BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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PIPEDA Mandatory Notification for Federally Regulated Organizations

Particular sections of the *Digital Privacy Act* that amend the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") will come into force on November 1st, 2018. Organizations which are subject to *PIPEDA* will be required to report to the Federal Privacy Commissioner where any breach of a security safeguard arises involving personal information. The amendments under division 1.1 require that a report to the Privacy Commissioner be done where there is a **"real risk of significant harm to an individual"**.

In order to determine whether there is a "real risk of significant harm" the legislature has provided three guiding factors:

- the sensitivity of the personal information involved in the breach;
- the probability that the personal information has been, is being or will be misused; and
- any other prescribed factor.

Significant harm is defined in the legislation as including, bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property.

In addition to reporting to the Privacy Commissioner, if an organization determines that a "real risk of significant harm" exists due to a breach, the organization will also be required to notify the individual who has had their information compromised. The notification from the organization to the individual will require that sufficient information be provided to allow the individual to understand the significance of the breach and to provide them, where possible, with steps to reduce the risk.

In addition to the above, the notification to the affected individual requires the following:

- a description of the circumstances of the breach;
- the day on which, or period during which, the breach occurred;
- a description of the personal information that is the subject of the breach;
- a description of the steps that the organization has taken to reduce the risk of harm to the affected individual resulting from the breach or to mitigate that harm;
- a description of the steps that the affected individual could take to reduce the risk of harm resulting from the breach or to mitigate that harm;
- a toll-free number or email address that the affected individual can use to obtain further information about the breach; and
- information about the organization's internal complaint process and about the affected individual's right, under the Act, to file a complaint with the Commissioner.

An interesting part of the legislation is that it does not necessarily prescribe a specific time requirement for notice to be provided. Instead, the timing requirement says "as soon as feasible after the organization determines that the breach has occurred". This necessarily opens the door for a variety of court interpretations for timing of notification required. The word feasible is defined as, *to do easily or conveniently*. As a result, an organization could argue that a significant delay was caused because of a lack of resources, for example. As the legislation is new, until a court interpretation is given, organizations should err on the side of caution to provide information as soon as possible in the circumstances.

There is also a requirement under the legislation that the organization subject to the breach, notify any other organization or government institution if they believe that notification would help reduce the risk of harm or mitigate that harm.

The amendments will also require that an organization maintain a record of every breach that occurs. The record will be required to be kept for a period of 24 months after the day on which the organization determines the breach has occurred.

Organizations need to understand that failure to follow the legislation can potentially be very costly and fines can be up to $100,000.00. The new penalty sections will penalize organizations who do not follow reporting requirements under subsections 8(8), section 10.1 or subsections 10.3(1) and 27.1(1).

We will keep you up to date of any further case law that occurs and interpretation of the legislation.

Termination Clauses must be read as a Whole to Determine Intention of the Parties

In *Amberber v. IBM Canada Ltd.,* 2018 ONCA 571, released June 22, 2018, the Ontario Court of Appeal ("OCA") has released another decision regarding the interpretation of a termination clause in an employment contract. The decision is good news for employers.

As most of our readers are aware, a termination clause contained in an employment contract must be clear, unambiguous and at a minimum, provide for the employee's minimum statutory entitlements as provided by the applicable employment standards legislation. In this case, the termination clause considered by the court provided:

> "If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current base salary or (b) one week of your current annual base salary, for each completed six (6) months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. **This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separate payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation.** In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment."

The employee contended that the clause was ambiguous and that it failed to adequately displace the employee's entitlement to common law reasonable notice. The motion judge agreed with the employee and determined that the clause was ambiguous. In doing so, she interpreted the clause as three separate parts: the options section, the inclusive payment section (bolded above), and the failsafe section. She ruled that because of the final portion, the "failsafe provision", did not expressly reference or displace the common law entitlement, it was ambiguous and therefore, it did not rebut employee's entitlement to common law reasonable notice.

The employer appealed the decision. The OCA overturned the motion judge's decision. The OCA said that the fundamental error made by the motion judge is that she subdivided the clause into what she regarded as three separate parts and interpreted them individually rather than as a whole. The motions judge failed to consider the entire termination clause as a whole. When read as a whole, there was no ambiguity as to the clause's meaning. A clear formula was established by the employer, which included all minimum statutory entitlements. The OCA reaffirmed that principle that the court should not strain to create ambiguity where none exists. In this case, the motion judge strained to find ambiguity where none existed. The clause was enforceable and displaced the employee's entitlement to common law reasonable notice. The onus remains with employers to draft clearly defined termination clauses without ambiguity.

Employee Benefits in Ontario – Termination of Benefits of Employees 65 Years and Older

In *Talos v. Grand Erie District School Board*, 2018 HRTO 680, which was released on May 18, 2018, the Ontario Human Rights Tribunal considered the impact of benefit plans that terminate at age 65.

The employee was a teacher who received health care benefits and life insurance throughout his career until he turned 65 years of age. Under the School Board's plan, an employee who reached the age of 65 was no longer entitled to benefits. The *Employment Standards Act, 2000* (the "ESA") permits differentiation in employee benefit plans for employees over the age of 65. The *Ontario Human Rights Code* (the "*Code*") section 25(2.1) permitted differential treatment with respect to employee benefits or pensions that comply with the *ESA*. The combination of these provisions meant that employers are permitted to provide benefit plans that exclude persons over 65. The teacher filed a claim alleging that the employer's benefit plan was discriminatory.

The Tribunal determined that the statutory provisions under the *Code* and *ESA* permitted the exclusion of benefits for persons over the age of 65. However, the Tribunal goes on to find that the exclusion of benefits was in violation of the *Charter of Rights of Freedoms* (the "*Charter*"), and in particular, the right to equal treatment under the law as protected by section 15 of the *Charter.* In Canada, all statutory provisions must comply with the *Charter.* The law created a distinction between workers under the age of 65 who are members of the workplace and those who are 65 or older and do the same work. It also created a disadvantage as it deprived these same individuals of their benefits, and resulted in those individuals having loss of peace of mind, financial outlays, and being subjected to needs-tested processes in order to receive government support.

Despite the *Charter* breach, the provisions could still be saved under section 1 of the *Charter* if the limits were reasonable and justified. In this case, the Tribunal determined that there were less drastic measures other than the complete denial of benefits to those over the age of 65 that could accomplish the goals of the legislation which was stated to be flexible to employees and employers in these circumstances to negotiate different terms and conditions of employment. As such, the provision could not be saved by section 1 of the *Charter*.

As a result, the provision is unconstitutional and cannot be relied on by employers to defend the termination of benefits to employees who reach the age of 65. Employers should review their existing benefits plans to determine whether benefits plans provide for the termination of benefits at age 65.

We will keep you updated on any further developments surrounding this particular issue.

The Duty of Good Faith when Dealing with Independent Contractors on Fixed Term Contracts

In a recent case from the Ontario Court of Appeal, *Mohamed v. Information Systems Architects Inc.,* an independent contractor was awarded damages for the full term of his contract (six months). This was the case even though the consulting agreement contained a termination provision indicating that the contractor could be terminated at any time at the discretion of the company.

In this case, Information Systems Architects ("ISA") hired the Plaintiff as an independent contractor under an Independent Consulting Agreement for a six-month project working on a project with Canadian Tire. One of the requirements of the position was that a criminal record check be performed. At the initial stages and before he was assigned, the Plaintiff disclosed to ISA that he had a criminal record. ISA placed him at Canadian Tire. After about a month of work, Canadian Tire discovered this fact and asked that he be replaced. As a result, ISA terminated the consulting agreement relying on paragraph 3 of the termination clause in the consulting agreement, which provided:

> This Agreement and its Term shall terminate upon the earlier occurrence of:
>
> 1. ISA, at their sole discretion, determines the Consultant's work quality to be sub-standard.
> 2. ISA's project with Customer gets cancelled; experiences reduced or altered scope and/or timeline.
> 3. ISA determines that it is in ISA's best interest to replace the Consultant for any reason.
> 4. Immediately, upon written notice from ISA, for any breach of this Agreement by the Consultant.

The Plaintiff sued ISA for the full amount of the contract. In finding in favour of the employee, the motion judge ruled that ISA breached the duty of good faith required in the performance of contracts. The Court of Appeal determined that while ISA had an express right to terminate the contract "*for any reason*"; it had an obligation to perform the contract in good faith. ISA breached its obligation of good faith by using paragraph three (3) of the termination clause on the basis of his criminal record which had been fully disclosed by the Plaintiff. ISA did not make any attempt to get Canadian Tire's agreement for the Plaintiff to continue working on the project and did not offer him any other consulting work. As a result, the Court of Appeal awarded the Plaintiff the full amount outstanding under the fixed term contract.

This case affirms that independent contractor agreements will be subject to the duty of good faith that was recognized by the Supreme Court of Canada in *Bhasin v. Hrynew* in 2014 as a general organizing principle applicable to commercial contracts. Despite the contractual language which provided ISA with an unfettered right to terminate the agreement for any reason, it had an obligation to terminate the contract only in good faith. Organizations who hire independent contractors on fixed term contracts should be careful when ending independent contractor relationships before the end of the fixed term in the absence of good faith reasons for the termination, and clear contractual language supporting that decision. The case does not limit an organization's right to have early termination provisions in independent contractor agreements, but it does require that those provisions be relied upon and exercised in good faith.