

EMPLAWYERS' UPDATE

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A Quarterly Newsletter on Labour and
Employment Law Issues

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Alberta Court Finds Return-to-Office Mandate was Constructive Dismissal for Employee who was Hired Prior to the Pandemic as a Remote Worker

In *Nickles v. 628810 Alberta Ltd.*, 2025 ABKB 212, a judge of the Alberta Court of King's Bench has ruled that an employer's directive requiring an employee to return to the office constituted a constructive dismissal.

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Constructive dismissal arises when an employer unilaterally makes a significant change to a fundamental term of employment without the employee's consent. In such cases, the employee may treat the contract as terminated and pursue a claim for constructive dismissal.

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The plaintiff, Ms. Nickles, had worked as an office manager for 37 years. Throughout her employment, she had worked remotely and attended the office solely at her discretion. Following the pandemic, her employer directed her to begin working from the office. When she declined, the employer proposed a hybrid schedule requiring in-office attendance 2.5 days per week, while reserving the right to demand full-time office work in the future. Ms. Nickles did not accept this offer and commenced a claim for constructive dismissal.

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The Court found that remote work was a long-standing and integral part of Ms. Nickles' employment arrangement that preceded the pandemic. As such, the employer's return-to-office directive amounted to a unilateral change of a fundamental term of employment. This change, made without reasonable notice, constituted a constructive dismissal. The Court distinguished this case from post-pandemic return-to-office scenarios, emphasizing the historical context of the work-from-home arrangement.

The employer argued that Ms. Nickles failed to mitigate her damages by rejecting the hybrid work proposal. However, the Court rejected this argument, concluding that accepting the modified offer would effectively allow the employer to impose the same fundamental change that led to the

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constructive dismissal in the first place. Nevertheless, the Court confirmed that traditional principles of mitigation continue to apply.

Key Takeaways for Employers:

1. Employers must exercise caution when making unilateral changes to core employment terms, particularly where long-standing practices exist;
2. An employee may not be required to mitigate by accepting an alternative arrangement that reproduces or could reproduce the same fundamental change at issue; and
3. Employer's implementing return-to-office mandates must take into account individual employment histories to ensure the manner of recall is legally permissible.

Notable Win for Employers — Ontario Court of Appeal Upholds Enforceability of Unambiguous Termination Clause

Bertsch v. Datastealth Inc., 2025 ONCA 379, is a welcomed decision that stands out amid a long trend of increased judicial scrutiny of employment contracts. The Ontario Court of Appeal has confirmed the enforceability of a termination clause that limits an employee's entitlements to the minimum standards under the *Employment Standards Act, 2000* ("ESA"). The *Bertsch* decision is a significant development for employers navigating Ontario's increasingly restrictive termination clause jurisprudence.

The clause at issue provided that, whether the employee was terminated "with or without cause," they would receive only the minimum amounts required under the *ESA*. These included wages, vacation pay, termination pay, severance (if applicable), and benefit continuation, but only to the extent required by the *ESA*. Importantly, the contract explicitly disclaimed any entitlement to common law notice or damages beyond *ESA* standards, and confirmed the provision applied throughout the employment relationship.

The plaintiff employee, Mr. Bertsch, challenged the provision as ambiguous and therefore unenforceable. Specifically, Mr. Bertsch asserted that, while a person trained in the law might find the clause unambiguous, an ordinary person might understand, incorrectly, that they could be terminated from their employment without notice for conduct such as carelessness or negligence, rather than "wilful misconduct, disobedience or wilful neglect of duty".

Under the *ESA*, employers are generally required to provide employees with notice of termination or pay in lieu of notice. However, there are specific exemptions where this requirement does not apply. One such exception (under *O.*

Reg. 288/01) is for employees who have "been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer". The standard for "wilful misconduct, disobedience or wilful neglect of duty" is high, and requires more than mere carelessness or negligence. It necessitates a deliberate and intentional act with knowledge that the conduct is wrong, or a reckless disregard for the consequence.

Relying on this legal distinction between careless and intentional acts, Mr. Bertsch alleged that the termination provision in his employment contract would permit the employer to terminate an employee for cause short of "wilful misconduct, disobedience or wilful neglect", without payment.

Both the judge of first instance and the Court of Appeal disagreed. In upholding the termination clause, the Court emphasized:

- **Clarity of Language:** The wording used in the termination clause was clear and unambiguous. In dismissing Mr. Bertsch's assertions that an ordinary person may incorrectly interpret the clause, the Court clarified that the issue is not whether an ordinary person might arrive at an incorrect interpretation of the termination provisions of the employment agreement, but how the agreement can be reasonably interpreted;
- **"With or Without Cause" Phrasing:** This language did not improperly broaden the employer's right to withhold *ESA* entitlements in just cause situations. Instead, it reflected the employer's intention to pay *ESA* minimums even if the employer was terminated for cause (wilful misconduct, disobedience or wilful neglect of duty); and
- **Effect of the "Failsafe":** The termination clause included a "failsafe" that expressly provided for an employee to receive their minimum entitlements under the *ESA* on termination. While helpful, the failsafe was not essential to the provision's enforceability. The clause was already compliant.

Ontario courts have historically approached termination clauses with a high degree of scrutiny. Even minor technical flaws have rendered otherwise reasonable provisions void. Against this backdrop, *Bertsch* offers a welcome counterbalance.

Key Takeaways for Employers:

1. This decision offers a key opportunity for employers to revisit their employment contracts;
2. Use clear, unambiguous language;
3. A "failsafe" clause may be helpful in adding protection, but it won't rescue a fundamentally flawed provision;

4. Avoid definitions of “cause” that conflict with or undercut ESA protections; and
5. Consider updating existing contracts if their termination provisions are unenforceable. For current employees, new termination provisions must be supported by fresh consideration, such as a signing bonus, to be enforceable.

Federal Court of Appeal Upholds Drug and Alcohol Testing for Nuclear Industry Workers

In *Power Workers’ Union v. Canada (Attorney General)*, 2024 FCA 182, the Federal Court of Appeal (FCA) upheld the constitutionality and reasonableness of pre-placement and random alcohol and drug testing for safety-critical workers in the nuclear sector. This ruling affirms that legislatures can impose such testing requirements within safety-sensitive industries.

The Canadian Nuclear Safety Commission (the Commission) imposed mandatory alcohol and drug testing for licensees operating “Class I” nuclear facilities. While testing for reasonable cause, post-incident, follow-up, and return-to-duty situations went largely unchallenged, the unions opposed two specific testing provisions:

- Random testing of 25% of safety-critical workers annually; and
- Mandatory pre-placement testing.

The unions argued that these provisions violated sections 7 (life, liberty, and security of person), 8 (search and seizure), and 15 (equal rights) of the *Canadian Charter of Rights and Freedoms*, and were also unreasonable on administrative law grounds. The dispute proceeded to judicial review and was ultimately appealed to the FCA following the Federal Court’s dismissal of the challenge.

The FCA confirmed that the Commission has broad statutory powers under the *Nuclear Safety and Control Act*, including imposing conditions on licensees to ensure nuclear safety. Against this backdrop, the FCA reviewed the three *Charter* claims and administrative challenge.

Section 7 (Life, Liberty, and Security of Person)

The FCA found that section 7 was not engaged. The testing methods were deemed relatively non-invasive, and without disciplinary consequences tied directly to positive results, the measures did not impose the level of psychological stress required to trigger section 7 protections.



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Section 8 (Search and Seizure)

The FCA applied the two-step test required for Section 8 challenges. First, it considered whether the impugned search or seizure interferes with an individual’s reasonable expectation of privacy. The Court acknowledged that drug and alcohol testing intrudes upon privacy. Second, it considered whether the action was reasonable. The Court concluded that the action was reasonable and emphasized the diminished expectation of privacy for workers in safety-critical roles. Ultimately, the Court held that:

- The search was authorized by law;
- The law itself was reasonable; and
- The state’s interest in preventing nuclear incidents outweighed the workers’ privacy interests.

The FCA stressed that a proactive, rather than reactive, approach is appropriate in a highly regulated, high-risk industry such as nuclear energy.

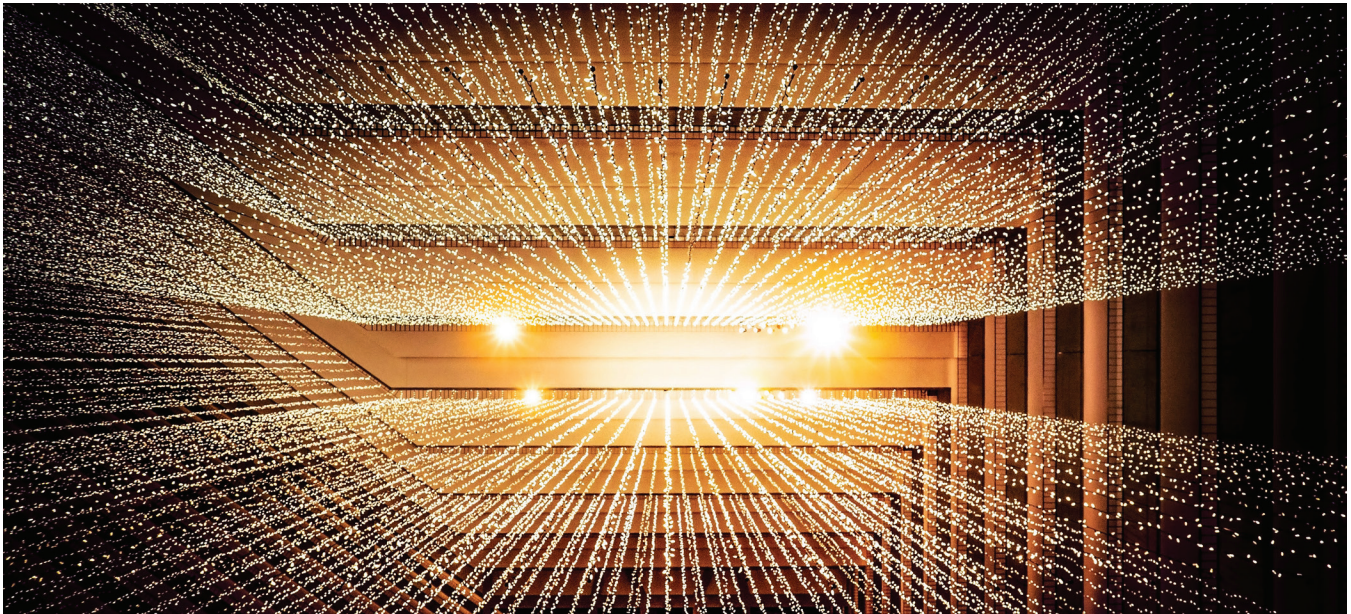


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Section 15 (Equality Rights)

The FCA rejected the claim that the testing discriminated against safety-critical workers or individuals with substance use disorders. It found no evidence that the provisions disproportionately affected drug-dependent individuals, and held that temporarily removing unfit workers from safety-sensitive roles was neither arbitrary, nor discriminatory.

Administrative Law Challenge

The appellants also argued that the Commission provided insufficient reasons and improperly fettered its discretion. The FCA dismissed these claims, finding that:

- The Commission reasonably relied on its staff’s extensive work over a 10-year consultation period,
- The public consultation process did not constrain the Commission’s authority to adopt the measures.

Key Takeaways for Employers:

1. While the decision is explicitly confined to the unique risks of the nuclear industry, it has broader implications for employers and regulators;
2. The decision reinforces that safety-critical workers have reduced expectations of privacy;
3. The decision recognizes the relative intrusiveness of various testing methods; and
4. The decision confirms that legislative frameworks can support preventive safety measures, even in the face of *Charter* scrutiny.

Digital Platform Workers’ Rights

A digital platform is defined as an online platform that allows workers to choose to accept or decline digital platform work. Uber is a familiar example of a digital platform operator.

The *Digital Platform Workers’ Rights Act, 2022*, and its associated regulations, came into force on July 1, 2025. The *Act* imposed new obligations on digital platform operators regarding the treatment and rights of workers performing digital platform work in Ontario, including:

- Operator must retain records pertaining to all workers using an operator’s platform;
- Operator must provide the workers with information relating to pay and work assignment in writing;
- Operators must pay workers at least minimum wage, and provide them with clear recurring pay periods that must be established for the payout of all amounts, including tips;
- Operators must provide workers with a written explanation if the workers’ access to the digital platform is removed;
- Non-compliance may result in penalties, fines, and quasi-criminal liability; and
- Affected businesses should ensure they are fully compliant with these standards.