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LAWYERS FOR EMPLOYERS

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Attendance Management Program Resulted in Systemic Discrimination for Disabled Employees

In *Coast Mountain Bus Company*, the British Columbia Court of Appeal recently restored a British Columbia Human Rights Tribunal decision that found that certain aspects of Coast Mountain's attendance management program ("AMP") were discriminatory. This decision of the Court of Appeal overturned a 2009 decision of the British Columbia Supreme Court.

Coast Mountain's AMP set out levels for employees to move through progressively if their above-average absenteeism did not improve. Levels 1 and 2 of the AMP involved a warning to the employee that the employer had concerns regarding their absenteeism and would require medical confirmation if the employee suffered from a disability. Level 3 involved speaking to the employee and warning him or her of the risk of termination if a certain attendance level was not reached over the course of the next two years. At the Level 3 stage, the average rate of absenteeism for transit operators was used as a benchmark to establish the required level of attendance at work. Employees were advised that any absence while on long-term disability, short term disability or worker's compensation claims would also be taken into account when the employer calculated their absenteeism level.

The Court of Appeal concluded that parts of the AMP were discriminatory when applied to disabled employees. While the Court concluded that the application of Levels 1 and 2 to disabled employees was not discriminatory, it found that Level 3 of the AMP, in which absences relating to disability were used to calculate the attendance levels of employees, resulted in a *prima facie* case of systemic discrimination.

The Court found that adverse treatment arose for employees with disabilities when, as a result of the inclusion of their disability-related absences in the AMP, they reached Level 3 – and the related threat of termination for excessive innocent absenteeism.

The Court explained that employers cannot address the absenteeism of disabled employees by applying an AMP in the same way as they apply the AMP to other employees. AMPs must properly identify and accommodate disabled employees who may be unable to attend work regularly as a result of their disability.

In addressing the question of whether the employer had established a *bona fide* occupational requirement ("BFOR") which would justify the discriminatory treatment of the disabled employees, the Court applied the well-established *Meiorin* test, and confirmed that this test does not require the employer to show that it would be impossible to accommodate, but rather only to show that it would be impossible to accommodate *without incurring undue hardship*. However, as the employer in this case had failed to provide any evidence about the hardship it would incur in accommodating the disabled employees for the purposes of the AMP, the employer was unable to justify the *prima facie* discrimination.

In terms of remedy, the Court of Appeal overturned the Tribunal's order that the employer participate in mediated negotiations with the union regarding changes to be made to the AMP, finding that the Tribunal lacked the jurisdiction to make such an order. Rather, the Court clarified that the employer could make revisions to the program to accommodate disabled employees, and the union would have to lodge a complaint with the Tribunal if it believed the program continued to be discriminatory. The Court upheld the Tribunal's damage award.

In this case, the Court of Appeal confirmed that the application of an AMP to disabled employees does not in itself constitute systemic discrimination; however, the way the program is *applied* may result in discrimination. The decision appears to limit employers' ability to terminate for excessive innocent absenteeism, as it suggests that employers may not be able to take disability-related absences into account for attendance management purposes in all cases.

This decision adds but another dimension to an already complex and unclear situation. Coast calculated disability absences at Level 3 of their AMP to determine if there would be improvement of prognosis for employment. This would appear to be entirely consistent with the approach adopted by the Supreme Court of Canada in the *McGill Health, Keays* and *Hydro Quebec* decisions. The British Columbia Court of Appeal's decision is contrary to this, and leaves employers in the position that they cannot complete the last phase of the Supreme Court's analysis.

As this newsletter went to print, leave to appeal in this case had not been filed at the Supreme Court of Canada. Thus, this decision represents the state of the law in British Columbia, and is likely to influence decisions in other Canadian jurisdictions as well.

Criminal Charges Laid in Case Involving Death of Four Workers

Company officials in Ontario have been charged with criminal negligence as a result of a workplace fatality.

Criminal charges were laid after the death of four employees in Toronto on Christmas Eve, 2009. The swing-stage where the employees had been working broke apart while the employees were restoring the exterior of an apartment building. The employees fell 13 storeys. Four employees died, and one suffered serious injuries.

The construction company, Metron Construction Corp., its owner, a supervisor, and a company official have all been charged with four counts of criminal negligence causing death, and one count of criminal negligence causing bodily harm. The charges, which could potentially result in life sentences, were confirmed on October 13th, 2010, by Toronto Police during a press conference.

The criminal charges were laid pursuant to Bill C-45, an amendment to the *Criminal Code* that came into force in 2004. The law allows for the laying of criminal charges against organizations and corporations for the acts of their representatives. There is a legal duty for those directing work to ensure the health and safety of both their employees and the public. For an organization to be found guilty of committing a crime of negligence, the evidence must show that employees of the organization committed the act, and that a senior officer did not meet the standard of care reasonably expected in the circumstances. It must also be proved that the individual acted carelessly or with reckless disregard for the safety of others.

To date, Bill C-45 has resulted in very few charges. Although the risk of criminal charges may be small, employers must be sure that they understand and comply with their legal obligations. The charges in this case also reiterate the importance of organizations fostering a workplace culture of health and safety, and being proactive to ensure regulatory compliance.

The criminal investigation in this case was conducted independently and did not involve the Ontario Ministry of Labour. However, the Ministry conducted its own investigation, which resulted in *Occupational Health and Safety Act* charges being laid against the employer, as well as an equipment supplier. Over 60 charges were laid by the Ministry in total. Following the accident, the Ministry also increased the number of safety inspections it performs, and held a blitz to investigate workplaces for fall-related hazards.

The tragic circumstances that resulted in the laying of the criminal and occupational health and safety charges in this case also led to the creation of a provincial health and safety

review panel, led by Tony Dean. This case thus acts as a reminder of the importance of health and safety in the workplace, and the serious criminal and other consequences for employers who are found to be in violation of their obligations.

Arbitrator Justifies Employer Access to Employee's Personal Cell Phone Records

Teamsters Canada Rail Conference v. Canadian Pacific Railway Company, (June 23, 2010) Case No. 3900 (Picher).

Following a number of serious railway collisions, the Canadian Pacific Railway ("CPR") adopted a policy asking employees to provide copies of their personal cell phone records as part of an investigation regarding any significant accident that continued to be unexplained. CPR explained that the policy was created for the legitimate purpose of knowing whether communication devices had been used in proximity to a serious accident. The policy stated that any personal information regarding the phone numbers called or the contents of a text message could be concealed.

The arbitrator decided that CPR's policy did not constitute a violation of employees' privacy rights, despite the union's objections that the policy contravened the federal *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"). The arbitrator reasoned that there must be a balance between both parties' interests – on one hand, the employee's privacy rights and, on the other hand, the employer's concern for ensuring safe operations. The arbitrator decided that the scale must tip in favour of the employer where a serious workplace accident is involved. The policy, he explained, was a reasonable tool created to ensure safe operations.

The arbitrator noted the importance of safe railway operations and explained that unsupervised CPR crews worked within a complex system of switches and signals that require the care and attention of the employees. The arbitrator also took into account prior arbitral decisions where the particular nature of railway operations had been recognized. The arbitrator explained that, in some cases, it is necessary to justify the decision of a Company to identify employee conduct which threatens safe operations. The arbitrator explained that, despite the personal privacy interests that are present when a person uses a mobile telephone (or other device), there nevertheless has to be a point where that interest is forfeited in order to ensure public safety.

This case may be of interest to employers who are considering the implementation of a similar policy. However, it is important to take notice of the safety-sensitive nature of the industry in this case. Further, the fact that the company did not seek private information was an important consideration. No information was collected as to who the employees communicated with, or what they were communicating, rather, CPR's policy sought only to determine if an employee had operated a communication device in proximity to a serious accident.

Government Charged Following Workplace Fatality

The Canadian government has been charged following a boiler explosion in Ottawa that occurred on October 19th, 2009. The explosion took place at the Cliff Central Heating and Cooling Plant near Parliament Hill, resulting in the death of an engineer, and seriously injuring others. Federal health and safety officers had recommended that several charges be laid against the government in connection with the event.

The charges were laid on Tuesday, October 19th, 2010, the deadline to bring charges against the government. The charges allege health and safety violations of the *Canada Labour Code* by Public Works and Government Services Canada. Applicable penalties are a sentence of up to two years in prison, or a $1 million fine. The charges are the result of an investigation conducted in April. The investigation revealed multiple safety violations, which had been directed to be fixed. The investigation also revealed that the plant had no proper emergency procedure, that employees were not familiar with the standard operating manuals, and that the company that serviced the boilers was not certified.

Labour Minister Lisa Raitt apologized for the unsafe working conditions at the plant during Question Period on October 19th, 2010. She explained that a review had been completed and that charges were laid against Public Works as a result. Raitt affirmed the government's commitment to fostering safe and healthy workplaces.

The charges against Public Works result in a peculiar situation: a federal department cannot be sentenced to jail, and a fine would simply be symbolic as the funds would be directed back to the federal government. To date, no government in Canada has faced a similar charge, although there have been some cases against other employers in the past.

Divisional Court Confirms Christian Employer can Benefit from *Human Rights Code* Exemption

Christian Horizons is an organization created in 1965 that ministers to developmentally disabled persons in an Evangelical Christian Environment. However, it serves people regardless of their faith.

Connie Heintz was employed by Christian Horizons as a support worker. As part of her employment contract, she was required to sign a "Lifestyle and Morality Statement" ("the Statement"). The Statement explicitly prohibits employees from engaging in homosexual relationships, stating that they are inconsistent with the traditional Christian values of the employer.

Heintz later entered into a same-sex relationship. In April 2000, she divulged the relationship to two co-workers and admitted the relationship to her supervisor when she was asked about it.

Following a harassment complaint by a co-worker in June 2000, Heintz was issued a disciplinary letter. Heintz met with her employer in July in regards to the letter but, in August 2000, went on medical leave due to stress. She resigned from her employment in late September, 2000.

Heintz brought a complaint under the Ontario *Human Rights Code* (the "*Code*") against Christian Horizons, alleging that she had been discriminated against on the basis of her sexual orientation and that she had been exposed to a poisoned work environment.

In the decision of the Human Rights Tribunal, released in April 2008, the Tribunal ruled that Christian Horizons could not benefit from the exemption under section 24(1)(a) of the *Code,* which exempts certain organizations from the prohibition of discriminatory hiring practices. The exemption applies to organizations primarily engaged in serving the interests of a minority, provided the discriminatory practice can be justified as a *bona fide* occupational requirement ("BFOR") of the job. The Tribunal also upheld the allegation that she had been subjected to a poisoned work environment and ordered damages as well as remedies relating to Christian Horizons' policies and procedures.

On appeal to the Ontario Divisional Court, Christian Horizons argued that the Tribunal's ruling should be overturned, and alleged that the Tribunal erred in concluding that Christian Horizons did not benefit from the exemption. Given that support workers are the "face of the organization", Christian Horizons argued that strict adherence to the Christian code of conduct was in fact a BFOR of the job.

In order to benefit from the exemption under section 24(1)(a), Christian Horizons had to establish that it met three essential criteria:

(1) that it is a "religious organization";

(2) that it is "primarily engaged in serving the interest of persons identified by their creed and employs only people who are similarly identified"; and,

(3) that religious adherence is a reasonable and *bona fide* requirement due to the nature of the employment.

The Court found that the Tribunal had erred in the way it applied the test, and explained that the language of 24(1)(a) requires an analysis of the nature of the activity the organization is engaged in and a determination as to whether it is seen by the organization as a fundamentally religious activity. The Court found that Christian Horizons did in fact benefit from the exemption under section 24(1)(a) of the *Code*.

In regards to the third criteria, however, the Court agreed with the Tribunal that abstinence from same-sex relationships was not a BFOR for the job. Christian Horizons had failed to prove that the requirement was necessary to the position.

The Court upheld the damages awarded, but modified some of the public interest remedies that had been accorded by the Tribunal. The Lifestyle and Morality Statement may continue to be signed by Christian Horizon employees; however, it may no longer contain a prohibition of same-sex relationships.

It is obvious that the Divisional Court took a broader approach to the application of section 24(1)(a) of the *Code* than the Tribunal. The Court stated that the Tribunal's narrow interpretation could result in an "absurd result," and could restrict a religious group, with the goal of ministering to the public, from restricting its leadership to those of similar faith.

While employers can in some cases benefit from the exemption under s. 24(1)(a) of the *Code* even if they serve a diverse clientele, the three criteria outlined by the court must still be met. If belonging to a certain gender, race, religion, etc., is not a BFOR, the exemption will not apply.