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LAWYERS FOR EMPLOYERS

EMPLAWYERS'™ UPDATE

Winter 2013

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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Federally-Regulated Employer Liable for Damages for Termination of a Totally Disabled Employee

In January 2011, an inter-provincial transportation company terminated an employee who had been on medical leave following a workplace accident since December 1989. The grievor was in receipt of benefits under the *Workplace Safety and Insurance Act* (*WSIA*). The union, relying on the protections of the *Canada Labour Code* (*Code*), grieved the dismissal.

In November 2010, the employer requested that the grievor complete a work capabilities form to determine whether his conditions had changed or whether suitable work was now available. Contrary to representations that his benefits would continue until he turned 65 years of age, the request indicated that if there was no prospect of change in his condition and no suitable work, his employment would be severed. The grievor did not complete the form but informed his employer by telephone that he was in no condition to return to work.

He was subsequently terminated without severance pay or pay in lieu of notice.

At grievance arbitration, the employer submitted that the dismissal was proper on the following basis:

- the grievor's absence from work and his continued inability to work had frustrated the contract of employment;
- the duty to accommodate the grievor could not be fulfilled given that there was no prospect of a return to work in any capacity;
- under the collective agreement, in order to receive health benefits, an employee is required to have reported to work in the month for which contributions to same were made; and

- the employer had met its one year obligation to maintain the grievor's benefits under the *WSIA*.

The Union argued that the dismissal was a violation of the *Code* and of the collective agreement on the following basis:

- section 239.1 of the *Code* prohibits an employer from dismissing an employee because of absence from work due to work-related illness or injury, and requires that the employer continue to make contributions to the health benefits plan as if the employee were not absent;
- section 168(1) of the *Code* provides that the statutory obligations override any law, custom or contract that is less favourable to the employee; and
- the provision in the collective agreement which provides that absence due to *bona fide* illness or injury could not constitute cause for discharge.

The arbitrator concluded that the dismissal was not proper and reinstated the grievor. His decision highlights the following points:

- While section 239.1 of the *Code* is not an open-ended guarantee of employment status and health benefits, where the circumstances of the employee has not changed (i.e. alternate positions with the employer are not available, alternate employment is not obtained, and medical clearance to return to work is also not obtained) there is to be no change in the employee's entitlement to employment and the associated health benefits.
- There is no distinction between absence due to a work related-injury and absence due to the inability to perform work because the former is a direct result of the latter.
- The *Code* specifically overrides the common law doctrine of frustration rendering it inapplicable to the employee in these circumstances.
- With regard to the collective agreement, where the collective agreement contradicts the *Code*, such as the requirement to work in the months that a contribution is made as in the instant case, it is invalid.
- Where the provisions of the *WSIA* are less favourable to the employee, such as those pertinent to this case, the provisions of the *Code* must apply in their stead.

The grievor was reinstated with full benefits and pension entitlements. He was reimbursed for all expenses which he incurred that would have been covered by the benefits plan had his enrollment been uninterrupted.

This decision has set a precedent for federally-regulated employers faced with employees who are unable to return to work due to illness or injury resulting from a workplace accident. It indicates that short of a change in circumstances whereby the employee is healthy enough to return to work or the employee has found suitable work elsewhere, terminating such an employee promises to be nearly impossible.

Reminder: Update your Workplace Discrimination and Harassment Policies

On June 19th, 2012, Bill 33, known as Toby's Act, received Royal Assent. The Bill amends Ontario's *Human Rights Code* to prohibit discrimination and harassment on the basis of gender identity and gender expression. This amendment will help to protect transsexuals, transvestites, cross dressers, and other individuals who do not identify with the gender identity assigned to them at birth against discriminatory treatment.

Employers are thus reminded to update their workplace discrimination and harassment policies to include gender identity and gender expression as grounds protected by the *Code*.

Court Awards $240,000 in Wrongful Dismissal Damages against Embassy

In a recent decision of the Ontario Superior Court of Justice, an embassy employee was awarded $240,000 in damages for wrongful dismissal.

Sandra McDonald was 57 years old at the time of her termination, and had been employed by the Embassy of the United States of America in Ottawa for 29 years. After receiving surgery and subsequently developing complex regional pain syndrome, Ms. McDonald exhausted all of her sick leave credits and went on long-term disability (LTD) beginning in November 2009.

While its previous policy had permitted employees on LTD to maintain their positions for the duration of their illnesses, in February 2010, the Embassy introduced a new policy, such that it would hold an employee's position for only one year while the employee was on LTD. At the one-year mark, the employee would be terminated, unless the employee provided a medical statement assuring the employer of her/his fitness to return to work.

When the Embassy advised Ms. McDonald that it would hold her position for one year unless she provided a fitness to return to work statement before or at that time, it was informed by Ms. McDonald's doctor that Ms. McDonald was not fit to work. Thus, in December 2010, the Embassy informed Ms. McDonald that she would be terminated effective January 31st, 2011, at which point she had been off work

for approximately 19 months. However, Ms. McDonald did continue to receive LTD benefits after her termination.

Ms. McDonald brought a claim of wrongful dismissal. Despite having been served with the claim, American officials failed to file a defence or contest the claim at any point. Accordingly, the Ontario Superior Court of Justice issued a default judgment finding that, as alleged, the Embassy had wrongfully dismissed Ms. McDonald and had violated Ontario's *Human Rights Code* by holding the positions of disabled employees for only 12 months. The Court awarded Ms. McDonald all of the compensation she had requested, including:

- damages for a 32-month reasonable notice period (amounting to nearly $220,000);
- $10,000 for pain and suffering as a result of the Embassy's breach of the *Human Rights Code*;
- over $4,000 for unused leave credits;
- nearly $4,000 for out-of-pocket medical expenses;
- her legal costs; and
- interest.

Foreign Embassies enjoy substantial immunity from Canadian law. These immunities are detailed in the Canadian *State Immunity Act*. This legislation provides that foreign state departments and agencies, including embassies and consulates, are immune from the jurisdiction of Canadian courts. While an exception exists for a foreign state's "commercial activities", the Supreme Court of Canada has ruled that, in the employment context, this exception includes only the "bare contract for employment services". Since most of the damages claimed by Ms. McDonald were not related to the enforcement of her employment contract and were instead based on the common law construct of reasonable notice and the statutory entitlements under the *Human Rights Code*, invocation of the *State Immunity Act* could have eliminated most if not all of the damages awarded against the Embassy.

In order to avoid the situation where sovereign immunity is overlooked by the courts, an embassy should always file a Statement of Defence which denies the allegations against it by seeking a ruling that sovereign immunity is applicable.

An embassy can also enter into formal employment contracts with staff, which detail their rights and obligations, both during the course of employment and at termination. These are "commercial contracts" under the *State Immunity Act*, and are enforceable by the employee, but set out precisely what the obligations are. Thus, embassies can terminate the employment of locally engaged staff knowing precisely what is payable to them. When properly drafted, such contracts are fully enforceable in Canadian courts and can help embassies to avoid awards such as the one in *McDonald*.

Therefore, while the *McDonald* decision demonstrates the potentially costly consequences of a wrongful dismissal claim against an embassy by locally engaged staff, there are many preventative tools and defences that are available to embassies in order to prevent such a situation.

Employee Privacy Rights at Work: An Update

In previous newsletters we have reported on the progress of *R. v. Cole*, a criminal prosecution case that was set to define an employee's privacy rights with respect to personal information stored on a work-issued computer.

Cole was a high-school teacher whose school had provided him with a laptop computer to facilitate his duties. While a school board technician was performing maintenance activities on this laptop, explicit images of an underage female student were found. The technician reported this to the principal who seized the laptop, downloaded its contents onto a compact disc and turned both laptop and disc over to police.

Cole was charged with possession of child pornography and unauthorized use of a laptop. The Ontario Court of Appeal had held that his privacy rights were breached and the contents of the laptop were inadmissible at trial. The prosecution appealed.

The Supreme Court of Canada recently issued a pivotal ruling with consequences for employment law. While this Court overturned the Court of Appeal in holding that the laptop and its contents were admissible for other reasons, it maintained that where an employer provides an employee with a computer, for which the employee is permitted to carry-on incidental personal activities, the contents of that computer are protected with a reasonable expectation of privacy.

To arrive at this conclusion, the Court had to decide a number of issues. Of most importance to employers is whether the accused had a reasonable expectation of privacy for a work-issued computer.

The Court found that a privacy interest existed where a reasonable and informed person would expect privacy, given the totality of the circumstances. In this case, an expectation of privacy was derived from the way Cole used the laptop, saving personal data to its hard drive and using it to browse internet sites of personal interest. These activities generated information that was both meaningful and intimate to Cole's person.

The Court then looked at whether this expectation was reasonable. To determine this, the Court referenced other cases which have established that:

- the closer the subject matter of the alleged search lies to the biographical core of the personal information, the more there is a reasonable expectation of privacy. As previously mentioned, Cole's usage generated meaningful and intimate information.
- ownership of property is a relevant consideration but is not determinative of whether one ought to expect privacy. Use of the school board's work-issued laptops were governed by their Policy and Procedures Manual which stated that "all data and messages generated on or handled by board equipment are considered to be the property of [the school board]".
- the context in which personal information is placed on an employer-owned computer is significant. Operational realities, policies and customs are not determinative on their own. The court held that when personal use is permitted, or reasonably expected, the employee has a reasonable expectation of privacy. The school board's Policy and Procedures Manual allowed for incidental personal use of the board's information technology. The policy stipulated that teachers' email correspondence remained private, but subject to access by school administrators if specified conditions were met. Also, the school's Acceptable Use Policy not only restricted the usage of laptops for the students and teachers, but also warned users not to expect privacy in their files.

The principal's access was uncontested because of the statutory duty under s. 256 of Ontario's *Education Act* to maintain a safe school environment, and, by necessary implication, a reasonable power to seize and search a school-board issued laptop. The school board technician in fulfilling his work duties also had the same power.

However, the lawful authority of the accused's employer to seize and search the laptop did not furnish the police with the same power. In order for the police to have legally searched the laptop, they needed to obtain a search warrant. The Court found that there had been a violation of s. 8 of the *Canadian Charter of Rights and Freedoms*. The fact that the principal handed these materials over to the police was insufficient to waive the employee's rights as only the employee can waive his rights to *Charter* protections.

This case has several implications for Canadian employers:

- It stands for the proposition that employees have an expectation of privacy on the information generated through use of work-issued equipment where personal use is permitted. As previously stated, policies governing computer-owned devices are important. It is also important to make employees aware of these policies in order to reduce their expectation of privacy;
- This rule is tempered by a need to consider the total circumstances where realities like ownership, password protection, organizational policies and customs may reduce the privacy expectation to tilt the analysis in the other direction; and
- Where the employer is within its rights to access such information, that information may be excluded from arbitration or civil suits where the employer improperly grants access to third parties. Furthermore, when such personal information is accessed for legal proceedings, the employer must be cautious that no laws are violated in the process.