BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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B.C. Court Enforces Employee Handbook Notice Provision

In *Arasteh v. Best Buy Canada Ltd.*, the British Columbia Supreme Court confirmed that a termination clause contained in an employee handbook which limits the amount of notice of termination owing to an employee was enforceable.

Mr. Arasteh worked for Best Buy for six years before he was terminated for poor performance. The trial judge of the British Columbia Provincial Court found that Best Buy had not established just cause for his termination, and that Mr. Arasteh was therefore entitled to damages for wrongful dismissal. The judge concluded that the damages owed to Mr. Arasteh should be calculated in accordance with an Associate Handbook that Mr. Arasteh had signed when he began work. The clause in the handbook limited his entitlement upon termination without cause to the minimum notice established under the provincial employment standards legislation.

Mr. Arasteh appealed the decision to the British Columbia Supreme Court. He argued that the handbook did not form part of his employment contract, and as such, could not replace his common law right to reasonable notice of termination. He further argued that the employer was precluded from relying upon this clause given that it had terminated Mr. Arasteh for cause.

The Court dismissed Mr. Arasteh's appeal. The Court found that the handbook could properly be incorporated as part of that contract because it did not contradict any of its terms.

More significantly, the Court went on to conclude that where an employer fails to establish that it had just cause to terminate the employee, it will not be precluded from relying upon the termination clause which limits the notice period.

This case illustrates the importance of ensuring that employment contracts contain a termination provision that limits the notice period to the minimum standards set by the

Employment Standards Act, 2000. While ideally this provision would be included in the contract itself, it can also be set out in an employee policy or handbook – as long as it does not contradict any provisions in the contract. Expressly limiting the amount of notice owed to an employee on termination can significantly reduce your liability for damages in case of a wrongful dismissal claim.

Supreme Court to Decide Whether CHRT can Award Legal Costs

In *Canada (Canadian Human Rights Commission) v. Attorney General of Canada*, the Supreme Court of Canada granted the Commission leave to appeal from the decision of the Federal Court of Appeal, in which that court found that the Canadian Human Rights Tribunal (CHRT) did not have the jurisdiction to award legal costs.

The complainant, Donna Mowat, was a Master Corporal in the Canadian Armed Forces (CAF) who alleged that she had been the subject of gender discrimination at the hands of CAF, contrary to the *Canadian Human Rights Act* (*CHRA*). The Canadian Human Rights Commission did not take carriage of the matter, and Ms. Mowat hired her own legal representation for the hearing before the CHRT.

After six weeks of hearing, the CHRT found that Ms. Mowat's complaint was substantiated. The Tribunal awarded her $4,000 for suffering and loss of self-respect, and $47,000 in legal costs.

The CAF applied to the Federal Court for judicial review of the costs award, arguing that the Tribunal did not have jurisdiction to award legal costs and that, even if it did have such authority, it exceeded this jurisdiction and failed to give adequate reasons for its decision.

Section 53(2)(a) of the *CHRA* states that, when an employer violates the *Act*, the CHRT can order the employer to compensate the victim "for any or all of the wages that the victim was deprived of **and for any expenses incurred by the victim as a result of the discriminatory practice**." The Federal Court found that the CHRT's interpretation of this provision as giving it jurisdiction to award legal costs as an expense arising from discriminatory conduct was reasonable. However, the Court also found that the CHRT had failed in its duty to give reasons for its costs award, and accordingly quashed the decision on costs.

The Attorney General appealed this decision to the Federal Court of Appeal, which allowed the appeal. The Court of Appeal noted the definitional differences between "costs" and "expenses", and further noted that, in other Canadian jurisdictions, where the legislature intended a human rights tribunal to have the authority to award costs, this authority was expressly addressed in a separate provision. Thus, the Court of Appeal concluded that Parliament did not intend to grant, and did not grant, jurisdiction to the CHRT to award legal costs.

The Commission has appealed this decision and will argue that the Court of Appeal applied a narrow and legalistic interpretation of the *CHRA* that frustrates the purposes of the *Act*, and could jeopardize access to justice. We will keep you updated on the outcome of the appeal.

Canada Ratifies *International Convention on the Rights of Persons with Disabilities*

On March 11, 2010 Canada ratified the United Nations' *International Convention on the Rights of Persons with Disabilities*. The Convention is an international human rights instrument to protect the rights and dignity of persons with disabilities. Its chief goal is to ensure the full and effective participation and inclusion in society for people with disabilities. The Convention's core obligations relate to non-discrimination and reasonable accommodation. These obligations are elaborated upon in specific provisions that address a variety of issues, including how these values apply in the employment context.

Court of Appeal says Employers Cannot be Sued for Negligent Infliction of Mental Distress

The Ontario Court of Appeal has become the first appellate court in Canada to rule on whether there is a free-standing cause of action against employers for negligent infliction of mental harm in the workplace. The Court of Appeal overturned the Ontario Superior Court's groundbreaking 2008 decision in *Piresferreira v. Ayotte*, and pronounced that the tort of negligent infliction of mental distress is *not* available in the employment context.

During an argument, Piresferreira's supervisor, Ayotte, had pushed her shoulder, threatened her with a performance improvement plan, and sworn at her. In response to Piresferreira's complaint, the employer, Bell Mobility, told her that Ayotte would apologize, would be disciplined, and would be required to attend conflict management and communication training courses. However, these steps were not implemented. Piresferreira was diagnosed with depression, anxiety and post-traumatic stress disorder and was off work and in receipt of long-term disability. She brought a claim for

damages against both Ayotte and Bell for assault and battery, negligent and intentional infliction of emotional distress, past and future loss of income, and constructive dismissal.

The Ontario Superior Court found that Ayotte had committed the torts of assault and battery and intentional infliction of mental distress, and held the employer vicariously liable for his actions. The Court also found Bell liable for negligent infliction of mental distress. Further, in the trial judge's view, the employer's failure to take Piresferreira's complaints seriously amounted to constructive dismissal. On these bases, the Court found that Bell and Ayotte were jointly and severally liable for over $500,000 in damages.

The Court of Appeal found that the trial judge had erred in concluding that the tort of negligent infliction of mental suffering was available for conduct that occurred in the course of employment. The Court stated that policy considerations militated against recognition of a duty of care arising from the parties' employment contract. As Justice Juriansz stated:

> "A general duty to take care to shield an employee during the entire course of his or her employment from acts in the workplace that might cause mental suffering strikes me as far more expansive than a duty to act fairly and in good faith during just the termination process."

The Court of Appeal concluded that Piresferreira had also failed to establish that Ayotte had intended to cause harm or that he even knew that the type of harm that occurred was substantially certain to follow from his actions. Her claim for intentional infliction of mental suffering was dismissed.

Although the Court of Appeal set aside the award for negligent and intentional infliction of mental anguish, it upheld the finding of assault and battery and awarded $15,000 in general damages for which Ayotte and Bell Canada were jointly and severally liable. The Court also awarded $45,000 for mental suffering due to the manner of the dismissal. The award of twelve months for constructive dismissal was upheld.

Given all of the new and onerous obligations placed on employers by Bill 168 (which came into force on June 15th, 2010), this decision confirms that an employer can be held jointly and severally liable for the assault of an employee by another.

Piresferreira plans to seek leave to appeal this decision to the Supreme Court of Canada. Bird Richard will keep readers apprised of developments in this case.

Federal Court of Appeal Rules on Pay Equity at Canada Post

The Federal Court of Appeal dismissed an appeal by the Public Service Alliance of Canada (PSAC) and upheld the Federal Court's ruling that set aside the decision of the Canadian Human Rights Tribunal (CHRT) granting pay equity to the female employees.

In 1983, PSAC had filed a complaint on behalf of the Clerical and Regulatory Group at Canada Post. The union alleged that Canada Post was discriminating against employees in this female-dominated group by paying employees in the male-dominated Postal Operations Group more for work of equal value, contrary to section 11 of the *Canadian Human Rights Act*. The union sought equal pay for the Clerical and Regulatory Group, retroactive to October 15th, 1981.

In 2005, the Canadian Human Rights Tribunal upheld PSAC's complaint. Canada Post sought judicial review of this decision. In 2008, the Federal Court allowed Canada Post's application for judicial review, finding that the Tribunal had made two errors, each of which was sufficient to warrant the overturning of the decision.

The Federal Court found that the Tribunal had failed to establish a necessary element of wage discrimination. The Tribunal had set out the following four factors, which are required in order to make out a *prima facie* case of wage discrimination:

1) the complainant occupational group is predominately of one sex, and the comparator is predominantly of the other;
2) the groups are employed in the same establishment;
3) the work being compared is of equal value; and
4) there is a "wage gap" between the two groups.

The Federal Court concluded that the Tribunal made errors in its application of the third part of the test – the work being compared is of equal value. As a result, the Federal Court set aside the Tribunal's decision.

The Federal Court of Appeal dismissed PSAC's appeal and upheld the decision of the Federal Court.

On April 23rd, 2010, PSAC filed an application for leave to appeal this decision to the Supreme Court of Canada. We will keep you updated on the progress of this application.

Arbitrator Orders Employer to Pay over $500,000 for Bad Faith Termination

In *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004*, Arbitrator Owen Shime ordered the GTAA to pay over $500,000 in damages for its bad faith conduct in wrongfully terminating a unionized employee for suspected abuse of sick leave.

The grievor had worked for the GTAA for over 23 years, and had no disciplinary record. After a workplace injury, she underwent knee surgery and told her employer that she required four weeks' sick leave to recover.

During this time, the grievor resided with another GTAA employee who was under surveillance for an unrelated issue. Upon viewing the surveillance, it appeared that the grievor did not have any problem with her knee, which caused the employer to question the legitimacy of her absence and to request further information from her surgeon.

When the grievor returned to work and displayed a limp that had not been present in the video surveillance footage, the employer's suspicions that the grievor's leave had been fraudulent increased. The employer met with the grievor and concluded that she had been dishonest in reporting that her injuries required time off and that she had continued to be dishonest when questioned. As a result, the grievor was terminated because of loss of trust.

Arbitrator Shime allowed the grievance and concluded that the GTAA had failed to prove that the grievor had dishonestly claimed sick leave benefits, and that her termination was therefore unreasonable.

In his decision, the arbitrator stated that the employer had an implied obligation to act in good faith with respect to the administration of the collective agreement. He went on to find that, in this case, the GTAA's conduct was so egregious as to constitute bad faith. Specifically, the arbitrator criticized the employer for:

- terminating the grievor prematurely and without conducting a full investigation;
- failing to properly consider the evidence before it with an open mind;
- not obtaining medical corroboration of its suspicions before terminating the grievor; and
- not considering a lesser penalty, given the grievor's long service and discipline-free record.

The arbitrator ordered that the incident be removed from the grievor's file, that the GTAA be prohibited from discussing the matter, and that a positive letter of reference be provided to the grievor. He also awarded damages totalling $500,000, including damages for past and future loss of income until the date the employee would likely have retired, mental distress damages, and punitive damages. Notably, with respect to damages for the loss of future earnings, Arbitrator Shime stated the following (at page 116):

> "...there is an obligation on the employer not to conduct itself, without reasonable or proper cause, in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

In this case, the arbitrator found that the employer's "high-handed, arbitrary and capricious" conduct destroyed the relationship of trust between the employer and the grievor such that this obligation was not met, and compensation in lieu of reinstatement was provided to the grievor.

This decision confirms that arbitrators will order significant monetary awards where employers have acted in bad faith. In order to avoid such an award, an employer should carefully consider its course of action before terminating an employee. Suspicions should be verified and corroborated by a professional, where applicable. Consideration must also be given to the employee's past service and disciplinary record in determining the appropriate penalty.

The GTAA has applied for judicial review of this decision. We will keep readers updated on the status of the application.

Workplace Safety System Review Panel Appointed

The Ontario Government has appointed an expert advisory panel to conduct a comprehensive review of the provincial occupational health and safety system. The panel consists of safety experts from labour groups, employers, and academic institutions, and will provide recommendations for operational, policy and structural improvements. In particular, the panel will examine workplace safety practices and entry-level safety training, the impact of the underground economy on safety practices, and how existing legislation provides for worker safety.

The panel is expected to report to the Minister of Labour in the Fall of this year. We will update you regarding the panel's recommendations at that time.