BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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In this Issue

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Zero Tolerance Policy – Tribunal Rules in Favour of Employer in Medical Marijuana Case

In *Aitchison v. L&L Painting and Decorating Ltd.*, the Ontario Human Right's Tribunal has provided guidance to employers regarding the use of zero tolerance policies concerning drug use in the workplace and medically prescribed marijuana.

The employer was a commercial subcontractor involved in the restoration of high-rise buildings. The employee had been employed as a painter for four seasons, before he was terminated from his employment for smoking marijuana at work in contravention of a zero tolerance policy. The employee filed a human rights complaint with the Human Rights Tribunal of Ontario alleging discrimination on the basis that he suffered from a disability and that he was using medically prescribed marijuana at the time of his termination. The employee suffered from a degenerative disc disease which caused chronic pain in both his back and neck. As a result, he received a prescription for medical marijuana in March 2015. In June 2015, the employee was caught smoking marijuana while he working on a swing stage suspended on the exterior of the building, 37 stories above the ground.

The employee admitted that he was smoking marijuana at work. When confronted by the employer before the termination, the employee stated that it was his right to smoke medical marijuana at work because he had a prescription. The Tribunal rejected the employee's claims that he had been discriminated against. Ultimately, the employee was terminated because of the health and safety risk that he created when he intentionally disregarded a zero tolerance policy. The Tribunal held that the termination had nothing to do with his disability and that the termination was not discriminatory.

An interesting aspect of the case is the testimony provided by the doctor who prescribed the marijuana. The doctor testified that he had a standard conversation with the employee that he was not to operate heavy machinery or be involved in

any activity that required quick reaction time while he was consuming the marijuana. The evidence revealed that there was no discussion between the doctor and employee about whether the marijuana could be used at work or about the true nature of the work that the employee was engaged in (namely, working in a dangerous position 37 stories above the ground on the exterior of a building). The doctor admitted that he assumed that by "painter" the employee was an interior house painter. When confronted on cross-examination about the employee's work, the doctor admitted that he would never have authorized the applicant to medicate while at work in those circumstances.

Employers should scrutinize prescriptions that are provided by employees for medical marijuana. Reasonable inquiries about the scope and impact of marijuana use on the employee's ability to perform their duties in a safe manner may be necessary. A prescription for medical marijuana does not provide an employee with an absolute right to use marijuana in the workplace, especially if health and safety is compromised.

Bill 148 Legislative Update: Equal pay for Equal work Provisions come into Force

As a result of Bill 148, on April 1, 2018, new equal pay for equal work provisions came into force under the *Employment Standards Act, 2000.*

The new provisions are aimed at equalizing pay between workers performing substantially the same type of work under similar working conditions, irrespective of their status as part-time, full-time, temporary, permanent, seasonal or casual. Exceptions are available for employers to pay different rates if the difference is based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production or any other factor other than sex or employment status.

The new provisions provide employees with the statutory right to request a review of their rate of pay if he or she believes that these new equal pay provisions are not being followed. In response, an employer must adjust the employee's rate of pay accordingly or provide the employee with a written response setting out the reasons for the disparity. An employer is not entitled to reprise an employee for making a request pursuant to this provision or reduce an employee's rate of pay in order to comply with these provisions.

As many of our readers are aware, Bill 148 brought about many new requirements that came into force on January 1, 2018. Equal pay for equal work came into force on April 1, 2018, and more amendments will come into force on January 1, 2019. Employers may wish to review their policies closely to ensure compliance with these new obligations.

Update on Random Drug Testing – the Suncor saga Continues

As we first reported in the Summer 2014 edition of EMPLawyers' Update, in 2012, Suncor announced a new policy that would include random drug and alcohol testing in safety-sensitive positions. The Union obtained an interim injunction preventing random testing until an arbitration board rendered a decision on its grievance against such a policy. The arbitration has been ongoing ever since. The parties are awaiting the Supreme Court's decision on whether it will grant leave to hear the Union's appeal of an Alberta Court of Appeal decision which upheld a judicial review application setting aside an arbitration award which had held the drug policy invalid, and remitted the matter for a new arbitration before a fresh panel.

When Suncor refused to extend a standstill agreement, the Union applied for a declaration that the 2012 Injunction remain in effect or, alternatively, for a new interim injunction prohibiting implementation until completion of a new arbitration. The Chambers Judge granted an interlocutory injunction, and Suncor appealed.

In a 2:1 decision, the Alberta Court of Appeal denied Suncor's appeal, and the injunction remains in place. The dissenting Justice was of the opinion that the lower court decision to grant an injunction was in error, as the Chambers Judge had not fully examined the record, and that his conclusions about irreparable harm and the balance of convenience were outside the range of any reasonable conclusion.

In obiter, the dissenting Justice made interesting comments with respect to the power of an arbitrator to issue an injunction. While acknowledging the power of the courts to intervene, Justice Slatter stated:

> "There is no reason in principle to think that an arbitration board is unable to grant interim relief when it has jurisdiction over the substantive issue. The modern trend, particularly in the labour context, is for superior courts to exercise restraint when invited to become involved in arbitrations. The intervention of the superior court in this matter appears to have caused unnecessary delay. There was no urgency or other extenuating circumstance preventing recourse to the arbitration board for the requested interim relief."

Legislative Update: WSIB Claims for Chronic Mental Stress

On December 14th, 2017, Bill 177, *Stronger, Fairer Ontario Act, (Budget Measures) 2017*, received Royal Assent. As a result, significant amendments came into force on January 1, 2018 surrounding WSIB claims for mental stress under the *Workplace Safety and Insurance Act* ("*WSIA*").

Prior to the implementation of these amendments, entitlement to mental stress claims was limited to cases where there was an "*acute reaction to a sudden and unexpected event*". The Workplace Safety and Insurance Tribunal ruled that the limitation on claims for mental stress was unconstitutional. As a result, workers will be entitled to WSIB benefits if chronic or traumatic mental stress arises out of and in the course of the worker's employment. The amendments significantly lower the threshold for entitlement to benefits arising from mental stress in the workplace. In addition to the lower threshold, transitional rules have been implemented to ensure that existing claims for mental stress will be adjudicated based upon the new provisions and new policy concerning chronic mental stress in the workplace. Lastly, workers will be entitled to make claims for mental stress that arose between April 29, 2014 and January 1, 2018, and will have until July 1, 2018 to file a claim.

To be eligible for WSIB benefits, chronic mental stress must be predominantly caused by a substantial work-related stressor or series of stressors, beyond normal workplace management decisions. Three criteria must be satisfied in order to be eligible for benefits: (1) a medical diagnosis from a regulated health professional; (2) the person has experienced a substantial work-related stressor (this can comprise of a cumulative series of work-related stressors), including workplace bullying or harassment; and (3) the substantial work-related stressor was the predominant cause of the diagnosed mental stress injury. The policy is clear, however, a worker is not entitled to benefits if the mental stress is caused by decisions or actions of the worker's employer relating to the worker's employment, such as changes to working conditions, discipline or termination of employment. Notably, the policy provides that interpersonal conflicts between workers and supervisors are features of normal employment, and will not generally be considered to be a substantial work-related stressor.

These changes are significant for employers. The impact is two-fold: (1) as a result of the transition rules, claims dating back to April 2014 may emerge during the fresh six-month window that has been created, along with the lowering the threshold for such claims; (2) employers may now face increased costs of dealing with claims for chronic mental stress. While the Policy limits entitlement to "substantial" workplace stressors, concepts such as harassment and bullying are often confused with legitimate management actions in the workplace.

Ontario Employment Termination Clause Update

The Ontario Court of Appeal has recently ruled once again, on the validity of a termination clause contained in an employment contract in *Nemeth v. Hatch* Ltd., [2018] O.J. No. 145. In this case, the termination clause read:

> The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

The employee argued, in part, that the termination clause did not explicitly exclude the common law and therefore, the employer had an obligation to provide reasonable notice instead of the minimum statutory requirements under the *Employment Standards Act, 2000* ("ESA"). The employee also argued that because the clause did not reference "severance pay" or the continuation of benefits during the statutory notice period as required by the ESA, it was an attempt to contract out of the ESA and therefore unenforceable.

The Court disagreed with the employee and held that the clause clearly established that the parties intended and agreed to limit the employee's entitlement to common law notice. The Court recognized that there was no particular phrase or specific words that were necessary. Rather, the Court stated that it was sufficient that the parties' intention to displace the common law notice entitlements can be "*readily gleaned from the language agreed to by the parties.*" Assessing the sufficiency of the termination clause, the Court determined that it was not necessary to have an explicit stipulation in the termination clause displacing the common law as long as the employment contract specifies for some period of notice. The Court also stated that while the wording of the clause attempted to limit the notice period for the employee, it did not specifically exclude the entitlements for severance and benefits under the ESA and was, therefore valid.

Termination clauses in employment contracts are extremely important and are vital to protect employers at the time of termination. Employers need to ensure that these clauses comply with the minimum standards under the ESA and clearly set out what the employee is entitled to in the event of a termination. In our view, this case restores a measure of common sense to the jurisprudence surrounding the enforceability and legitimacy of termination clauses.

Couvrette/Ottawa

Bird Richard Welcomes New Associate

Bird Richard is pleased to welcome our newest Associate, Travis Ujjainwalla, who joined the Firm in January of this year.

Travis was called to the Bar in 2017. Travis provides advice to employers on statutory obligations, wrongful dismissals, and human rights claims.

Travis is a member of the Law Society of Upper Canada and the County of Carleton Law Association. In his spare time, he is a board member for a local charity.