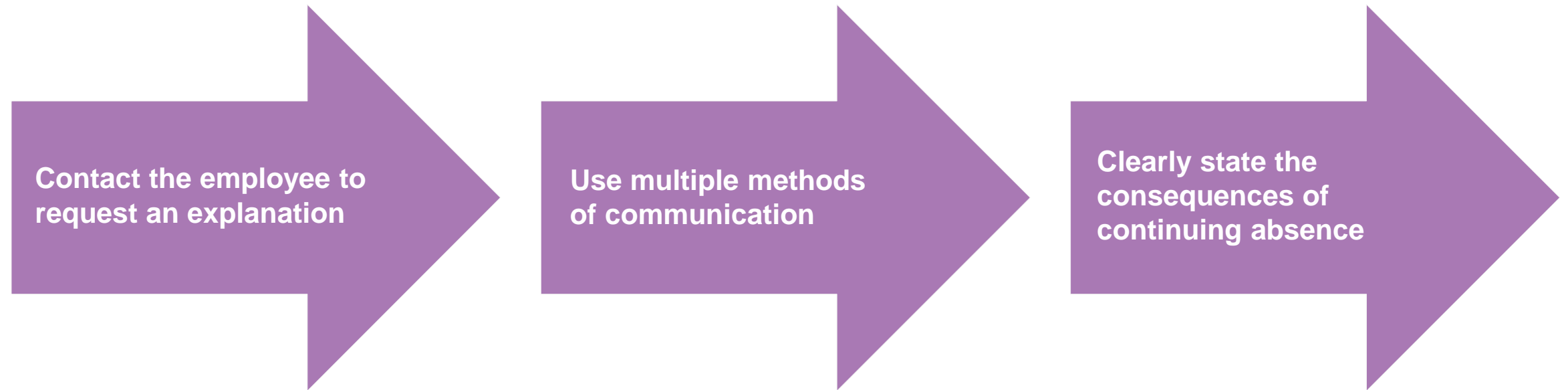
Objective evidence of abandonment

**Failure to
report to
work**

**Failure to
follow
established
policies and
procedures**




**Actions
outside of the
workplace**

Establishing job abandonment



Rinse and repeat!

Where employee is on a leave

-  Need to ask if employee is fit for work first.
-  Employee is required to participate in any accommodation attempts.
-  Consider whether lack of response is due to disability.

Other options



If the employee indicates that they intend to return to work, more difficult to assert abandonment.



Other options may be available such as progressive discipline leading to just cause termination.



Each case is different so important to seek advice before you act!



Beware:

**The chilling updates to CAPSA's 2024
Capital Accumulation Plan Guideline**

Pamela Chan Ebejer

CAPSA Guideline No. 3

Guideline for Capital Accumulation Plans

- The **Canadian Association of Pension Supervisory Authorities (“CAPSA”)** is a quasi-regulatory association of Canadian pension regulators.
 - Mission is to facilitate an efficient and effective pension regulatory system in Canada, which it does through various mandates including establishing common regulatory expectations for pension plan administration across Canada.
- **Guideline No. 3, Guideline for Capital Accumulation Plans (“CAP Guideline”)** was initially released in 2004.
 - Updated CAP Guideline released September 9, 2024 and took effect on this same date (“2024 CAP Guideline”).
 - Where IT system changes or process changes are needed to support compliance with the 2024 CAP Guideline, such changes should be implemented by January 1, 2026.
 - CAP Guideline does not replace any legislative requirements but is designed to support legal compliance and the development of best practices.

2024 CAP Guideline

What is a capital accumulation plan?

- The CAP Guideline applies broadly to **capital accumulation plans (CAPs)**, which are “tax-assisted investment or savings plans that permit its members to make investment decisions in respect of the investment of their individual accounts among two or more investment options selected by the CAP sponsor”.
- Includes:
 - Defined Contribution (DC) Pension Plan;
 - Registered Retirement Savings Plan (RRSP);
 - Deferred Profit Sharing Plan (DPSP);
 - Locked-in Retirement Account (LIRA);
 - Registered Retirement Income Fund (RRIF);
 - Tax Free Savings Plans (TFSA);
 - Registered Education Savings Plan (RESP);
 - First Home Savings Account (FHSA).

2024 CAP Guideline

What are the requirements for CAP sponsors?

- Standard of care:
 - Explicit statement that CAP sponsors have responsibilities towards members and in some instances, *fiduciary responsibilities*.
- CAP sponsor responsibilities:
 - Expanded list of responsibilities including, determining key features of the CAP, selecting service providers, maintaining records, providing access to ongoing education to members and maintaining oversight of the CAP.
- Governance:
 - Establishing and documenting a governance framework for the administration of the CAP that includes, a description of the roles, responsibilities and accountabilities of parties involved in governance, a code of conduct, conflict of interest policy, risk management framework, communication process and oversight mechanism.

2024 CAP Guideline

What are the requirements for CAP sponsors?

- Service providers:
 - Detailed criteria to be considered when selecting service providers including, potential conflicts of interest, reputation, team stability, data security measures, quality, level and continuity of services offered, information access and cost of services.
 - Detailed criteria for the periodic review of service providers including, performance, quality of products and service, conflicts of interest and member satisfaction.
- Member education:
 - Requirement for an ongoing member education strategy;
 - Updated list of information on the nature and features of the CAP to be provided at the time of enrollment and on an ongoing basis;
 - Providing additional investment-related information including, historical performance;
 - Periodically reviewing effectiveness of member education.

2024 CAP Guideline

What are the requirements for CAP sponsors?

- Decision-making tools:
 - Expanded criteria to consider when selecting decision-making tools;
 - Periodically reviewing assumptions underlying tools that provide future projections and communicating these assumptions to members.
- Investment selection and default investment options:
 - Expanded list of factors to consider when choosing investments, including default investment options;
 - Establish a policy regarding failure to make investment choices;
 - Detailed criteria for the periodic review of investments, including default investment option.
- Maintaining oversight of the CAP:
 - Updated criteria for review of plan features, governance framework, fees and expenses, and records maintenance.


CAP sponsor has ultimate responsibility for maintaining and overseeing the CAP.

2024 CAP Guideline

Best Practices for CAP sponsors

- Establish a documented governance framework / Review your existing governance framework.
- Establish a committee that oversees, monitors and supervises the CAP, and to review at least annually:
 - Service providers;
 - Investment options and funds;
 - Fees and expenses;
 - CAP features;
 - Member education and decision-making tools;
 - Records maintenance.
- Training on 2024 CAP Guideline for committee members and any other employees assisting with the governance of the CAP.
- Document oversight and supervision in committee minutes.

Note: CAPSA recognizes proportionality and that the method of implementing the 2024 CAP Guideline will differ from one plan to another.



Terrifying termination clauses: Ontario's unenforceable termination clause cases and key takeaways

Larysa Workewych

Termination Clauses: An Evolving Battleground

“An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal.”

- *Waksdale v Swegon North America Inc.*, paragraph 10

Dufault v The Corporation of the Township of Ignace, 2024 ONSC 1029

4.01 The Township may terminate this Agreement and terminate the Employee's employment **at any time** and without notice or pay in lieu of notice **for cause**. If this Agreement and the Employee's employment is terminated with cause, no further payments of any nature, including but not limited to, damages are payable to the Employee, except as otherwise specifically provided for herein and the Township's obligations under this agreement shall cease at that time. **For the purposes of this Agreement, "cause" shall include but is not limited to the following:**

(i) upon the failure of the Employee to perform the services as hereinbefore specified without written approval of Municipal Council and such failure shall be considered cause and this Agreement and the Employee's employment terminates immediately;

(ii) in the event of acts of willful negligence or disobedience by the Employee not condoned by the Township or resulting in injury or damages to the Township, such acts shall be considered cause and this Agreement and the Employee's employment terminates immediately without further notice.

Dufault v The Corporation of the Township of Ignace, 2024 ONSC 1029

4.02 The Township may at its sole discretion and without cause, terminate this Agreement and the Employee's employment thereunder **at any time** upon giving to the Employee written notice as follows:

(i) the Township will continue to pay the Employee's base salary for a period of two (2) weeks per full year of service to a maximum payment of four (4) months or the period required by the Employment Standards Act, 2000 whichever is greater. This payment in lieu of notice will be made from the date of termination, payable in bi-weekly installments on the normal payroll day or on a lump sum basis at the discretion of the Township, subject at all times to the provisions of the *Employment Standards Act, 2000*.

(ii) with the exception of short-term and long-term disability benefits, the Township will continue the Employee's employment benefits throughout the notice period in which the Township continues to pay the Employee's salary. The Township will continue the Employee's short-term and long-term disability benefits during the period required by the *Employment Standards Act, 2000* and will pay all other required accrued benefits or payments required by that Act.

(iii) all payments provided under this paragraph will be subject to all deductions required under the Township's policies and by-laws.

(iv) any further entitlements to salary continuation terminate immediately upon the death of the Employee.

(v) such payment and benefits contributions will be calculated on the basis of the Employee's salary and benefits at the time of their termination.

Dufault v The Corporation of the Township of Ignace, 2024 ONSC 1029

- Key takeaways:
 - Avoid conflating the ESA standard and the common law standard (“including but not limited to”).
 - If listing entitlements, include references to vacation pay and any other contractual entitlements that may be required to continue during the notice period.
 - Employer has no discretion to terminate “at any time”.

De Castro v Arista Homes Limited, 2024 ONSC 1035

If you are **terminated for Cause or** you have been guilty of wilful misconduct, disobedience, **breach of Employment Agreement** or wilful neglect of duty that is not trivial and has not been condoned by ARISTA, then ARISTA will be under no further obligation to provide you with pay in lieu of reasonable notice or severance pay whether under statute or common law. For the purposes of this Agreement **“Cause” shall include your involvement in any act or omission which would in law permit ARISTA to,** without notice or payment in lieu of notice, **terminate your employment.**
(Emphasis added)

De Castro v Arista Homes Limited, 2024 ONSC 1035

- Key takeaways:
 - For cause provision should not include provisions that go beyond the limited circumstances of O. Reg. 288/01.
 - Clause purported to allow termination at common law for cause without notice.
 - Clause purported to allow termination without notice for breach of the employment agreement.
 - Courts will apply all words of the contract in their plain grammatical reading.

Wilds v. 1959612 Ontario Inc., 2024 ONSC 3452

- (c) **Termination Without Cause:** We may terminate your employment at any time and in our sole discretion by providing you with written notice and/or pay in lieu of notice. The notice / pay in lieu to be provided will be two (2) weeks plus any applicable notice and severance requirements in accordance with the *Employment Standards Act, 2000* (the “**Severance Period**”).

If pay in lieu of notice is provided, you will receive **only your base salary and employment-related health and dental benefits for the applicable period**, save and except for short-term disability, long-term disability, and which will not continue beyond the statutory notice period or as required by applicable employment standards legislation.

You have an obligation to take all reasonable steps to mitigate the loss of your employment. Your obligation includes an obligation to accept reasonable alternate work offered to you if your position with the Organization ends.

If you obtain alternative employment (or otherwise commence earning income in lieu of working for the Organization) before the expiry of the Severance Period, the payments will end immediately and the Organization will pay you the equivalent of 50% of the amount owed from the date you commence alternative employment (or otherwise commence earning income in lieu of working for the

Organization) and the expiry of the Severance Period, provided that you will never receive less pay in lieu of notice (and severance pay, as applicable) than you are entitled to under the employment standards legislation applicable to your employment.

You agree to immediately advise the Organization when you receive an offer of employment, commence alternative employment (or otherwise commence earning income in lieu of working for the Organization).

You agree that in exchange for the notice and/or pay set out herein, you will execute a Full and Final Release, in a form acceptable to the Organization, pursuant to which you will agree to waive any and all claims relating to your employment with the Organization or the termination thereof.

Wilds v. 1959612 Ontario Inc., 2024 ONSC 3452

(e) **Termination With Cause:** We may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, **other than any notice, pay in lieu of notice or severance required pursuant to the applicable employment standards legislation.** For the purposes of this Agreement, just cause includes, but is not limited to:

- (i) a material breach of this Agreement or our employment policies;
- (ii) unacceptable performance standards;
- (iii) theft, dishonesty or falsifying records, including providing false information as part of your application for employment;
- (iv) intentional destruction, improper use or abuse of Organization property;
- (v) violence in the workplace;
- (vi) obscene conduct at our premises, property or during Organization-related functions at other locations;
- (vii) harassment of your co-workers, supervisors, managers, customers, suppliers or other individuals associated with the Organization;

- (viii) insubordination or willful refusal to take directions;
- (ix) intoxication or impairment in the workplace;
- (x) repeated, unwarranted lateness, absenteeism or failure to report for work;
- (xi) personal or off-duty conduct (including online conduct) that prejudices the Organization's reputation, services or morale; or
- (xii) any conduct that would constitute just cause pursuant to common law.

It is intended that this termination provision includes any entitlements you have pursuant to the *Act*. In the event that your entitlements pursuant to the *Act* exceed these contractual provisions, those statutory provisions shall replace these contractual provisions and no further payments are required. You agree that the provision of notice, pay in lieu, or a combination of both as set out above will fully satisfy all obligations of the Organization to you, whether arising pursuant to statute, common law or otherwise, and that you will have no further entitlement to notice, pay in lieu, or severance arising out of your employment or the termination thereof. To be clear, these provisions replace any common law entitlement that you would otherwise have.

Wilds v. 1959612 Ontario Inc., 2024 ONSC 3452

- Key takeaways:
 - Notice entitlements are not based on base salary but on wages.
 - Employees cannot be required to sign a release in exchange for their statutory minimum entitlements.
 - Language that a cause termination will be subject to ESA entitlements is not sufficient to overcome invalid language.
- Case also serves as an important reminder to employers to manage terminations carefully and to ensure compliance with all statutory and contractual requirements.

A Little Treat: *Bertsch v Datastealth Inc.*, 2024 ONSC 5593

5. Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the [ESA] and its Regulations,...including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.

You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.”

A Little Treat: *Bertsch v DatastealthInc.*, 2024 ONSC 5593

11.(a) If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owning under the [ESA] ...you shall instead receive your minimum entitlements under the [ESA]...

(h) This Agreement constitutes the complete understanding between you and the Company with respect to your employment, and no statement, representation, warranty or covenant have been made by you or the Company with respect to this Agreement except as expressly set forth herein. The parties have expressly contemplated whether there are any additional implied duties owed by the Company to you, at common law or otherwise, outside the written terms of the Agreement or under statute and confirm that there are no such obligations. This Agreement shall not be altered, modified, amended or terminated unless evidenced in writing by the Company.”

(k)... The invalidity, for any reason, of any term of this Agreement shall not in any manner invalidate or cause the invalidation of any other term thereof...”

A Little Treat: *Bertsch v DatastealthInc.*, 2024 ONSC 5593

- Key takeaways:
 - For a clause to be invalid, it must potentially contravene the ESA and/or its regulations.
 - The presumed power imbalance that exists between employee and employer does not invalidate a clause where the proper meaning of the clause is clear.
 - “Failsafe” clause can help reaffirm the intention of the parties and reinforce the clarity of the clause.



**Immigration nightmares:
Beware IRCC's spine-chilling new rules for work
permit eligibility and other changes to
immigration programs**

Heelan Kwon

Changing immigration landscape in Canada

- Students and recent graduates;
- Spousal work permits;
- Temporary foreign worker program:
 - Low-wage and high-wage streams.
- International mobility program:
 - Intra-company transferee work permit.

Students and recent graduates

Reduced intake caps and heightened requirements for study permits

- Intake cap:
 - 2024: 485,000 new study permits – 35% reduction from 2023;
 - 2025: 437,000 new study permits – 10% reduction from 2024;
 - 2026 expected to be the same as 2025.
- Requirement for provincial/territorial attestation letter.
- Off-campus work authorization:
 - During regular academic sessions: 20 hours per week.
 - During scheduled breaks in the school year: full-time.

Students and recent graduates

Post-graduation work permit

- Additional eligibility requirements will come into effect on **November 1, 2024**:
 - Language proficiency requirement:
 - University students – Canadian Language Benchmarks (CLB) 7 in English or Niveaux de compétence linguistique canadiens (NCLC) 7 in French, in all 4 language areas.
 - College students – CLB 5 in English or NCLC 5 in French, in all 4 language areas.
 - Field of study requirement:
 - University students graduating from bachelor, master, or doctoral degree programs – all fields of study are eligible.
 - University/college students graduating from college-level or any other program – must graduate from a program linked to certain occupations in long-term shortage, e.g., agriculture and agri-food, healthcare, STEM, trade, transport.

Spousal work permits

Restrictions on eligibility for open spousal work permits

- Spouses of foreign students
 - As of **March 19, 2024**, principal foreign student must be in a:
 - Master or doctoral degree program.
 - Certain professional degree university program, e.g., BEng, BEd, MD, DDS, JD, Bpharm, BScN, etc.
 - **Upcoming change**: principal foreign student in master degree program must be in a program that is at least 16 months in duration.
- Spouses of foreign workers:
 - Upcoming change: principal foreign worker must be in a management/professional occupation, or in a sector with labour shortages, under Canada's work permit programs (TFWP & IMP).

Temporary foreign worker program

Low-Wage and High-Wage Streams

- New measures for Low-Wage Stream, as of **September 26, 2024**:
 - Reductions to employer cap on proportion of low-wage positions.
 - Refusal to process in census metropolitan areas with unemployment rate of 6% or higher.
 - Reduction in maximum employment duration.
- Upcoming change to High-Wage Stream Eligibility, expected **November 8, 2024**:
 - Raised wage threshold for stream determination: 20% higher than median wage in applicable province/territory of work.

Resource: [Upcoming changes to the High-Wage Labour Market Impact Assessment Stream - Dentons Canadian Employment & Labour Law](#)

International mobility program

Changes to work permit categories based on Free Trade agreements

- New program delivery instructions for work permits based on the following agreements:
 - Canada–United States–Mexico Agreement (CUSMA);
 - Canada–European Union: Comprehensive Economic and Trade Agreement (CETA);
 - Canada–United Kingdom Trade Continuity Agreement (CUKTCA);
 - Canada–Korea Free Trade Agreement;
 - Canada–Chile Free Trade Agreement;
 - Canada–Colombia Free Trade Agreement;
 - Canada–Peru Free Trade Agreement;
 - Canada–Panama Free Trade Agreement;
 - Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).
- Guidance regarding the consideration of wage.

International mobility program

Changes to the Intra-Company Transferee category

- Definition of Multinational Corporation (MNC);
- Specialized knowledge workers;
- Availability of position with foreign enterprise;
- Location of employment;
- Commercial physical presence;
- Prevailing wage.

Resource: [Dentons - immigration, refugees and citizenship canada issues revised guidance on intra-company transferee work permits](#)

Thank you



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