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LAWYERS FOR EMPLOYERS

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No Stand-Alone Procedural Rights under the *Canadian Human Rights Act*

The Federal Court has recently ruled that the *Canadian Human Rights Act* (the *Act*) does not include a stand-alone right to procedural accommodation.

In a recent application to the Federal Court, the Canadian International Development Agency requested that the Court overturn a decision of the Canadian Human Rights Tribunal. The Tribunal had allowed a complaint by an employee, Bronwyn Cruden, in which she had alleged that she was denied a posting to Afghanistan on the basis of Health Canada's finding that her Type I diabetes may lead to a life-threatening medical emergency, making her unfit to serve in that country.

Notwithstanding that the Tribunal found the complainant had established a *prima facie* case of discrimination and that it would have caused undue hardship to the employer to accommodate her, it allowed the complaint based on a breach of the employer's procedural duty to accommodate. The Tribunal thought the employer ought to have offered the complainant an alternate deployment or sought a medical opinion apart from that of Health Canada. Further, the Tribunal found the health guidelines for Afghanistan to be discriminatory because they did not permit individualized assessments.

Accordingly, the complainant was awarded damages and ordered to be deployed to a country that was one of her top three choices. The Tribunal also ordered that the health guidelines for Afghanistan be clarified in order to ensure that they did not constitute a complete ban for anyone with a chronic medical condition.

Justice Zinn for the Federal Court allowed the employer's application for judicial review on the basis that the Tribunal's decision was unreasonable.

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The Court found that there was no reasonable interpretation of the *Act* that permitted the Tribunal to continue to examine a complaint once it found that accommodation was not possible without undue hardship. The procedural analysis is simply an analytical tool for determining whether or not the employer had established undue hardship; where undue hardship is found, a *bona fide* occupational requirement is also established. As Justice Zinn stated (at paragraph 70):

> That is not to say that the procedure used by the employer when considering accommodation cannot have significance in any given case; indeed, in practical terms, if an employer has not engaged in any accommodation analysis or attempts at accommodation at the time a request by an employee is made, it is likely to be very difficult to satisfy a tribunal on an evidentiary level that it could not have accommodated that employee short of undue hardship [citations omitted]. That is the very real and practical effect of the evidentiary burden to establish a BFOR resting with the employer.

Thus, a finding of undue hardship is a full defence for the employer, upon which the complaint is dismissed and no remedies may be ordered. The Federal Court concluded that there is no further and separate procedural duty under the *Act* that could be breached.

In light of the finding that the complainant could not be accommodated without undue hardship, the decision was quashed and not referred back to the Tribunal.

It is worth noting that this issue may be treated differently in different jurisdictions. In Ontario, the Human Rights Tribunal and the reviewing courts have repeatedly found that, even where undue hardship has been substantively established, damages may be awarded if a separate, procedural duty of accommodation has been breached. Procedural deficiencies such as failure to conduct a thorough investigation or a detailed search of alternative suitable employment have given rise to awards of damages in Ontario.

For employers in the federal sphere, however, this decision is significant, as it dissuades the possibility of a right to procedural accommodation independent of the substantive rights provided for under the *Act*.

Court of Appeal Increases Fine Levied Against Owners

Convictions for criminal negligence under the *Criminal Code* have become all the more onerous for business owners after the Ontario Court of Appeal levied a $750,000 fine against a business owner late last year.

In a prior edition of EMPlawyers Update, we informed our readers of the tragic events of the *R. v. Metron Construction* case. On December 24, 2009 a swing stage descended from the fourteenth floor of Metron Construction's high-rise condominium construction site, fatally injuring three workers and a site supervisor. Post-mortem examinations identified the cause of death as multiple injuries consistent with a fall from a great height, as well as the presence of marijuana in three of the four deceased. It was identified that the incident was caused by the defective design of the swing stage, the swing stage's inability to support the weight of six men and their equipment, and the lack of personal harness lifelines on all but one of the workers.

In the court of first instance, the parties agreed that the site supervisor breached his duties as a senior officer. Thus, Metron pled guilty to one count of criminal negligence causing death under section 219 of the *Code*, and the President of Metron pled guilty to four charges under the *Occupational Health and Safety Act* (the *Act*). For this, Metron was fined $200,000 plus a Victim Fine Surcharge of $30,000.

The Crown, viewing the sentence as being too lenient, requested leave to appeal. It sought a fine of one million dollars, presenting the position that, regardless of mitigating factors such as a "guilty" plea, the accident was preventable.

The Defence contended that the guilty plea was a *significant* mitigating factor. Also, the accident resulted from a momentary lapse in judgement; there were safety precautions in place generally throughout the construction site, including a usual practice of only two workers being on a swing stage at one time. It was argued that this was not a systematic course of non-compliance with the *Act* and the *Code*.

The Court of Appeal discussed the distinction between regulatory offences of the *Act* and criminal offences of the *Code*. The *Act* protects the public from adverse effects of otherwise lawful activity, while *Code* offences require an element of fault and blameworthiness. Of the various *Code* offences, criminal negligence causing death is one of the most serious and is at the high end of the continuum of moral blameworthiness. Sentences under this charge can result in life imprisonment for an individual and an unlimited fine for an organization, whereas offenses under the *Act* are limited by statutory maximums. The Court then concluded that the distinction between these two types of offences establishes

that a proportionate sentence under one regime would not be proportionate under the other. Therefore, the reliance of the court of first instance on statutory maximums in this case was an error.

The Court of Appeal also determined that an organization's ability to pay should not be treated as a prerequisite to the imposition of a fine; while economic viability may be considered, the prospect of bankruptcy should not be used to evade an appropriate fine. Thus, the Court of Appeal found the sentencing judge's decision in this regard also erroneous.

Finally, the Court of Appeal stressed the gravity of the offence, characterizing the corporation's liability for the site supervisor's negligence as "extreme". In place of the $350,000 fine, the Court levied a sentence of $750,000 against Metron.

This decision is relevant to all employers as it demonstrates the courts' treatment of criminal charges arising out of an occupational health and safety violation. Specifically, this decision demonstrates that the potential liability for a corporate defendant employer is unlimited.

Alberta Privacy Legislation Violates Freedom of Expression

In a recent decision by the Supreme Court of Canada, Alberta privacy legislation that prohibited the capture and publicizing of workers crossing a picket-line was declared invalid as a disproportionate restriction on freedom of expression.

During a 300-day labour relations dispute, an Alberta casino employed replacement workers. As the Union picketed the casino, it took photographs and videotapes of these replacement workers, as well as other executive-level staff members. The Union posted notices that these images and video clips would be available on the Internet.

The workers whose images were captured objected, making a complaint to the Information and Privacy Commissioner's Office, in which they alleged that their privacy was being violated in contravention of Alberta's *Personal Information Protection Act* (*PIPA*). The Union contended that, in accordance with the *Canadian Charter of Rights and Freedoms* (the *Charter*), it had the right to capture these images and disseminate them for the purpose of furthering a labour relations cause. The Adjudicator appointed to determine this constitutional issue agreed with the workers on the basis that *PIPA* did prohibit the collection, storage, use and dissemination of personal information by any organization without consent. In the Adjudicator's opinion, the legislation fit squarely with the facts at hand.

On judicial review to the Court of Queen's Bench, however, the Adjudicator's decision was overturned. The Court established that the Union's collection, use and dissemination of the images and video clips constituted expressive content, which is clearly protected by the right to freedom of expression under section 2(b) of the *Charter*. The Privacy Commissioner and the Attorney General of Alberta appealed this decision to the Alberta Court of Appeal. At this level, it was affirmed that the impugned information is personal information which, in the context of these facts, is constitutionally protected expressive content. The Court of Appeal also noted that the privacy interest in the images and video clips were minimal, while the blanket prohibition under *PIPA* was quite broad.

Leave to appeal to the Supreme Court of Canada was sought and granted. On November 13, 2013, the Supreme Court rendered its decision. The issue before the Court was whether *PIPA* violated the right to freedom of expression provided for by the *Charter* and, if so, whether such a violation could be demonstrably justified. Justices Abella and Cromwell writing for the Court determined that yes, the *Charter* had been violated and no, such a violation could not be justified.

The Court based its decision on the following findings:

- Both labour relations and privacy rights are important aspects of the political economy in general and the lives of citizens specifically;
- Picketing has historically been recognized in this society and by the Supreme Court as an important aspect of labour relations;
- The protection of privacy rights through privacy legislation is fundamentally "quasi-constitutional"; and
- On the particular facts of this case, *PIPA* is too broad because it fully protects the privacy of workers crossing the picket-line but it has no regard for the nature of personal information, the purpose for which it is collected, used or disclosed and the labour relations context of that information.

The Court emphasised that, in order to justify a *Charter* violation, there must be a pressing objective, a rational connection between the objective and the means to achieve that objective, and the means must be a proportional avenue to achieve that objective.

The Court stated that *PIPA*'s blanket prohibition is disproportional: on one side of the scale is a labour relations dispute and union's ability to use striking and picketing effectively to communicate persuasively with the general public, while on the other side of the scale is a mild privacy interest that consists of limited, non-intimate photographs and video of people walking in the public sphere where they may be observed by anyone in the context of the politically charged exercise of crossing a picket line.

As a remedy, the Court declared *PIPA* invalid. The declaration of invalidity is suspended for a period of 12 months, in order to give the legislature time to ensure compliance with the *Charter*.

Few Canadian provinces have enacted privacy legislation similar to *PIPA*, and the Court in this case took care to differentiate *PIPA* from the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*), which applies to interprovincial and international commercial collection, storage, use and disclosure of personal information. Ontario and *Québec* do not fall under *PIPEDA* and have not enacted similar privacy legislation. Regardless, this decision is relevant to employers throughout Canada as it demonstrates that the right to privacy is not subservient to freedom of expression. Rather, where there is a conflict, access to both rights and freedoms will be weighed for balance and proportionality.

Mandatory Health and Safety Training for All Workers and Supervisors

In a previous edition of EMPlawyers Update, we made our readers aware of the potential new *Occupational Health and Safety Awareness and Training* regulation under the *Occupational Health and Safety Act* (the *Act*).

On November 15, 2013, existing Regulation 780/94 – Training Programs was revoked and the new *Health and Safety Awareness and Training* regulation was filed.

As a result, by July 1, 2014, employers must ensure that workers and supervisors complete mandatory basic occupational health and safety awareness training. The regulation specifically:

- delineates the minimum content of both the worker and supervisor awareness training programs, including 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;
- requires that employers ensure that workers complete the training program as soon as practicable, and supervisors complete the training within one week of performing work as a supervisor; and,
- requires employers to maintain a record of training, and provide workers and supervisors with proof of completion, on request, for up to six months after the worker or supervisor stops performing work for that employer.

An exemption is provided for workers and supervisors who have previously completed an awareness training program that covers the same content as that set out in the regulation.

The Ministry of Labour has developed free awareness training programs and materials that are available online, and in many languages. Employers in both private and public sectors of Ontario should use these resources with a view to achieving full compliance by July 1, 2014.

Accessibility for Ontarians with Disabilities Act – Employment Standards Compliance in 2014

For all public sector employees with 50 or more employees, the *Accessibility for Ontarians with Disabilities Act* requires that the following employment-related standards be in place by January 1, 2014:

- ensure that performance management, career development and job changes are accessible to employees;
- inform staff about policies for supporting employees with disabilities;
- provide training to all employees and volunteers at your organization about the requirements of the *Act*;
- ensure that the manner in which feedback is received and responded to is accessible; and
- ensure that your organization's hiring practices are accessible.

By 2014, all public sector organizations are required to have developed accessibility policies.