BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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In this Issue

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Ontario Court of Appeal Revisits the Employee vs. Independent Contractor Distinction

In *McKee v. Reid's Heritage Homes Ltd.*, the Ontario Court of Appeal confirmed that there is an intermediate category between the categories of employee and independent contractor, and altered the traditional analysis used to determine into which class an individual falls.

Elizabeth McKee was a salesperson for Reid's Heritage Homes. She received money from Reid's for each home she sold, from which she in turn paid her own employees. When Reid's offered McKee a new, six-month contract after nearly 20 years, she rejected the offer and brought an action for wrongful dismissal.

Applying the well-established *Sagaz* test, the trial judge found that McKee was obliged to sell exclusively for Reid's, and was an integral part of their business. On this basis, the judge concluded that McKee was an employee of Reid's and awarded her 18 months' pay in lieu of notice of termination. Reid's appealed, claiming that McKee was really a dependent contractor.

The Ontario Court of Appeal dismissed the company's appeal, finding that McKee was an employee, regardless of the fact that she ran her own business and employed her own employees. In addition to broadening the definition of employee to potentially include individuals who have their own businesses, the Court's decision is significant for employers in two other respects.

First, the Court confirmed that there is an intermediate category between the employee and independent contractor classifications: the dependent contractor. The dependent contractor is defined by the exclusivity

and economic dependency of the working relationship. The Court further confirmed that a dependent contractor relationship will give rise to reasonable notice of termination; however, the precise amount to which a dependent contractor will be entitled was not addressed in *McKee*, as the Court had already concluded that the plaintiff was an employee.

Second, the Court of Appeal modified the test that has traditionally been applied to distinguish between employees, dependent contractors, and independent contractors. Instead of immediately considering all three categories into which an individual may fall, the Court stated that the correct approach is comprised of two steps. The first is a consideration of whether the worker is an employee or a contractor. Only if the court concludes that the individual is a contractor will the court go on to determine whether the person is a dependent or independent contractor. In other words, plaintiffs have two "kicks at the can" to demonstrate that they are entitled to notice of termination: they may either prove that they are employees or, at the second stage of the analysis, prove that they are dependent rather than independent contractors.

What Does this Decision Mean for Employers?

Businesses must be wary when attempting to create an independent contractor relationship. Even if an individual operates through his or her own company, if the company only has one client, and is bound to this client by an exclusivity or non-competition clause, the individuals may be considered dependent contractors or even employees of the company. In either case, the individual is entitled to reasonable notice of termination or compensation in lieu thereof.

Ontario Provides Additional Protections for Foreign Nationals Working as Live-in Caregivers

Bill 210, *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, which was enacted to provide additional protections for foreign nationals employed as live-in caregivers in Ontario, received Royal Assent on December 15th, 2009. It will come into force on a date which has yet to be proclaimed by the Lieutenant Governor.

Once the *Act* takes effect, individuals who recruit and employ foreign nationals to provide live-in care for a child, senior or disabled person in their residence will have new restrictions and responsibilities in respect of those workers.

The *Act* specifically prohibits recruiters from charging foreign nationals a fee for any services provided, and prohibits employers for recouping from the foreign national the costs of arranging for that person to work in their home. Employers are also prohibited from retaining their caregivers' passports. Reprisals by employers or recruiters against employees for seeking to enforce their rights under the *Act* are similarly prohibited.

In terms of positive obligations, recruiters and employers are now required to provide greater information to live-in caregivers regarding their rights. Documents published by the Director of Employment Standards, which will be available in several languages, must be provided to foreign nationals by the recruiter as soon as possible after their first contact or, where no recruiter was used, by the employer at the start of employment. Foreign nationals already employed as live-in caregivers when the *Act* comes into force must also be provided with such documents as soon as possible.

Recruiters and employers will also have a duty to retain certain information, including whether the employer paid a recruitment fee, and contact information for all parties involved.

In terms of compliance, the Ministry of Labour's employment standards officers will have the authority to investigate complaints and perform proactive investigations. The officers may issue orders, including the repayment of fees that were charged to a live-in caregiver in contravention of the *Act*, orders to pay, and orders for reinstatement.

The passage of Bill 210 means increased protection for live-in caregivers, but places greater obligations on their employers. In particular, the restriction on recruiters' and employers' ability to recoup the costs associated with employing foreign nationals means that the full cost of recruitment will now lie with the employer. Bill 210 thus has the potential to increase the costs of hiring a foreign national as a live-in caregiver.

Class Action for Unpaid Overtime Certified

In recent years, there have been repeated attempts by Canadian employees to launch class action claims for unpaid overtime against their employers. The Ontario Superior Court certified one of these class actions: a claim against the Bank of Nova Scotia on behalf of over 5,000 employees for approximately $300 million in unpaid overtime.

The Court found that systemic wrongs arose from the bank placing the onus on employees to obtain prior approval for overtime, rather than ensuring that employees were paid overtime after the fact. According to the Court, these systemic wrongs gave rise to common issues among all class members and permitted the certification of the class action.

This decision is at odds with another recent decision of the Ontario Superior Court, in which the Court refused to certify the class action claim of CIBC employees who were claiming $600 million in overtime. There, the Court found that there were no systemic failures to pay overtime, and thus no common issues among the employees involved in the lawsuit.

The CIBC decision is under appeal, and it is expected that the Bank of Nova Scotia will also appeal the decision. The outcome of these cases will have a major impact on the future of class action litigation in the employment context. We will keep readers updated on the status of these appeals.

Reminder to Employers: Workplace Violence and Harassment Prevention

By June 15th, 2010, every employer in Ontario will be required to have established workplace violence and harassment prevention policies and programs, to have conducted detailed risk assessments, and to have trained its employees. Proactive measures to ensure compliance with Bill 168 should be undertaken as soon as possible. Employers can expect the Ministry of Labour to add these requirements to their audit and inspection checklists, and to issue orders for compliance where an employer has failed to meet the legislative obligations.

New Brunswick Employer Met Duty to Accommodate Suicidal Employee

In *McConnell v. Brunswick News Inc.*, the New Brunswick Human Rights Inquiry Board found that a New Brunswick employer did not fail to accommodate a repeatedly suicidal employee and that the decision to terminate him was completely unrelated to his mental disability.

McConnell suffered from severe depression and attempted suicide three times during his employment with Brunswick News. After each attempt, the company allowed him to take disability leave and attempted to accommodate him upon his return to work. Due to organizational changes, McConnell's original position as a Circulation Supervisor was eliminated after his second suicide attempt and, upon his return, he was assigned to the mailroom. After this third suicide attempt, he was assigned to supervise the telemarketing department. Eventually, McConnell was terminated from this position on the basis of poor performance, including a lack of enthusiasm for the employer's approach to increasing circulation of the newspaper, and a failure to meet sales targets.

McConnell filed a human rights complaint, alleging that his employer had discriminated against him by:

1. terminating him; and
2. failing to accommodate him during his employment by eliminating his former position, placing him in the mailroom and then the telemarketing department, and denying him other management positions.

The Board rejected the complaint in its entirety. The Board found that the allegations of a failure to accommodate during employment were not properly before it, since they were not included in the original complaint, and the incidents upon which they were based occurred outside of the one-year limitation period for bringing a complaint. However, the Board went on to find that, even if these allegations were properly before it, they were unfounded. The elimination of the employee's former position was in no way related to his disability. Further, the Board stated, the employer had made extensive efforts to include McConnell and his doctors in all decisions relating to his accommodation, and the

various positions to which he was ultimately assigned were suitable in terms of his medical restrictions.

With respect to McConnell's complaint that his termination was discriminatory, the Board found that there was no evidence to connect his disability to the reason for his termination; which was unsatisfactory productivity.

This decision reiterates that employees who are being accommodated may still be dismissed, so long as the reason for dismissal is not at all connected to the employee's disability. The decision also reinforces the importance of making efforts to accommodate employees to the point of undue hardship, and exemplifies the types of efforts that employers may be required to make in order to satisfy the duty to accommodate.

Employers Beware: Failures to Comply with Orders to Pay Result in Hefty Fines

On February 18th, 2010, an Ontario employer was fined $5,000 for its failure to comply with an order to pay in violation of the *Employment Standards Act, 2000* (*ESA*). After issuing an order to pay related to hours of work and overtime pay, the employment standards officer reviewed the company's payroll records and found that an employee had worked overtime hours since the order was issued, but had not been paid the appropriate overtime pay. The employer pleaded guilty to failing to pay an employee overtime pay.

In a similar case, a different Ontario employer and its director were fined $25,000 for violating the *ESA* by failing to comply with two orders to pay. An investigation of two claims for unpaid wages had caused the Ministry of Labour to issue orders to pay totaling approximately $10,000, which the employer failed to pay. The employer and its director were then found guilty of failing to comply with orders to pay. A Justice of the Peace imposed a $15,000 fine on the company and a $10,000 fine on the director.

These cases serve as a reminder to employers to ensure that they comply with orders of the Ministry of Labour, as a failure to do so can result in severe financial penalties for both the company and its directors.

School Board Must Pay Maternity Benefit Top-up to Laid-off Workers

As a result of the Supreme Court of Canada's decision in *Greater Essex Country District School Board v. OSSTF, District 9*, an Ontario school board will be required to pay approximately $60,000 in back pay of pregnancy leave top-up benefits.

Educational support staff employed by the school board are paid hourly, and are laid off during the summer months. Their collective agreement provides that, when an employee is on pregnancy leave, a six-week top-up of the employee's employment insurance entitlement will be provided. However, the school board did not pay this top up to employees who went on pregnancy leave during the summer lay-off period.

In 2007, the matter was referred to arbitration. The arbitrator found that the fact that an employee was not working and receiving wages at the time of her child's birth did not limit her entitlement to the top-up. The school board successfully appealed this decision, while the union was successful on appeal to the Ontario Court of Appeal. The Supreme Court ultimately denied the school board's application for leave to appeal, thereby affirming the arbitrator's decision and requiring the employer to pay the pregnancy leave top-ups retroactively.

Upcoming Seminars

Eighth Annual HRPA Ottawa Labour and Employment Law Conference:

Stephen Bird will discuss the federal experience under workplace violence regulations and what Ontario employers can expect under Bill 168.

Time and Location:
Tuesday, May 4, 2010, 8:00 a.m. – 4:00 p.m.
Fairmont Château Laurier – 1 Rideau Street

To register, please visit the Seminars page of our website.