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LAWYERS FOR EMPLOYERS

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RCMP Members Right to Freedom of Association Not Violated

In June 2012, the Ontario Court of Appeal released its' decision in the *Mounted Police Assn. of Ontario v. Canada (Attorney General)* case. The decision addresses the scope of section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") which protects freedom of association, a controversial subject which has been addressed by the Supreme Court of Canada in four recent decisions.

The case involved an appeal by the Crown from a decision of the Ontario Superior Court which found that section 96 of the *Royal Canadian Mounted Police Regulations* infringed the rights of RCMP members of two associations, the Mounted Police Association of Ontario (MPAO) and the British Columbia Mounted Police Professional Association (BCMPPA) to freedom of association. The associations, made up of RCMP members, were organized by individual RCMP members who wanted to represent the members in collective bargaining. However, section 2(1)(d) of the *Public Service Labour Relations Act* (the "*Act*") precludes the associations from applying for certification as a bargaining agent for RCMP members. A separate labour relations system exists for the RCMP members, the Staff Relations Representative Program (SRRP), which is established by the *Regulations*.

The Court of Appeal explained that the case raises two "new questions" in respect of freedom of association in the labour context:

(1) whether "the right to collective bargaining" under section 2(d) guarantees workers the right to be represented by an association of their own choosing; and,

(2) whether "the right to collective bargaining" under section 2(d) requires that the process for addressing workers' concerns with management be independent of management.

The Court of Appeal allowed the appeal and dismissed the cross-appeal brought by the associations.

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The appeal had been delayed, pending the release of the Supreme Court of Canada's decision in *Fraser.* Consequently, relying heavily on the *Fraser* decision, the court explained that section 2(d) does not give RCMP members the right to establish a particular type of association defined in a particular statute. Rather, the court held that collective bargaining, as protected by section 2(d), only protects the right to make collective representations and to have the representations considered by the employer in good faith. Further, section 2(d) also protects members from interference by management in the establishment of an independent employee association.

In order for there to be a positive obligation on the part of the government to include workers in the labour regime set out in the *Act*, the court determined that the RCMP members would have to demonstrate that it was "effectively impossible" for them to "associate collectively to achieve workplace goals".

In support of its' decision, the court highlighted the fact that the RCMP members had been able to successfully form voluntary associations, meaning that it was not "effectively impossible" for them to act collectively to achieve workplace goals. In addition, the existence of the SRRP and the Legal Fund demonstrated that the exercise of freedom of association by RCMP members was not effectively impossible.

Because the court found that it was not effectively impossible for RCMP members to associate collectively to achieve workplace goals, the court concluded that there was no positive obligation on the government to include them in the labour regime as set out in the *Act*.

In this case, the Court of Appeal underscored the Supreme Court's pronouncement in *Fraser* that "there is no general obligation for the government to provide a particular legislative framework for employees to exercise their collective rights". Thus, the court reiterated that the protection provided by section 2(d) is the associational activity, not a particular process or outcome.

An application has been made for leave to appeal to the Supreme Court of Canada.

Employment Agreements Must Specify Duty to Mitigate

A recent ruling of the Ontario Court of Appeal has clarified that where an employment agreement provides for a specific amount to be paid to the employee in the event of termination without cause and is silent with respect to mitigation, the employee will *not* be required to mitigate.

The employee in this case, Peter Bowes, had worked as Vice-President, Sales and Marketing for Goss Industries Inc., since Fall 2007. On April 13, 2011, his employment was terminated immediately, without cause and without notice.

The employment contract that Bowes had signed prior to commencing his employment provided that he would receive six months' notice or pay in lieu thereof in the event his employment was terminated without cause. The contract was silent with respect to mitigation.

The termination letter Bowes received stated that he would receive salary continuance for six months, and that he was required to seek employment and keep the employer informed in this regard. Bowes secured a position at the same salary in only two weeks. After paying the statutorily required amount of three weeks' salary, the employer stopped making payments.

Bowes brought an application for a determination of his rights pursuant to the employment agreement, arguing that the contract set out the payment that was due, and that he had no duty to mitigate.

At first instance, the judge determined that an employment agreement was subject to the duty to mitigate, unless the agreement expressly relieved the employee of the duty. However, on appeal, the Ontario Court of Appeal overturned the judge's decision.

The Court of Appeal explained that an employment contract that provides for a fixed term of notice, or pay in lieu thereof, must be treated as fixing liquidated damages or as a contractual amount, as opposed to damages in lieu of common law reasonable notice. As such, there was no obligation on the employee to mitigate.

The decision thus reiterates that where the parties have entered into an agreement that specifies a fixed amount of damages, clear and specific language is required in order for mitigation to apply upon termination without cause.

Employer Liability to Provide Safe Workplace is a Perpetual One

In *R. v. Corporation (City of Guelph)*, the Ontario Court of Justice declared that an employer's duty to maintain a safe workplace is a continuing one to which no time limitations apply.

In 2003, the City of Guelph undertook to construct a building in one of its parks. An architect and engineer were hired for the project. They prepared and approved a design for the building, which was completed in June 2004 and declared satisfactory by both parties in November 2005 and October 2007 respectively.

On June 16, 2009 a 14-year-old Grade 9 student was in this building waiting for a stall in washrooms to become vacant. She idly attempted to hoist herself onto a change table. The wall to which the table was affixed collapsed upon her causing fatal injuries.

The Ontario *Occupational Health and Safety Act* (*OHSA*) is provincial legislation that requires employers and employees to maintain health and safety standards in the workplace. The Ministry of Labour promptly charged the City with a contravention of s. 25(1)(e) which provides that "an employer shall ensure that a building, structure or any party thereof or any other part of a workplace, whether temporary or permanent, is capable of supporting any loads that may be applied to it in accordance with the Building Code, any other requirement or good engineering practices".

The Ministry of Labour then charged the professionals under s. 31(2) which states that "an architect and an engineer contravene the act if as a result of their advice that is given negligently or incompetently, a worker is endangered". At the material time, the building was a workplace as defined by the *OHSA*.

By way of defense, both parties claimed that the charges contravened s. 69 of the *OHSA*, which provides a limitations period which states that "no prosecution under the Act shall be instituted more than one year after the last act or default upon which the prosecution is based".

The Ministry replied that the principle of discoverability applied to the charges, meaning that the limitations period did not begin to run until the act or omission was discovered. That is, until the wall collapsed.

In determining whether the charges were barred, the court looked at the nature of relevant sections of the *OHSA*. The Court classified them into two categories: continuing offences and non-continuing offences.

Continuing offences are those that take, or may take, a long time to commit. They are a continuing breach of a duty to take action to put an end to a forbidden state of affairs. They are indicated when the statute provides a penalty for every day that the corrective work is not done, or that the offending activity continues. Generally, these offences are of a passive character consisting of a failure to perform a duty imposed by law. Examples from other cases involving these types of offences are failing to remit money to a government authority and failing to make payment of wages.

On the other hand, non-continuing offences are those in which a one-time event, once committed is complete, concluded, and exists only in the past. These are found wherever the act does not continue, regardless of whether the consequence continues. Examples of these types of offences from other cases are the faulty installation of electrical equipment and construction of a dock without a building permit.

Given this characterization, the court concluded that the incorrect advice of the professionals did not constitute a continuing offence. This meant that the Ministry had just one year from the date their professional advice was rendered to lay the charges.

Next, the court looked at the principle of discoverability, finding that while the actions of the engineer and architect had endangered workers, the words of the section did not intend to impute a discoverability principle into these charges.

However, the court held that the City's failure to *maintain* a safe workplace was a continuing offence, making the City liable for every day that the wall could potentially have fallen. The conclusion was supported by the wording of s. 25(1)(e), which speaks to the nature of the offence. Finally, the court found that any other interpretation would frustrate the spirit of the law.

This decision reiterates that employers must be aware of the potential for continuing offences under the *OHSA*, and their obligation to continually maintain a safe workplace.

Accommodation Efforts by Employees Results in Discipline

When a training session was being conducted on the second floor of a local hardware store, a few employees realized that their wheelchair-bound colleague would be unable to attend. The colleague requested that they strap him in his wheelchair onto a forklift, in order to hoist him onto the second floor. They gladly obliged. At the end of the training session they lowered him to the ground floor. While no one was hurt, several safety procedures were not followed.

At first glance, this incident simply appears to be a workplace accommodation effort, in fulfillment of the duty imposed by the *Human Rights Code*. Normally, one is not penalized for trying to comply, but in this case, all of the employees involved were disciplined for their involvement.

The case centers on one of the disciplined employees, an Assistant Store Manager with over ten years of service. He was terminated for cause on the basis that he failed to prevent the incident from taking place. He brought a wrongful dismissal suit to the Ontario Superior Court of Justice.

The court found that the employer did not have just cause to dismiss the employee. Firstly, the court reasoned that the Supreme Court of Canada's landmark decision in *McKinley v. BC Tel*, set out the proper interpretation for just cause terminations, pursuant to the *Employment Standards Act, 2000*.

The decision states that the analysis must be contextual and proportional, and must strike an effective balance between the severity of an employee's misconduct and the sanction imposed.

Second, looking at a more recent decision, in *Tong v. Home Depot of Canada*, the court found the standard to have been further clarified, requiring that the misconduct be serious. The misconduct must amount to a repudiation of the contract.

Finally, the court looked at the equally recent decision of the Court of Appeal in, *Dowling v. Ontario,* where the court applied a three-part test for the application of this standard. It consists of:

- determining the nature and the extent of the misconduct;
- considering the surrounding circumstances; and,
- deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

The court found that on the one hand, the plaintiff was not on duty when the incident occurred, even though he had been informed of it prior to the day. Further, the plaintiff did not expressly permit the act, but neither did he expressly forbid his subordinates from doing the same. Further, an internal investigative report had concluded that all the employees involved ought to be disciplined short of termination because they had good intentions, and they had expressed remorse for their actions. Finally, the plaintiff had no disciplinary record, excellent performance appraisals, and ten years of service.

On the other hand, the Employee Handbook clearly stated that "any deliberate act which might endanger the safety or lives of others" was among one of several causes for immediate dismissal. The notice was reinforced by the workplace Health and Safety National Manual, the Code of Conduct, and the Safe-Tech Training program. The court declared these to be implied terms of the employees' contracts. In addition, the court held that being in a supervisory role, the plaintiff must be held to a higher standard of care than non-managerial employees.

However, upon considering the whole of the circumstances, the court concluded that, in this case, one act of misconduct was not of sufficient severity to justify dismissal.

This decision is an important one for employers because it reiterates the importance of proportionality where an employer is considering a disciplinary penalty. The decision also demonstrates that workplace safety must always be considered in meeting the duty of accommodation.