BIRD RICHARD
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In this Issue

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Canadian Human Rights Tribunal Orders Reinstatement of Air Canada Pilots

The Canadian Human Rights Tribunal has ordered the reinstatement of two Air Canada pilots compelled to retire upon reaching age 60. The pilots' retirement was mandatory according to the terms of both the pension plan and the collective agreement between the airline and the union. The two Air Canada Pilots argued that being forced to retire at age 60 constituted discrimination on the basis of age, contrary to the *Canadian Human Rights Act* (*CHRA*).

In 2007, the Tribunal rejected the pilots' complaint. Section 15(1)(c) of the *Act* provides an exception for age discrimination, provided that "an individual's employment is terminated because that individual has reached the normal age for retirement for employees working in positions similar to the position of that individual." The rejection of the pilots' complaint was on the basis that 60 years of age was the normal retirement age for positions similar to those occupied by the complainants, at the time of their retirement. The termination of their employment, therefore, was not found to be a discriminatory practice. The Tribunal also found that section 15(1)(c) of the *Act* was not a violation of section 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), because the complainants' had not suffered a loss of dignity.

In 2009, the Federal Court of Canada granted the pilots' application for judicial review. The pilots argued that the Tribunal had erred in coming to the conclusion that section 15(1)(c) was constitutional, in light of the guarantee of equality without discrimination under section 15(1) of the *Charter.* The complaint was sent back to the Tribunal. The question to be determined was whether section 15(1)(c) of the *CHRA* could be justified as a reasonable limit in a free and democratic society, within the meaning of section 1 of the *Charter* and, if not, whether the mandatory retirement provision in the collective agreement was a *bona fide* occupational requirement (BFOR) under sections 15(1)(a) and 15(2) of the *CHRA*.

The Tribunal reversed its 2007 decision and upheld the pilots' complaint. The Tribunal reinstated the pilots as soon as they met the eligibility requirements, including possession of a valid pilot's licence and medical certificate. The pilots were awarded compensation for lost wages, but only from September 1st, 2009 until the date of their reinstatement. Given the state of the law prior to 2009, the Tribunal determined that Air Canada had acted in good faith in applying the mandatory retirement policy to the pilots.

The Tribunal, however, did not order the reinstatement of over one hundred other pilots who had put forward complaints regarding forced retirement. Further, the Tribunal did not order the airline and the union to remove the mandatory retirement policy; rather, it determined that individual complaints are to be decided on a case-by-case basis, as the issue does not involve a complaint of systemic discrimination.

The finding that section 15(1)(c) offends the *Charter* did not set a legal precedent, and was therefore applied only to the facts in the instant case. Citing a number of decisions of the Supreme Court of Canada dealing with the Ontario Labour Relations Board, it was explained that a formal declaration of invalidity is not available to the Board, and that that the Board cannot expect deference in regards to constitutional decisions.

Both parties have filed applications for judicial review of the decision regarding remedy, and it is expected that the Air Canada Pilots Association will file an application for judicial review as well. Bird Richard will keep readers apprised of any further developments.

Bill 68 Update

We first reported on Ontario Bill 68, *The Open for Business Act, 2010*, in our Fall 2010 newsletter.

As of January 19th, 2011, amendments to the *Employment Standards Act* (*ESA*) pursuant to Bill 68 have changed the *ESA* claims process in Ontario. The amendments aim to encourage employers and employees to resolve *ESA* issues internally, and to promote early settlement. In addition to making changes to the *ESA* complaint procedure, Employment Standards Officers (ESO) have been provided with new powers.

Under the old complaints process, a complaint filed with the Director of Employment Standards was assigned to an ESO for investigation and decision. Now, when a complaint is assigned to an ESO, the employee is required to notify the employer that he or she believes that a right under the *ESA* is being (or has been) violated. The employee and employer are then encouraged to attempt to resolve the complaint internally.

Failing resolution of the complaint, the employee may file the complaint with the *ESA* Branch. He or she must demonstrate that the employer was notified of the complaint, explain what information was provided to the employer, and state the employer's response. The employee must also complete a claims form in order to provide evidence supporting the allegations of the claim.

If an employee does not complete the steps required within six months of having filed the complaint, the Director of Employment Standards can either assign the file to an ESO, refuse to assign the file to an ESO, or an ESO can be deemed to have refused to issue an Order.

During the investigation process, or at any time before a decision is made by an ESO, the ESO may attempt to settle the complaint through mediation. This new power provides the parties with more opportunity to settle the complaint. Should a settlement be reached, the terms of settlement will be binding on the parties, and the complaint will be deemed to have been withdrawn, and the investigation terminated. Any proceeding, other than a prosecution, will also be terminated.

Under the old process, employers were not likely to be made aware of complaints brought by employees. The changes to the process thus make it more likely for an employer to become aware of a complaint, and be able to attempt to resolve it, before it reaches the ESA Branch.

Bill C-28: How will it affect Your Organization?

Bill C-28, the *Fighting Internet and Wireless Spam Act*, received Royal Assent in December 2010.

Similar in many respects to its predecessor, Bill C-27, the *Electronic Commerce Protection Act*, which died on the order paper in December 2009, Bill C-28 aims to prohibit the sending of unsolicited commercial electronic messages.

The anti-spam rules apply to "commercial electronic messages". Messages are "commercial" if the nature or the purpose (or one of the purposes) of the message is to encourage participation in a commercial activity. The *Act* defines "electronic message" to include messages sent over any means of telecommunication, including text, sound, voice and image. The *Act* also defines "electronic address" broadly, in order to cover e-mail, instant messaging, text messages, and messages on "any similar account". This definition could include messages sent using Facebook, Twitter, and other social media applications.

Commercial electronic messages may be sent only where the recipient consents, unless the sender can demonstrate that a statutory exception exists (for example: providing a quote or estimate, completing or confirming a commercial transaction, providing warranty information, or providing product recall information or safety information regarding a product that the message recipient has purchased or used).

Limits are placed on when consent may be considered to have been implied, including when there is an existing business relationship between the sender and the recipient. An "existing business relationship" exists where the sender can demonstrate that a business relationship arose from:

- the purchase or lease of a product, good or service within the previous two-year period;
- a written contract that exists with the recipient (for two years following the termination of the contract); or,
- the recipient having made inquiries with the sender about commercial activities within the previous six-month period.

However, the above-noted time periods do not apply during the first three years that the rules come into force if the existing business relationship includes communications that the recipient has not chosen to opt-out of.

In order to obtain consent for the purposes of the *Act*, businesses must clearly set out the purpose for which consent is being sought, and provide information identifying the person seeking consent and any other information required by the regulations. Commercial electronic messages must also include an "unsubscribe" mechanism that meets certain requirements, and messages must include the sender's contact information.

Bill C-28, in addition to fighting against spam, also addresses the threats of spyware and pharming. With respect to spyware, a new consent-based regime for the installation of any computer program on a user's computer has been created. Pharming, or the altering of transmission information in an electronic message without the consent of the sender, is prohibited.

Bill C-28 also amends other statutes. The *Act* restricts certain exceptions that exist under the *Personal Information Protection and Electronic Documents Act*, and amends the *Competition Act* with respect to misleading electronic marketing messages.

The Bill sets out significant administrative monetary penalties of up to $10 million for corporations and $1 million for individuals, as well as statutory damages of up to $1 million per day. It should be noted that corporate officers and directors can be held personally liable for corporate violations or contraventions, and for contraventions committed by employees who are acting within the scope of their employment. The *Act* also provides for a private right of action to allow consumers and businesses to commence enforcement proceedings in order to recover damages.

If enacted, Bill C-28 will impact many organizations and will create significant penalties for non-compliance. Given that it is unknown whether the government will delay the coming into force of the Bill in order to provide businesses with time to make necessary changes to their operations, organizations should start the process of reassessing their practices for sending commercial electronic messages now. Organizations may wish to reassess their procedures and systems with respect to obtaining and documenting consent, develop procedures and systems to meet the new disclosure rules, and provide for an "unsubscribe" mechanism for commercial electronic messages. Organizations may also wish to consider outsourcing e-mail campaigns to a third party that has developed appropriate systems and processes.

Court of Appeal Establishes Test to be Applied in Determining if a Government Program is Discriminatory under the *Ontario Human Rights Code*

In *Director, Ontario Disability Support Program v. Tranchemontagne et al.*, the Court of Appeal established the test to be applied in determining whether a government program is discriminatory under the Ontario *Human Rights Code,* and determined whether that test involves the same analysis for discrimination that is applied under s. 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

The claimants in this case originally argued before the Social Benefits Tribunal that section 5(2) of the *Ontario Disability Support Program Act* (*ODSPA*) is discriminatory because it excludes income support from individuals who suffer from substance dependence if addiction is their sole impairment. The claimants were alcoholics, and as a result of the exclusion, were only eligible for income support under the *Ontario Works Act*. The Social Benefits Tribunal determined that s. 5(2) of the *ODSPA* was discriminatory and the Divisional Court agreed.

The Ontario Court of Appeal dismissed the government's appeal and upheld the decision of the Divisional Court. The Court of Appeal agreed with the finding that the provision of the *ODSPA* that denied benefits to those with alcohol addiction without other impairments was discriminatory, and constitutes a breach of the Ontario *Human Rights Code*.

In so finding, the Court of Appeal held that the definition of discrimination should be the same under both a human rights and *Charter* analysis. This decision of the Court was

informed by the recent decision of the Supreme Court of Canada in the discrimination case *R.* v. *Kapp*. The Court explained that a claimant who alleges that a government program is discriminatory has the onus of establishing that there has been differential treatment on the basis of a protected ground under the *Code*, and that the distinction is arbitrary and based on some connection to the ground of discrimination, in that it perpetuates a stereotype or prejudice. The evidence necessary to establish discrimination, however, will vary according to the context. In some cases, stereotyping is apparent, while in other situations, a claimant may be required to show discrimination in a substantive sense, rather than simply showing differential treatment.

The fact that the Court added a part of the s. 15 *Charter* analysis for discrimination into the human rights test is an important addition: the claimant must now establish that the disadvantage is caused by stereotyping or prejudice.

The test for discrimination under human rights statutes currently remains unsettled in many jurisdictions across Canada. This ruling of the Ontario Court of Appeal will therefore likely provide guidance regarding the correct test to apply, both within Ontario and in other jurisdictions.

Update on Class Actions for Unpaid Overtime

We previously reported on the repeated attempts in recent years by Canadian employees to launch class action claims for unpaid overtime against their employers.

One decision of the Ontario Superior Court certified a class action which authorized a claim against the Bank of Nova Scotia on behalf of over 5,000 employees claiming approximately $300 million in unpaid overtime. The Ontario Superior Court held that systemic wrongs arose from the bank placing the onus on the employees to obtain approval for overtime, rather than ensuring that the employees would be paid for overtime worked. An appeal to the Divisional Court was heard in December, 2010.

In another decision of the Ontario Superior Court, the Court had refused to certify a class action against CIBC by employees claiming approximately $600 million in overtime. The Court found that the class members had no common issues, as there were no systemic failures to pay overtime. This decision was appealed and, on September 10th, 2010, the Court upheld its refusal to certify the class action.

Yet another class action case has made the headlines recently. Employees of CN Rail are claiming approximately $300 million in unpaid overtime. The claim was certified in Ontario in mid-August, 2010. The claim alleges breach of contract, violations of the *Canada Labour Code* (the "*Code*"), and unjust enrichment.

The CN case was brought by Michael McCracken on behalf of over 1,000 employees of CN Rail. The class includes both current and former employees of CN. The employees argue that they regularly worked overtime, often working more than 50 hours per week, but were never paid for overtime. The failure to pay overtime is argued as both a breach of contract and a contravention of the *Code* by CN Rail. The *Code* requires overtime to be paid to employees in non-managerial and non-exempt positions for hours worked in excess of 40 per week, or eight hours per day.

CN Rail argues that the employees worked as "first line supervisors" properly excluded from the overtime provision of the *Code*. The employees, however, argue that they were deliberately misclassified by the Company in order for CN Rail to avoid its legal obligations concerning overtime.

The Court certified the action; however, the decision to certify has been appealed and the appeal is expected to be heard in 2011.

It is important for employers to understand the legal definition of the term "manager" for overtime purposes in order to avoid a contravention of *Code* overtime obligations and the costly consequences that may result from a contravention. Determining who is, or is not, working as a manager or supervisor is not simply determined by the title given to the employee. Further, the fact that others may refer to that person as their manager is not determinative. In order to determine whether a position should be classified as managerial will depend on many factors. For example, managerial responsibilities include: the ability to hire, promote, transfer, discipline and terminate employees, manage operations, make decisions in regards to company policy, make significant purchases or be responsible for the company finances or budget, and attend high-level meetings.

Employers are also advised to maintain accurate records, have a clear and well-understood company policy regarding overtime, and use overtime banks with care.

For employees working under Ontario legislation, the *Employment Standards Act* contains similar provisions regarding overtime and should be reviewed by employers to ensure compliance.

The outcome of these cases will have an important impact on the future of class action cases in the employment context and we will continue to keep readers updated in this regard.