Employment Law

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

Bill 132: Ontario's Sexual Violence and Harassment Action Plan Act

Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*, received royal assent on March 8, 2016. The legislation is a result of commitments made in "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment" released by the Ontario government in March 2015. The Bill amends six government statutes, with the overall goal of improving support for survivors in the justice system as well as protecting students and workers from the threat of sexual violence and harassment.

One of the government statutes amended by the Bill is the *Occupational Health and Safety Act (OHSA)*. The Bill modifies definitions and expands obligations related to sexual violence and harassment in the workplace. These Amendments to OHSA came into force on September 8, 2016.

Summary of the Amendments to OHSA:

1. Definitions

Bill 132 amends *OHSA* to add a definition of ***workplace sexual harassment*** which means:

> a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expressed, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, **or**
>
> b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

Further, the Bill expands the general definition of workplace harassment to **include** workplace sexual

harassment.

2. Workplace Harassment Policy & Program

Sections 32.0.6 to 32.0.8 of *OHSA* have been amended to impose additional duties on employers to protect employees from harassment. Employers must now develop and maintain a written program to implement a workplace harassment policy. At a minimum the program must be reviewed annually.

The mandatory workplace harassment program **must** set out:

- measures and procedures for reporting workplace harassment incidents,
- how incidents will be investigated and dealt with,
- how information obtained regarding an incident will be protected, including procedures for disclosure, and
- how the worker will be informed of the results of the investigation and of any corrective action

An employer must also provide workers with information regarding the contents of the policy and program. The amendment also obligates an employer to provide appropriate instruction to workers regarding the policy and program.

3. Impartial Investigations

Inspectors of the Ministry of Labour will have the ability to order an employer to investigate incidents of workplace harassment by hiring an impartial investigator at the employer's own cost. An employer must also cover the cost of obtaining a written report by the impartial investigator. The qualifications for the impartial investigator are set by Inspector of the Ministry of Labour.

Unjust Dismissal Under the Canada Labour Code Remains Alive

The Supreme Court of Canada recently overturned a controversial decision of the Federal Court of Appeal (**Koskie Minsky LLP Employment Blog February 9, 2015**).

Specifically, the Federal Court of Appeal held that "Unjust Dismissal" provisions pursuant to sections 240 to 246 of the *Canada Labour Code*, R.S.C. 1985, c.L-2 (the "*Code*") only provided non-unionized federally regulated employees the right to challenge a dismissal without cause where reasonable notice had not been provided, similar to the common law standard. Accordingly, a dismissal without just cause was found not to be "unjust" per se.

The majority of the Supreme Court of Canada disagreed, stating that the "Unjust Dismissal" provisions (sections 240-246 of the *Code*) consist of "expansive protections like those available to employees

covered by a collective agreement" in respect of non-unionized federally regulated employees who have completed 12 consecutive months of employment; those protections including being the right not to be unjustly dismissed.

The Supreme Court of Canada held that unless an employee has been terminated for "just cause", whether or not the employee has been provided with statutory notice and severance pay under the *Code*, reasonable notice at common law (or pay in lieu) or pursuant to contract, the employee still has the right to:

> (i) ask the employer for a written statement setting out the reason for dismissal, which must be provided within 15 days; and
>
> (ii) apply under the Unjust Dismissal provisions of the *Code* for an inspector to determine whether the dismissal was unjust, and seek an appropriate remedy, including reinstatement or compensation.

The only exceptions are where the employee has been laid off for lack of work, the discontinuance of a function, or if the employee's position is managerial.

The Supreme Court of Canada decision reinstates the longstanding interpretation by an overwhelming majority of arbitrators and labour law scholars alike, and the vast majority of legal counsel, that the Unjust Dismissal provisions prevent the termination of covered employees other than for "just cause" or a termination due to lack of work or the discontinuance of a function.

The Supreme Court of Canada decision will have a huge impact upon a vast number of employees; those within the Federal government, banks, airlines and other federally regulated businesses, and renews the right of such employees to file an Unjust Dismissal complaint pursuant to the *Code* to seek reinstatement and other equitable relief rather than, or in addition to, monetary compensation. The decision will be a significant point of leverage in negotiations relating to the quantum of reasonable notice to be provided by an employer to avoid the prospect of reinstatement.

***Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29**

Ontario Court of Appeal Upholds Reinstatement by Human Rights Tribunal After 14 Years

In a decision released May 31, 2016, the Ontario Court of Appeal made clear that the passage of time shall not in and of itself be treated as a bar to the order of reinstatement.

In this case, the employee had been off on medical leave for 2½ years when she began seeking to return to work. Her employer alleged it had no position to return her to and ultimately terminated her

employment. The employee brought a complaint before the Human Rights Tribunal alleging a failure to accommodate and discriminatory termination.

The tribunal found that there were positions available in which the employee could and should have been placed as accommodation of her disability and ordered that she be reinstated (though not expressly stated in the Appeal decision, the employee was awarded 14 years of lost wages). The employer sought judicial review of the decision which application was dismissed by the Divisional Court.

The Court of Appeal also agreed. It held the findings to be reasonable based upon the evidence before the Tribunal. The employer argued that there is no authority for the proposition that accommodation requires that the employee to be accommodated be given preference over another legitimate and more qualified candidate for the role. The Court held this to be in fact not correct. While an employer has no obligation to place a disabled employee into a position for which he or she is not qualified, an employer may be required in an appropriate case to place a disabled employee into a position for which he or she is qualified, but not necessarily the most qualified. Accommodation to the point of undue hardship may also include altering the employee's previous position or looking for alternate positions if the previous one could not be altered in order to accommodate without undue hardship. The Court agreed that the Tribunal's conclusion that the employer failed to do so was reasonable.

The Court of Appeal went on to conclude that while rarely used in the Human Rights context, the remedy of reinstatement certainly falls within the jurisdiction of the Tribunal to award. The Tribunal having specialized expertise is to be given a high degree of deference with respect to the remedy awarded. It held:

> "the passage of years is not, by itself, determinative of whether reinstatement is an appropriate remedy. Rather, the decision as to whether to order reinstatement is context-dependent. In the present case, the Tribunal found… [the Employee's] employment relationship with the [Employer]… was not fractured and the passage of time had not materially affected her capabilities."

This decision represents a consistent approach to obligations respecting accommodation to what we have seen in the past and an acceptance of the principle of reinstatement after a long passage of time, in human rights cases.

Hamilton-Wentworth District School Board v. Fair 2016 ONCA CA 421 (CanLII)

Family Caregiver's Rights Upheld by Court

Sponsorship of caregivers from overseas is an increasingly common choice for families seeking affordable child care, particularly where there are two or more children in a household. In a recent case from Ontario, the Court considered basic statutory and common law employment principles in the caregiver

context, where the parties were also related.

The employer couple immigrated to Canada from India. In 2001 they arranged for the wife's sister to come to Canada and live with them as a caretaker and housekeeper under the Federal government's caregiver program. The facts of the case reveal a progressive breakdown in the parties' relationship, resulting in the end of the employment relationship in 2010. Shortly thereafter, the employee brought a claim for wrongful dismissal and overtime pay, among other claims.

The parties offered diametrically opposed evidence on every issue: the employee claimed she was promised $5,000 per month, while the employers asserted that she was entitled to payment of minimum wage less room and board. The employee claimed she worked 12 hour days and was frequently required to work on weekends to enable her employers' to attend social functions, while the employers asserted that the employee had little responsibility for childcare and often had no household responsibilities. Although the Court did not accept the employee's position on the terms of her employment, on balance, the Court preferred the evidence of the employee. The Court found as fact that she had poor English language skills, had very limited interaction outside the employers' household, was diagnosed as autistic, and implicitly trusted her employers who were her also her biological family.

The Court cited the *Employment Standards Act*, which requires overtime to be paid where an employee has worked more than 44 hours per week, at a rate of one and half times the regular salary. This statutory standard applies to caregivers, notwithstanding the fact that the living and working arrangements may overlap. The Court made it clear that in situations where when no work has been assigned but an employee is not free to leave the workplace and pursue personal matters, generally speaking, that employee is "working" for the purposes of the Act, even in the absence of any productivity or benefit for the employer. The Court accepted that the Plaintiff did all the household tasks and childcare responsibilities and that these responsibilities involved both evening and weekend work, and she was entitled to pay based on 58 hours per week.

With respect to the dissolution of the employment relationship, the Court found that the employee was dismissed when her employers gave her $5,000, paid for her airfare to Calgary and asked her to sign a release. In assessing the reasonable notice period, the Court noted that the employee's age of 51, coupled with her 9 years of employment which was longer than usual for such a position, favoured a notice period of 10 months of pay in lieu of notice.

This case is an important reminder that individuals and couples who employ caregivers are subject to the same statutory and common law employment standards as organizations and businesses. They must inform themselves of applicable employment laws and observe employee entitlements, failing which they may be held accountable by the Courts or the appropriate tribunal as the case may be.

***Fernandes v Goveas*, 2016 ONSC 1992 (CanLII)**

A Layoff is a Constructive Dismissal but a Failure to Accept a Recall will Limit Damages

The Ontario Superior Court of Justice recently concluded that an employer's imposition of a layoff in the absence of a contractual clause permitting a layoff can be treated as a repudiation of a fundamental term of the employment contract even in circumstances where an identifiable recall date is provided at the time of the layoff.

The employee worked as a facilities manager for fifteen years with the employer. In September 2014, the employer told him that he was being temporarily laid off and that he would be recalled three months later in December 2014. The employee took the position that the layoff amounted to constructive dismissal and commenced an action for wrongful dismissal.

In concluding the layoff amounted to a constructive dismissal entitling the employee to damages, the Court noted that compliance with the *Employment Standards Act, 2000* when affecting a lay-off is irrelevant to the question of whether a layoff is a constructive dismissal. The Court then proceeded to award the employee three months' pay as damages, representing the employee's pay that he would have received for the duration of the layoff (as opposed to the fifteen months' pay in lieu of reasonable notice being claimed by the employee in the lawsuit). The Court reasoned that the employee was only entitled to receive pay for the duration of the layoff because the employee's failure to accept a recall on the exact terms in place prior to the layoff was unreasonable and therefore amounted to a breach of his duty to mitigate.

This decision underscores the importance that express terms in an employment contract can play in an employment dispute and also the consequences of an employee rejecting a reasonable offer of re-employment.

Bevilacqua v Gracious Living Corporation 2016 ONSC 4127 (CanLII)

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