BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Fall 2010

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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Ontario Bill 68: *The Open for Business Act, 2010*

Ontario Bill 68, *The Open for Business Act, 2010*, was tabled on May 17th, 2010. The *Act* proposes 100 amendments to various acts. In particular, the Government of Ontario seeks to modernize the employment standards regime as follows:

- elimination of a backlog of employment standards claims within two years (by launching a Task Force in August 2010);
- implementation of changes in an attempt to avoid future backlogs;
- empowering employment standards officers, labour relations officers and Ministry of Labour employees to attempt to settle complaints which have been assigned for investigation.

By providing earlier notice of employee claims and increasing opportunities for settlement, the McGuinty Government aims to make the employment standards system more efficient, less expensive and less time-consuming for businesses.

Bill 68 would also implement a "self-help" model for initiating complaints, the same model currently in use in British Columbia. Following the implementation in BC, complaints dropped dramatically.

The Ministry of Labour has proposed to exempt certain workers from mandatory self-enforcement. Among the exempted workers are: live-in caregivers, employees with language barriers or disabilities, young workers, workers who are afraid to contact their employer, or those whose employer has closed or gone bankrupt.

Bird Richard will monitor this Bill and provide you with updates as it passes through the legislative stages.

Appropriate Monitoring of Employee E-mail Accounts

With the use of e-mail, instant messaging and social networking becoming increasingly popular, many employers are beginning to question how they can appropriately supervise employee's use of technology in the workplace.

The Assistant Privacy Commissioner addressed the complaint of an employee pursuant to the *Personal Information Protection and Electronic Documents Act ("PIPEDA"),* which alleged that his employer had breached his right to privacy when it accessed his personal e-mail account during a labour dispute. The employee believed that the information gathered by the company was used inappropriately by the employer to support disciplinary actions against him.

The complaint arose after a meeting at which the company presented the complainant with a copy of an e-mail as evidence that the employee had been involved in distributing copyrighted materials owned by the company in an online discussion forum. The company alleged that the employee had posted content belonging to the company without having received authorization to do so.

The company in this case had a corporate security policy in place. The policy stated that any messages sent via e-mail would be considered company records and that the company reserved the right to access and disclose messages sent over its e-mail system for any purpose. The policy further stated that e-mails could be disclosed to law enforcement officials without prior notice to employees. Additionally, the company's policy declared that e-mail should only be used for business purposes, the use must not interfere with normal business activities, and must not involve non-job-related solicitation.

The Assistant Commissioner determined that the employer had an established policy for acceptable use of e-mail in the workplace and that the policy clearly created an expectation that the employer would consider messages sent using the company's system as its own records. The policy also clearly stated that the company reserved the right to access and disclose messages.

It was found that the employee had forwarded e-mails from his personal e-mail account to his corporate account. The company explained that information available publicly on the online forum had led it to believe that the person responsible for posting the material was an employee who worked for the company in a certain area, and whose name had the same initials as the complainant. After narrowing their search, the company decided to review the employee's corporate account which is where it came across supporting evidence.

The Assistant Commissioner concluded that the employer's collection of the information complied with paragraphs 7(1)(b) and 7(2)(d) of *PIPEDA*, which permits collection of information without the consent of the individual for the purposes of investigating a possible breach of an agreement or a contravention of the laws of Canada or a province.

The Assistant Commissioner raised concerns that the company's corporate security policy "may not establish adequate parameters for the monitoring of employee e-mail," however, it was decided that the company had a justifiable reason to access the employee's corporate e-mail account as it was investigating a breach of the employee's employment agreement. The Assistant Commissioner also noted that the company had conducted an external investigation prior to accessing the employee's corporate account.

This decision highlights the importance of a clear computer use policy which expressly authorizes the employer to monitor an employee's computer use, including e-mail messages, and which states that the employee has no expectation of privacy with respect to the use of the company's computer equipment. This policy should also address the use of social media such as Facebook and Twitter during working hours. Further, employers should consider the inclusion of confidentiality clauses in their employment contracts in order to protect its confidential business information against inappropriate disclosure by employees.

Arbitrator Denies Severance to Employees on Strike at the Time Their Employer Went Out of Business

In a recent decision out of Saskatchewan, an arbitrator denied severance pay to employees who were on strike at the time their employer went out of business.

The employer ran a specialized printing company that printed tickets for professional sports teams, airline tickets and boarding passes, transit tickets and passes for the Toronto Transit Authority, and more. Many of the staff had been employed by the company for more than 10 years and some employees had more than 30 years' seniority.

Prior to collective bargaining in 2008, the union had heard rumors that the employer was experiencing financial difficulties. Each of the bargaining units normally negotiated their agreements separately, but in 2008, collective bargaining negotiations were grouped together at a common table. During the negotiations, the company made clear that it was in fact experiencing financial trouble and explained that without considerable compromises there would be a definite loss of business.

The employees went on strike. Days after the strike commenced, the employer presented to the union a letter indicating that effective September 18th, it would implement the terms of its final offer and stated that employees were welcome back to work. However, the employees did not return to work. As a result, the employer decided to close the plant, which took effect on December 18th.

The company acknowledged that provisions of the collective agreement which had vested prior to the termination of the agreement could be enforced after the termination of the agreement. For example, if the employer had not paid wages to an employee that had been earned prior to the termination of the collective agreement, the wages, as the right to them had been vested, could be recovered despite that the collective agreement had been terminated.

However, it was the position of the employer that unlike wages or pension benefits, severance pay is not a vested right but is a contingent right which may never arise. Further, if employees voluntarily resign, they are no longer entitled to severance pay.

Further, even if the employees had returned to work, they would have done so under the terms and conditions of employment imposed by the employer on September 18th and those terms and conditions contained no provision regarding severance pay.

The union argued that severance benefits provided by the termination of the collective agreement had vested prior to the termination and could therefore not be withdrawn unilaterally. In the alternative, common law principles regarding severance pay apply where there is no express provision in the collective agreement.

The arbitrator came to the conclusion that severance pay provisions are a contingent right. Therefore, in order for an employee to be entitled to severance pay, there must be a "triggering event". In addition, the severance (or triggering event) must occur before the collective agreement is terminated.

The arbitrator explained that because the agreements were terminated prior to the severance of the employees, it was impossible to say that the "essential nature" of the dispute between the parties arose from the interpretation, application, administration or violation of the collective agreements.

The arbitrator found that even if it had been appropriate to rely on common law principles in order to interpret and apply a collective agreement, there was, in this case, no agreement into which the principles could be inserted. The arbitrator therefore found himself to be without jurisdiction.

The arbitrator's decision, therefore, was that severance pay provisions could not be enforced and common law principles could not be inserted as the collective agreements had been terminated prior to the dispute. The union has appealed the ruling.

We will keep readers apprised of the outcome of the appeal.

Ontario Government to Extend Wage Freeze to Unionized Public Sector Employees

Unionized public service employees are being asked by the Ontario government to accept a wage freeze.

On March 25th, 2010, the Ontario government tabled Bill 16, which included the *Creating the Foundation for Jobs and Growth Act, 2010.* This Act enforces a two-year freeze on compensation structures and affects MPPs and over 350,000 non-unionized public service employees. The Act applies retroactively to March 25th, 2010.

The Act freezes the rate of pay to the rate which was in effect on March 24th, 2010, until April 2012. However, the Act does not deal explicitly with compensation increases that were promised, decided or approved by employers that were not in effect on March 24th, 2010.

The Act also prevents the across-the-board provision of new or additional benefits to employees. Benefits are only to be provided to employees if authorized under the compensation plan as it existed on the effective date.

When the government tabled the Ontario Budget and introduced the Act, it expressed the intent to restrain wages of unionized employees as well.

On July 20th, 2010, Finance Minister Dwight Duncan met with approximately 60 union leaders and public service employers. The meeting served as a consultation process prior to more detailed discussions regarding compensation.

Finance Minister Duncan expressed at the meeting that the province would respect current collective agreements; however, for agreements that are now open or that will soon expire, the government would expect "zero and zero" increases for a two-year period.

Public sector employers have been asked to stop negotiating if they are currently at the bargaining table. Finance Minister Duncan called on the public sector to assist the province in sustaining important services while working to eliminate the deficit.

The meetings are an attempt to reach a consensus as an alternative to imposing the wage freeze through legislation. We will keep readers apprised of developments in this area.

Bill 119: WSIB Clearance Certificates

The Workplace Safety and Insurance Board ("WSIB") has developed draft policies to support the implementation of Bill 119, the *Workplace Safety and Insurance Amendment Act, 2008*.

Under the draft policies, the WSIB anticipates the launching of a web-based eClearance system for obtaining clearance certificates.

Clearance certificates are issued to employers (or contractors and subcontractors in the construction industry) that are registered with the WSIB, provided that their account is in good standing. The certificate relieves the principal (who retains a contractor) of liability for the contractor's payment obligations, including premiums and penalties, to the WSIB. The current validity period for clearance certificates is 60 days, but if the draft policies are finalized, the validity period could be extended to 90 days.

The eClearance system will enable employers to quickly and easily obtain clearance certificates and will also act as a primer to prepare businesses for the more significant changes slated to take place in 2012.

Bill C-29: Amendments to Federal Private Sector Privacy Legislation

On May 25th, 2010, the Government of Canada introduced Bill C-29, which will alter the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"). The changes to the federal private sector privacy legislation are the result of a parliamentary review of the legislation that occurred in 2007.

Among the proposed amendments are changes which include:

- mandatory reporting of data breaches;
- provisions allowing for personal information to be disclosed for business transaction purposes, and
- consent exceptions for employee information and work product information.

The Bill provides a clarification of the meaning of "consent", and adds a security breach disclosure requirement. The Bill requires that a report be made to the Privacy Commissioner in the event of a "material breach of security safeguards involving personal information". The organization is responsible for determining if the breach is material, and must examine the sensitivity of the information and the number of individuals affected by the breach, and detect whether or not the problem is systemic.

Another proposed requirement is that the breach must be reported to individuals if there is a reasonable belief that the breach could create a "real risk of significant harm" to those persons. It is left to the organization to determine whether or not there is a real risk. This notification must be given "as soon as feasible". At present, there is no requirement to disclose security breaches, and it is clear that the proposed amendments set a high threshold for disclosure.

With respect to the disclosure of personal information for the purposes of business transactions, the new business transaction exception permits use and disclosure of personal information for the purpose of carrying out business transactions. The amendment is a response to concerns that *PIPEDA* could create obstacles for businesses wanting to carry out certain transactions. There are, however, limitations on the use of the information.

In terms of business exceptions, the Bill adds a new work product exception, which applies to the collection, use and disclosure of information produced by employees during the course of their employment. Another exception exists for the collection, use and disclosure of information used to "establish, manage or terminate an employment relationship".

Further business exceptions allow for voluntarily disclosure of personal information to organizations for the purposes of investigating a breach of an agreement that has been, is, or may be committed. The exception also exists as an aid to prevent, detect or suppress fraud.

Bird Richard will monitor this Bill and provide you with updates as it passes through the legislative stages.

Firm Announcements

The Firm welcomes our new Associate, Peter MacTavish. Peter worked as in-house counsel for one of our large crown corporation clients. Peter brings to the Firm a full range of expertise in labour and employment law.

We also welcome our new Articling Student, Katherine Symonds.