BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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In this Issue

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Claim for Sexual Assault and Harassment Statute Barred

As of January 1, 2018, important policy changes were implemented to workers' compensation in Ontario which provided for entitlements relating to claims for workplace harassment, including sexual harassment. As a result, employees with workers' compensation coverage can pursue benefits arising from mental stress that is caused by workplace harassment. At the same time, employees who have access to these benefits cannot sue their employer (or executives of the employer) for the same injuries suffered in the course of employment. This has been described as the "historic trade off" whereby employees get benefits for workplace injuries under a "no fault" system in exchange for giving up the right to sue employers for negligence that may have caused those injuries. More specifically, section 26 of the *Workplace Safety and Insurance Act, 1997* (the *"Act"*) provides that entitlement to benefits arising from a workplace accident (which now includes workplace harassment) is in lieu of any right of action that an employee may otherwise have against the employer or executives of the employer.

Recently, in *Decision 3096/17*, the Workplace Safety and Insurance Appeals Tribunal (the "Tribunal"), considered whether a civil claim for sexual harassment could proceed against the employer and owner of the business given section 21 of the *Act*. The worker started a civil claim against the employer, owner and supervisor for damages she attributed to sexual harassment and sexual assaults by her supervisor. The supervisor was charged criminally and ultimately pleaded to criminal charges. The decision did not impact the civil claims against the supervisor. She also claimed that the employer and owner were negligent by failing to have appropriate policies and procedures in place with respect to the conduct of employees in the workplace and by failing to provide her with a safe working environment. The employer and owner brought an application to the Tribunal asserting that her claims were statute barred.

The Tribunal confirmed that the employee's right of action was taken away and that she could not proceed against the employer and owner with her civil claim. The employee argued, unsuccessfully that the allegations of sexual harassment and assault did not fall within the meaning of "accident" as required under the *Act*, and that her claims ought to proceed. The Tribunal found that the case law clearly established that sexual assault against a worker in the course of employment is considered to be an accident within the meaning of the *Act*, and therefore, her claims were statute barred. The Tribunal recognized that the bar to actions against employers is a necessary and integral component of workers' compensation, which has been recognized by the Supreme Court of Canada.

For employers, it is important to recognize that workers' compensation claims can now include claims related to workplace harassment. Important policy changes were made to chronic mental stress and traumatic mental stress policies which specifically define workplace harassment and set out the conditions that must be satisfied in order for an employee to be entitled to benefits, including appropriate medical diagnosis and a strong causal link between injuries suffered and workplace harassment. An employee who has workers' compensation benefits is not entitled to pursue a civil claim against the employer in respect of the same allegations of workplace harassment. Employers with workers' compensation coverage for employees should be vigilant in ensuring that the statutory bar is applied when employees seek to pursue civil claims based on allegations of workplace harassment.

Bill C-86 Receives Royal Assent – Changes *Canada Labour Code* and New *Pay Equity Act*

On December 13, 2018, Bill C-86 received Royal Assent resulting in many changes to the *Canada Labour Code* and creation of a new *Pay Equity Act*. Many of the changes will be implemented on September 1, 2019. Others changes will be in force at a date to be determined by Order in Council (likely sometime in 2019).

Canada Labour Code

Bill C-86 makes sweeping changes to the *Canada Labour Code* including amendments related to rest periods, meal breaks, scheduling, increased vacation, added leaves,

increased notice upon termination and changes to the unjust dismissal provisions, just to name a few. For example, an employer will be required to provide the employee's work schedule 96 hours before the start of the first shift under the schedule, failing which an employee will be entitled to refuse to work any shift during the first 96 hour period following the release of the schedule. There are several new leaves such as Leave for Victims of Family Violence (up to 5 days of paid leave), Leave for Court or Jury Duty, Medical Leave (up to 17 weeks of absence for personal illness) and Personal Leave (up to 5 days, with 3 days being paid days) for illness or other urgent matters involving family members.

Pay Equity Act

Some of the highlights of the new legislation include the requirement for employers to create a "pay equity plan" where employers are expected to identify, evaluate and eliminate differences in compensation between female and male jobs or equal or proportionate value. The *Act* also establishes a Pay Equity Commissioner who will have the power to enforce the *Act* and make orders in respect of it. The *Act* will come into force at a date still to be determined.

If you are a federally regulated employer, these changes are significant. For more information about all of the changes, feel free to contact us.

Employee did not fail to Mitigate Despite Retirement and Rejection of Reasonable job Offer

In *Dussault v. Imperial Oil Ltd.*, the Ontario Superior Court of Justice held that two employees who had worked for Imperial for more than 39 years and 36 years respectively were entitled to 26 months' notice of termination. Both employees participated in a defined benefit pension plan.

The employees, who both worked in Imperial's retail store division, were advised in 2015 of a possibility of a sale to Mac's Convenience. Both employees were offered positions with Mac's. The offers of employment from Mac's guaranteed the same salary for the employees for 18 months in comparable management positions, with participation in a defined contribution plan and group benefits. The benefits were considered to be less favourable than the benefits enjoyed with Imperial. Imperial also offered to pay the employees a gratuitous lump sum payment to compensate the employees for these reduced benefits but refused to disclose the exact amount of the payment until after they accepted employment with Mac's. After 18 months, their salaries would likely be reduced. Both employees refused to accept the offers of employment from Mac's considering the terms of employment to be less favourable. Both employees elected to retire and started collecting from pension benefits. Unsurprisingly, neither had found new employment since their terminations from Imperial.

Imperial argued that the employees should have accepted the offers of employment from Mac's. The duty to mitigate, according to the Supreme Court of Canada, requires an employee to make reasonable efforts to find alternative sources of income that flow from the loss of employment. The law only requires employees to search for comparable employment. The law also places the onus on the employer to prove that reasonable steps were not taken by the employee. The Court found that there were "sufficient differences" to make the rejection of the offers reasonable. The Court found that the benefits and salary were less favourable. On benefits, there seemed to be consensus that the benefits offered by Mac's were less favourable, but Imperial offered to pay a lump sum to offset that difference. Imperial did not disclose the amount of the lump sum payment, and this was a problem for the Court. The salary was viewed as the Court as less favourable, even though it was to be the exact same salary for 18 months. Mac's would not tell the employees what their salary would be after 18 months, and the releases would have precluded a lawsuit against Imperial for any differences. The Court said that this factor alone rendered the offer as not comparable. Respectfully, the decision is flawed and is inconsistent with principles of mitigation that have been recognized by the Supreme Court of Canada. The result is that an employee must be offered a guaranteed position, guaranteed term and guaranteed salary for the duration of an entire notice period, in order to be "comparable", according to the Court.

Employees Entitled to Damages for Pension Losses during Notice Period

Following the initial decision in February 2018, the parties were unable to resolve the issue of damages during the 26-month notice period surrounding the employees' defined benefit pension plan. In particular, the Court considered whether the employees were entitled to contributions that Imperial would have made during the 26-months' notice and whether the damages should be reduced for the increase in the commuted value of their pension.

Generally speaking, the basic principle is that a terminated employee is entitled to compensation for all losses arising from the failure to provide proper notice of termination. This includes compensation for all salary and benefits that the employees would have received had they received notice of termination. Notably, following the terminations, both employees chose to retire and started receiving pension benefits. Imperial argued, with the support of an expert, that the commuted value of the pensions was actually higher

than it would have been had they received 26 months of notice. Imperial argued that damages ought to be reduced as a result. The Court noted that the only reason the value of the pension was higher was because the employees started receiving payments earlier, and therefore, refused to offset the differences from damages.

At the same time, the Court rejected the employees' demand for contributions that would have been made by Imperial. The employees suffered no pension loss. Indeed, the employees may have been in a better position financially as it pertained to the pension. The Court rejected the claim for damages equivalent to contributions that Imperial would have made during the notice period.

Employee not Entitled to Rescind Notice of Resignation after Acceptance by Employer

In *English v. Manulife Financial Corporation,* the Ontario Court of Appeal considered whether an employee who has resigned from her employment by written notice was entitled to rescind the notice of resignation after it had been accepted by the employer.

The employee worked for Manulife (previously Standard Life) for 10 years. She was a Senior Customer Relationship Manager. She was 66 years of age. On September 22, 2016, she met with her supervisor and advised him that she would be retiring on December 31, 2016. She provided written notice of resignation to Manulife confirming her intention to retire on December 31, 2016.

Approximately one month later, the employee advised Manulife that she wanted to rescind her notice of resignation. By this time, Manulife had begun to make plans to manage her retirement including the assignment of files to other managers. Manulife advised her that they would respect her decision to resign on December 31, 2016, and would not allow her to rescind the notice of resignation.

The Court found that the employee clearly and unequivocally resigned from her employment. She was not under any duress and did so of her own volition. The issue is whether she could resile from that resignation *after* it has been accepted by the employer. Generally speaking, an employee can resile from a notice of resignation *before* it is accepted by the employer, provided that the employer has not relied on the resignation to its detriment (for example, hired a replacement). In this case, the employee was not entitled to rescind her notice of resignation because it had been accepted. The Court found that the employee was not induced in any way, shape or form to tender her notice of resignation and that she did so willingly and freely. It was accepted by the employer. The Court concluded that there was a binding contract between the parties which required her resignation.

If an employee provides notice of resignation (verbally or in writing), employers should provide written acknowledgement and acceptance of the resignation given the legal significance attached to the employer's acceptance of the resignation. In this case, it is notable that there was not any dispute about the resignation or acceptance by the employer.