BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Winter 2012

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

Bird Richard
130 Albert Street, Suite 508
Ottawa, Ontario K1P 5G4
T 613.238.3772
F 613.238.5955
www.LawyersForEmployers.ca

Important Arbitration Decisions of 2011

The following 2011 arbitral decisions clarified the law with respect to terminations for workplace violence, what medical information an employer is entitled to, and attendance management.

Kingston v. CUPE, Local 109:

An employee with 28 years of service with the City of Kingston had a history of angry outbursts, and had received many warnings and a suspension as a result. After having received Bill 168 training, and just two days after having taken an anger management course, the grievor had an angry confrontation with a colleague, who was also the president of the union's local. The president told the grievor, "Don't talk about Brian – he's dead", to which the grievor responded, "Yes, and you will be too". The president reported this threat to the grievor's supervisor and, following an investigation into the incident, the employer terminated the grievor.

In upholding the termination of this long-service employee, Arbitrator Newman relied upon the grievor's anger issues, lack of remorse, and failure to take responsibility for her actions.

This decision is one of the first to interpret Bill 168 in detail. In it, the arbitrator stated that Bill 168 has "changed the law of the workplace in a significant way", and employers are now required to treat seriously and investigate all threats of violence. This decision also confirms that Ontario arbitrators will consider the potential for future threats to workplace safety when they are assessing the reasonableness of a disciplinary penalty.

Providence Care, Mental Health Services v. OPSEU, Local 431:

The grievor was an RPN with a history of excessive absenteeism: he was absent 44 days in 2006, 69 days in 2007, and 52 days in 2008. When the grievor called in sick for three days in January 2009, the employer requested a medical certificate.

The note the grievor provided stated only that he was "absent from work for medical reasons". The employer advised the grievor that this cursory note was insufficient, and denied him sick leave benefits.

Arbitrator Surdykowski upheld this denial, finding that, before sick leave benefits are provided, an employer is entitled to sufficient information to confirm the reason for the grievor's absence. The arbitrator confirmed that employers are not obligated to accept cursory medical notes as proof of illness and went on to state that the information necessary to confirm the reason for the absence may include the nature of the illness and the date of the employee's visit to the doctor, even if this information is otherwise confidential, and/or will suggest the employee's diagnosis.

Ottawa Hospital v. CUPE:

The grievor had been placed in the employer's Attendance Management Program due to her excessive absenteeism. Once in the program, her absences continued to increase, to the point that she had 94 absences in a three-year period, and was absent 45 percent of the time. Since there was no sign that the grievor's absenteeism would improve, the employer reduced her hours from full-time to part-time for six months. This temporary reduction in hours rendered the grievor ineligible for the employer's benefit plan. The union grieved the reduction in hours, alleging that it was a layoff which, pursuant to the collective agreement, could only be done on five months' notice. Since no notice was given in this case, the union argued, the employer had breached the collective agreement.

Arbitrator O'Neil found that the reduction in hours was not a layoff, but rather a demotion, which the attendance management policy anticipated as a possible outcome of excessive absenteeism. The arbitrator further found that this outcome was a reasonable response to the grievor's absenteeism in this case, since the grievor had been warned, and her absenteeism was excessive, getting worse, and showed no signs of improvement.

Even though the union did not raise the issue of accommodation, and had in fact argued that the grievor did not require a reduced work week, the arbitrator found that the reduction in hours in accordance with the attendance management program was a form of accommodation.

Regarding the grievor's loss of benefits for six months, the arbitrator confirmed that it is not discriminatory to compensate a person who, due to a disability, is working part-time hours in the same way that other part-time employees are compensated.

This decision therefore makes clear that employers need not tolerate excessive absenteeism indefinitely. Further, a reduction in working hours in response to excessive absenteeism, when appropriate and when the employee has been warned that demotion is a possible consequence, will not be discriminatory.

Supreme Court of Canada Confirms Canadian Human Rights Tribunal Cannot Award Costs

Donna Mowat filed a human rights complaint with the Canadian Human Rights Commission (CHRC) alleging that she had been discriminated against by the Canadian Forces on the ground of sex, contrary to the *Canadian Human Rights Act* (*CHRA*).

The Canadian Human Rights Tribunal found the complaint substantiated in part, and awarded damages in the amount of $4,000 as compensation for "suffering in respect of feelings or self respect".

Mowat then applied to the Tribunal for legal costs. The Tribunal determined that it had the authority to grant such an award, and Mowat was awarded costs in the amount of $47,000.

On appeal, the Federal Court upheld the Tribunal's decision with respect to its authority to award costs. However, another appeal to the Federal Court of Appeal resulted in the decision that the Tribunal had no such authority.

Finally, the Supreme Court of Canada has heard and dismissed the appeal, agreeing with the reasons of the Federal Court of Appeal.

The question before the Court was whether sections 53(2)(c) and (d) of the *CHRA*, which state that the Tribunal has authority to "compensate the victim…for any expenses incurred by the victim as a result of the discriminatory practice" can be interpreted in such a way as to permit an award of legal costs.

The Court found that the proper standard of review to be applied to the decision of the Tribunal was reasonableness, since the question was a question of law within the expertise of the Tribunal, and related to the interpretation and application of the Tribunal's enabling statute.

The Court recognized that human rights legislation expresses fundamental values and goals, and that, accordingly, it must be interpreted liberally and purposefully. However, the Court explained that the words of the legislation must be read in context and in their grammatical and ordinary sense. The Court found that the words "any expenses incurred by

the victim", on their own were wide enough to include legal costs. However, reading these words in their statutory context leads to the opposite result.

The Court held that the term "costs" is a well-recognized legal term of art, and is distinct from "compensation" or "expenses". Had Parliament intended to provide the Tribunal the authority to award costs, the Court explained, it is difficult to understand why it did not use the well-known, and widely used, legal term of art.

A review of the legislative history of the *CHRA*, the Commission's understanding of costs, and comparable provincial legislation all led to the same conclusion – the Tribunal does *not* have the authority to award costs.

In addition to these findings, the Court noted that, where the Tribunal's interpretation is applied, an award for pain and suffering along with an award for legal costs could be for an unlimited amount. The Court had difficulty reconciling this approach, given that there are monetary limits for awards of pain and suffering, and no express authority is stated in section 53(3).

On the whole, the Court found that no reasonable interpretation of the statutory provisions could support the Tribunal's interpretation that it could award legal costs to successful complainants.

As a result, the Supreme Court's decision has clarified that statutes likely need to make specific reference to "costs" as a type of remedy in order to confer upon a tribunal the authority to grant such an award.

Federal Court of Appeal Finds Tribunal Orders Hold Same Weight as Court Orders

While the Supreme Court of Canada determined in *Mowat* that the Canadian Human Rights Tribunal (CHRT, the "Tribunal") does not have the authority to award costs, a recent decision of the Federal Court of Appeal has confirmed other powers of the Tribunal, finding that orders issued by the Tribunal carry the same weight as court orders and can lead to findings of contempt.

In *Canada (Canadian Human Rights Commission) v. Warman*, a majority of the Federal Court of Appeal found that Mr. Termaine was in contempt for having defied an order of the Tribunal.

In 2004, Richard Warman, a well-known human rights activist, filed a complaint against Terry Tremaine under section 13 of the *Canadian Human Rights Act*, (the "*Act*") alleging that Mr. Tremaine had engaged in discriminatory practices on the grounds of religion, national or ethnic origin and colour, by way of comments he published on Internet websites.

The Tribunal found that Mr. Tremaine's messages were likely to expose persons and, specifically, non-white minorities, to hatred and contempt and that, as such, the comments constituted a discriminatory practice under subsection 13(1) of the *Act*. A cease and desist order and a fine of $4,000 were issued by the Tribunal.

A certified copy of the order was filed with the Federal Court in February of 2007. However, Mr. Termaine was not put on notice that this filing had occurred. Many of his messages remained on the Internet, and additional messages were also posted.

The Federal Court had to decide whether Mr. Tremaine was in contempt of the Tribunal's order. The Court determined that he was in contempt of the order but that, since contempt could only be pronounced for breach of an order of the Federal Court, Mr. Tremaine could not be found guilty of any conduct prior to March 2009, the time he became aware of the order having been registered with the Court.

On appeal, the Federal Court of Appeal found that no legal principle restricts the use of contempt powers to orders issued by superior courts and that, although Tribunal orders may be different than court orders, they are nevertheless enforceable by superior courts through contempt proceedings.

The Court of Appeal determined that there is only one order, that of the Tribunal, which can be enforced by the Federal Court. As a result, the Court of Appeal found that the Federal Court judge had erred in finding that a violation of the Tribunal's order could not result in a finding of contempt. Thus, the Federal Court of Appeal held that Mr. Termaine was in contempt of the order from February 2nd, 2007 onwards, and the case was sent back to the Federal Court Judge for sentencing.

The Federal Court of Appeal's decision thus stands for the proposition that an order by the Canadian Human Rights Tribunal can be enforced in the same way as a court order.

Accessibility Standards post-January 1st, 2012 – Are you Compliant?

The *Accessibility for Ontarians with Disabilities Act, 2005* was enacted with the objective of making Ontario completely accessible to people with disabilities by the year 2025. In order to work towards this goal, various Accessibility Standards have been developed.

The Customer Service Accessibility Standard

The Customer Service Accessibility Standard requires businesses to ensure that the goods and services they provide are accessible to all members of the public. This standard has

been in effect for public sector organizations since January 2010. For private-sector organizations, this Standard came into effect on **January 1st, 2012.**

This standard applies to all organizations that have one or more employees, and provide goods or services directly or indirectly to the public, or to other organizations. It contains several specific requirements, including:

- establishing policies, practices and procedures to govern the provision of goods and services to persons with disabilities;
- establishing policies, practices and procedures to ensure that service animals and support persons are permitted to enter the premises, or alternative assistive measures are available;
- giving notice when there are temporary disruptions to facilities or services usually used by persons with disabilities;
- providing and keeping records of training for employees, contractors and volunteers about the provision of goods and services to people with disabilities; and
- establishing a feedback and complaints process.

The requirements apply immediately, to large and small businesses alike (although they do vary slightly if a business has less than 20 employees).

The Integrated Accessibility Standard

The Integrated Accessibility Standard addresses accessibility in the areas of transportation, employment, and information and communication. Both public and private sector organizations were expected to be in compliance with two requirements of this standard as of **January 1st, 2012** (the other requirements have later dates of compliance, which are set out in the standard). The particular provisions that require immediate attention are:

- if your organization has emergency procedures, plans, or public safety information that are available to the public, they must be available in an accessible format; and
- you must establish, and review when necessary, individualized workplace emergency response information for employees whose disabilities necessitate such individualized emergency plans.

A failure to comply with any accessibility standard that applies to your organization can result in a fine of up to $100,000 for a business and $50,000 for an individual, for each day the offence continues.

Supreme Court Affirms Arbitrators' Flexibility in Applying Legal Principles

In early December 2011, the Supreme Court of Canada once again confirmed that decisions of arbitrators should be given a high level of deference.

The Court's decision in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals* involved an arbitrator's decision of a grievance disputing the interpretation of an article in the collective agreement between the parties. The Employer, Nor-Man, had consistently applied the collective agreement provisions for a period of 20 years without challenge from the Union.

The arbitrator found that it would be unfair for the employer to suffer the consequences of the union's inaction, and ruled that the union was therefore estopped from relying on the wording of the articles in the collective agreement.

The matter was heard by the Supreme Court of Canada and ultimately allowed the employer's appeal. The Court applied the standard of reasonableness and held that labour arbitrators are *not* legally bound to apply equitable and common law principles in the same manner as courts of law.

The Court reiterated that labour arbitrators are "uniquely placed to respond to the exigencies of the employer-employee relationship" and that they "require the flexibility to craft appropriate remedial doctrines when the need arises". Qualifying this statement, however, the Court added that:

> …the domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.

The decision raises some concern in respect of the latitude provided to arbitrators in applying what has been previously considered to be a strict legal principle. The Supreme Court essentially has stated that as long as the decision is reasonable, one of the essential prerequisites of an estoppel need not be there in order for an estoppel to be founded. In light of the Supreme Court's decision, a degree of certainty in respect of the application of familiar legal principles is now open to question.

www.LawyersForEmployers.ca

BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' ADDENDUM Winter 2012

Bill Proposes Another Unpaid Family Leave in Ontario

Bill 30, an Act to amend Ontario's *Employment Standards Act, 2000* (the "*Act*") in respect of family caregiver leave was introduced by the McGuinty government December 8th, 2011.

The Bill creates a leave of absence without pay for employees who are required to provide care or support to certain individuals when a health care practitioner has issued a certificate declaring that the individual has a "serious medical condition". No definition is provided for what constitutes a serious medical condition.

The Bill provides for up to eight weeks of leave in each calendar year, which must be taken in entire weeks. Employees may take such leave in order to care for the following individuals:

1. the employee's spouse;
2. a parent, step-parent or foster parent of the employee or the employee's spouse;
3. a child, step-child or foster child of the employee or the employee's spouse;
4. a grandparent, step-grandparent or grandchild or step-grandchild of the employee or the employee's spouse;
5. the spouse of a child of the employee;
6. the employee's brother or sister;
7. a relative of the employee who is dependent upon the employee for care or assistance; and,
8. any other individual who is prescribed as a family member for the purposes of this section of the *Act*.

Employees wishing to take family caregiver leave will be required to advise their employer in writing, and must provide a copy of the relevant medical certificate if requested by the employer.

It is important to note that family caregiver leave would be *in addition* to employees' entitlement to family medical leave and personal emergency leave. Currently, family medical leave already allows for an unpaid leave of absence of up to eight weeks in order to care for an individual who is terminally ill.

Additionally, while current emergency leave provisions of the *Act* only apply to workplaces with 50 or more employees, there is no minimum threshold for family medical leave or family caregiver leave. Further, because each type of leave is considered separately, an employee could take consecutive periods of leave, which could thus amount to a significant period of time away from work.

If enacted, the Bill would come into force on July 1st, 2012. Bird Richard will keep readers apprised of developments related to Bill 30.

Bird Richard
130 Albert Street, Suite 508
Ottawa, Ontario K1P 5G4
T 613.238.3772
F 613.238.5955
www.LawyersForEmployers.ca