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Labour and Employment Law Bulletin

August 2005

Recent Developments in Labour and Employment Law

The following is a summary of recent case law and legislative changes which may affect employers in Ontario.

Amendments to the *Labour Relations Act*

Bill 144 received royal assent on June 13 2005 and therefore, the following amendments to the Ontario *Labour Relations Act* are now in effect:

- The Labour Relations Board now has the power to automatically certify an employer if an employee commits an unfair labour practice during a union organizing drive.
- Employers are no longer required to post decertification information in unionized workplaces.
- The Labour Relations Board is empowered to make interim orders to reinstate workers who are fired or disciplined during a union organizing campaign because of their efforts to unionize their employer.
- Unions do not have to disclose the name, salary and benefit of all directors, officers and employees earning $100,000 or more.
- The Labour Relations Board is now able to grant union certification when an employer violates labour laws, or to dismiss certification applications when the union violates labour laws.
- The card-based certification system for the construction sector has been re-established in addition to the existing vote system. The card-based system will permit automatic union certification in the construction sector if more than 55% of employees sign cards to join a union.
- Consecutive strikes are prohibited in the home building industry. The legislation has entrenched the special bargaining and dispute resolution regime for the residential construction sector in the City of Toronto and surrounding area which had been in place since 2001.

Does an employer have the right to suspend a non-unionized employee without pay for misconduct?

Employers in unionized settings have long been entitled to discipline employees, and to suspend an employee without pay, for conduct not serious enough to warrant termination. This right has been codified in almost every collective agreement.

However, in non-unionized settings, prior to 1999, the common law precluded employers from imposing this type of discipline without being subject to claims for constructive dismissal. Judges tended towards the view that in the absence of an express or implied term in a contract of employment, it was **not** open to employers to suspend an employee without pay as a means of disciplining him or her for misconduct, the nature of which while serious, would not warrant termination. An employer could only suspend an employee without pay where the employee's conduct was serious enough to warrant termination from employment, but the employer decided to impose a lesser sanction. Otherwise, if an employer suspended an employee without pay for conduct that was not serious enough to constitute just cause for termination, a court would likely find that a constructive dismissal had occurred and the employee would be entitled to damages.

In 1999, and again in 2001, the Ontario Court of Appeal and then the Supreme Court of Canada began to consider the appropriateness of allowing employers in non-unionized settings to impose disciplinary measures short of dismissal. The Supreme Court of Canada stated that there might be situations where lesser sanctions for less serious types of misconduct might be warranted, such as "docking" an employee's pay or suspending an employee without pay.

A very recent decision of the Ontario Superior Court of Justice, *Carscallen v. FRI Corp.*, released on June 10, 2005, has provided more detail regarding what the procedural and substantive scope of an employer's right to impose disciplinary measures short of dismissal in a non-unionized setting might be.

First, *Carscallen* stands for the proposition that if an employer expressly contracts for the right to impose discipline short of dismissal in its employment contract with an employee, that right will only be upheld if it is considered to be fair and reasonable. In order to be deemed fair and reasonable,

the supervisor imposing the discipline must not be permitted to be the "*sole judge, jury and executioner*". The Court ruled that there must be an opportunity to have whatever penalty is imposed reviewed by another person. Such a right of review would usually occur in the case of a mid-level manager whose decision could be scrutinized by senior management in consultation with Human Resources professionals. However, the Court also stated that if it is the CEO who seeks to impose the discipline, a review might involve consultations with an independent Human Resources professional. It is difficult to know how this will be applied in cases involving small employers.

If the employer has not entered into a contract which expressly allows suspension without pay, employers will only be permitted to impose such discipline if the right to do so is implied from the employment relationship. Cases where a Court might imply such a right into the employment relationship are:

(a) the employer has a long history of imposing such discipline and the employee was aware of the employer's practice; and/or

(b) the discipline practice is set out in an employment policy which is well known to the employee in question.

Even in circumstances where such a right is implicit in the employment relationship, it appears from the decision in *Carscallen* that the Court will still require the right to be meted out in a fair and reasonable manner.

As a result of these cases, employers who want to be able to impose unpaid suspensions may wish to ensure their contracts of employment specifically set out the employer's right to do so. Alternatively, or simultaneously, employers might wish to revise their employment policies to provide for the right to suspend an employee without pay in cases specified by Company policy. In light of the Court's comments in *Carscallen*, employers might wish to draft policies that allow a penalized employee the opportunity to have the discipline reviewed by senior management.

Please note that the *Carscallen* decision has been appealed and will probably not be before the Court of Appeal for several months. Pallett Valo's Labour & Employment Department will closely follow the appeal, as well as any subsequent judicial interpretations of the *Carscallen* decision.

Court of Appeal Rules that Denying Severance Pay to Disabled Employee is Unconstitutional

In the decision of *Ontario Nurses Association v. Mount Sinai Hospital*, the Ontario Court of Appeal recently confirmed that it was unconstitutional to deny severance pay owed under the *Employment Standards Act* of Ontario (the "ESA") to disabled employees.

Under the ESA, subject to some exceptions, employees who are dismissed without having engaged in serious, willful misconduct are entitled to severance pay of approximately one week's pay for each year of service, to a maximum of 26 weeks' pay, if they have been employed with the employer for at least five years, and if the employer's payroll is at least $2.5 million annually.

Subsection 58(5)(c) of the ESA created an exception to the employer's obligation to provide severance pay if an employee's employment contract was "frustrated by illness or injury". Frustration is a legal term that refers to a situation where unexpected circumstances make it impossible for the obligations of a contract to be fulfilled. In some cases, where an employee was absent from work for an extended period of time, and his or her return to work was uncertain, the employment contract was considered "frustrated".

In the Mount Sinai Hospital case, an employee was dismissed for innocent absenteeism after a prolonged leave of absence due to non-work-related health problems. The hospital refused to provide the employee with severance pay on the basis of subsection 58(5)(c) of the ESA. The Ontario Nurses'Association filed a grievance on behalf of the employee challenging the constitutionality of subsection 58(5)(c). (**Note:** parts of the ESA were amended after the filing of the grievance. The revised provision, subsection 9(2)(b) of Ontario Regulation 288/01 of the current ESA, also contains an exception which is similar in substance to subsection 58(5)(c).

At arbitration, it was held that the employee's contract of employment had been frustrated and that the employer was therefore not required to provide severance pay. The Arbitrator also found that subsection 58(5)(c) of the ESA did not violate the right to equal protection and equal benefit of the law without discrimination under section 15 of the *Canadian Charter of Rights and Freedoms* (*the "Charter"*).

On appeal, the Divisional Court ruled that subsection 58(5)(c) was contrary to the equality provisions of the Charter, and therefore of no force and effect. The Divisional Court held that the purpose of severance pay is to compensate long-term employees for their past service and for their "investment" in the employer's business. The Divisional Court held that denying severance pay to a group already disadvantaged by their disability was discriminatory and not demonstrably justifiable. As a result, the Court ordered the payment of severance pay to the employee.

The employer appealed the decision to the Ontario Court of Appeal. The employer argued that the primary purpose of severance pay was not to compensate for past services, but rather to compensate for losses on a "go-forward" basis as an employee seeks new employment. The employer argued that since employees whose contracts have been frustrated due to illness or injury are unlikely to re-enter the workforce, the denial of severance pay does not constitute discrimination.

The Court of Appeal rejected the employer's argument. The Court noted that the skills of employees with permanent disabilities, as well as the devices and techniques available to accommodate special needs, are always changing. It agreed with the Divisional Court that severance pay is retrospective and is intended to compensate employees for their past service.

This case illustrates the commitment of the Ontario Courts to uphold the rights of disabled persons, and stands for the proposition that the severance pay provisions of the ESA were designed to reward past service where an employee suffers a loss of employment at the initiation of an employer.

As mentioned above, this decision interprets a provision in the ESA that has since been amended. Although the new wording may be a change in form and not in substance, there is no case yet that decides whether the exemption in the regulation of the current ESA is unconstitutional.

$500,000 in Punitive Damages Awarded

In a recent case called *Keays v. Honda Canada Inc.*, the Ontario Superior Court of Justice issued one of the largest punitive awards ever in a wrongful dismissal case. Mr. Keays was awarded 15 months' pay in lieu of notice of termination of employment, an additional nine months' pay in lieu of notice for "bad faith" damages, and $500,000 for punitive damages. The Court found that the punitive damages were warranted because the employer attempted to avoid its obligation to accommodate Mr. Keays.

Mr. Keays was employed as an associate in the Quality Engineering Department at one of Honda's plants for approximately 14 years. During the course of his employment, Mr. Keays suffered several health problems and was frequently absent from work. He was eventually diagnosed with Chronic Fatigue Syndrome, and was off from work for approximately two years and in receipt of disability benefits. He returned to work when his insurance benefits were cancelled by the insurer.

Upon his return to work, Mr. Keays was chronically absent, but for just a few days at a time, because of his disability. He was subjected to Honda's progressive disciplinary program, and was required to substantiate absences by providing medical certificates. The Court was highly critical of this requirement. The Court noted that other employees with "mainstream" illnesses were not obliged to validate every absence with a doctor's note before returning to work. The Court also noted that because Mr. Keays would be required to visit a doctor when suffering the systems of chronic fatigue, his return to work would actually be delayed by this requirement.

In the three months prior to his termination of employment, Mr. Keays was absent from work fourteen times. Honda's company doctor found that Mr. Keays did not suffer any medical condition prohibiting him from regularly attending at work. The doctor even recommended that he could return to work on the demanding production line. Honda eventually

advised Mr. Keays that it no longer considered his absences to be legitimate and required him to meet with a second company physician to determine whether his absences were justified. Mr. Keays resisted this request and requested more information about the parameters of the second medical examination. Mr. Keays retained a lawyer to attempt to mediate his concerns. Honda decided to terminate Mr. Keays' employment for insubordination after he refused to meet with the second company physician. Mr. Keays sued Honda for wrongful dismissal.

At trial, the Court found that there was no just cause for the termination of Mr. Keays' employment and awarded him 15 months' pay in lieu of notice of termination of employment. In addition, the Court extended the notice period by nine months because it found that Honda acted in bad faith in the manner it terminated Mr. Keays' employment. The Court found that the requirement that Mr. Keays meet with the second physician was not reasonable in the circumstances, nor was it made in good faith. The Court criticized management at Honda for doubting the sincerity of Mr. Keays' illness and "stonewalling" his attempts to be accommodated.

The Court also awarded $500,000 in punitive damages on the basis that Mr. Keays had been harassed and discriminated against by Honda in an "outrageous manner". The Court found that Honda had attempted to avoid its obligations to accommodate under the *Ontario Human Rights Code*. The Court also found that Mr. Keays was terminated in an act of reprisal for asserting his legal rights.

Honda is currently appealing the *Keays* decision (which is not surprising). Again, we will be monitoring the result.

Pallett Valo LLP Labour & Employment Law Group

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We provide support to management in drafting employment contracts and company policies, collective bargaining, collective agreement administration and grievance arbitration. We work for a diverse range of employers in the private and public sectors, and have specialized expertise in the construction industry.

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