BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Spring 2019

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

Bird Richard
130 Albert Street, Suite 508
Ottawa, Ontario K1P 5G4
T 613.238.3772
F 613.238.5955
www.LawyersForEmployers.ca

Severance Pay Threshold under the *Employment Standards Act, 2000* Limited to Ontario Payroll

Under section 64 of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*"), employees who are terminated without cause are entitled severance pay. Under the *ESA*, an employer who has a payroll in excess of 2.5 million must pay additional severance pay to employees with more than five (5) years of service upon termination of employment. Generally speaking, this amounts to a week of salary up to a maximum of 26 weeks' pay.

In a recent decision from the Ontario Labour Relations Board, *Doug Hawkes v. Max Aicher (North America) Limited* ("MANA") raised the question of whether the 2.5 million payroll threshold should include Ontario payroll only or alternatively, should it include international payroll. MANA was a steel company incorporated in the province of Ontario and was a wholly owned subsidiary of a German company headquartered in Bavaria ("MAG"). The employee had been working for the company (or its predecessors) since 1977. Its payroll in Ontario was below 2.5 million.

The argument made by the employee was that the total payroll of MANA and international payroll including the payroll of MAG should be used in order to determine whether the 2.5 million payroll threshold was met.

Prior to the release of a decision the Ontario Court in 2014, *Paquette v. Quadraspec Inc.*, the calculation was limited to Ontario payroll and there were many cases supporting the position that only Ontario payroll ought to be included since the reach of the *ESA* is limited to Ontario as provincial legislation. In *Paquette*, the Court ruled that the employer's national payroll should be included because the *ESA* did not limit the calculation specifically to Ontario payroll. It did not consider international payroll. MANA argued that Paquette was wrongly decided. MANA relied on previous cases that illustrated that the payroll calculation was limited to Ontario.

The Board distinguished *Paquette*, and indicated that the decision did not consider section 3(1) which provides that the employment standards only applies to employers and employees for work performed in Ontario, or if it is performed outside of Ontario, is a continuation of work performed in Ontario. The Board concluded that the *ESA* is directed at Ontario-based employment, and that it would be inconsistent with the scope of the legislation to include payroll from outside of Ontario. The Board stated that it agreed with the pre-Paquette line of reasoning and refused to follow *Paquette* because it did not consider the interrelationship between section 3(1) and the severance pay provisions. The Board stated that "it is only Ontario-based employment and operations that is captured by section 3 and therefore, section 64 of the Act." As a result, only MANA's Ontario payroll could be considered in the 2.5 million payroll calculation.

The case is good news for employers who may have businesses located across the country or who are global. A more narrow view of the 2.5 million threshold limited to Ontario payroll is logical given the scope and jurisdiction of the *ESA*. Having said this, due to the conflicting case law (between the Ontario Court and the Ontario Labour Relations Board), there is a possibility of judicial review of the decision. We will continue to monitor the case and provide updates on any important decision.

Ontario Court of Appeal rules that Uber Arbitration Clause is Unconscionable

In the recent decision, *Heller v. Uber Technologies Inc.*, [2019] O.J. No. 1, the Court of Appeal decided on whether an arbitration clause in the services agreement provided to Uber drivers is enforceable under Ontario law. The claim in Heller is a proposed class action against Uber alleging that Uber drivers should be categorized as employees and as such, governed by the provisions of the *Employment Standards Act, 2000* (the "*ESA*"). Uber successfully advanced a motion to stay the claim on basis of an arbitration clause, which required any disputes to be resolved by arbitration in the Netherlands.

Uber requires that drivers accept a Services Agreement before being able to offer the service, which contains an "arbitration clause". Effectively, the clause required that any driver that had any dispute or conflict with the agreement must submit the matter to arbitration in the Netherlands. In doing so, a driver would be required to pay approximately $14,500.00 US dollars in order to participate in the arbitration. The driver argued that the arbitration clause was invalid because it amounted to contracting out of the *ESA* which is prohibited under section 5(1).

For the purposes of this decision, the Court assumed that the drivers were employees. On this basis, the Court concluded that requiring an employee to go to arbitration creates a contracting out of the provisions of the *ESA*, and in particular, section 96 which provides an employee with a statutory right to file a complaint with the Ministry of Labour if an "employee" believes that the *Act* is being contravened. As a result, the Court determined that the paragraph was void as it was contrary to section 5(1) of the *ESA*.

The Court also considered whether the clause was unconscionable at common law and therefore, void. Typically, the Court will set aside a contractual provision on the basis of unconscionability if the provision is grossly unfair, imposed without the benefit of legal advice, in the context of an overwhelming imbalance of power and where the other party is particularly vulnerable. In this case, the arbitration clause was unconscionable for the following reasons:

1. It required an individual with a potentially small claim to incur significant costs of arbitrating the claim under the applicable agreement;
2. Uber was much better positioned to incur the costs associated with the arbitration procedure;
3. The clause required that each claimant individually arbitrate the claim in Uber's home jurisdiction completely unconnected to where the drivers live and perform their duties;
4. It required that the rights of the drivers be determined in accordance with the laws of the Netherlands, not the laws of Ontario, and the drivers were given no information as to what the laws of the Netherlands were;
5. There was no evidence that the drivers had any legal advice prior to entering into the services agreement, nor is it realistic to expect that they would have, and there is no reasonable prospect of being able to negotiate the terms of a services agreement;
6. There is a significant inequality of bargaining power; and
7. The conclusion could be drawn that Uber chose the arbitration clause in order to favour itself and take advantage of its drivers who were clearly vulnerable to the market strength of Uber. They did so knowingly and intentionally.

The Courts have held that there is a power imbalance between employers and employees generally and therefore, employment contracts can be challenged on the basis of unconscionability. Employers often include arbitration clauses in employment contracts as a means of providing a more expedient, cost-effective manner in which to resolve disputes with employees. As can be observed by the reasons provided by the Court, Uber was in a unique position of power vis-à-vis its drivers and failed to provide them with any chance to obtain legal advice. Employers can mitigate the risks of such an unconscionability challenge by taking some simple steps such as providing employees with a reasonable amount of time to consider a contract and allowing an employee the opportunity to seek independent legal advice before the contract is accepted.

Nurse Reinstated after Theft of Narcotics from the Workplace

On January 10, 2019, Arbitrator Larry Steinberg released a decision reinstating a nurse who had violated numerous workplace policies, committed theft and falsified medical records.

The grievor worked on a full-time basis as a Registered Professional Nurse at a long-term care facility. She had been employed with the employer for approximately 14 years. The grievor had a strong performance record, until she began to suffer from a kidney condition which necessitated the use of narcotics to control the pain, which led to an addiction to pain killers. The grievor testified that she "diverted" narcotics from the employer's premises in order to get through each day at work. Following an investigation, the employer terminated the grievor's employment on the basis of falsification of records, breach of trust and gross misconduct. She had misappropriated narcotics for her own improper purpose over a two-year period, while at the same time falsifying medical records in conjunction with each theft.

The Union grieved the termination and asserted that the employer had discriminated against the grievor based on her addiction. The employer argued that the addiction was not a factor in the decision to terminate the grievor's employment. After the termination, the grievor entered a 35-day treatment facility to address her addiction. She was successfully discharged and completed the program. She was also following an outpatient treatment plan. The College of Nurses of Ontario (CNO) had prohibited the grievor from the practice of nursing, but reinstated her after the completion of her treatment under various conditions. Medical evidence at the arbitration confirmed that the grievor had a "*…significantly diminished capacity to resist urges to engage in behaviours that supported her addiction.*" Some evidence also suggested that there was a risk of relapse.

The arbitrator ultimately concluded that there was a nexus between the termination and the grievor's substance abuse disorder, and was therefore, *prima facie* discriminatory. The arbitrator stated that compulsive behaviour and impaired

judgment are symptoms of the mental illness and substance abuse disorder. She testified and it was accepted by the arbitrator that "*she could not stop*". The arbitrator rejected the argument that the trust required for the position had been irreparably harmed or that accommodation could not be provided.

The employer argued that the grievor could not be accommodated, given that her position required the trust of residents, their families, and other healthcare professionals, many of whom had been deceived by the grievor, and that having independent access to controlled drugs (including administering drugs to patients) was too great a risk. The employer argued that it had a legitimate business interest in protecting residents and providing quality care. The employer argued that the risk of relapse was too great a risk for the employer and its patients. The arbitrator disagreed and held that the employer had not accommodated the grievor to the point of undue hardship.

While we disagree that all of the actions by the grievor were explained by the addiction (for example, she could have reported her addiction immediately and taken any number of steps to ensure that patient care was not compromised as it was), the case is unique in two respects: (1) following the termination, the grievor immediately sought treatment for her addiction to address the substance dependency issues; and (2) the CNO as a professional regulatory body was actively involved in terms of ensuring that the grievor had recovered and was fit to practice. The CNO imposed significant conditions on her practice, but ultimately determined that she was fit to practice. The arbitrator put a significant weight in these two factors in support of reinstatement.

An Employer's Duty to Accommodate Drug Use in a Safety-Sensitive Position

A recent arbitration decision concerning an employer's duty to accommodate a medical cannabis user rendered in Newfoundland has recently been judicially reviewed and upheld. The arbitration decision, *Lower Churchill Transmission Construction Employers' Assn. Inc. and Valard Construction LP v. International Brotherhood of Electrical Workers, Local 1620 (Tizzard)*, 2018 CarswellNfld 198, 136 C.L.A.S. 26, dealt with a grievor who had applied for two positions with the employer and was denied. The positions required that the grievor undertake a drug test as the positions were safety-sensitive positions.

At the time of taking the drug tests the grievor was being prescribed medical marijuana on account of his osteoarthritis and Crohn's Disease. He would take the medical marijuana in the evening after work; he would use a vaporizer to consume approximately 1.5 grams per day. The dose of THC content was approximately 22%, but it did not specify the dose or frequency of use. When taking the test, the grievor informed the employer that he used medical marijuana. The employer decided not to hire the grievor on the basis of safety concerns and particularly, that the grievor's cannabis use would impair his ability to perform those jobs safely.

The employer argued that the grievor could not be accommodated due to the risk of possible impairment in a safety-sensitive position. In his decision, the Arbitrator determined that once a risk of possible impairment had been established, the employer was entitled to demand medical information which demonstrated to the employer's reasonable satisfaction that the grievor could perform the job safely. In this case, the medical evidence confirmed that residual impairment would continue for at least 24 hours after the use of the medical marijuana and as result, there would be a safety hazard if the employee were provided either of the positions. The Arbitrator determined that undue hardship existed because of the safety risk and because it was not possible to determine the level of impairment of the grievor.

On judicial review, the Court accepted the Arbitrator's decision entitling an employer to require further medical information to its reasonable satisfaction to ensure that the Grievor could perform the job safely, placing the onus on the grievor to establish to the satisfaction of the employer that he could safely perform the job. The decision is a positive one for employers who have many safety-sensitive positions. However, it is important to note that while an employer may decide not to employ an individual who is required to take impairing medication in a safety-sensitive position, it does not alleviate employers from their initial requirement to determine whether or not they are able to accommodate the employee. If you have any questions regarding your duties to accommodate employees with disabilities, please do not hesitate to contact us.