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LAWYERS FOR EMPLOYERS

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Sexual Harassment in the Workplace and Employment Releases in Ontario

A recent case from the Ontario Superior Court of Justice, *Watson v. Governing Council of the Salvation Army of Canada,* will significantly alter the way settlements and releases ought to be structured involving employees who have experienced sexual harassment in the workplace.

The employee worked for the Salvation Army as a manager from April 2011 to August 2011. In exchange for a severance payment in the amount of $10,000, she signed a Memorandum of Settlement and Release, which provided for the full and final settlement of **all claims arising out of her employment**. The agreement also included a typical clause whereby the employee agreed to *"…release any and all claims I have or may have against The Salvation Army, past, present or future, known or unknown, which arise out of or which are in any way related to or connected with my employment or the ending of my employment."* It also provided that a release of any claims against anyone or any organization in any way connected with the employer which arose out of or in any way were related to her employment or the ending of her employment. Finally, the agreement confirmed that the employee had the opportunity to obtain legal advice and that she fully understood the agreement.

Several years later, in 2015, Ms. Watson made a complaint of sexual harassment during her employment against her supervisor at the time. Other employees had also complained. The matter was investigated by a third party and ultimately, the employer terminated the employment of the supervisor. Despite the Memorandum of Settlement and Release, and receipt of a $10,000 payment from the employer, the employee elected to commence a claim on August 16, 2016 seeking damages for negligence, intentional infliction of emotional harm and breach of fiduciary duty from the employer.

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The employer brought a motion to have the matter dismissed on the basis of the Memorandum of Settlement and Release. After reviewing the release, Gordon J. determined that the release did not include a claim for sexual harassment, regardless of the phrase "*which arise out of or which are in any way connected to my employment*". Sexual harassment, intimidation and other improper conduct were not connected to employment, according the Court. The Court concluded that the settlement pertained to severance only, and that specific language addressing sexual harassment was necessary in the Release to properly bar the employee's claims.

The decision raises concerns about the finality and certainty of settlement payments made by employers in exchange for a full and final release. While it will not be onerous for employers to add specific reference to "sexual harassment" into its releases, it is concerning that the Court appears to have ignored the principles of finality and certainty. There does not appear to be any allegation in this case that the employee was forced to accept the settlement payment or that she did not understand the nature of the settlement. To the contrary, it confirms that she had the opportunity to seek legal advice about it and that she understood its terms. However, in light of this decision, employers should take care to address issues of sexual harassment specifically in releases to ensure that certainty and finality is achieved by settlements that are reached with former employees.

Non-Solicitation Clauses – Update for Employers

In the recent decision of the Ontario Court of Appeal, *MD Physician Services Inc. v. Wisniewski,* the Court upheld the decision of the lower court on the enforceability of the non-solicitation clause.

The case involved two employees who were hired by MD Management Ltd. ("MDM"), a wholly owned subsidiary of MD Physician Services Inc., to provide financial services to their clients, who are primarily physicians. They each signed employment contracts including a non-solicitation clause, which provided as follows:

> **Non-Solicitation.** The Employee agrees that the Employee shall not solicit during the Employee›s employment with the Employer and for the period ending two (2) years after the termination of his/her employment, regardless of how that termination

should occur, within the geographic area within which s/he provided services to the Employer.

"Solicit" means: to solicit, or attempt to solicit, the business of any client, or prospective client, of the Employer who was serviced or solicited by the Employee during his/her employment with the Employee.

The employees left the employer and immediately commenced employment with a competitor firm, RBC Dominion Securities Inc. ("RBC"). On their first day of work with RBC, the employees wrote out from memory a list of their former employer's clients who they had serviced and began phoning them. Many MDM clients followed them to RBC. MDM commenced an action against the employees claiming that they breached the terms of the non-solicitation clause.

The lower court reviewed the basic principles related to the enforceability of a non-solicitation clause in an employment contract, which can be summarized as follows:

(a) There must be a proprietary interest entitled to protection;

(b) The temporal and geographical restrictions cannot be too broad;

(c) The clause must be limited to solicitation of clients (as opposed to a more general prohibition against all competition); and

(d) The clause cannot be ambiguous.

The lower court determined that MDM had a legitimate proprietary interest in the respective client lists of the two departed employees. An employer's customer lists are considered confidential information that an employer is entitled to protect by way of a non-solicitation clause.

The lower court also found that the temporal length (2 years) and the geographic scope (wherever the employee serviced clients) was not overly broad. The court commented that while the geographic location scope could technically be enormous given the language of the clause, the definition of "solicit" included the words "who was serviced" which limited its scope. It was clear to the employees that the restriction only applied to clients they had previously dealt with. The lower court concluded that the employees knew, or should have known, that their actions constituted a breach of the non-solicitation clause.

The employees argued that the phone calls to former clients were simply intended to provide information to clients who may have been concerned about their investments, and that the phone calls did not amount to "solicitation". The court rejected this argument, stating that the contact with former

clients had nothing to do with any perceived obligation to advise the clients that they had left their employment, or to reassure clients regarding their investments at MDM. The contact had everything to do with an attempt to retain the business of these clients and was clearly solicitation in breach of the non-solicitation clause to which the employees were bound.

The Court of Appeal agreed with the lower court on all issues and confirmed the enforceability of the non-solicitation clause.

The take-away for employers is that a properly drafted non-solicitation clause can be enforceable and can protect your business when an employee decides to leave and join a competitor. A standard clause is a useful starting point, but each case is unique and it is important to understand that a non-solicitation clause must be drafted in a manner that is only as broad as necessary to protect your business.

Employee on Sick Leave Entitled to Salary During Notice Period

In a recent case from the Divisional Court, *McLeod v. 1274458,* the Court recently upheld the Superior Court's decision on the issue of whether an employer is entitled to give working notice (rather than pay in lieu of notice) to an employee who is incapable of working for medical reasons.

The case involved an employee who had been employed for a period of approximately 17 years. On September 15, 2015, the employee was involved in a non-work related motor vehicle accident. He was placed on an unpaid medical leave of absence. He did not collect any disability benefits during his absence. On January 31, 2016, while on his leave of absence, the employer sent him notice of termination confirming that as of July 31, 2016, its operations were going to cease. He ultimately returned to work on two occasions for a few

hours at the end of July just before the employer ceased its operations. The employee secured alternative employment as of October 31, 2016.

The employee commenced a wrongful dismissal lawsuit. He sought payment for salary between January 31, 2016 and October 31, 2016. The employer argued that he had not suffered any damages because the employee could not work until the end of July 2016, and that he had been provided adequate notice of termination. The Court rejected this argument stating that because he was incapable of working he was entitled to damages representing salary that he would have earned during the nine-month period from January 31, 2016 (notice of termination) to October 31, 2016 (new job). On appeal to the Divisional Court, the Divisional Court agreed and upheld the decision of the lower court.

For employers, it is important to recognize that working notice is only given to those employees who are capable of working. Attempting to provide working notice to an individual who is incapable of working will not be sufficient to reduce the reasonable notice period available to an employee. An important fact in this case is that the worker had not collected any disability payments and therefore, the issue of whether disability payments ought to have been deducted from any damages for wrongful dismissal was not applicable.

Employer Requirement of Permanent Residency held to be Discriminatory

In the decision of *Haseeb v. Imperial Oil Ltd.*, the Human Rights Tribunal of Ontario determined that an employer discriminated against a prospective employee because it required the ability to work in Canada on a "permanent basis" (citizenship or permanent residency) as a condition of employment.

The applicant was an international engineering student at McGill University. At the conclusion of his studies, the applicant would have qualified for a three year postgraduate work permit (PGWP) upon graduation, which would have entitled him to work in Canada. He applied for a job with Imperial Oil. The company processed him through every step in the job application process and had provided him with an offer of employment, conditional upon providing documentary evidence of his citizenship or permanent residency. He could not provide this evidence and the offer was rescinded by the company.

Under the *Code*, "citizenship" is a protected ground. Imperial Oil argued that its requirement for an individual to "*work in Canada on a permanent basis*" was an immigration issue and that the *Code* protections based on citizenship did not apply. The Tribunal disagreed and concluded that the distinction created by Imperial Oil between those with permanent residency or citizenship as compared those with three year post graduate work permits was discriminatory on the basis of citizenship. The Tribunal found that the distinction created unjustifiable categories in the hiring process.

Imperial Oil also argued that the requirement constituted a *bona fide* occupational requirement related to succession planning, training costs and investment in recruits for long term employment. While the Tribunal did undertake to review whether or not there could be a *bona fide* occupational requirement where there was indirect discrimination, it determined that the occupational requirement (i.e. citizenship or permanent residency) were not linked to the performance of essential job tasks, that the requirement was not adopted in honest and good faith, and there was no evidence presented of the measure of the risk to its succession planning strategy. As such, the Tribunal rejected the employer's position and concluded that the company's practice of not hiring any PGWP holders was unjustified.

If employers have a policy which requires permanent residency or Canadian citizenship as a condition of employment, this practice may be discriminatory and should be reviewed immediately. While an employer is entitled to require proof of *eligibility* to work in Canada as a condition of employment, a blanket prohibition against hiring any international students with a PGWP was not justifiable. This case should not be read as a complete prohibition against the requirement for permanent residency or citizenship as a condition of employment. However, in order to justify such a requirement, an employer must clearly and objectively establish a rational connection between such a condition and the essential tasks of the position. In addition, an employer would have to establish that an individual without Canadian citizenship or permanent residency could not be accommodated without creating undue hardship.