

RISKY BUSINESS:
 A Crash Course for BC Employers
 on Terminations, Damages &
 Prohibited Actions

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CLARK WILSON

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1

Risky Business: A Crash Course

Our firm operates from the traditional,
 ancestral, and unceded territory of the
 Skwxwú7mesh (Squamish),
 Səlilwətaʔ/Selilwitulh (Tsleil-Waututh), and
 xʷməθkʷəy̓əm (Musqueam) Nations

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2

Outline

1. Prohibited Actions
2. Risky Terminations
3. Damages

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3

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Prohibited Actions

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4

Prohibited Actions

- Prohibited Action Complaints
 - formerly called “discriminatory action”
 - prohibited action protections are designed to prevent employers from retaliating against employees who raise health and safety concerns or seek to enforce their rights under the *Workers Compensation Act*

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5

Prohibited Actions

- Division 6 of the *Workers Compensation Act* prohibits an employer from taking certain actions classified as “prohibited” against an employee, when workers are engaged in certain activities related to workplace health and safety.

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6

Prohibited Actions

- Workers are protected from engaging in the following activities:
 - exercising any right or carrying out any duty in accordance with the OHS provisions, the regulations or an applicable order;
 - if the worker has testified or is about to testify in a matter, inquiry or proceeding under the *Workers Compensation Act* or the *Coroners Act* on an issue related to workplace health and safety or the work environment; or
 - if the worker has given any information regarding workplace health and safety or the work environment of that worker or any other worker to the employer, the union, or any other person concerned with the administration of the OHS provisions

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7

7

Prohibited Actions

- In summary, if a worker has exercised their rights or duties under workplace safety legislation, is participating in certain proceedings regarding workplace safety, or if a worker has made a report regarding workplace health and safety, then the worker is entitled to protection from certain actions by their employer.

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8

8

Prohibited Actions

- These actions include:
 - suspension, layoff or dismissal
 - demotion or loss of opportunity for promotion
 - transfer of duties, change of location of workplace, reduction in wages or change in working hours
 - coercion or intimidation
 - imposition of any discipline, reprimand or other penalty
 - the discontinuation or elimination of the worker's job

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9

9

Prohibited Actions

- When a worker considers that their employer has taken or has threatened to take prohibited action, they may make a complaint to WorkSafeBC within one year of the alleged prohibited action
- Unionized employees may elect to deal with prohibited actions through the grievance procedures under a collective agreement or by a complaint to WorkSafeBC

10

Prohibited Actions

- When a complaint is filed, WorkSafeBC inquires into the matter and, if the complaint is not settled or withdrawn, they must make a determination as to whether the alleged prohibited action occurred and deliver a written statement of their determination
- Typically when prohibited action complaints are filed, WorkSafeBC will do an inspection and may make orders while the complaint process is underway

11

Prohibited Actions

- The parties are offered the chance to attend mediation and if mediation does not occur, the matter is sent for determination and the employer provides a response and their evidence. Hearings are done by way of written submissions.

12

Prohibited Actions

- There are three elements that must be present for a finding of a prohibited action:
 - the employee has suffered at least one of the negative consequences listed in the legislation;
 - the employee was engaged in the type of activity protected by the legislation; and
 - there is a causal connection between the negative consequence and the protected activity

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13

13

Prohibited Actions

- If those three elements are proven, the burden shifts to the employer to prove that the decision concerning the negative consequences was in no way motivated by retaliation for the employee's protected activity
- WorkSafeBC will apply the "taint" principle when making its determination
- Generally, the burden of no contravention rests with the employer and the third element is not considered an onerous burden for the employee

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14

14

Prohibited Actions

- If WorkSafeBC makes a decision that prohibited action takes place, a decision will then be made on remedy and submissions are typically sought from both the worker and the employer

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15

15

Prohibited Actions

- Remedies that can be awarded include:
 - the employer/union stop the prohibited action (if it is ongoing)
 - reinstatement
 - payment of lost wages
 - reprimand or references to the matter in the employee's records be removed
 - payment of reasonable out-of-pocket expenses incurred because of the prohibited action
 - any other thing that WorkSafeBC considers necessary to secure compliance with the legislation
- WorkSafeBC cannot provide general damages (i.e. pain and suffering), or make remedies related to the general health and safety of the workplace – remedies are related to the worker's personal losses
- Workers are required to mitigate their damages if they have been terminated

16

Prohibited Actions

- Decisions on either or both the determination and the remedy can be appealed to the Workers' Compensation Appeal Tribunal

17

Prohibited Actions

- Why does this matter?
 - prohibited action complaints seem to be on the rise
 - employees are more aware of their rights
 - the test WorkSafeBC applies in making its determination is very unfavourable to employers
 - you need to be cautious if taking certain actions if an employee has raised a health and safety concern, including a bullying and harassment complaint

18

Prohibited Actions

- What should you do if you get a prohibited action complaint?
 - cooperate with and comply with any WorkSafeBC investigations and/or orders arising from the complaint
 - note applicable deadlines
 - take steps to preserve evidence
 - consider mediation
 - consider other legal risks involving the worker
 - consider whether you want to participate in the decision process
 - consider getting legal advice

19

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Risky Terminations

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20

Risky Terminations

Every termination from employment carries some risk of legal action (even if without merit) but certain circumstances heighten the chances of a successful claim/complaint.

21

Risky Terminations

1. No enforceable contractual termination language

- Common law applies
- Unpredictable and costly
- Short service is becoming a lesser factor on the analysis

Preventative actions

- Always include language in offer letter/employment agreement setting out entitlements on termination, from minimum standards to a negotiated amount
- Revisit agreement when a term of employment changes or after significant passage of time
- Consider language of bonus, equity compensation plans

22

Risky Terminations

2. Employee on leave

- Any leaves under ESA – must have a legitimate reason unrelated to the leave (or the basis of the leave) or risk reinstatement and backpay
- Substantiated medical leave – possible violation of human rights legislation and employee not in a position to mitigate
- Unsubstantiated medical leave – possible violation of human rights legislation and employee not in a position to mitigate

Preventative actions

- Provide "soft" notice when the decision is made – will still need to provide full legal notice/pay in lieu effective the return date
- Return to work and performance manage
- Do not terminate until prognosis is inability to return to work or significant time has passed (i.e. frustration of contract)
- Hire a replacement as soon as needed

23

Risky Terminations

3. Employee seeking accommodation

- no job is available – filled or redundant
- modifications can't be undertaken without undue hardship
- human rights complaint for failure to accommodate and/or dismissal due to a protected ground

Preventative actions

- Place on an unpaid leave of absence
- Continue to look for modified work
- Continue to seek updated medicals

24

Risky Terminations

4. Cause terminations

- "Cause" does not mean a reason or basis for termination
- Cause implies an act of moral turpitude
- Fundamental trust inherent in the employment relationship is irrevocably broken
- Only allege cause in good faith where there is reasonable basis or risk additional damages (i.e. aggravated or punitive damages)
- Poor performance – only if culpable

Preventative actions

- Collect as much as information (i.e. evidence) as possible to support cause allegations – consider an investigation
- Provide the information to the employee and allow the employee to fully respond to the allegations
- Review policies
- Review employment contract – may be prudent to provide notice/pay in lieu of notice if cause is not certain or to avoid legal costs of a claim
- Consult with legal counsel before making decision

25

Risky Terminations

5. Faulty process

- Delay in ESA or contractual entitlements
- Requesting a release for ESA or contractual entitlements
- Withholding ROE or incorrect coding
- Lack of confidentiality and negative statements (exception: "qualified privilege")
- Raising stale or unfounded allegations during the termination meeting
- Advertising/hiring replacement before termination
- Failing to cut access to systems/secure Company property
- Mismanaging benefits issues

Preventative actions

- Script a "to do list" and consider talking points
- Keep termination meetings as brief as possible
- Designate one person as the communicator to employees, stakeholders, and prospective employers
- Seek legal advice for termination letter, without prejudice offers and Releases

26

Risky Terminations

6. Federal employers

- *Canada Labour Code* – mimics collective agreements
- Terminating an employee (other than a "manager") on a without cause basis – "unjust dismissal"
- back pay and **reinstatement**

Preventative Action

- Only terminate employee for just cause or a redundancy of position

27

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Damages

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28

BC Supreme Court Claim

Province's superior trial court for claims over \$35,000

In the employment context, claims for:

- Wrongful dismissal
 - o Includes constructive dismissal
- Breach of Contract

Does not have jurisdiction to hear claims arising from breaches of the BC Employment Standards Act or Human Rights Code

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29

BC Supreme Court Claims

Zoehner v. Algo Communication Products Ltd., 2023 BCSC 224

- ER was company founded by parties' parents, owned by plaintiff EE and his 2 brothers
- EE, aged 64, began working in late 1970s, by 1985 was general manager of one of two divisions of company, making \$350,000
- ER terminated EE, claiming EE abandoned employment in 2020

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30

BC Supreme Court Claims

- All 3 shareholders agreed to sale of division, making EE's position redundant
- ER didn't provide meaningful work as substitution for work EE had previously been doing
- EE didn't accept ER's repudiation of contract of employment
- ER terminated EE's employment effective January 2021, without reasonable notice
- Mitigation: EE's health issues limited his employability, on brink of retirement, limited professional skills, unlikely to find reasonable alternative employment

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31

31

BC Supreme Court Claims

- EE brought action in damages for wrongful dismissal
- Action allowed, burden was on ER to establish that EE repudiated contract of employment, failed to do so
- ER ordered to pay:
 - \$560,000 in general damages (19.2 months' notice)
 - \$8,482.74 for cost of replacement of personal health insurance

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32

32

BC Supreme Court Claims

Klyn v. Pentax Canada Inc., 2024 BCSC 372

- EE hired by medical equipment company as Territory Sales Manager in 2006, 100 % commission basis
- 2014, ER changed compensation = \$100,000 per year plus new commission rate
- April 2022, ER terminated EE's employment without cause, ER made some payments
- EE found new employment

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33

33

BC Supreme Court Claims

- Termination letter to EE contained requirement to sign "Full and Final Release Agreement"
- Employee brought action for punitive damages, and other relief
- EE awarded \$326,095.78 in general damages
 - Parties agreed reasonable notice period under circumstances was 18 months, \$469,166.12
 - EE mitigated losses by \$150,070.34 by finding employment in last 8 months of relevant period
 - EE was entitled to \$7,000 for value of trip he won but never received

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34

34

BC Supreme Court Claims

- Punitive damages:
 - EE awarded \$25,000 in punitive damages, exceptional remedy
 - ER had overriding duty of good faith, honest performance of terms of employment, duty includes manner in which ER terminated EE
 - Implicit threat in letter to withhold payment EE was legally entitled to was "*oppressive and reprehensible*"
 - Release presumably waived any right to pursue funds that were already owed to EE

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35

35

BC Supreme Court Claims

Chu v. China Southern Airlines Company Limited., 2023 BCSC 21

- EE began working for ER in 2008, 2011-2018 was Marketing and Business Development Manager
- ER demoted EE in 2018 to customer service position, again demoted EE to airport terminal worker
 - EE not trained as airport terminal worker, not physically capable of performing role, failed competency tests
- In 2019, ER terminated EE's employment, alleging just cause

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36

36

BC Supreme Court Claims

- EE was 68 years old, skills didn't transfer well to general marketplace
- EE brought application for summary trial of wrongful dismissal action

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37

37

BC Supreme Court Claims

Findings:

- ER terminated EE before providing promised training and testing
- ER disciplined EE, made serious and false allegations in response, EE suffered mental distress before and after termination
- ER breached duty of good faith and fair dealing in manner of dismissal, attempted to manufacture disciplinary record to support termination
- ER set EE up for failure, disciplined EE unfairly in humiliating and embarrassing ways
- ER's conduct was "profoundly harmful to employee", continued almost 5 years

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38

38

BC Supreme Court Claims

- EE awarded :
 - General damages of \$58,800 (20 months' notice)
 - Aggravated damages of \$50,000
 - Punitive damages of \$100,000

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39

39

BC Supreme Court Claims

Zheng v. China Southern Airlines Company Limited., 2023 BCSC 1763

- EE was 57-year-old Chinese Canadian employed by international airline
- EE was working for another airline, recruited by ER's general manager
- Worked for ER for 9 years, EE told she was under investigation, immediately placed on a leave, not given reason for leave or investigation
- ER sent EE termination letter

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40

40

BC Supreme Court Claims

- EE diagnosed with acute stress & PTSD from sudden termination, recommended not to work for at least 2 months
- EE unsuccessful in finding other work, found out ER communicated throughout Vancouver travel industry that EE was fired
- EE retrained as chef and obtained job as pastry chef

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41

41

BC Supreme Court Claims

- EE obtained default judgment, ER was deemed to have admitted allegations of fact in claim
- EE was awarded:
 - general damages of \$98,832.75 (20 months' notice)
 - aggravated damages of \$35,000.00
 - punitive damages of \$75,000.00
- Allegations made by ER were baseless and false and investigation into EE's conduct was sham
- ER's conduct was "...highly blameworthy. It was abusive, planned and deliberate."

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42

42

BC Supreme Court Claims

Lefebvre v. Gisborne Holdings Ltd., 2023 BCSC 2231

- EE hired by ER on 18-month fixed-term contract, replacing EE on leave
- 6 weeks into term, EE sent email with questionable "tone and content"
- ER terminated, citing "irreconcilable breakdown of employment relationship"

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43

43

BC Supreme Court Claims

- Termination not proportionate to the email, which did not rise to level of insubordination
- ER had progressive discipline policy that was not followed
- Employment contract did not contain termination provisions

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44

44

BC Supreme Court Claims

- Uncertainty as to whether a duty to mitigate is owed by an EE with a fixed-term employment contract who is wrongfully dismissed
 - EE took reasonable steps to mitigate losses
- EE awarded \$81,100, amount she would have earned during term of contract
- Declined to award punitive damages

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45

45

BC Provincial Court Claim

Hears all civil claims between \$5001 and \$35,000

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46

BC Provincial Court Claim

Collins v. Duncan Housing Society, 2023 BCPC 63

- EE hired by ER in 2018 as Maintenance Worker, then Maintenance Supervisor
- EE terminated without cause in February 2021, provided 3 weeks' notice
- Found work part-time, earning less, suffered injury at new job, unable to work physical job
- Eventually found part time, then full time work

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47

BC Provincial Court Claim

- EE made claim against original ER for wrongful dismissal
- Court considered significant position EE had with ER, age, health challenges, job market in pandemic
 - Awarded \$10,394, (15 weeks' notice, minus mitigation)
 - Did not subtract any income earned during 3-week ESA notice period

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48

BC Human Rights Tribunal Complaints

The independent, quasi-judicial body created by the BC Human Rights Code

Accepts, screens, mediates and adjudicates human rights complaints in BC

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49

BC Human Rights Tribunal Complaints

Mema v. City of Nanaimo, 2023 BCHRT 91

- EE was black person, worked as Chief Financial Officer for City of Nanaimo
- ER suspended then terminated EE, after receiving a misconduct report filed by another EE
- EE brought HR Complaint, alleging ER breached s. 13 of Human Rights Code, discriminating against EE on basis of ancestry, place of origin, race and colour

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50

BC Human Rights Tribunal Complaints

- ER's decisions to suspend and terminate EE's employment were discriminatory, contrary to s. 13 of Code
- Misconduct report was inflected with racial bias and stereotype, likely unconscious, which ran through each of key points of report
- Misconduct report was foundation for ER's decision to suspend and terminate EE's employment
 - Therefore: termination was discriminatory

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51

BC Human Rights Tribunal Complaints

- ER's suspension and termination of EE's employment left him unemployed and depressed
- EE became ostracized from his professional community
- It impacted EE's standard of living and mental health
- EE claimed wages lost from time of termination to hearing, as he had been unable to find reemployment
 - Determined EE did not establish that difficulty in finding reemployment not solely due to discrimination

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52

52

BC Human Rights Tribunal Complaints

- ER ordered pay EE:
 - \$50,000.00 as compensation for injury to dignity, feelings and self-respect
 - \$583,413.40 as compensation for wages or salary lost
 - o EE had Claimed \$777,884
 - \$10,150.04 as compensation for expenses

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53

53

BC Human Rights Tribunal Complaints

Kimball (by Kuebler) v. Kelowna Actors Studio Inc., 2024 BCHRT 136

- EE was 14 year old, neurodivergent performer
- EE worked for ER theatre company for 3 weeks, as lead in play
- ER terminated EE
 - Acknowledged they did not meet legal obligation to accommodate EE's disabilities
- Termination had significant effect on EE

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54

54

BC Human Rights Tribunal Complaints

- ER ordered pay EE:
 - \$1,200 lost wages
 - \$35,000 injury to dignity, feelings and self-respect
 - \$18,998 for expenses

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55

55

BC Human Rights Tribunal Complaints

Christensen v. Save-a-Lot Holdings Corp. (No. 3), 2023 BCHRT 125

- ER operated a car wash and dealership, EEs' father was one of founding directors and shareholders
- EEs were terminated same day their father was
- EEs alleged ER discriminated against them based on family status
- ER claimed nepotism, stated father hired EEs for jobs they weren't qualified for, they failed to perform, "*grossly overpaid*"

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56

56

BC Human Rights Tribunal Complaints

- Timing of the terminations gave rise to reasonable inference that EEs' family status was a factor in their termination, if not the only factor
- ER failed to establish that reason for termination was EEs grossly overpaid or poor work performance
- Found EEs terminated due to father being terminated as well
 - ER failed to take any steps to determine whether terminating EEs employment was necessary based on individual merits and capabilities or as part of ER's overall restructuring
 - Therefore: terminated was discriminatory

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57

57

BC Human Rights Tribunal Complaints

- ER ordered pay EEs:
 - \$10,500 each for lost wages
 - \$10,000 each for injury to dignity, feelings and self-respect

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58

58

BC Human Rights Tribunal Complaints

Harder v. Tupas-Singh and another, 2022 BCHRT 50

- EE employed by ER for approximately 13 months
- EE was 59 years of age when terminated, alleged she was passed over for promotion & terminated due to her age
- ER alleged they terminated due to EE not being available as needed and not meeting expectations
- Tribunal relied in part on audio recordings EE had made of conversations with ER

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59

59

BC Human Rights Tribunal Complaints

- Tribunal unable to find EE passed over for promotion, that claim dismissed
- Found EE was terminated, in part, due to her age, and was out of work for approx. 15 weeks
 - Age was likely not predominant factor, or even secondary factor, however it was a factor
- ER ordered pay EEs:
 - \$5,102 for lost wages
 - \$4,000 each for injury to dignity, feelings and self-respect

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60

60

ON Superior Court of Justice Claims

Province's superior trial court for claims over \$35,000

In the employment context, claims for:

- Wrongful dismissal
 - o Includes constructive dismissal

Breach of Contract

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61

ON Superior Court of Justice Claims

Boyer v. Callidus, 2024 ONSC 20

- EE worked as President of Underwriting and Portfolio Management for ER for 7 years
- EE gave ER notice of intention to retire at end of 2016
- During notice period, EE alleged workplace became toxic and EE was constructively dismissed
- Found there was no CD, EE had voluntarily retired

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62

ON Superior Court of Justice Claims

- EE also claimed damages for vacation time, deferred bonus and unvested stock options
- ER alleged pursuant to ER policies:
 - EE had used vacation time, not entitled to carry over
 - Deferred bonus not payable as EE not actively employed
 - EE not entitled to further vesting of stocks following retirement
- Court held ER required to not only show there was such policies, but that EE was aware of these policies

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63

ON Superior Court of Justice Claims

- ER failed to do so, ordered to pay:
 - \$93,076 for 22 weeks unused vacation
 - \$525,000 +3% interest for unpaid and deferred bonus
 - \$1,213,856 for value of lost stock options

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64

64

ON Superior Court of Justice Claims

Giacomodonato v. PearTree Securities Inc., **2023 ONSC 5628**

- EE recruited to join ER in 2016 as President and co-head of Banking
- EE terminated without cause in January 2018
- EE sued for wrongful dismissal, claiming approx. \$3M
- ER counterclaimed for \$1M for breach of restrictive covenants when EE went to work for competitor
 - ER filed report alleging losses of \$1,599,000 in damages

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65

65

ON Superior Court of Justice Claims

- ER abandoned claim for \$1M in punitive damages mid-way through trial
- Court dismissed remainder of ER's claim
- EE claimed ER's counterclaim significantly increased EE's costs, expanded scope of discovery
- EE awarded:
 - \$718,103 in damages
 - \$830,761 in costs
 - *"to sanction inappropriate behaviour by [ER] in its conduct" and "discourage frivolous and strategic claims"*

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66

66

QUESTIONS?



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67
