BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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In this Issue

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Bill 132 to Amend the *OHSA* and Strengthen its Protections against Harassment

Back in March 2015, the provincial government introduced "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment". One of the many commitments contained in the action plan was the introduction of legislation to strengthen Ontario's *Occupational Health and Safety Act (OHSA)*.

As a result, Bill 132, *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, received its first reading in October of 2015 and is currently being considered by the Standing Committee on Social Policy.

The Bill amends a number of Acts with respect to sexual violence. Specific to the *OHSA*, the Bill's objective is to strengthen the provisions regarding workplace harassment.

The amendments would provide a definition of sexual harassment (which is not currently contained in the *OHSA*), and clarify that sexual harassment is workplace harassment.

Interestingly, the Bill states that, "a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment." As such, the Bill attempts to codify an employer's right to manage the workplace by distinguishing reasonable management and direction of workers from harassment.

Bill 132 would also impose on employers an explicit requirement to create a program with respect to workplace harassment, including measures to protect workers, procedures for workers to confidentially report incidents, and procedures for such complaints to be investigated. The Bill goes one step further and places a positive obligation on employers, not just to have such procedures in place, but to actually investigate all incidents and complaints of workplace harassment in order to protect workers.

Bird Richard will keep you updated on Bill 132 and, should it come into effect, its interpretation by Ontario courts and tribunals. In the meantime, employers should be prepared

to review their workplace policies, programs and employee training regarding workplace harassment in order to ensure they reflect these new definitions and obligations.

Ontario Court of Appeal Upholds 26 months' Notice to Deemed Dependent Contractors

In our Summer 2015 Newsletter, we reported on an Ontario Superior Court of Justice decision whereby two dependent contractors, Mr. and Ms. Keenan, with respectively 32 and 25 years of service, were awarded 26 months' wages in lieu of reasonable notice of termination.

At issue at trial was whether the plaintiffs were dependent contractors or independent contractors of Canac.

On appeal, the Court upheld the trial judge's decision that they were dependent contracts and reasoned that:

- The Keenans were economically dependent on the company due to complete exclusivity or a high level of exclusivity.
- A determination of exclusivity must involve consideration of the full history of the relationship between the parties.
- While the Keenans did some work for another competitor in 2008 and 2009, the "substantial majority" of their work continued to be done for Canac.
- Given the Keenans' ages, length of service, and the character of the positions they held, the Court did not interfere with the award of 26 months' notice.

When determining whether a contractor is dependant or independent, the courts will weigh the exclusivity of the relationship between the parties. The more economically dependent the worker is on the company due to a high level of exclusivity, the more the courts will favour a dependant contractor relationship for the purposes of common law reasonable notice entitlements.

Contracting Out of the *WSIA* "Contrary to Public Policy", Court of Appeal Holds

The Ontario Court of Appeal has recently determined that employers classified as non-covered under Part X of the *Workplace Safety and Insurance Act (WSIA)* may not contract out of the provisions providing for their workers' right to sue them for workplace accidents.

The *WSIA* establishes a scheme that provides no-fault loss of earnings benefits to workers, and which completely displaces all common law rights of action that workers may have had against their employer, with one exception: employers under Part X of the *WSIA* can elect not to contribute to the insurance fund and are thus not liable to pay benefits. Instead, Part X of the *WSIA* provides workers with certain rights to actions for damages against their employer.

In *Fleming v. Massey*, Mr. Fleming was the race director for a go-kart club, a workplace classified as non-covered by the WSIB. He was injured after crashing a go-kart into the hay bales lining a corner of the track. Mr. Fleming brought an action for damages against the following defendants:

- Andrew Massey, who drove the go-kart that injured Mr. Fleming;
- Lombardy Raceway Park, the track where the accident occurred;
- Lombardy Karting, which co-organized the race event;
- the National Capital Kart Club, which co-organized the race event and arranged for Mr. Fleming to act as a race director; and
- the Lombardy Agricultural Society, which owns the property on which the track operated.

Mr. Fleming had previously signed a waiver releasing all of the Defendants in the action from liability for all damages associated with his participation in the event due to any cause, including negligence.

In hearing a motion for summary judgment in this case, the judge found that the race director:

- was not an employee but rather a volunteer who received a stipend;
- signed the waiver; and
- knew generally what signing the waiver would mean, and that the wording of the waiver was broad enough to cover all eventualities.

Mr. Fleming appealed, arguing that he was an employee of the National Capital Kart Club, and that the waiver was void because it violated public policy.

The Ontario Court of Appeal found that the motion judge had erred in finding that the race director was not an employee, and the National Capital Kart Club admitted that the race director was a paid employee on the day of the accident.

The Court of Appeal went on to find that Mr. Fleming was not an insured worker under the *WSIA*, and the National Capital Kart Club did not apply for coverage under the *WSIA*. As a result, both the employer and the employee fell under Part X of the *WSIA*, which states, *inter alia*, that workers are allowed to sue their employers for workplace accidents.

Reasoning that to allow individuals to contract out of the provisions of Part X of the *WSIA* would be contrary to the

public policy of ensuring that employees injured in workplace accidents receive compensation, the appellate court set aside the summary judgment and permitted the employee's action to go to trial.

For employers that are regulated under Part X of the WSIA, this decision sends a clear message that waivers aimed at contracting out of the worker's right to sue for negligence or otherwise in relation to a workplace accident may be considered null and void by Ontario courts.

Project Manager Sentenced to 3.5 Years in Deadly Swing Stage Collapse

In our Winter 2014 Newsletter, we reported on the four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm that had been laid against Metron Construction Corp., its owner, a supervisor, and a project manager.

The charges arose from an incident in which five workers employed by Metron fell more than 100 feet to the ground when the swing stage on which they were working suddenly collapsed. Four workers died after the fall and one was left seriously injured.

The project manager and site supervisor were aware that law and industry practice require that each worker wear a life line, but failed to enforce the regulation the day of the accident.

The project manager was with the workers at the time of the collapse and had taken no steps to ensure that one lifeline per worker was available, or that they were used. As a result, he was found guilty on all counts.

In January of this year, the Court rendered its decision on the appropriate sentence for the project manager. In the Court's opinion, the sentence that would be proportionate to the gravity of the offences and the project manager's degree of responsibility was a term of incarceration of 3.5 years on each of the five counts, to be served concurrently. In rendering this decision, the Court considered this sentence would satisfy the objectives of denunciation and deterrence.

As for the employer, it had pleaded guilty to a charge of criminal negligence causing death as a result of the acts and omissions of Fayzullo Fazilov, Metron's site supervisor. Mr. Fazilov had failed to take reasonable steps to prevent harm and death by directing and/or permitting six workers to work on the swing stage when he knew or should have known that it was unsafe to do. The employer was initially fined $200,000 for the criminal negligence of its supervisor but the Crown appealed the sentence to the Ontario Court of Appeal. The Court reasoned that "a sentence consisting of a fine of $200,000 fails to convey the need to deliver a message on the importance of worker safety," and sentenced the employer to pay a fine of $750,000.

For employers, this tragic workplace accident demonstrates the importance of training employees and managers on the OHSA and its regulations and, perhaps even more importantly, that a failure to provide this training and enforce the OHSA's requirements *can result in severe consequences for all involved - management, the employer and, most of all, the victim of the workplace accident.*

Employers Entitled to Dismiss Probationary Employees without Notice or Reasons

The Divisional Court of Ontario has recently confirmed that an employer may terminate a probationary employee during the probation period, provided it acts in good faith in determining the employee's suitability and ability to fulfill the requirements of the job.

In *Nagribianko v. Select Wine Merchants Ltd*., the employee had entered into an employment agreement with the employer that provided for a probationary period of six months. The employer terminated the employee's employment within the six month probation period because it had concluded that the employee was "unsuitable for regular employment." Shortly thereafter, the employee commenced an action against the employer seeking damages for wrongful dismissal.

The evidence at trial was that the employer's employee handbook – which was incorporated by reference into the employment contract, provided that the employer could terminate an employee's employment during the probationary period upon providing written notice or payment in lieu under the *Employment Standards Act, 2000* (*ESA*).

The trial judge accepted the employee's argument that, at the time the employment agreement was signed, he did not receive a copy of the employer's employee handbook. Further, the judge held that that the meaning of probation was not clear on the face of the contract and relied on the employee's subjective understanding of the term probation. In determining damages in lieu of notice, the judge found that the employer had induced the employee to come work for the employer. The employee was ultimately awarded damages based on a notice period of four months.

On appeal by the employer, the Divisional Court held that the trial judge had erred in law in failing to recognize that the employment of a probationary employee is different in nature from that of a non-probationary employee. Rather, when interpreting a contract, the Court held that:

> "[…] the question the Court should ask is what reasonable persons in the same circumstances as the parties would have understood the contract to mean. The subjective intent of the parties is irrelevant."

A reasonable person in the same circumstances as the employee, the Court stated, would have understood the term "probation" to mean a period of tentative employment during which the employer may determine the employee's suitability. In this case, the employee's subjective belief was that the employer would find him to be a suitable employee but, as the Court noted, "[…] a reasonable person in those circumstances would also have understood that that might not happen."

The Court held that the standard for dismissal from probationary employment is suitability, which includes considerations of the employee's character, ability to work with others, and ability to meet the employer's present and future standards.

The Court held that, where the employment of a probationary employee has been terminated for unsuitability, the employer's judgment and discretion in the matter cannot be questioned. All that is required is that the employer show that it acted fairly in determining the probationary employee was suitable and that he/she was given a fair opportunity to demonstrate his/her ability.

In the absence of bad faith, an employer is entitled to dismiss a probationary employee without notice and without giving reasons, provided they have an *ESA*-compliant termination clause and the employee's probation period is three months or less. Where the probationary period is longer than three months, notice of termination must be provided, but will still be very limited where an *ESA*-compliant termination provision is in place.

Also worth noting is the fact that the Court held that the trial judge erred in law in failing to enforce the clear terms of the contact, which made reference to a probation period of six months. It was not necessary for the employee to refer to the employee handbook to know that his employment was subject to a six month probationary period.

Finally, regarding the allegation of inducement, the Court held that, "[…] probationary employment, on its face and by its nature, is inconsistent with any inducement or promise of long-term employment."

A key takeaway from this case is that an employer may terminate employment in good faith during the probationary period, provided its ability to do so is expressly worded in an employment contract signed by the employee, and the employer has provided a fair opportunity for the employee to demonstrate his/her suitability and ability to do the job. Moreover, the case suggests a probationary period may assist employers in defending against claims for inducement.

As with non-probationary employment terminations, in order to limit their notice pay obligations to the statutory minimums, employers must ensure they have in place enforceable employment contracts which include an ESA-compliant termination provision.

Supreme Court Confirms Termination of Disabled Employee due to Workplace Violence Not Discriminatory

In our Fall 2015 Newsletter, we reported that the Ontario Court of Appeal had upheld an employer's decision to terminate an employee with a mental disability following an instance of workplace violence. The Supreme Court of Canada has recently dismissed the employee's application for leave to appeal.

In *Bellehumeur v. Windsor Factory Supply Ltd.*, the employer had been accommodating Mr. Bellehumeur for various disabilities he had reported over time, including alcoholism, and thyroid and cardiac issues. When the employee 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, the employee 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 and, 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.

As this decision demonstrates, the existence of a disability is not always a factor in workplace misconduct, and it does not necessarily absolve employees for their actions. Since this decision has now been upheld by Canada's highest court, it sets a strong precedent in support of termination for cause when the employer has not been made aware of (and ought not to have otherwise been aware) of a disability-related reason for a serious incident of workplace misconduct.