BIRD RICHARD
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In this Issue

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Court of Appeal Quashes a $1.6 Million Wrongful Dismissal Award

After a trial judge granted an award of $1.6 million, in addition to pay in lieu of notice, the Alberta Court of Appeal quashed the damage award, and leave to appeal was denied by the Supreme Court of Canada.

After five years as one of the top performers at the investment broker Merrill Lynch in Calgary, Mr. Soost was fired for cause in May 2001 after allegedly breaching the company's rules and policies.

Soost's clients were notified by way of letter that Soost was no longer with Merrill Lynch and that a new financial advisor could assist them. While Soost did find employment at another firm, he was unable to convince his clients to follow him because of the negative impression caused by his sudden exit from Merrill Lynch. Soost was unsuccessful in recruiting clients, and eventually left the industry in 2001. He then commenced a wrongful dismissal action against Merrill Lynch.

The trial judge found that none of Soost's breaches of company rules or policies was sufficient to justify dismissal, and awarded 12 months' pay in lieu of notice. In addition, the judge found that Merrill Lynch had acted in a manner that was both insensitive and unfair, finding that the termination had a significant effect on Soost's reputation and his ability to both keep old clients and attract new ones. The judge awarded an additional $1.6 million to Soost on this basis.

On appeal, the Alberta Court of Appeal quashed the $1.6 million award for damages, explaining that the award was an attempt to compensate "for matters which the law does not recognize as compensable". The Court explained that:

> … Every employee can be dismissed at once with no notice and without any grounds. That will not be a breach of the employment contract, provided the employer gives pay in lieu of notice.

[…]

> Therefore, in ordinary circumstances, damages because of dismissal with neither reasonable notice nor pay in lieu cannot exceed what pay in lieu would have been […] There is but one exception to that rule, which the Supreme Court of Canada has now clarified in *Keays v. Honda* [citation omitted].

Finding that the dismissal, even without cause, was not a wrong, the Court determined there could be no compensation beyond the pay in lieu of reasonable notice already awarded.

In *Merrill Lynch*, the Alberta Court of Appeal confirmed that it is only in rare circumstances that damages for wrongful dismissal will exceed the amount associated with the reasonable notice period. As stated by the Supreme Court in *Keays v. Honda,* "the unfairness or insensitivity must be in the methods used, not in the mere fact of dismissal" in determining whether additional damages may arise. Accordingly, compensation beyond payment in lieu of reasonable notice will not be warranted simply because the employee loses his or her job, but rather only where the *method* of termination gives rise to a loss by the employee.

Bill 160 receives Royal Assent

As part of the Government's commitment to act on the recommendations made by the Expert Advisory Panel on Occupational Health and Safety that was led by Tony Dean, Bill 160, the *Occupational Health and Safety Statute Law Amendment Act, 2011* was adopted.

The Bill amends two statutes: the *Occupational Health and Safety Act* and the *Workplace Safety and Insurance Act, 1997.* The amendments to the legislation are intended to assist the Ministry of Labour in implementing the recommendations flowing from the Expert Advisory Panel's report, which was released in December 2010.

One major change resulting from Bill 160 is the transfer of responsibility for occupational injury and illness prevention from the Workplace Safety and Insurance Board to the Ministry of Labour. The repeal of Part II of the *Workplace Safety and Insurance Act, 1997*, which deals with prevention, will come into force on April 1st, 2012, or earlier if so proclaimed.

The Bill 160 amendments aim to: facilitate development of standardized training for workers, allow for the creation of a Prevention Council, and create the position of Chief Prevention Officer (CPO) within the Ministry.

On August 31st, 2011, George Gritziotis, the founding executive director of the Construction Sector Council, was appointed as Ontario's first CPO. He will be responsible for establishing a provincial occupational health and safety strategy, ensuring that prevention activities are aligned across various workplace health and safety partners, and providing advice regarding workplace injury and occupational disease prevention, as well as related funding. Mr. Gritziotis will also provide an annual report on the performance of the occupational health and safety system to the Minister of Labour.

The Interim Prevention Council continues to work toward the development of a permanent Prevention Council, and to work with the Ministry to implement the Expert Panel's recommendations. Bird Richard will continue to keep its readers apprised of legislative developments.

Employee or Independent Contractor: The Intention of the Parties Matters

Two recent decisions of the Tax Court of Canada confirm that the intention of the parties is an important consideration in the determination of whether there is an employee-employer relationship, or an independent contractor relationship.

In *Prue v. Canada (Minister of National Revenue)*, Prue worked as a product demonstrator at grocery stores in the Vancouver area. Prue was not supervised, determined the duration of the demonstrations herself, and provided her own transportation to the stores and the materials and equipment, where necessary. She had no investment in the company, was not exposed to financial risk, and was not guaranteed income. In addition, Prue could choose to accept or refuse any assignment, and could – and did – provide her services to another company.

Prue stopped working for the company and claimed Employment Insurance (EI) benefits. The Minister of National Revenue determined that Prue was an independent contractor, not an employee. Therefore, her work was not insurable under EI, nor pensionable under the Canada Pension Plan.

On appeal to the Tax Court of Canada, Prue argued that she had previously believed herself to be an independent contractor but, upon reflection, believed she must in fact be an employee.

In addition to the intention of the parties, the judge examined: the level of control the employer had over the person performing the services, the provision of equipment and tools, the degree of financial risk and responsibility for investment and management, and the opportunity for profit in the performance of tasks. The judge found that, based on the circumstances, Prue had acted as a person doing business on her own account, providing her services as an independent contractor.

The Tax Court judge dismissed the appeal, finding that Prue had at one point acknowledged that she was an independent contractor for a period of time, only to change her interpretation of the events after the fact. The judge explained that the parties had conducted themselves in accordance with an employer-independent contractor relationship, and that he could not understand Prue's re-characterization of her working status.

In *Smith v. Canada (Minister of National Revenue)*, the same principles were applied.

Stuart Smith drove a truck two days per week for a delivery company, in return for 45 percent of the revenue generated by the operation of the truck. Smith also did similar trucking work for other companies. The Minister of National Revenue found that Smith was an independent contractor, and thus ineligible for EI and Canada Pension Plan coverage.

On appeal, the Tax Court found that the parties had clearly intended for the relationship to be that of an independent contractor, and Smith's appeal was dismissed.

These decisions confirm that, in addition to considering the circumstances of the relationship, a significant factor in deciding whether an individual is an employee or an independent contractor under the EI/CPP legislation is the intention of the parties.

Accessibility for Ontarians with Disabilities Act Update

We first reported on the *Accessibility for Ontarians with Disabilities Act, 2005* in our Fall 2009 newsletter.

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

At the time of our last update, the Accessibility Standards for Customer Service had been enacted in law. It requires businesses to ensure that the goods and services they provide are accessible to all members of the public. Public sector organizations were required to be compliant by January 1, 2010, while private sector businesses have until January 1, 2012 to bring themselves into compliance.

The Employment, Information and Communication, and Transportation Standards have now been combined into the Integrated Accessibility Standards Regulation. The timelines for the implementation of these standards by public and private sector employees vary, from 2011 to 2025.

Yet another Standard, the Built Environment Standard, continues to be developed separately from the Integrated Standards.

Most important to employers is the Employment Accessibility Standard, which will apply to all employers with paid employees, except for those who employ only unpaid volunteers or interns. Large employers will have to meet significant requirements, but smaller organizations will also have a number of obligations to meet.

The general requirements for all Ontario employers will include:

- the creation of accessible employment policies and the provision of training to employees regarding those policies;
- recruitment, assessment, selection and hiring (including a procedure to consult with and appropriately accommodate disabled applicants, documentation of essential job duties for each job description, and making employment-related information accessible; and
- retention (including the provision of individualized accommodation plans for individuals where applicable, the provision of accessible information regarding advancement opportunities, and the development of return-to-work procedures).

Employers are therefore required to address disability-related issues during the recruitment and hiring stages of the employment relationship, and throughout the employment relationship.

Further, the Information and Communication Standard requires employers who employ disabled persons to make employment-related information and emergency procedures available to those employees using formats that are compliant with the Standard, and requires employers to provide training to any employees who are responsible for designing, providing or receiving information on how to provide information to persons with disabilities in an accessible format.

The Transportation Standard sets out additional accessibility requirements for businesses that provide passenger transportation services, and aims to make these services fully accessible to persons with disabilities.

Employers should ensure that managers, supervisors and those responsible for recruitment are aware of, and trained on, the legal obligations set out in the *AODA*.

Employers are also reminded that meeting the Employment Standard under the *AODA* does not necessarily mean that an organization has met its obligations under the *Human Rights Code* or the *Workplace Safety and Insurance Act* (*WSIA*).

Organizations are still required to accommodate to the point of undue hardship, and to meet return to work obligations under the *WSIA*.

Bird Richard will continue to keep readers apprised of developments in this area.

Recent amendments to the *PIPEDA:* the Privacy Commissioner's Discretionary Investigation Powers

In order to improve internal operational efficiencies at the Office of the Privacy Commissioner (OPC) and to better serve Canadians, the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*, the "*Act*") has been amended. Some amendments have already been enacted, while others are forthcoming. The amendments are, in large part, a result of the five-year Parliamentary review of *PIPEDA* which is required by the *Act*.

We first reported on Bill C-28, which received Royal Assent on December 15th, 2010, in our Spring 2011 newsletter. Bill C-28 created a new regulatory regime to address online threats, such as spam and spyware. Two additional key amendments to *PIPEDA* were brought into force in April, 2011.

The Privacy Commissioner now has the discretionary power to decline to investigate a complaint, or to discontinue an investigation that is already underway.

Previously, the Commissioner was obligated to conduct an investigation of all written complaints that were filed with the OPC. Only under certain circumstances was the Commissioner allowed to decline to issue a report. Section 13(2) of the law set out the circumstances as follows:

(a) where an existing grievance or review procedure existed that the complainant should exhaust first;

(b) where other procedures existed that would be more appropriate for dealing with the complaint;

(c) where a report would not be useful, given the amount of time between when the complaint was filed and when the subject-matter of the complaint arose; and

(d) where the complaint was trivial, vexatious or made in bad faith.

Section 13(2) of the *Act* has been repealed and the Commissioner now has broader discretionary powers. The closing of a complaint can now be done in two scenarios:

1. where the Commissioner decides not to investigate, for the same reasons that existed under section 13(2); and
2. where the Commissioner decides to discontinue an investigation already underway, for the same reasons as set out in the former section 13(2).

The Commissioner's discretion, however, has also been broadened to include additional circumstances, including:

- where there is insufficient evidence;
- where an organization has provided a fair and reasonable response;
- where there is already an on-going investigation about the matter; and
- where the matter has already been the subject of a report by the Commissioner.

The Commissioner also has the ability to reconsider the decision not to investigate where a complainant provides a convincing reason to do so. In the event of a discontinued complaint, a complainant can apply for relief under section 14 to the Federal Court.

In addition, the Commissioner is now empowered to enter into agreements with provincial privacy commissioners, as well as foreign authorities, in order to cooperate and share information. These amendments aim to increase the effectiveness of the OPC in dealing with complaints. While the OPC previously had the ability to coordinate with provincial privacy commissioners, the new amendment extends this ability to foreign data protection authorities and permits the Commissioner to share information. Given that privacy issues can easily extend beyond borders, the amendments should enable the OPC to successfully address complaints involving cross-border data.

In addition to Bill C-28, the Parliamentary review of *PIPEDA* resulted in Bill C-29. We first reported on this Bill in our Fall 2010 newsletter. The Bill, which addresses the mandatory reporting of data breaches, personal information disclosure for the purposes of business transactions, and consent exceptions for employee information, died on the order paper earlier this Spring when the federal election was called. However, given the important subject matter, it is likely that these topics will be raised again in another Bill.

Bird Richard will continue to keep its readers apprised of further legislative developments.