mcmillan

May 2012

employment and labour newsletter

in this issue...

employment contract amendments - a landmine for employers

by Elisabeth Preston and George Waggott

In recent years, a number of our employer clients have faced difficult decisions regarding their businesses. More specifically, many businesses we advise have skilled employees who the employer wishes to retain, but economic circumstances do not justify continued employment on the same contract terms. As a result, many of the most challenging H.R. situations involve navigating the difficult topic of how an employer can implement less favourable employment terms without such changes automatically leading to a lawsuit.

The foundation for any employee contract changes is the concern about potential constructive dismissal claims. In very general terms, constructive dismissal involves situations where employees are "construed" as having been dismissed based on changes implemented by the employer. The legal analysis is focused on an objective test which assesses whether or not the employee is being subjected, when viewed objectively, to a fundamental change to the employment relationship. These changes ordinarily involve two main types: the first are changes to an employee's compensation; while the second relates to fundamental changes to the employee's duties, reporting relationship or responsibilities. In both situations, the risk for employers is that once such a fundamental change is implemented, there is the possibility that, despite the intention of retaining the employee with the company, the employee may be able to resign and claim damages on the same basis to which they would have been entitled had they been dismissed without cause.

The topic has been reviewed in a number of recent court decisions, with many practitioners now having some sense of strategies which may be adopted. In the Ontario Court of Appeals' decision in *Wronko v Western Inventory Service Ltd.* (2008) ONCA 327, the employer was faced with the challenge of how to deal with a senior executive's employment agreement which had termination provisions more favourable than the colleague who was superior to him. When Darrell Wronko's boss learned of

Wronko's entitlement to two years of compensation on termination of employment, various discussions ensued around what the company intended to do. Ultimately, Wronko was sent a document which asked him to agree to change his termination provision to a maximum of 30 weeks. Wronko refused and advised that he would be prepared to consider a "reasonable alternative" should the company wish to propose one. In response, Wronko was then sent a memo which purported to give him two years' notice of the intention of the company to amend the termination provision in his employment contract to a provision which was essentially the same as the document he refused to sign. Wronko objected over the next two years but continued to work in his same position. Then, two years and four days later, the company sent him a document which it claimed was then his employment contract. Wronko replied that he understood his job to be terminated and did not report to work. He sued for wrongful dismissal and claimed damages for breach of contract, as well as for bad faith, punitice and exemplary damages and unpaid vacation pay. The Ontario Court of Appeal ultimately held that Wronko had been constructively dismissed because the employer's memo with the new agreement indicated that if he was not prepared to accept the new contract, "then we do not have a job for you", which was effectively notice of termination.

The decision in *Wronko* confirms that there are essentially three options available to an employee when an employer attempts to make a unilateral amendment to a fundamental term for contracted employment. The options are as follows:

1. The employee accepts the change, either expressly or implicitly, in which case the employment would continue under the altered terms.

2. The employee may reject the change and sue for damages. In these instances, the rejection is essentially immediate and constructive dismissal ensues. An example of this is the leading case of *Farber v Royal Trustco* [1997] 1 SCR 46 where the employee was advised that he would be required to accept a demotion, but he refused and successfully claimed constructive dismissal.

3. The employee may make it clear to the employer that he or she is rejecting the new term. The employer is thus able to respond to this rejection by deciding whether or not to terminate the employee with proper notice. If the employer does not take this course and essentially permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to essentially insist on adherence to the terms of the original contract.

Wronko found himself in the third situation, where his "steadfast opposition" to the revised terms was clear and not challenged by the employer. Thus, when they saw that he was not prepared to accept the revised agreement, the employer effectively had the choice to advise that the employment was going to be terminated (as opposed to amended) two years hence. The failure to do this in September 2002 when he was instead given the two years notice of the change meant that he was essentially continually employed on the same initial terms he had prior to the contract provision coming to the attention of the supervisor.

In a more recent decision which applied the framework above, Lorenzo Russo successfully sued his employer of 37 years, Kerr Bros. Limited, for damages which arose while he remained employed by the company. In other words, because the employer had unilaterally made contract changes to Russo's employment (decreases in compensation), he had a valid claim for constructive

dismissal. However, since he decided to remain employed at the reduced salary, the claim which Russo pursued successfully at trial was for the wage differential during the period of reasonable notice. In its decision in *Russo v Kerr Bros. Limited* (2010) ONSC 6053 (Ont.S.C.J.), the Court focused on the fact that there had been "a fundamental alteration in the terms and conditions of employment as a repudiation of the contract", or, to use the current terminology, it amounted to constructive dismissal.

Russo was prepared to accept the alterations to the terms and conditions of his employment as a repudiation or constructive dismissal, but had the right to remain in his employment under the new terms in order to mitigate his damages. As the Court noted, once the employer, Kerr, had been told that the plaintiff had accepted that a constructive dismissal had occurred and that he did not accept the new terms and conditions, Kerr could have told the plaintiff to leave the workplace, in which case, he would have been paid an amount on account of reasonable notice commencing at that moment.

These types of situations are arising with increasing frequency and can be very costly, particularly since the costs of training and orienting employees can be quite substantial. Further, many employers have cyclical businesses where they have a reasonable prospect that the amount of work will ultimately increase as economic conditions improve, but requires flexibility in the short term allowing them to adjust compensation levels given fluctuating conditions.

We offer the following recommendations to employers who are looking to minimize their exposure to damages for potential changes to employee contract terms:

1. Prepare contracts at the outset of employment which contain broad provisions which allow duties to be amended.

2. Document, in writing, the specific changes that will take effect on a certain future date.

3. Provide a significant period of working notice of amendments to employment contract changes, with employees signing back agreement to such changes, but avoiding language providing for termination for failure to sign.

4. If amended contract terms are not acceptable to the relevant employee, make a clear decision that the employee will either be retained on the old terms or terminated based on the refusal.

5. In appropriate circumstances, retain employees or contractors on defined term agreements (e.g, one year increments), which can then be amended as required when new terms are negotiated.

6. Provide employees with an appropriate form of compensation (such as a signing bonus, options or an increased vacation entitlement) in exchange for any required contract changes.

For more information on this topic, please contact:

Elisabeth Preston, 613-232-7171, ext. 196
elisabeth.preston@mcmillan.ca

George Waggott, 416-307-4221
george.waggott@mcmillan.ca

Click here to return to index

seclusion intrusion: a common law tort for invasion of privacy

by Lyndsay A. Wasser and Rob Barrass

How would you react if you discovered that someone had accessed your bank records more than 174 times, without authorization or any lawful reason? Sandra Jones ("Jones") reacted by suing for invasion of privacy. Her action was summarily dismissed by the Ontario Superior Court of Justice on the basis that Ontario does not recognize common law privacy rights, and Jones was ordered to pay $30,000 in costs to the woman who had repeatedly invaded her privacy.

This week, the Ontario Court of Appeal overturned the lower court's decision.[1] In the process, the Court definitively recognized a new common law tort: "intrusion upon seclusion." This decision represents an important evolution in Canadian privacy law, which will affect businesses and individuals. In particular, this case has the potential to significantly impact private-sector, provincially-regulated employers in Ontario and other provinces that do not currently have data protection legislation applicable to employment matters.

background

Jones was an employee of the Bank of Montreal, where she also had a personal bank account. Winnie Tsige ("Tsige") worked for a different branch of the same bank. Although the two women did not know one another, Tsige was in a common law relationship with Jones' former husband. Over the course of four years, Tsige used her work computer to view Jones' personal banking activity on more than 174 occasions. Such activity was conducted without authorization and for purely personal reasons. When Jones discovered that Tsige had repeatedly gained access to her confidential information, she brought an action for invasion of privacy.

Although Tsige admitted to accessing her colleague's bank account, at first instance, the Court ruled that Jones' claim could not succeed because Ontario common law does not recognize a tort of invasion of privacy. The Court's reasoning relied upon an off-hand comment in a prior, unrelated Court of Appeal decision. In addition, the Court indicated that privacy legislation in Canada constituted a balanced and carefully nuanced system for addressing privacy concerns.

The lower Court's reasoning contained some significant flaws. Courts have been considering the existence of a common law cause of action for invasion of privacy for over 100 years, and a number of cases have suggested that privacy rights should be recognized. Moreover, there are significant gaps in the statutory framework. For example, the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") does not provide any recourse for privacy intrusions by individuals or persons who are not engaged in commercial or employment activities. Further, in Ontario and a number of other jurisdictions, there is no privacy legislation applicable to employment matters for private-sector, provincially-regulated employers.

intrusion upon seclusion: Ontario's newest tort

The Ontario Court of Appeal overturned the Superior Court of Justice decision, ruling in favour of Jones and recognizing a new common law tort: "intrusion upon seclusion." The new tort is a subset of the broader invasion of privacy category, which includes other recognized and potential causes of action. A central rationale for the recognition of the new cause of action was the unprecedented power to capture and store vast amounts of personal information using modern technology. In the last century, technological changes included the invention of near-instant photography and the proliferation of newspapers. Today, highly sensitive personal information can now be accessed with relative ease, including financial and health information as well as data related to individuals' whereabouts, communications, shopping habits and more. The Court found that the common law must evolve in response to the modern technological environment.

The Court of Appeal followed the approach that has been developed in the United States, and formulated the new tort as follows:

One who intentionally [or recklessly] intrudes, physically or otherwise, upon the seclusion of another or his [or her] private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

It is significant that this test includes an objective standard, such that the invasion of privacy must be "highly offensive" to a "reasonable person." The Court also acknowledges that the protection of privacy may give rise to competing claims, such as freedom of expression, which may trump privacy rights.

It is also noteworthy that the tort of intrusion upon seclusion is actionable without economic harm. However, the Court indicated that an upper ceiling of $20,000 is appropriate in cases where there is no evidence of economic harm. Punitive and aggravated damages may also be possible in egregious circumstances. The Court listed the following factors relevant to assessing damages:

1. the nature, incidence and occasion of the defendant's wrongful act;

2. the effect of the wrong on the plaintiff's health, welfare, social, business or financial position;

3. any relationship, whether domestic or otherwise, between the parties;

4. any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and

5. the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

Upon consideration of these factors, Jones was awarded damages of $10,000 in this case.

importance for employers

Although this case did not involve any intrusion on Jones' privacy by her employer, this case has significant implications for provincially-regulated employers in Ontario and other provinces that currently have no privacy legislation applicable to private-sector employment matters.

Employers are frequently required to balance the privacy of employees with the need to effectively manage their businesses. In the absence of applicable legislation, employers often take the position that they are entitled to engage in activities that could be

considered intrusions upon privacy, including video and computer monitoring, pre-employment background checks, and searches of employees and their property. Although some arbitrators have placed limits on these types of activities in unionized workplaces, prior to *Jones v Tsige*, it was unclear whether non-union employees had any recourse to dispute potential invasions of their privacy. Now that it is clear that common law privacy rights exist in Ontario, it is likely that intrusion upon seclusion claims will arise in employment cases. For example, employees may add such claims in constructive dismissal cases where an employer implements video monitoring, or where the employee is dismissed for inappropriate use of technology discovered through computer monitoring. It will be interesting to see how the courts apply this new tort in the employment context.

practical tips

Courts and litigants will doubtless wrestle with intrusion upon seclusion claims in the months and years ahead. The best defence against such claims is to prepare and enforce reasonable, effective privacy policies. Organizations that were already subject to privacy legislation, such as PIPEDA or provincial health privacy legislation, may be better prepared to defend against this new cause of action, but should still be mindful of whether their privacy policies address this new source of potential liability.

On the other hand, prospective plaintiffs should consider the Court's reasoning respecting damages. In the past, plaintiffs have claimed hundreds of thousands of dollars for privacy breaches. Today, the potential for damages has been significantly curtailed, and plaintiffs would be well-advised to consider whether the cost and risks of litigation are worthwhile.

[1] *Jones v Tsige*, 2012 ONCA 32.

For more information on this topic, please contact:

Lyndsay A. Wasser, 416.865.7083
lyndsay.wasser@mcmillan.ca

Rob Barrass, 416.865.7099
rob.barrass@mcmillan.ca

Click here to return to index

internet and web-browsing: the importance of copyright assignments and potential vicarious liability for employers

by George Waggott

A recent decision from the British Columbia Supreme Court[1], discussed widely for its application of internet and intellectual property law, also contains some legal implications that Canadian employers should be aware of.

Century 21 sued an internet-service-provider for the actions of its subsidiary, who accessed and used Century 21's publically-available website and its contents for commercial use. Although much of the Court's discussion revolved around public access to copyrighted material on the internet and the related contractual implications, the issue of ownership in and use of copyrighted material touched on the employer-employee relationship as well.

Century 21 based their claim for copyright infringement on property descriptions and photographs (the "Works") on the Century 21 website. However copyright in the Works were with various real estate agents who licenced to Century 21 "use of the Works to promote the business of Century 21 Canada, including, without limitation, use on the Century 21 Canada's Website". In addition the agents assigned their right of action for copyright infringement to Century 21.

ownership of copyright and copyright licence

In order for Century 21 to bring an action for copyright infringement with respect to the Works, it was required to establish who owned the copyright, whether the copyright had been validly assigned, and the effective date of such assignment.

The validity of the assignment was challenged by the defendant on the following grounds:

1. Century 21 had not defined the works with any specificity, so the description of the subject-matter was not sufficient to validly assign copyright;

2. Century 21 had not indicated who specifically owned the copyrighted works until late in the day, and even then advanced several alternate possibilities;

3. there was no apparent provision for future-created works; and there was no fixed term of the agreement.

The Court held that the specificity of and ownership in the Works was a matter of evidence, finding that the copyright over the subject-matter claimed to have been infringed was in fact the same subject-matter referred to in the assignment agreement. This was because the evidence was sufficiently specific to identify the subject-matter of the assignment.

With respect to the "future work", the Court held that when future work is assigned, the promisee becomes the equitable assignee and the beneficial owner of the copyright, and the promissor is the equitable assignor with a bare legal title. As a result, the assignment of future-created Works was still valid in equity provided it was made for valuable consideration. Employers should note that as soon as such assigned "future" works are created, the copyright is validly assigned to

the assignee. Employers should consider having counsel review assignment agreements prior to the commencement of work when independent contractors are engaged. As a precaution, employers should also get follow up assignments once the "future works" are created to ensure that they have an assignment of the copyright that is valid at common law, not just in equity.

property descriptions by an employee

The Court discussed in detail the situation of one particular Century 21 agent, whose assignment agreement was challenged due to the fact that the agent himself did not create the Works in issue – rather the Works were written by his employee. This argument failed and the Court applied section 13(3) of the *Copyright Act* which generally provides that, for works created by an employee in the course of his or her employment, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright.

The employee only had a written contract of employment with the real estate agent until January 1, 2009, the date the agent incorporated a company. Although the agent had incorporated the company with the intention of running his real estate business through his corporation, as is often the case, he did not formalize this change in relation to his own employment agreement nor the employment agreement with the employee. Further, the evidence did not indicate if the corporation paid the employee from a corporate bank account, though this was what the agent had intended.

However since the existing employment agreement had not yet been cancelled or varied and the agent remained the employer, the Court was satisfied that the agent had retained copyright in the employee's work only after the agent-employer adduced evidence that her continued employment, now through the corporation, was intended.

It was this finding that the Court said would normally result in the conclusion as well that the assignment of copyright made by the agent to Century 21 remained validly assigned.

photographs by hired photographers

With respect to the photographs, the agent (not the corporation) hired the photographers – though the corporation did pay them. The agent operated on the basis that his accountant at the end of the year would determine what was corporate and what was personal. There was no written agreement produced respecting the photographs nor was there evidence that the agent informed those photographers that they were now dealing with his company, not him.

The Court concluded on the balance of probabilities that the agent personally continued to contract with the photographers and that this arrangement did not change.

On the basis of the Court's conclusion respecting employment status and the agent's practice with respect to hiring photographers, it found that after the agent incorporated, the copyright in the property descriptions (created by the employee) and the copyright in the photographs (that the agent hired to be taken), remained that of the agent. As such, the agent corporation had no copyright to assign.

copyright licence

In considering the copyright licence agreements that purported to assign interest in copyright to Century 21, an issue arose between the purported licence to use the Works and the effect of the assignment of the right of action for copyright infringement. Because the terms licence and assignment are frequently used

indiscriminately, the Court looked to the substance of the transaction, not its form.[2]

The Court held that, in this instance, the terms of the licence simply granted Century 21 the non-exclusive use of the Works, with the copyright holder clearly retaining the copyright including any other use or derivative use of the Works. The Court was of the view that what the agent and the agent corporation purported to grant as an assignment was in fact a licence.

Further, because the licence was not exclusive, it simply granted a right of use to Century 21 who did not possess a proprietary interest or the grant of an interest in the infringed works. As a result, Century 21 could only enforce licensing, not copyright infringement to the limited extent granted to it by the licence. In this case, that was the right to use the Works.

The claims for copyright infringement therefore were held to lie with the agents, not Century 21 and the claim of Century 21 for copyright infringement was dismissed (this is why the real estate agents who did have the appropriate rights were also plaintiffs in the lawsuit and were awarded $32,000 in damages).

The take away employers should note is to ensure sufficient rights are assigned from their employees or contractors (so that reliance on the author's right to sue is not necessary).

vicarious liability for an employer or parent company

One final warning which this case provides is that employers should be aware of what employees are permitted to do on third party websites. Although this was in the context of a parent-subsidiary relationship, the Court's analysis would likely be analogous in an employer-employee situation as well.

Century 21 claimed that the defendant parent company was liable for authorizing the breach of copyright pursuant to s. 27(1) of the Copyright Act and for inducing the subsidiary's breach of contract arising under the Century 21 website's terms of use. Century 21 alleged that the parent had gone beyond the role of shareholder and investor and had directly supported and promoted the subsidiary. In particular, employees of the parent company, acting in their capacity as such, had developed the idea for and actively promoted the subsidiary, and the subsidiary's three directors were all officers of the parent. When employees of the subsidiary met with Century 21, they even presented themselves with their parent's business cards.

The Court looked at whether the parent exercised control over its subsidiary since this recognition would pierce the corporate veil and held that the evidence did not establish that the subsidiary was "under the complete control" of its parent so that it had "no independent functioning of its own." As a result, Century 21 failed to rebut the presumption that the parent only authorized the subsidiary to use its website in accordance with the law. Additionally the Court was unable to find that the requisite intent was present for the parent company to have "induced" the breach of contract, even though the parent received 4 cease and desist letters.

Although evidence was lacking in this case for the Court to establish that the parent intentionally turned "a blind eye" to the subsidiary's conduct, employers should be aware that a parallel could be drawn to the employer-employee relationship. If it can be shown that on a balance of probabilities the employer both controlled the employee or demonstrated the requisite

intent to have induced the employee's breach, a court could find an employer liable for an employee's copyright infringement or breach of contract of a third-party website's terms of use.

[1] *Century 21* Canada *Limited Partnership v Rogers Communications Inc*, 2011 BCSC 1196.

[2] John McKeown, *Fox Canadian Law of Copyright*, 3d ed. (Carswell: Scarborough, Ont., 2000) [*Fox Canadian Law of Copyright*] at 380.

For more information on this topic, please contact:

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

Click here to return to index

not fit for duty

by Lai-King Hum

"It wounds a man less to confess that he has failed in any pursuit through idleness, neglect, the love of pleasure, etc., etc., which are his own faults, than through incapacity and unfitness, which are the faults of his nature."

Lord Melbourne

Self-regulating professions in Canada demand exacting standards of their members. The pressure to comply is significant as failure to do so can lead to disciplinary action and losing one's license to practice. What then does a professional do when they begin to question their own capacity to meet these demands due to the onset or progression of a physical or mental illness, or substance use that has gotten out of control? In such an environment, it is unsurprisingly rare to hear of individuals self-reporting mental issues, addictions or other potential issues that can give rise to incapacity. Further, professionals tend to be proud of their membership in their profession, who, like Lord Melbourne, are loathe to report their own failures and deficiencies that threaten to tear them away from their chosen pursuit. Admitting that mental illness or addiction has affected a person's ability to perform as a professional is a source of deep embarrassment; a stigma both personal and professional surrounds admissions of incapacity.

Understanding incapacity in the professions, the misguided stigma that surrounds it, and how different professions have chosen to deal with the problem, is essential in developing an informed means of protecting the profession, the public, and the individual suffering from incapacitating issues. The focus will be on Ontario professional regulators and case law, but the conclusions are largely applicable to all professional regulators in Canada.

There are generally three paths by which a regulator can deal with the failure to maintain the standards exigent on a professional: (i) discipline; (ii) incompetence; and (iii) incapacity. However, not all professions deem there to be a difference procedurally between incapacity and incompetence, and, albeit rarely, some deal with all three under the rubric of discipline. In general, issues pertaining to professional negligence are not in the jurisdiction of the regulator, although there is often overlap between professional misconduct and negligence issues – the latter being a matter to be determined by civil legal remedies by the party affected by the professional negligence. Similarly, there is often overlap between discipline issues and issues of incompetence or incapacity.

Click here to read entire article.

For more information on this topic, please contact:

Lai-King Hum, 416.307.4086
lai-king.hum@mcmillan.ca

Click here to return to index

university's accommodation of anxiety disorder

by Lai-King Hum

Universities are often challenged by the need to accommodate students with medical conditions. However, the balance between maintaining legitimate academic standards and treating a student fairly by accommodating for medical conditions is sometimes hard to achieve.

In *Singh v. University of British Columbia, 2012* CanLII 691 (SCC), a case involving an anxiety disorder and a student's persistent inability to maintain the requisite academic standards, the Supreme Court of Canada recently dismissed with costs an application for leave to appeal from a decision of the British Columbia Court of Appeal. The University purportedly failed to provide procedural justice to a student who had a history of failing her courses. As the case demonstrates, however, a well publicized accommodation policy, and an Access and Diversity Office dedicated to such issues, provided the university with the basis for defeating accusations of a failure to accommodate.

Ms. Priya Singh enrolled in the University of British Columbia's Diploma in Accounting Program (DAP), after having received an undergraduate degree from the university. On probation in the DAP, she was required to maintain a 65% average in her first two terms. Unfortunately, she fell well short of the 65% benchmark in her first five courses, failing all except one, even after two examination re writes – only one of which was formally authorized by the university.

Her appeal to the Appeals Committee accused the university of a failure to accommodate her, and requested that she be given an opportunity to re write all of her failed exams or be accorded retroactive withdrawal from the courses. She provided medical evidence of an anxiety disorder related to the taking of exams unless her panic attacks could be effectively treated.

Under its usual procedure in medical disability cases, the matter was referred to the Access and Diversity Office ("ADO") for assessment. The ADO supported Ms. Singh's application for retroactive withdrawal from three of the courses, stating that she had provided documentation establishing "a picture of a student in difficulty". It noted that she did not realize the extent of the impact of her disability until after she had failed, then sought more intensive help. However, it recommended that the failing grade in the fourth course stand, as she had been provided with accommodation to sit the exam for that course, but did not write it. Instead, in spite of well publicized university rules regarding exam accommodation, she chose to write the exam on an alternate date, absent university authorization.

Dissatisfied with the ADO's recommendation, Ms Singh asked for a modification of the ADO's assessment regarding the fourth course. The ADO did not change its recommendation.

In oral submissions before the Appeals Committee, Ms. Singh expanded her claim for relief, requesting that all of her 19 failed grades at the university, including her undergraduate record, be expunged.

The Appeals Committee accepted the recommendations of the ADO, and refused Ms. Singh's expanded claims for relief. Ms. Singh applied for judicial review on the basis of a failure of procedural justice.

On judicial review, the chambers judge confirmed the decision of the Appeals Committee. The chambers judge found no evidence of a failure of procedural fairness, as the ADO was not prohibited from changing its recommendation – it had just chosen not to.

On further appeal to the Court of Appeal, deference was paid to the judgment of the Appeals Committee, and its decision was found not to have been unreasonable. The Supreme Court of Canada refused Ms. Singh's application for leave to appeal.

As was borne out in the ultimate decision of the Supreme Court, the University's assessment and review, while adhering to academic criteria set out for Ms. Singh, had navigated a reasonable balance between accommodation and upholding academic standards. Unfortunately for Ms. Singh, she persisted with her excessive demands through several appeals and ultimately had costs awarded against her.

For more information on this topic, please contact:

Lai-King Hum, 416.307.4086
lai-king.hum@mcmillan.ca

Click here to return to index

racism – is speculation enough?

by Lyndsay A. Wasser

"A complainant cannot merely point to his or her membership in a racialized group and an unpleasant interaction to establish a *prima facie* case of discrimination."[1]

This quotation encapsulates the finding of the Ontario Superior Court of Justice, Divisional Court (the "Court") in the recent case of *Peel Law Association v Pieters* ("*Pieters*"). In *Pieters*, the Court overturned a finding by the Human Rights Tribunal of Ontario (the "Tribunal") that a librarian's decision to confirm the identity of three black men (and no other persons) in a lawyers' lounge, violated the *Ontario Human Rights Code* (the "C*ode*").

facts

The Peel Law Association ("PLA") operates a lawyers' lounge and library in the Brampton, Ontario courthouse for the exclusive use of lawyers and law students. As part of their job duties, the librarians are expected to routinely check the identification of persons using the facilities.

On May 16, 2008, a librarian approached three individuals who were in the lounge, all of whom "self-identify as Black," and asked them to confirm they were lawyers or law students (and therefore admissible to the lounge). No one else in the lounge was black, although there were other "racialized" persons in the lounge, and no one else was asked for identification at that time. Two of the men (the "Complainants") felt they were singled out as a result of their colour, and filed an application with the Tribunal against PLA and the librarian, Melissa Firth ("Firth"), under the *Code*.

decision of the Human Rights Tribunal of Ontario

The Tribunal found that race was a factor in Firth's decision to approach the Complainants for confirmation of identity. In coming to this conclusion, the Vice-Chair found that Firth had questioned the Complainants in a demanding and aggressive fashion, and that she did not ask anyone else in the lounge for identification at that time. These factors were found to establish a *prima facie* case of discrimination. Therefore, Firth and PLA were required to provide a credible and rational explanation to establish that Firth's conduct was not tainted by race or colour.

Despite hearing (and accepting) evidence that Firth regularly asked for identification from persons in the lounge and library, the Vice-Chair found that discrimination had occurred. Each of the Complainants was awarded $2,000.00 for "…violation of their inherent right to be free from discrimination and for injury to their dignity, feelings and self-respect."[2]

the decision of the court

The decision of the Tribunal was reviewed by the Court on a standard of "reasonableness," which requires the highest degree of deference respecting determinations of fact and human rights law. Applying this standard, the Court found that the Tribunal's decision could not be rationally supported and fell outside the range of possible acceptable outcomes defensible in fact and law.

In coming to this conclusion, the Court reinforced prior case law that indicates complainants bear the initial

burden of proving *prima facie* discrimination, and accordingly, must show evidence of all of the following:[3]

a) a distinction or differential treatment;

b) arbitrariness based on a prohibited ground;

c) a disadvantage; and

d) a causal nexus between the arbitrary distinction based on a prohibited ground and the disadvantage suffered.

Only after all four of these factors have been established will the burden shift to the respondent(s) to provide a non-discriminatory explanation for their conduct.

In *Pieters*, the Court found that these factors were not established. In particular, the Court found that:

1. There was insufficient evidence of differential treatment. Firth and PLA put forward evidence that Firth's job duties required her to seek identification from persons in the lounge and library, and it was her established practice to do so. Also, the Complainants were located near the door, and were the first persons Firth encountered on her way into the lounge.

2. There was no evidence of a causal nexus between race/colour and Firth's conduct. Rather, the Vice-Chair incorrectly assumed the causal nexus from his finding of differential treatment.

The Court concluded that the Tribunal had improperly reversed the burden of proof in *Pieters*, thereby placing "an impossible onus" on Firth and PLA to disprove discrimination. The Court overturned the damages awarded to the Complainants, and awarded $20,000.00 in costs to Firth and PLA.

importance for human rights respondents

The decision in *Pieters* may be useful for respondents to human rights complaints in Ontario, although the Complainants have sought leave to appeal. In particular, the Court's clear statement that "(s)peculation or inferential statements are simply not enough"[4] to prove discrimination, will be helpful in future cases where no concrete evidence of discrimination exists.

However, in such cases (where there is no evidence of discrimination), it is also possible that the application may be dealt with by the Tribunal at a summary hearing. In such event, the test outlined in *Pieters* would not apply, but rather, the Tribunal will consider whether there is a "reasonable prospect" that the complainant will be able to prove discrimination or harassment on a balance of probabilities.[5] Since it is becoming increasingly common for the Tribunal to order summary hearings on its own initiative, respondents should be prepared to argue that the applicant(s) have not met this standard in frivolous, vexatious and tenuous cases.

Further, before relying too heavily on *Pieters*, respondents should also consider the recent Ontario Court of Appeal case of *Shaw v Phipps* ("*Shaw*")[6]. In *Shaw*, a police constable was found to have violated the *Code* when he chose to inquire into the identity of a black letter carrier working in an affluent neighbourhood. In that case, there also did not appear to be direct evidence that the constable took race or colour into account. However, the Court of Appeal stated that:

> *There is seldom direct evidence of a subjective intention to discriminate, because "(r)acial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices" and racial*

> *discrimination "often operates on an unconscious level." For this reason, discrimination is often "proven by circumstantial evidence and inference."*[7]

The Court of Appeal upheld the Tribunal's decision in *Shaw* that colour was a factor, and "probably the predominant factor, whether consciously or unconsciously," in the constable's decision to question Shaw's identity.

On its face, there does not appear to be much more evidence in *Shaw* than there was in *Pieters* establishing that colour was a factor in the constable's actions. However, the Court of Appeal in *Shaw* found that the Tribunal was entitled to draw reasonable "inferences" from the facts.

The opposite conclusions reached in *Pieters* and *Shaw* provide an example of the uncertainty of the outcome of human rights cases. In the end, despite the reasoning in *Pieters*, where there is no concrete evidence of discrimination the result may simply depend upon whether the specific panel of the court or tribunal accepts the explanation of the respondents for their conduct.

[1] *Peel Law* Association *v Pieters*, 2012 ONSC 1048 at para 44.

[2] *Ibid* at para 2.

[3] *Supra* note 1 at para 14.

[4] *Supra* note 1 at para 46.

[5] *Dabic v Windsor* Police *Service*, 2010 HRTO 1994.

[6] 2012 ONCA 155.

[7] *Ibid* at para 34.

For more information on this topic, please contact:

Lyndsay A. Wasser, 416.865.7083
lyndsay.wasser@mcmillan.ca

Click here to return to index

employee "termination" under employment statutes will end employment for all purposes

by George Waggott

A recent decision from the Ontario Court of Appeal[1], has confirmed that employees who are entitled to termination pay under the Ontario *Employment Standards Act,* 2000[2] (the "ESA"), will also be able to claim damages for wrongful dismissal under common law.

Brian Elsegood worked as a technician for approximately seven years until he was laid off in April 2009. Since his employer Cambridge Spring Service continued to pay the employer portion of benefits, the company was able to treat his period off work as a "temporary layoff", which meant that his statutory entitlements upon termination did not need to be paid out immediately. By January 2010, Elsegood had exceeded the "35 weeks within a 52-week period" threshold so his rights to statutory termination pay under the ESA crystallized.

Elsegood was paid the statutory amounts unconditionally, but the employer then took the position that no other amounts were owing. This resulted in a civil claim for wrongful dismissal damages. The employer proceeded with the rather novel argument that Elsegood's termination was only for statutory purposes, and his entitlement under the ESA was all that was owed. The Ontario Court of Appeal refused to overturn the decisions of the trial judge and the Divisional Court, both of which held that there was a valid common law claim for termination damages.

The employer unsuccessfully argued that the ESA and common law regimes are independent. The Court rejected this view and held that an employee's employment status simply cannot survive the termination of that status through a valid enactment of the legislature. The Court held that every employee should be able, in virtually every case, to claim constructive dismissal at common law if they are laid off for a period which exceeds 35 weeks in a 52-week period.

In dismissing the employer's attempt to argue for a prolonged indefinite layoff, the Court noted that the employer could not identify the date when this supposedly indefinite layoff would become a termination. Put differently, it is inconceivable for an employee to be "in limbo" perpetually.

The Court's decision in *Elsegood* confirms that while the ESA sets out the minimum requirements for various standards, these do not supplant the common law amounts which are payable on termination. And with respect to the timing for when claims arise, once an employee is terminated under the applicable statutory regime, the right to claim common law damages is triggered. As an interesting point to note, the Court of Appeal confirmed that this analysis would apply even in circumstances where an employment agreement contained an applied term allowing the employer to lay off the employee.

The *Elsegood* decision provides some helpful guidance to employers who are contemplating employee layoffs. Even in cases where the employee may well hold out hope for the economic circumstances to reverse and employment prospects with that employer to re-emerge, there are now virtually no circumstances

where Ontario employees can be laid off for a period which exceeds the 35 in 52-week threshold and not have a right to claim damages.

[1] *Elsegood v Cambridge Spring Service (2001) Ltd*, 2011 ONCA 831.

[2] SO 2000, c 41.

For more information on this topic, please contact:

George Waggott 416.307.4221
george.waggott@mcmillan.ca

Click here to return to index

harassment in the workplace: limitations on an employer's responsibilities

by Lyndsay A. Wasser

The recent introduction of requirements for policies and procedures relating to harassment and workplace violence in Ontario's *Occupational Health and Safety Act* ("*OHSA*") has increased the regulatory workload on employers. However, a recent decision by the Ontario Labour Relations Board (the "Board") appears to limit to some extent the scope of an employer's added responsibilities.

In *K. Annette Harper v Ludlow Technical Products Canada Ltd.*, an employee alleged that she was harassed at her workplace by co-workers who had circulated a petition regarding her activities in relation to a product safety issue. She complained to her employer, and then notified the Board that her employer had allegedly failed to investigate her concerns or comply with company procedure for the investigation of harassment complaints. The employee also claimed that, after filing a complaint with the Board, her employer had refused to appropriately process her claims for short-term disability or WSIB benefits in alleged violation of section 50 of the *OHSA*, which prohibits reprisals against an applicant by his or her employer.

The employer requested that the application be dismissed on the basis that it failed to raise a *prima facie* violation of section 50 of the *OHSA*. Under Rule 39.1 of the Board's Rules of Procedure, an application may be dismissed by the Board where the facts do not support the remedy or order requested, even if all the facts as alleged by the claimant are true and provable. The employer contended that because neither it nor any party acting on its behalf was

responsible for the alleged harassment of the applicant, and because the alleged harassment was claimed to be related to the applicant's product safety concerns (and complaints regarding product safety are not governed by the *OHSA*), the application should be dismissed. Further, the employer submitted that the application could not succeed, because the employer had prepared and posted a workplace harassment policy, developed and maintained a program to implement such policy, and provided workers with instruction on such policy, which are the only obligations of an employer under the *OHSA* with respect to workplace harassment, and there was no dispute that the employer had complied with these obligations.

Following an earlier case before the Board, *Investia Financial Services Inc.*, the Vice-Chair noted that under the *OHSA*, the employer has specific obligations and duties related to harassment and workplace violence, including an assessment of the risks of workplace violence; the establishment of a program to implement the employer's policy countering workplace harassment; and providing information and instruction to employees regarding the employer's workplace harassment policy and program.

However, there is no obligation on the part of the employer, and no jurisdiction provided to the Board, to ensure that the workplace is actually free of harassment. Similarly, the Board has no jurisdiction to ensure that a workplace harassment policy instituted by an employer is effective. Further, section 50 does not protect employees from reprisal in respect of a

complaint about the effectiveness of the policy, where such a policy already exists. As a result, the Board dismissed the case as against the employer.

No employer wants to see harassment in its workplace. However, provided that policies and procedures are in place to counter workplace violence and harassment, the employer has complied with its obligations under the OHSA. The Board does not have jurisdiction to address complaints of harassment under the *OHSA*.

For more information on this topic, please contact:

Lyndsay A. Wasser, 416.865.7083
lyndsay.wasser@mcmillan.ca

Click here to return to index

employee non-competition covenants: no place for blue pencils

by George Waggott

The recent decision of the Court of Appeal for Ontario in *Veolia ES Industrial Services Inc v Brulé*[1] deals with the interpretation and enforceability of a non-compete clause in an employment agreement and the scope of an employee's fiduciary duties to a former employer.

The parties entered into a three-year employment agreement on January 1, 2004, which was subject to the employer's right to terminate the employment for cause or without cause upon payment of the compensation to which the employee was entitled until the end of the term. The employee also had the right to terminate the employment agreement by giving the employer 180 days notice.

A non-competition covenant was included in the employment agreement and provided that Brulé employee was restricted from competing with the employer's core business for a period which would be either: (1) two years following termination for cause or as a result of the agreement's three-year term expiring; or (2) two years commencing January 1, 2007 following termination without cause or as a result of the employee's resignation in accordance with the agreement.

Brulé gave the employer notice of resignation on July 7, 2004, following which the employer asked him not come into work, but continued to pay him until one or two weeks prior to the expiration of the 180 day notice period. Upon leaving, the employee asked a colleague to assemble a binder with information about recent municipal tenders and bids put in by the company and others. When he left the company, Brulé took this binder and a list of the company's employees.

Following his departure, Brulé started his own company in the business of rehabilitating water mains, which was related but not identical to the employer's business of rehabilitating sewers. In the fall of 2005, Brulé's new company needed work and decided to submit a bid on a public tender for sewer rehabilitation. They succeeded and were awarded the tender over the former employer Veolia who had submitted the next-lowest bid . The employer sued for the gross profits claimed to have been lost as a result of not being awarded the tender.

At trial, the judge rendered the non-compete clause in the employment agreement enforceable by severing the words "commencing on January 1, 2007" in accordance with the blue-pencil severance test articulated by the Supreme Court of Canada in *KRG Insurance Brokers (Western) Inc v Shafron*[2]. The trial judge noted that severing this phrase produced the result that the parties intended, which was to have a two-year non-competition covenant.

The trial judge found that Brulé breached the non-competition covenant by bidding on the tender for the sewer work. Furthermore, he found that the employee breached his fiduciary duties to Veolia by breaching the non-competition covenant, by leaving the company with the binder of information regarding prior bids and by failing to disclose to Veolia that his company was submitting a bid in respect of the municipal tender for sewer rehabilitation work.

The Court of Appeal for Ontario overturned the trial judge's decision. The court rejected the application of the blue-pencil severance test to remove the words "commencing on January 1, 2007" from the non-competition covenant and concluded that, without the deletion of the disputed words, the restrictive covenant was unreasonable and unenforceable as the obligation commenced two years after the employee ceased to be employed.

Based on the Supreme Court of Canada's decision in *Shafron* the Court of Appeal noted that blue-pencil severance is only available in respect of trivial or technical parts of a restrictive covenant that the parties would unquestionably have agreed to sever without varying any other terms of the contract or otherwise changing the bargain. The words "commencing January 1, 2007" were not trivial as they pertained to the duration of the restriction. Furthermore, there was evidence that the parties would not have agreed to sever these words without varying the terms of the contract or changing their bargain.

The Court referred to the drafting lawyer's memorandum which explained to Brulé that upon termination without cause the company would pay his salary until the end of the three-year term. In light of this fact, the Court noted that it was logical for the non-competition obligation to commence on January 1, 2007, being the day after the term of the agreement expired. Removing this part of the clause would have left Brulé free to compete during a period in respect of which he may have been paid by Veolia. As a result, the Court found it highly unlikely that the parties would unquestionably have agreed to sever the words "commencing January 1, 2007" without varying any other terms of the contract.

Interestingly, the Court did not distinguish between the two sub-clauses of the non-competition provision which contained the disputed words, "commencing January 1, 2007". The first sub-clause applied in the event that the employee was terminated without cause, while the second sub-clause applied if the employee terminated the agreement. The Court could have removed the disputed words only from the second sub-clause. The effect would have been to establish that if the employee terminated the employment (as was the case on the facts) the non-competition obligation commenced on the effective date of his resignation. This would arguably have been a reasonable interpretation the parties' intentions with respect to the non-competition covenant.

Having ruled that the non-competition covenant was unenforceable, the Court went on to consider whether the employee breached his fiduciary duties to the former employer. The Court affirmed that certain fiduciary duties of an employee survive the employment relationship, but ruled that after the employment ends, a fiduciary is free to compete with his former employer, provided that he does not do so unfairly. Unfair competition includes soliciting the employer's customers or employees, taking advantage of a business opportunity that was developed during the employment, and using or disclosing the employer's confidential information in competing.

In this case, the Court found that Brulé did not breach his fiduciary duties because he did not compete unfairly with his former employer. With respect to the binder that he took when he left Veolia, the Court found that the employee did not use the information contained in the binder in making his bid for the disputed tender. Mere possession of the information did not make the competition unfair. Furthermore, the Court ruled that the information in the binder was neither confidential nor sensitive as municipal tenders

and bids are publicly issued. Lastly, the Court ruled that the employee did not breach his fiduciary duties by failing to disclose to the employer that he was bidding on the tender for sewer rehabilitation. A former fiduciary who is free to compete is not required to tell his former employer that he is about to do so.

This decision reminds us of the importance of meticulous drafting and careful deliberation of all the possible interpretations of a prospective non-competition clause in an employment agreement. As restrictive covenants are *prima facie* unenforceable, the onus falls on the employer, being the party seeking to enforce the restrictive covenant, to show that the covenant is reasonable. A poorly drafted non-competition clause will prejudice the employer's ability to demonstrate that the covenant is reasonable and that it should be enforced.

Although the doctrine of severance is potentially available to resolve an ambiguous term in a restrictive covenant, the *Veolia* decision confirms that the doctrine is only available in rare cases where the portion being removed is trivial and not central to the main purport of the restrictive covenant. Anything pertaining to the duration or location of the non-competition obligation is not likely to be trivial, as these are essential elements of a non-competition covenant.

Finally, this decision confirms that an employer can rely on the continuing fiduciary duties of a former employee in the absence of a non-competition clause. However, fiduciary duties only protect employers against unfair competition by the employee, which includes solicitation of the employer's customers and employees, appropriation of business opportunities developed during the employment relationship, and use or disclosure of the employer's confidential information in competing.

[1] 2012 ONCA 173 ("Veolia").

[2] [2009] 1 SCR 157 ("Shafron").

For more information on this topic, please contact:

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

Click here to return to index

leaves and jury duty

by David McInnes and Claire Morton

It is important to know what leaves of absence you are entitled to under the *Employment Standards Act* R.S.B.C. 1996, c. 113 (the "ESA") as well as the statutory obligations owed to you by your employer if you are called for jury duty.

pregnancy leave

The ESA provides minimum standards which must be met by employers. One available leave of absence available to all pregnant employees, regardless of their length of employment, is pregnancy leave. The pregnancy leave of absence is without pay, unless you have a separate agreement with your employer. An employee is entitled to up to 17 weeks of a leave of absence without pay, which may begin at any time up to 11 weeks prior to the expected date of delivery. If the birth is delayed beyond the expected date, this has no effect on the length of the leave, unless it would exceed 17 weeks. As part of the total of 17 weeks, the employee is entitled to six consecutive weeks after the actual date of the birth of the child. Please note that this period can be shortened on the request of the employee. If the employee does not take the leave before the birth of the child, the employee is still entitled to take 17 consecutive weeks of unpaid pregnancy leave.

If the employee's pregnancy is terminated through miscarriage or abortion, the employee is entitled to up to six weeks consecutive leave without pay. In addition, if the employee is unable to return to work for reasons related to the birth of the child or termination of the pregnancy, further leaves may be taken as long as the total leave of absence does not exceed a total of 6 additional consecutive weeks.

An employee who wishes to take a pregnancy leave must provide their employer with a written request at least 4 weeks before the day the employee proposes to begin the leave. A note dated and signed by the employee which clearly states the nature of the request and the start and finish date of the leave is considered to be sufficient as long as it is properly received by the employer.

Many employees are not aware that the period of the pregnancy leave is determined by the employee and not the employer. As long as the employee meets the requirements set out in the ESA, the employer must grant the leave.

parental leave

Both mothers and fathers, adopting or new parents, are entitled to leaves of absence without pay to care for newborn or newly-adopted children. Similarly with pregnancy leave, the right to parental leave is available for all employees regardless of how long they have been employed.

Employees are entitled to apply for parental leave as long as they are the mother or father of an expected newborn child or an adopting parent of a child placed or about to be placed with the parent for the first time.

One period of full parental leave is available for each parent. Note that in the case of multiple births, the employee is not entitled to double the parental leave entitlement.

duration:

If the birth mother has taken a pregnancy leave, then she is entitled to up to 35 consecutive weeks of parental leave without pay. The parental leave must

begin immediately following the end of the pregnancy leave, unless the employer and employee agree otherwise. Alternatively, if the mother did not take pregnancy leave, then the mother is entitled to up to 37 consecutive weeks of parental leave which may begin any time between the child's birth and 52 weeks after the event.

As per a birth father and adoptive parents, they are entitled to up to 37 consecutive weeks of parental leave which in the former case may begin any time between the child's birth and 52 weeks after the event or in the latter case, within 52 weeks after the child is placed with the parent.

A written request to the employer for parental leave must be made separately from pregnancy leave.

family responsibility leave

Family responsibility leave is an employee-initiated unpaid leave of up to 5 days in an employee's employment year, based on the starting date. The leave does not have to be as a result of an emergency but it must be related to the health, and in the case of a child, education, of a member of the employee's immediate family.

Under the ESA, "immediate family" means the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee and any person who lives with the employee as a member of the employee's family. It also includes common-law spouses, step-parents and step-children and same sex partners and their children as long as they live with the employee as a member of the employee's family.

The leave is supposed to help employees deal with family problems that conflict with job responsibilities. It does not carry forward from year to year and since it is a statutory entitlement, it is not at the discretion of the employer. Note that any time taken off on any day (even one hour) qualifies as one day for the purposes of this section under the ESA.

compassionate care leave

All employees are entitled to up to 8 weeks of unpaid leave within a period of 26 weeks to care for a gravely ill family member. This leave is available to all employees, regardless of how long they have been employed. The employee must provide their employer with a certificate from a medical practitioner, stating that the family member has a serious medical condition with a significant risk of death within 26 weeks. If the employee takes the leave and the family member is still alive within the 26 week period, the employee may obtain a new certificate which will entitle the employee to a further 8 weeks of leave within a subsequent 26 week period.

A "family member" is a member of the employee's immediate family (listed in the Family Responsibility Leave) as well as the following list of people in relation to the employee:

- a step-sibling;
- an aunt or uncle;
- a niece or nephew;
- a current or former foster parent;
- a current or former foster child;
- a current or former ward;
- a current or former guardian; or
- the spouse of:
    - a sibling or step-sibling;
    - a child or stepchild;
    - a grandparent;
    - an aunt or uncle;
    - a current or former foster child; or
    - a current or former guardian;

In relation to the employee's spouse:

- a parent or step-parent;
- a sibling or step-sibling;
- a child;
- a grandparent;
- a grandchild;
- an aunt or uncle;
- a niece or nephew;
- a current or former foster parent; or
- a current or former ward; and
- any individual with a serious medical condition who is like a close relative to the employee.

Note that for the purposes of this section in the ESA, a "week" commences on a Sunday so if the employee begins the leave in the middle of the week, it will be considered to be a full week even though it is less than 7 days.

The employee must provide the employer with a copy of the certificate as soon as practicable; however, due to the nature of this leave, the employee is not disentitled from taking the leave because they do not have the medical certificate at hand.

The leave ends on the last day of the week in which the family member passes away, or at the end of the 26 week period, whichever comes first.

bereavement leave

An employee is entitled to an unpaid leave of absence of up to 3 days to grieve, attend a funeral, and take care of issues relating to the death of a member of their "immediate family" (defined in the aforementioned section entitled Family Responsibility Leave).

Note that the days of the unpaid leave do not have to be consecutive and the employee does not have to take a full 3 days. An employer may request that an employee provide proof of death and the nature of the relationship.

jury duty

If an employee is required to attend court as a juror, the employee is entitled to an unpaid leave unless the employer and employee agree otherwise.

With all the above-mentioned leaves of absence and jury duty, it is important for employees to know that an employer cannot terminate an employee or change a condition of employment without the employee's written consent. As soon as the leave ends, the employer must place the employee in the position the employee held before taking the leave or jury duty or in a comparable position. Further, while the employee is on leave or while serving on jury duty, the employment is deemed continuous for the purposes of calculating annual vacation entitlement and additional pension, medical or other benefits to which the employee is entitled. The employee is entitled to all increases in wages and benefits that they would have been entitled to had the leave not been taken or the attendance as a juror not been required.

For more information on this topic, please contact:

N. David McInnes, 604.691.7441
david.mcinnes@mcmillan.ca

Claire E. Morton, 604.691.6866
claire.morton@mcmillan.ca

Click here to return to index

Bill 30, the Ontario *Family Caregiver Leave Act (Employment Standards Amendment), 2011*

by J. Michael Mulroy

On December 8, 2011, Bill 30, the *Ontario Family Caregiver Leave Act (Employment Standards Amendment), 2011*, received first reading.

If passed, Bill 30 will create a new leave providing Ontario employees with up to 8 weeks unpaid leave, to provide care or support to family members. Family members include the following individuals:

1. The employee's spouse.

2. The parent, step-parent or foster parent of the employee, or the employee's spouse.

3. A child, step-child or foster child of the employee, or the employee's spouse.

4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.

5. The spouse of the child of the employee.

6. The employee's brother or sister.

7. A relative of the employee who is dependent on the employee for care or assistance.

8. Any individual prescribed as a family member.

The employee is eligible for 8 weeks of leave with respect to each individual who requires care and may take Family Caregiver Leave without fear of losing his or her job.

A doctor's note is required to qualify for Family Caregiver Leave. The employer may require the employee to provide a copy of a certificate issued by a medical practitioner stating the family member has a serious medical condition.

The Family Caregiver Leave is in addition to existing leaves provided by the *Employment Standards Act, 2000* to aid employees dealing with ill family members. Specifically, the Family Caregiver Leave is in addition to both the Family Medical Leave, which is available when a family member has a serious medical condition with significant risk of death occurring within 26 weeks, and the Personal Emergency Leave, which provides up to 10 unpaid days, if the employer regularly employs 50 or more employees.

The proposed legislation is expected to receive second reading at the end of February or early March, 2012. If Bill 30 is carried at second reading and enacted at the third reading, the Family Caregiver Leave will be law as of July 1, 2012.

For more information on this topic, please contact:

J. Michael Mulroy, 416-307-4076
michael.mulroy@mcmillan.ca

Click here to return to index

mandatory retirement eliminated for Canadian federal sphere employees

by David McInnes and George Waggott

The Government of Canada has recently confirmed repeal of the legislative provisions which have allowed for mandatory retirement of employees governed by federal employment and human rights legislation. As a result of the Royal Assent of Bill C-13, the law governing federally regulated private sector employers now matches the provisions in other Canadian provinces, including B.C., Alberta and Ontario, which have already outlawed mandatory retirement.

The provisions of Bill C-13 which amend the relevant provisions of the *Canadian Human Rights Act*, will not take effect until December 2012, which allows employers a period of transition. The elimination of mandatory retirement will mean that federally regulated employers will not be able to terminate employment because of age unless the employer is able to establish a *bona fide* occupational requirement. It is anticipated that it will be difficult, from a practical perspective, for employers to meet this legal test.

In those jurisdictions where mandatory retirement has already been abolished, there has not yet been the predicted raft of complaints from employees claiming they have been forced to retire contrary to the abolishment of mandatory retirement. However the extent to which this may change as the requirement for employers to "manage out" older workers who are not performing becomes more pronounced as the work force ages, remains to be seen.

The end of mandatory retirement has clearly led to employers taking a more proactive and aggressive approach to employee performance management since they will in many cases no longer be able to rely on a retirement rule or policy. This reality, which already affects most other employers in Canada, now also faces federally regulated employers as a result of the Royal Assent of Bill C-13.

For more information on this topic, please contact:

N. David McInnes, 604.691.7441
david.mcinnes@mcmillan.ca

George Waggott, 416.307.4221
george.waggott@mcmillan.ca

Click here to return to index

mcmillan

May 2012

employment and labour newsletter

case update - drug and alcohol testing

by Jennifer Bond

Mandatory random drug and alcohol testing has been at the centre of a litigious tug-of-war at arbitration boards and courts across Canada. However, the relevant legal principles may soon be clarified as the Communications, Energy and Paperworkers Union of Canada, Local 30 (the "Union") has been granted leave to appeal to the Supreme Court of Canada, a decision of the New Brunswick Court of Appeal which upheld Irving Pulp & Paper Limited's ("Irving") policy on mandatory random alcohol testing on "inherently dangerous" work sites.

Irving operates a kraft paper mill which is considered an inherently dangerous work site. Irving instituted a mandatory random alcohol testing program for employees holding "safety sensitive" positions. At arbitration, the Union successfully argued against the random alcohol testing of its members. Irving subsequently appealed to the New Brunswick Court of Queen's Bench where the Arbitration Board's decision was quashed. The Union then appealed to the New Brunswick Court of Appeal where the Court of Queen's Bench Appeal was upheld, justifying Irving's policy on mandatory random alcohol testing.

The Union sought leave to appeal the New Brunswick Court of Appeal decision and leave was granted on March 23, 2012. It is expected that the decision of the Supreme Court of Canada will provide much-needed clarification regarding drug and alcohol testing of employees, and will almost surely have an impact on the adoption and administration of drug and alcohol testing policies in the future.

For more information on this topic, please contact:

Jennifer Bond, 416.307.4248
jennifer.bond@mcmillan.ca

Click here to return to index