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LAWYERS FOR EMPLOYERS

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Reminder: January 1st, 2016 *AODA* Compliance Obligations

EMPLawyers' Update has kept its readers informed about the *Integrated Accessibility Standards Regulations* under the *Accessibility for Ontarians with Disabilities Act, 2005* (*AODA*), which creates obligations for employers in the areas of customer service, employment, information and communications, transportation and the built environment on an ongoing basis.

January 1st, 2016 will mark the deadline for **private sector employers with 50 or more employees** to fulfill certain obligations under the accessibility standard for employment, including the following:

- informing the public and their employees about the availability of accommodations during the recruitment process, providing suitable accommodations if requested, and informing successful applicants of the employer's accommodation policies;
- informing existing and new staff about the employer's disability and accommodation policies, and providing updated information as the policies are amended;
- providing information to employees in an accessible format;
- implementing written processes for the development of individual accommodation plans for employees with disabilities;
- developing return to work processes for employees who are absent from work due to disability; and
- considering the accessibility needs of employees and any accommodation plans during performance management, career development and job changes.

Also beginning January 1st, 2016, **private sector employers with one to 49 employees must**:

- provide appropriate and up-to-date training to all employees and volunteers regarding the accessibility standards and the *Human Rights Code*; and
- ensure that they have in place accessible means of receiving and responding to feedback from persons with disabilities.

Finally, **small designated public sector organizations and private sector organizations with 50 or more employees** must, upon request, provide accessible formats and communication supports for persons with disabilities in a timely and affordable manner. They must also notify the public of the availability of such formats and supports.

Failure to comply with the Regulations may expose organizations to administrative penalties, which range between $500 to $15,000.

Family Status Includes Accommodating Eldercare

In *Canada (Attorney General) v. Hicks*, the Federal Court recently confirmed that the ground of family status in the *Canadian Human Rights Act* can protect eldercare responsibilities.

Mr. Hicks worked for the federal government in Nova Scotia. He was relocated to a new position in Ottawa when his previous position became redundant.

Mr. Hicks' wife did not move with him, in part due to her mother's serious health problems. While the mother's health necessitated that she live in an assisted living apartment and eventually move to a full-care nursing home, Mr. Hicks' wife still provided care to her mother, as third party caregivers could not adequately provide all necessary support (which included shopping, meal preparation, laundry, etc.). As a result, Mr. Hicks and his wife maintained dual residences after he was transferred to Ottawa.

At the time of his transfer, Mr. Hicks was offered relocation expenses via a formal offer letter, which read: "Relocation Expenses will be reimbursed at public expense according to the Treasury Board [1993] Relocation Directive." Under this Directive, Mr. Hicks made an expense claim for temporary dual residence assistance (TDRA). His claim was denied, however, because his mother-in-law did not reside with Mr. Hicks or his wife, and so was not considered a "dependent" under the Directive.

Mr. Hicks filed a complaint with the Canadian Human Rights Commission, alleging discrimination on the basis of family status and disability arising from his employer's denial of payment of the TDRA.

The Tribunal found that the Directive's definition of "dependent" created a distinction between persons that permanently resided with the employee and those that did not, and that that distinction was harmful to Mr. Hicks: it resulted in the denial of his TDRA claim, it made him feel as though his mother-in-law was not considered part of his family, and it created stress that resulted in physical health problems and a 40-day stress leave.

In considering whether this adverse distinction was based on Mr. Hicks' family status, the Tribunal drew the following conclusions:

- Although family status is not defined in the *Canadian Human Rights Act*, the jurisprudence recognizes this ground as protective of: the absolute status of being or not being in a family relationship, the relative status of who one's family members are, the particular circumstances or characteristics of one's family, and the duties and obligations that may arise within the family. The ground of family status could thus be considered as protective of eldercare responsibilities;
- In the instant case, characteristics of Mr. Hicks' family included his eldercare responsibilities toward his mother-in-law who, because of a permanent disability, could not live with him in the family home; and
- The denial of the TDRA benefit to Mr. Hicks was based on his above-noted family characteristics.

Therefore, the Tribunal concluded that there was a *prima facie* case of discrimination under the prohibited ground of family status, and that the employer had failed to meet its onus to establish a *bona fide* occupational requirement or that it had accommodated to the point of undue hardship. The Tribunal ordered damages in the amount of $15,000 for the pain and suffering experienced by Mr. Hicks as a result of the discriminatory practice, and $20,000 as a result of the employer's reckless discriminatory practice.

On judicial review, the Court upheld the Tribunal's decision and confirmed that eldercare is covered under the ground of family status as protected by the *Act*, stating as follows:

> The prohibited ground of discrimination of family status should encompass the eldercare obligation because whose non-fulfillment can attract not only civil responsibility (*Maintenance and Custody Act*), but also criminal responsibility if not exercised properly (*Peterson*). Eldercare obligation is entrenched in Canadian societal values. It demonstrates the adult children's responsibility to their elderly parents.

In light of a revised 2009 Directive that expanded the definition of "dependent" to include both a person "permanently residing with the employee" and "a person who resides outside the employee's residence and for whom the employee has formally declared a responsibility for assistance and/or support", the Court found the TDRA does intend to provide assistance to relocated employees irrespective of whether their dependant resides with them. Hence, it was reasonable for the Tribunal to conclude that the denial of the TDRA to Mr. Hicks constituted an under-inclusive benefit that justified a finding of discrimination.

Federal employers should thus note that the duty to accommodate under the *Act* now clearly encompasses eldercare accommodations. As in the present case, failure to accommodate will not be taken lightly by courts and tribunals, and may result in awards for damages. Therefore, when drafting benefits and accommodation policies, federal employers should be mindful of this decision and its interpretation of the ground of family status.

While this decision was made in accordance with federal human rights legislation, Ontario employers also have a well-established obligation to accommodate eldercare responsibilities. The decision in *Hicks* was in fact based in large part on the reasoning of the Human Rights Tribunal of Ontario in a 2012 eldercare accommodation case, *Devaney v. ZRV Holdings*.

New Penalties for Non-Compliance with Foreign Worker Programs

Does your organization make use of the Temporary Foreign Worker and/or International Mobility Programs? If so, you now have added incentive to ensure your business is compliant with all program rules and conditions: as of December 1st, 2015, new penalties for non-compliance will come into force.

Currently, the consequences of non-compliance by employers are generally limited to a two-year ban from using the programs, and the publication of the employer's name as a non-compliant employer.

However, as of December 1st, 2015, financial penalties will be introduced. Fines will range from $500 to $100,000 per infraction, depending upon the nature of the violation, the employer's compliance history, and the size of the business. A maximum of $1 million in fines may be imposed within a one year period. In addition, non-compliance could now warrant a ban from the programs for up to ten years, or even a permanent ban – a significant increase from the previous maximum two-year ban.

Employers who use these programs are thus encouraged by the federal government to review their compliance with the programs' conditions and to voluntarily disclose any unintentional non-compliance, as voluntary disclosure has the potential to reduce penalties.

Union Financial Disclosure Bill Becomes Law

If you have ever wondered how exactly the unions associated with your organization spend the dues they collect from your employees, you may soon have some answers.

Bill C-377, *An Act to amend the Income Tax Act (requirements for labour organizations)* was a private member's bill first introduced over two years ago. It has now received Royal Assent and has thus become law in Canada.

Unions currently receive beneficial tax treatment. Accordingly, Bill C-377 amends the *Income Tax Act* in order to require unions to publically disclose some of their internal financial information. Specifically, unions must disclose to the Canada Revenue Agency (CRA) any spending of more than $5,000, as well as which of their officers and employees earn more than $100,000 per year. The information provided will then be posted on CRA's website.

The goal of the Bill is to enhance the transparency and accountability of unions, both to their members and to the Canadian public in general.

Zero Tolerance for Marijuana in the Workplace Policy Upheld

In the recent decision of *French v. Selkin Lodging Ltd.*, the British Columbia Human Rights Tribunal upheld an employer's policy that prohibited marijuana use in the workplace, notwithstanding the *prima facie* case of discrimination established by an employee who used marijuana to treat his physical disability.

John French was a cancer survivor who was employed by Selkin Logging for approximately eight months. During that time, he suffered a recurrence. While Mr. French's doctors had condoned the use of marijuana for pain if Mr. French found that it worked, they had not prescribed it to him, nor had they endorsed its use while he was at work.

In accordance with its statutory duties under British Columbia's occupational health and safety legislation, Selkin had a policy regarding drugs in the workplace. The policy did not contain an absolute prohibition; rather, it prohibits the presence in the workplace of a person "while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else."

Accordingly, when it came to Selkin's attention that Mr. French had been smoking marijuana on the job, the employer sent him a letter stating that he would be terminated unless he agreed to work "drug free". When Mr. French refused to return to work on that basis, he was dismissed.

Before British Columbia's Human Rights Tribunal, Mr. French successfully proved a *prima facie* case of disability: the employee was disabled, he used marijuana to manage the pain resulting from his disability, and he was terminated expressly because of his marijuana use.

However, Selkin was able to demonstrate that its zero tolerance policy relating to persons being in the workplace while under the influence of drugs or alcohol was a *bona fide* occupational requirement (BFOR). The purpose of the policy was clearly and rationally connected to the safe operation of heavy equipment in the logging industry. Further, there was no evidence to suggest that the zero tolerance policy was adopted for any other reason than an honest and good faith belief that it was necessary to ensure a safe working environment.

The Tribunal did note that strict application of a zero tolerance rule, without consideration of accommodation, may offend the *Human Rights Code* in circumstances where an individual is legitimately using marijuana for medical purposes.

In terms of a duty to inquire, the Tribunal was also clear that employers do not have to inquire about the use of marijuana. Rather, it is incumbent upon the employee to have already secured the necessary legal and medical authorization to obtain and use marijuana for medical purposes, and to inform the employer that (s)he is legitimately using marijuana as medically and legally authorized.

In Mr. French's case, the Tribunal found that he was in fundamental breach of his obligations in the accommodation process, which jeopardized the employer's ability to supervise his work and ensure workplace safety in compliance with applicable health and safety legislation. Thus, his complaint was dismissed.

Although this decision comes from the British Columbia Human Rights Tribunal, it is instructive for employers all over Canada. Marijuana in the workplace is a new reality for many employers, and they must learn to navigate and balance both health and safety and human rights legislation. As stated by this Tribunal, when a zero tolerance policy is necessary for a safe working environment, it may be upheld, but not without careful consideration of accommodation for individual employees.

Termination of Disabled Employee due to Workplace Violence Not Discriminatory

In *Bellehumeur v. Windsor Factory Supply Ltd.*, the Court of Appeal of Ontario confirmed an employer's decision to terminate an employee with a mental disability following an instance of workplace violence.

The employer, Windsor Factory Supply, had been accommodating Mr. Bellehumeur for various disabilities he had reported over time, including alcoholism, thyroid and cardiac issues. When Mr. Bellehumeur made violent threats to other employees as he was leaving the workplace after having been disciplined, the employer terminated him for cause, on the basis that the threats constituted workplace violence. Following his termination, Mr. Bellehumeur alleged that his conduct was linked to a previously undisclosed mental disability.

Both the trial court and the Court of Appeal upheld the termination for cause. The trial judge found that Windsor Factory Supply was not aware of the employee's mental disability at the time of his termination. Accordingly, the disability played no part in the employer's decision to terminate. Since the termination was not arbitrary or based on preconceived ideas about the employee's disability, it was not discriminatory under Ontario's *Human Rights Code*. As the Court of Appeal stated:

"The respondent being unaware of the appellant's mental disability did not engage in discriminatory conduct under the Ontario *Human Rights Code* when it fired the appellant. They fired him as they would any employee who engaged in such workplace misconduct."

This decision serves as a reminder to employers that, while employees with disabilities must be accommodated to the point of undue hardship, disability is not always a factor in their workplace misconduct, and it does not necessarily absolve employees for their actions.