

EMPLAWYERS' UPDATE

A Quarterly Newsletter on Labour and
Employment Law Issues

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Dishonesty was Clear Ground for Dismissal

In *Aboagye v Atomic Energy*, the Court of Appeal for Ontario upheld a Superior Court of Justice decision which confirmed that the employee's dishonest conduct justified his termination.

Mr. Aboagye was hired by AECL as an Industrial Safety Specialist. He was terminated after just over six months' service for a number of reasons, including that AECL had discovered that he had been dishonest in answering questions on a security questionnaire. The employee sued for wrongful dismissal and sought damages of about \$4 million. This matter proceeded by summary judgment motion rather than a lengthy trial.

At the time he filled the security questionnaire, the employee was employed at Ivaco Rolling Mills. The employee failed to disclose this fact about his employment history. The employee also indicated by email that he was unemployed. Later on, AECL learned that that the employee further lied about his whereabouts when the employer was trying to reach him to extend an offer of employment. At the time, the employee said he was in Africa attending his father's funeral, which was untrue.

Further, the employee admittedly chose to withhold the information about his current employment, despite the warnings on the security questionnaire. When he was specifically asked about whether he was "presently" "working", he outright lied: "I am currently unemployed".

The trial judge held that his employment was properly terminated for cause. Standing on its own, his dishonesty in the hiring process destroyed the trust relationship between employer and employee. The judge's reasons shed light on what type of dishonesty may constitute cause for dismissal. While dishonesty will not necessarily give rise to cause for dismissal, dishonesty that goes to the "core of the employment relationship" carries the potential for dismissal. For instance, if the dishonesty violates an essential condition of

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the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer. Further, the trial judge observed that AECL's employees have access to nuclear facilities and information vital to the security of the country. The security clearances were designed to protect national security.

This decision was upheld by the Court of Appeal which reiterated that the breach of honesty in this case went to the core of the employment relationship.

For employers in highly regulated environments, this decision provides insight into what degree of dishonesty will be sufficient to uphold a termination for cause. This case could also be relied upon by employers who wish to defend termination for cause cases at a lower cost, and in less time, through the summary judgment process.

Design of Public Space Standard Coming into Force on January 1, 2018 for Small Employers

On January 1, 2018, the design of public space standards under the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA") comes into force for private organizations with one to 49 employees (small organizations). As previously reported, for private organizations with 50 employees or more, these requirements came into effect on January 1, 2017.

Small organizations who are constructing or redeveloping public spaces on or after January 1, 2018, must meet a number of design requirements for the following structures and areas:

- Recreational trails
- Beach access routes
- Boardwalks
- Ramps
- Outdoor public use eating areas
- Outdoor play spaces
- Exterior paths of travel
- Accessible parking spaces
- Access aisles
- Signage
- Service counters
- Waiting areas

However, if your organization has entered into a contract to construct or redevelop any public space on or before December 31, 2012, you are not required to meet the design standards of the AODA in honouring the existing construction or redevelopment contract.



Ontario to Introduce New Bill in Preparation for Upcoming Legalization of Cannabis

As you may already know, if it is approved by Parliament, the *Cannabis Act* (or Bill C-45) could become law with a target date of no later than July 2018, legalizing recreational cannabis across Canada. This fall, the provincial government of Ontario plans to introduce a new bill in preparation for Bill C-45.

The upcoming provincial bill will regulate the use of cannabis to, among other things:

- make it illegal for people under the age of 19 to buy, sell, have, share and grow cannabis.
- propose that the Liquor Control Board of Ontario (LCBO) oversee the sale and distribution of recreational cannabis.
- propose regulations restricting use: individuals would only be permitted to use recreational cannabis in a private residence, would not be allowed to use cannabis in public, workplaces and motorized vehicles.
- implement new measures to address drug-impaired driving.
- develop an integrated prevention and harm reduction strategy to address and prevent substance abuse for young people.
- launch a public information campaign to raise awareness about Bill C-45.

Bird Richard will keep you informed of the introduction of the new provincial bill and how it may affect your workplace.



Right to Service Animal is not Absolute

Employers are often faced with questions regarding the scope of their duty to accommodate persons with disabilities; either in the context of employing individuals or providing services.

Recently, the Human Rights Tribunal of Ontario released its decision in *J.F. v. Waterloo Catholic District School Board*, 2017 HRTO 1121. In that decision, a pupil's parent ("CF") alleged that the School Board had failed in its duty to accommodate his autistic son when it refused him permission to attend class with his autism assistance guide dog ("guide dog").

In September 2014, JF was enrolled in grade two and his father requested that he be allowed to be accompanied by his guide dog while at school. His father explained to the school that his child had been running away from the house and bolting during outings. According to the family's research, the guide dog would assist in remedying JF's bolting behaviour, help him regulate his mood, calm him, and help him sit still. The Board considered the request, but ultimately denied it, finding that it had suitable accommodations in place for JF. In short, the guide dog was not necessary for his success at school. The father filed a human rights application on behalf of JF.

Firstly, the parent asserted that by virtue of the *Accessibility for Ontarians with Disabilities Act*, the school was a public

place and as such, JF was allowed to attend it with his guide dog. The Tribunal rejected this assertion in finding that the school was not open to the public. Secondly, his father claimed that the Board had violated the Ontario *Human Rights Code* because JF had a disability, the dog had been recommended as an accommodation measure, and the dog was a qualified service animal.

The Tribunal dismissed JF's application in finding that although it had denied JF the right to bring his guide dog to class, it had met its obligations to accommodate him. Cognizant of JF's learning needs, the Board had already implemented supports and strategies to accommodate his disability related needs. The Tribunal also found that these measures were inclusive and dignified insofar as his classmates also used the learning tools. This way, JF would not be singled out because of his disability. In short, the Board did not violate the *Human Rights Code*.

Respondents, be they employers or service providers, need not take accommodation requests at face value. This case underscores the fact that accommodation is not a matter of providing a specific type of accommodation requested. In order to meet their duty to accommodate, respondents must undertake inquiries and assess the appropriate form of accommodation (commonly known as the procedural component). Thereafter, suitable measures must be implemented (substantive component). If a respondent has satisfied both components, a violation of the Code will not be found.

Small Business Satisfied Duty of Accommodation

Thunder Bay Orthopaedic ("TBO") employed fewer than 10 employees, including two to three orthotic technicians. Darren Nason began his employment with TBO on May 10, 1993 as an orthotic technician. The employee developed carpal tunnel syndrome and by June 2010, he required accommodation. The co-owner testified that upon learning of the employee's condition, he and his co-owner sat down with him to discuss his limitations and to provide him with accommodation, which included:

- Allowing the employee to work at a slower pace that was compatible with his condition, which resulted in less productivity;
- Providing the employee with frequent rest breaks, taken as and when he deemed them to be necessary;
- Removing the significant duty of "cast modifications" from the scope of the employee's duties, given the physical demands of the task;

- Permitting the employee to take time off work for physiotherapy and medical appointments during working hours. The employer estimated that the employee took 18 periods of time off work (1.25 to 1.5 hours each time) out of 24 working days between June 10, 2010 and August 18, 2010; and
- The co-owners working additional hours on the evenings and weekends to cover the employee's reduced productivity.

The employer decided that it could no longer accommodate the employee and on August 18, 2010, it placed the employee on a medical leave of absence, which permitted the employee to collect WSIB benefits. After several years, the employer terminated the employee from his employment. The employee sued for wrongful dismissal and damages under the *Human Rights Code* alleging that the employer failed to properly accommodate his disability.

At the trial, the Ontario Superior Court of Justice concluded that he was wrongfully dismissed and awarded 15 months of pay in lieu of notice, less WSIB benefits received, along with \$10,000 in damages for a breach of the *Human Rights Code*. However, the Court also found that the employer had acted properly when it placed him on a medical leave of absence and that the employer attempted to accommodate

the employee's disability by altering the employee's hours of work and duties. Despite implementing these measures, the employee's condition worsened and his productivity dropped. The Court was clear the law did not require the two owners of this specialized, small business to continue working extra hours each week to cover for an employee who could not perform essential duties of his position.

The employee appealed the decision to the Ontario Court of Appeal seeking more damages and challenged the conclusion that the employer had met its duty of accommodation. The Ontario Court of Appeal rejected the employee's appeal and affirmed the decision of the Trial Court that the employer had met its duty of accommodation.

There are some valuable lessons that employers can glean from this decision. In particular, the Court affirmed the principle that when exploring accommodation measures for an employee, the employer is not expected to create a new position for an employee, nor are fundamental changes to the employee's job scope or working conditions required as part of the duty of accommodation. This is especially true of a small business, which was an important factor in the Court's analysis of undue hardship. Rather, undue hardship arises when an employee cannot fulfill the basic obligations of his or her employment, despite reasonable accommodations.



Bird Richard Welcomes New Partner

Bird Richard is pleased to welcome our newest Partner, Russell MacCrimmon who joined the Firm on September 5, 2017.

Since his call the Bar in 2002, Russell has provided legal advice and representation to employers. Russell advises employers on the day-to-day legal issues that impact a workplace. He represents employers on workplace issues such as discipline, performance management, employment contracts, workplace policies and severance packages.

Russell has extensive litigation experience and defends employers against wrongful dismissal and human rights claims. Russell has appeared before federal and provincial courts and administrative tribunals including the Ontario Superior Court, Ontario Court of Appeal, Ontario Human Rights Tribunal, Ontario Labour Relations Board, the Federal Court of Canada, the Canadian Human Rights Tribunal and the Public Service Labour Relations and Employment Board.