KOSKIE MINSKY

JUSTICE MATTERS

Employment Law

This is a summary of employment law matters of interest, from a litigator's point of view.

$10,000 in Human Rights Damages Awarded to One Month Employee

Termination during the probationary period without payment or notice, often thought to be an automatic entitlement of employers, is always subject to the caveat "except for a discriminatory reason". That was the expensive lesson **for** one Ontario employer recently.

The company was a distributor and the employee hired as a delivery truck driver. He was terminated after six weeks of service on the grounds that he was "unreliable". The employee had been required to stay home with his sick children, aged one and four, for two days in a row because his wife, who normally took care of the children was ill. The following day, he returned to work and had to leave after experiencing a sharp pain in his side. He was diagnosed with a hernia and scheduled for surgery roughly 2 weeks later. He applied for WSIB. His employment was terminated.

The Human Rights Tribunal of Ontario concluded the employee's probationary period was not relevant if there had been an act of discrimination under the *Human Rights Code* (the "Code").

The Tribunal considered next whether there had been any discrimination. The employee's wife was unable to care for the children who could not be left alone as they were very young. This engaged the employee's legal responsibilities as a parent. The tribunal accepted that the employee did not have anyone else to care for the children and did not require that the employee demonstrate having made efforts to find care for them. The Tribunal distinguished the facts in this case from an employee requiring a permanent accommodation for childcare on the basis of family status finding the efforts required where there is only "infrequent, sporadic or unexpected need to miss work to care for one's children does not require reasonable efforts be demonstrated. Instead, the employee need only show a "bona fide childcare problem" has resulted in the employee being unable to meet his or her work obligations. Accordingly, the employee was unable to work for two days for reasons protected on the "family status" ground under the Code. The Employee suffered from a hernia and therefore was unable

to work the third day because of "disability", a protected ground under the Code.

His absence on these three days was a significant part of the reason the company decided to terminate his employment. Accordingly, he was discriminated against contrary to the Code. The employee was awarded $10,000 as monetary compensation for injury to dignity, feelings and self-respect. The Tribunal noted that this amount was at the "lower end" of the range of cases involving termination of employment. However, it was appropriate having regard to the employee's short service and because there were some non-discriminatory reasons which supported the employer's decision to terminate.

***Miraka v. A.C.D. Wholesalfe Meats Ltd.* 2016 HRTO 41 (CanLii)**

The Ontario Registered Pension Plan

In the 2014 Budget, the Ontario government set out its commitment to establishing and launching a province-wide pension plan, intended to build upon the Canada Pension Plan ("CPP") and provide a predictable source of retirement income for life. Notwithstanding significant debate and some opposition by stakeholders, on April 14, 2016, the government proceeded to implement its plan with the release of the proposed *Ontario Retirement Pension Plan Act, 2016.*

Similar to the CPP, the Ontario Registered Pension Plan ("ORPP") will require both employer and employee contributions through payroll deduction, and will pay a benefit on retirement that varies depending on how many years the employee contributed and the employee's earnings.

The ORPP will begin enrolling employers in 2017, with the first phase of contributions beginning January 1, 2018. By 2020, subject to legislative approval, every employee in Ontario would be part of either the ORPP or a comparable workplace pension plan.

The following are some design features of the ORPP:

- it will apply to employees between the ages of 18 and 70 who work in Ontario or are paid salary and wages from an employer in Ontario, including employees who work from home offices;
- it will be mandatory for employers and employees without a comparable workplace pension plan;
- employers will contribute up to 1.9% on an employee's annual earnings up to $90,000;
- employees will make contributions equal to those of the employer;
- employers will be required to pay contributions on behalf of eligible workers, and also to collect and remit contributions from those employees;
- the minimum earnings threshold for eligible employees will be $3,500;
- employees who object to participation in the ORPP on religious grounds may apply for an exemption, similar to the approach for CPP.

Similar to the CPP, all contributions to the ORPP will be held in a trust and invested for the benefit of

members, and will not form part of the government's general revenues. Benefits on retirement will include a benefit paid for life and a survivor benefit, indexed to inflation. The ORPP is designed to provide roughly 15% of a worker's pre-retirement income, up to a maximum cap, after 40 years of contributing to it.

The ORPP is to be phased in over a period of several years, with contributions for large employers (500+ employees) and medium employers (50-499 employees) without registered workplace plans starting in 2018. It will also be reviewed five years after its full implementation to help ensure that it is meeting its intended objectives, and periodically thereafter.

Stay tuned for further updates.

Human Rights Tribunal Expands Definition of Disability to Include Miscarriage

The Ontario Human Rights Tribunal has recently issued an interim decision confirming the effects of a miscarriage can meet the definition of "disability" under the *Human Rights Code.*

Wenying (Winnie) Mou (the "Employee") worked for MHPM Project Leaders (the "Employer"). In January of 2013, the Employee suffered a serious slip and fall accident which kept her out of the workplace for a few weeks. A few months later, the Employee learned she was pregnant with her first child. Shortly into the pregnancy, however, the Employee suffered a miscarriage which resulted in her missing an additional two days of work. As a result of these absences, the Employee failed to meet her hourly targets for 2013. In February 2014, relying on performance issues tied in part to the Employee's workplace absences, the Employer terminated the Employee.

Shortly thereafter, the Employee filed a human rights complaint alleging the termination of her employment amounted to discrimination on the basis of a disability contrary to the Code. In response, the Employer filed a motion to dismiss the complaint arguing that the health issues faced by the Employee were temporary in nature and therefore did not have the requisite aspect of permanence or persistence to meet the definition of a disability under the Code.

In issuing its interim decision on this threshold issue, the Tribunal relied on a long line of case law confirming that although the definition of disability should not be interpreted so as to include "normal", "common" or "transitory" ailments, it should nevertheless be given a broad interpretation. Applying this broad interpretation approach, the Tribunal determined that the Employee's injuries resulting from her slip and fall that took almost three weeks to heal were neither "common" nor "transitory" and therefore met the definition of disability. The Tribunal also concluded that the Employee's miscarriage met the definition of disability on the facts having regard to the fact that the Employee continued to experience

significant emotional distress arising from her 2013 miscarriage – so much so that the distress continued to be evident at the time of the hearing in 2016. In reaching these conclusions, the Tribunal noted that the Code does not require a disability to be present at the time of the adverse treatment – rather, the question is simply whether the disability, regardless of when it occurred, was a factor in the adverse treatment.

This decision confirms that employers should proceed with caution before taking any action against an employee for performance issues that could be linked in any way to a health ailment, even if that ailment is not permanent. Any failure to do so could give rise to a successful claim of discrimination on the basis of a disability.

***Mou v. MHPM Project Leaders* 2016 HRTO 327 (CanLII)**

Criminal Charges Regarding Activities Unrelated to the Workplace not "Just Cause"

In a recent decision of the Ontario Superior Court of Justice, the Court held that conduct resulting in criminal charges being laid against an employee does not constitute "just cause" for termination where the conduct is unconnected to work.

The employee, a 67 year old labourer employed since 1998, was terminated in February 2015 for "just cause" after being charged with two counts of sexual assault against minors. The events alleged did not occur in the workplace and did not involve any employees of the employer. When the employee was asked about the charges by his employer, he elected to rely upon his constitutional right not to incriminate himself (right to silence) and the presumption of innocence. He did tell his employer that the allegations did not involve any of the employer's employees.

On the morning of his termination, the employee was transferred to another of the employer's plants to fill a vacancy. One of the employer's female employees at the new plant reported that she was very upset to see the employee in the plant because she had worked with the employee in a previous workplace when she was a minor and the employee had made very inappropriate advances and sexual comments to her. The female employee told the employer that she did not wish to interact with the employee.

The employer relied upon this information to terminate the employee for just cause later that day. The employer stated that the employee was being fired because of the impact of the criminal charges on the employer in general and on his fellow employees, in addition to a few previous performance warnings in prior years. The Court found as a fact that the female employee was not involved in the criminal charges against the employee (the employer had mistakenly asserted in the Court proceedings that she was). It also noted that no evidence was tendered regarding the criminal allegations, except that it was clearly off duty conduct which involved no other employees. Also, the employer did not conduct any independent

investigations regarding the criminal charges.

The Court held that criminal charges alone, for matters outside of employment, cannot constitute just cause. There must be a justifiable connection to the employer or the nature of employment. The Court held that a justifiable connection might be found if an employer can prove that:

(i) the conduct harms the employer's reputation or product;

(ii) the behaviour renders the employee unable to perform his duties in a satisfactory manner;

(iii) the behaviour leads to refusal, reluctance or inability of the other employees to work with him;

(iv) the employee has been guilty of a serious breach of the *Criminal Code*, rendering his conduct injurious to the general reputation of the employer and its employees; or

(v) the conduct renders the employer unable to properly carry out its function of efficiently managing its work and efficiently directing its workforce.

However, the Court also stated that the employee had to be a manager, professional or senior employee. This was not a factor articulated in prior decisions and the Judge gave no authority for this additional consideration.

In respect to the employer's reputation, the Court stated that the employer must show evidence of damage, or potential damage, to its reputation. Bald allegations of general "concern" are insufficient. Further, the Court indicated that if an issue arises as to the legitimate refusal of another employee involved in the charges to work with the employee, the employer had a duty to accommodate both employees.

In finding that no just cause existed, the Court awarded a notice period of 10 months, on the basis of the employee's rehiring in 2002 after a two year interruption of service.

***Merritt v. Tigercat Industries Inc.*, 2016 CarswellOnt. 2508**

Nancy Shapiro, Partner
Ernie Schirru, Partner
Arleen Huggins*, Partner

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