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LAWYERS FOR EMPLOYERS

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Embassy Gets Second Chance to Plead Sovereign Immunity in Wrongful Dismissal Case

As we reported in the Winter 2013 edition of EMPlawyers' Update, Sandra McDonald, a long service employee of the Embassy of the United States of America in Ottawa, brought a claim of wrongful dismissal against her employer, in which she alleged that she had been terminated without cause while on long term disability leave.

Despite having been served with the claim, American officials failed to file a Statement of Defence. Accordingly, the Ontario Superior Court of Justice issued a default judgment finding that the Embassy had wrongfully dismissed Ms. McDonald and had violated Ontario's *Human Rights Code*. The Court awarded Ms. McDonald all of the compensation she had requested, which amounted to $240,000.

By not filing a Statement of Defence, the U.S. Embassy missed the opportunity to claim that sovereign immunity was applicable. Foreign embassies enjoy substantial immunity from Canadian law, as detailed in the *State Immunity Act*. This legislation provides that foreign state departments and agencies, including embassies and consulates, are immune from the jurisdiction of Canadian courts, including their authority to order common law reasonable notice and human rights damages. Invocation of the *State Immunity Act* thus could have eliminated most if not all of the damages awarded against the Embassy in this case.

However, the American Embassy has now successfully overturned the default judgment by convincing the Court that it had unintentionally failed to respond to the claim. As a result, it will now have another opportunity to present arguments in its defence, which could include the defence of sovereign immunity.

Thus, although the Embassy was granted a second chance to rely on the *State Immunity Act*, this case is a cautionary tale for embassies – and all employers – regarding the risks

of failing to defend a claim at the earliest opportunity. Had the American Embassy plead sovereign immunity in the first instance, it is likely that no award would have been made. It also would have saved the legal costs associated with having the default judgment overturned, which included paying Ms. McDonald's legal costs and paying the $240,000 into a court trust.

While embassies have the protection of legislation to allow them to avoid some of the lengthy court hearings and costly awards associated with the dismissal of their locally engaged staff, they must be aware of their rights, and make the court aware as well.

Property Rights in Pension Benefits Plans

At age 65, Richard Waterman was terminated without cause by IBM Canada Ltd. after 42 years of service. IBM provided him with two months' notice of the termination. During his employment, Waterman participated in IBM's pension plan, which entitled him to a full pension. His entitlement was not affected by the termination, and Waterman began to draw from his pension benefits.

Waterman filed a claim for wrongful dismissal with the British Columbia Superior Court, which was unsuccessfully opposed by IBM. IBM argued that it was liable only for the difference between the pension benefits Waterman had been receiving since his termination, and the amount of reasonable notice he ought to have received on termination. Waterman's position was that the pension benefits, to which he had made contributions throughout his career, were not affected by the manner of termination and could not be factored into the amount payable by IBM as damages for wrongful dismissal.

At trial, the Superior Court determined that the appropriate notice was twenty (20) months, and declined to deduct the pension benefits paid to Waterman during the notice period in calculating the damage award.

On appeal, the Court of Appeal concurred with this determination and, in a ruling released late last year, the Supreme Court of Canada also found in Waterman's favour.

The issue before the Supreme Court was whether an amount owed to an employee as damages for wrongful termination (pay in lieu of notice) should be reduced by the pension benefit received by the employee during the notice period.

Ordinarily, when an employee receives other income during the notice period, an employer is only liable to pay the employee the difference between the other income and the amount the employee would have received, had he or she been paid adequate notice. This deduction is consistent with the duty to mitigate, which requires an employee to make all reasonable efforts to find alternative employment in order to limit his or her damages after a termination. IBM relied upon this general principle of compensation to support its position that the pension benefits constituted income received during the notice period and, as such, should also be deducted from any reasonable notice damages owed by IBM.

The Supreme Court rejected IBM's position on the basis that the pension benefits are deferred compensation and retirement savings. As such, the retirement savings had not been intended or designed to compensate an employee should he find himself wrongfully terminated.

The Supreme Court distinguished this case from another one of its earlier decisions, *Sylvester v. British Columbia*, in which it held that disability benefits should be deducted from reasonable notice damages when the employer has contributed to the disability plan. This earlier decision remains the law with respect to the deductibility of disability benefits. However, the same conclusion was not reached in the case of pension benefits because, as the Court explained, disability benefits are distinguishable as wage replacement benefits. Further, disability benefits are not free-standing entitlements; rather, they are typically off-set by other income to which the claimant has access under other wage replacement schemes. Finally, the employment contract in this case implicitly stated that it was not the parties' intention that employees receive disability benefits and wages at the same time.

The Court thus concluded that pension benefits constitute a retirement savings to which the employee has an absolute and free-standing entitlement. Therefore, regardless of the fact that it appears the employee may be unduly enriched, the principle of compensation does not apply.

This decision confirms that an employee who is in receipt of pension benefits is still entitled to reasonable notice of termination (or pay in lieu of notice) if he or she is terminated without cause, unless the employment contract limits the obligation to a lesser amount or to the minimum standards as set by the provincial legislation.

Mandatory Health and Safety Training – Will You be Compliant by July 1st?

As previously reported, the new *Health and Safety Awareness and Training* regulation under the *Occupational Health and Safety Act* (*OHSA*) will come into effect on July 1st, 2014.

What does this mean for Ontario employers? You must ensure that all workers and supervisors have completed basic occupational health and safety awareness training **by July 1st**. New employees should be trained as soon as is practicable

after they start. You must also keep a record of the training provided.

For free training materials, visit the Ministry of Labour's website: http://www.labour.gov.on.ca/english/hs/training/

The training includes instruction on the rights and duties of workers, supervisors and employers under the *OHSA*, the role of joint health and safety committee and health and safety representatives, and common workplace hazards and occupational illnesses. There is an exemption for employees who have previously completed an awareness training program that covers the same content. To determine whether your employees have previously completed training on the same content, review the training materials provided on the Ministry's website.

Mitigating Factors in Occupational Health and Safety Charges

The Ontario Court of Appeal recently determined that an employer's actions taken to comply with a health and safety inspector's order will not be considered a mitigating factor in determining the appropriate sentence.

Flex-N-Gate is an Ontario employer which produces automobile parts. It produces vehicle bumpers by processing metal sheets which are stored in approximately 5000 pound bundles of 120-170 sheets. On January 28, 2004 a forklift operator was in the process of loading a bundle onto a production line when the bundle came apart, causing the sheets to scatter, striking and injuring a worker's foot in the process. The worker underwent surgery and was unable to work for more than four (4) months.

A Ministry of Labour inspector investigated the accident and issued two orders pursuant to the *Occupational Health and Safety Act* (the *Act*): one requiring compliance with the safe movement of material, and the other halting production until the other order was fulfilled. The employer complied with both orders immediately.

The Employer was convicted of two offences under the *Act*: failing to ensure that material was moved in a manner that did not endanger the safety of a worker, and failing to provide information, instruction and supervision to protect the health and safety of workers. At trial, the Justice of the Peace imposed two fines of $25,000 for each offence, totalling $50,000. In making this award, the Justice of the Peace considered the employer's compliance with the orders (among other reasons) as to why a higher sentence should not be imposed.

The employer appealed to the Ontario Court of Justice. The appellate judge dismissed the conviction appeal but allowed the sentencing appeal, in part, by changing the fine to "concurrent" fines, such that $25,000 was to be paid once instead of twice. The judge also considered the employer's immediate compliance with the orders as a mitigating factor.

The Ministry of Labour successfully appealed to the Ontario Court of Appeal where it was determined that the lower courts had erred in rewarding the employer for complying with the inspector's orders. The Court of Appeal stated instead that failure to comply with an inspector's orders is a violation of the *Act*, and post-offence compliance must not be considered during sentencing, as this would work against the *Act*'s objectives to deter non-compliance generally and to prevent accidents. However, the Court indicated that if the employer were to do something above and beyond the requirements of the *Act* or orders of the inspector, a sentencing judge may properly take this into account, although this cannot be given more weight than the due diligence efforts the employer could have taken prior to the accident.

Regarding the concurrency of fines, the Court of Appeal relied on prior case law which established that where the employer is sentenced to pay a fine, a separate fine must be imposed for each offence.

This decision from the Ontario Court of Appeal thus establishes two sentencing principles relevant to employers in Ontario. First, compliance with an inspector's order prior to a formal conviction through trial will not be considered a mitigating factor in sentencing, and second, where an employer is sentenced to be fined for more than one offence, fines cannot be concurrent, and a fine must be issued for each offence.

Deductibility of Statutory Pay from Workers' Compensation Benefits

A production worker, 59 years old, suffered an elbow injury that resulted in the permanent impairment of both of his arms. He claimed workers' compensation benefits under the *Workplace Safety and Insurance Act, 1997* (*WSIA*), and was granted a Non-Economic Loss award.

Shortly after he returned to the accident employer on modified duties, he was laid off due to a plant closure, at which time the employer paid him severance pay and sixteen weeks of pay in lieu of notice of termination.

An annual review of the worker's claim revealed that, in determining entitlement to Loss of Earnings (LOE) benefits for the period immediately following the layoff, his pay in lieu of notice was not to be deducted, which resulted in an overpayment that the Workplace Safety and Insurance Board (WSIB) sought to recover.

The worker raised an objection to the decision to recover the funds with the WSIB's Appeals Branch, but the objection was denied. The Appeals Resolution Officer did not consider the severance pay amount to be earnings, but did consider the pay in lieu of notice of termination to be earnings as reported on the worker's tax documentation, and therefore deducted this amount from his LOE benefits.

The worker appealed to the Workplace Safety and Insurance Appeals Tribunal (the Tribunal) and asserted that, as the termination payments were made in recognition of his years of service pursuant to the *Employment Standards Act, 2000* (*ESA*), they were not disability payments under the *WSIA*, and he therefore ought to be entitled to both during the same period. The employer chose not to participate in this hearing.

The appeal was allowed in part. The Tribunal acknowledged that the *ESA* entitled the worker to eight weeks of pay in lieu of notice of termination for his sixteen years of service with the employer. The Tribunal also held that, in the interests of consistency and fairness, it ought to rely on prior decisions in which it had held that pay in lieu of notice, being a statutory entitlement, did not disentitle workers from LOE benefits during the same period. The Tribunal found this proposition to be supported by the *WSIA* and WSIB policies.

However, although the case law presented to the Tribunal did not address this issue, the Tribunal concluded that the additional eight week payment was deductible because these amounts constituted payments in excess of the minimum standards for termination pay, were part of a negotiated agreement regarding the closure of the plant, and meant that the worker did not suffer loss of earnings during that period. The Tribunal determined that this additional payment constituted taxable earnings that could be deducted from the worker's LOE benefits for that period.

This decision demonstrates the benefits of employer participation in workers' compensation proceedings. Because the employer in this case did not participate, the assertions made by the worker went uncontested before the Tribunal.

Bill C-4 – Amendments to the *Canada Labour Code*

On October 22, 2013, the Minister of Finance introduced Bill C-4, *A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures*, also known as the *Economic Action Plan 2013 Act, No. 2*. On December 12, 2013, the Bill received Royal Assent.

Among other amendments, Bill C-4 provides for important amendments to the *Canada Labour Code* (the "*Code*"). In particular, it amends the definition of "danger," modifies the refusal to work process, removes references to health and safety officers (HSO) and confers on the Minister of Labour former HSO powers, duties and functions, in addition to providing for greater enforcement oversight.

The following important amendments to the *Code* came into force on April 1, 2014:

1) The definitions of "health and safety officer" and "regional health and safety officer" in subsection 122(1) of the *Code* are repealed. All references to these officers are removed. The Minister is conferred with former HSO powers, duties and functions.

2) The definition of "danger" in subsection 122(1) of the *Code* is replaced by the following:

   "danger" means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered;

2) Bill C-4 also amends the work refusal regime. Amongst other changes, it now provides that employers are required to investigate work refusals and prepare a written report. Upon receipt of the employer's report, the workplace health and safety committee or the health and safety representative, is then entitled to conduct an investigation and provide a written report to the employer.

   Upon the employer's finding of "no danger" and upon the employee's continued refusal to work, the employer may notify the Minister who will then determine whether to conduct an investigation.

   The Minister is entitled, in the event that a decision to conduct an investigation is made, to rely on existing investigative reports and to combine multiple investigations.

   Should the Minister decide not to investigate, the employee is no longer entitled to refuse work.

   With these amendments, the Minister and the employer are afforded greater control over the administration of the health and safety provisions of the *Code*. Most especially, employers should take note of their new functions and duties in the work refusal regime.