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LAWYERS FOR EMPLOYERS

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Employer Ordered to Provide Personal Protective Equipment (PPE) to Employees

In the decision *Ontario Nurses Association v. Eatonville/ Henley Place*, 2020 ONSC 2467 released on April 22, 2020, the Ontario Superior Court of Justice considered an urgent application by the Ontario Nurses Association (ONA) seeking injunctive relief on behalf of nurses working at various long term care (LTC) homes.

ONA claimed that these facilities were engaged in ongoing breaches of Directives issued by the Chief Medical Officer of Health for Ontario (issued on March 22, 2020 and April 2, 2020 respectively) related to practices and procedures and the supply of appropriate personal protective equipment (PPE) to nurses, including access to N95 respirator masks and the ability to make PPE decisions at the point of care. All of the facilities experienced outbreaks, with more than 110 residents and several nurses contracting the COVID-19 virus. The Union asserted that the lack of necessary PPE and appropriate infection control procedures in the LTC facilities represented:

(a) a violation of collective agreements between ONA and the Respondents;

(b) a breach of public health Directives related to COVID-19;

(c) a violation of the *Occupational Health and Safety* Act (OHSA) which generally requires an employer to "*take every precaution reasonable for the protection of workers*"; and

(d) an infringement of the Applicants' rights under section 7 of the *Charter of Rights and Freedoms* (right to life, liberty and security of the person). This argument failed as the LTC facilities are private entities and not necessarily subject to the *Charter.*

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The LTC facilities asserted that the Directives were complied with and that ONA was really seeking control over the allocation of essential medical resources, such as PPE and in particular, N95 masks. The LTC facilities contended that the injunction relief being sought ignores the reality that PPE is scarce and that difficult decisions were required by management to conserve a limited supply of PPE and the implementation of inventory control measures. ONA filed grievances in respect of the failure to provide PPE and against these practices under the provisions of various collective agreements.

The employers also argued that this was a labour dispute and that the Court did not have jurisdiction because it arises from the collective agreement and that the grievance/arbitration procedure is the appropriate forum for the dispute, not the Ontario Superior Court of Justice. The Court rejected this argument on the basis that the "*arbitral process is a slow and protracted one*" and it had inherent jurisdiction to deal with this urgent matter as the only legal mechanism to realistically fill the void. The Court's rationale may provide some basis for appeal, as the arbitral process can be quick and efficient when necessary.

The applicable legal test to obtain an injunction and secure immediate judicial intervention comes from the decision in *RJR-MacDonald v. Canada*, where the Supreme Court summarized the requirements as follows: (a) a serious issue to be tired; (b) will the applicant suffer irreparable harm if the injunction is not granted; and (c) does the balance of convenience favour granting relief pending final determination of the matter? The Respondents did not dispute that this was a serious issue and that the supply of PPE in long term care facilities was a serious issue. The Respondents agreed that irreparable harm would result if PPE is not available, but raised the harsh reality that quantities of PPE such as N95 masks were in limited supply, and that by placing control of allocation of these scarce resources to nurses (rather than management), other groups such as health care workers could be harmed. The employers argued that the balance of convenience mandated consideration of the situation as a whole, and that the relief being requested could have a negative impact on other interested parties and the public in general. The Respondents argued that the injunction would put an unfair amount of power in the hands of the individual nurses, who may not consider the public as a whole. The Court rejected all of the employer's arguments, stating

that the balance of convenience clearly favoured those who were putting themselves at risk on the front lines. The Court concluded that all three steps for an injunction were satisfied.

The LTC homes were directed by the Court to provide nurses working in their respective facilities with access to fitted N95 masks and other appropriate PPE *when assessed by a nurse at point of care to be appropriate and required*. The Order is temporary until such time that there is a final disposition of the labour grievances, or until further Order of the Court. The Respondents were also ordered to implement administrative controls such as isolating residents and staff as required by the Directives during the COVID-19 crisis. This Order is also temporary in nature until the final disposition of the grievance.

For employers, these circumstances are unique. The severe impact of the COVID-19 crisis in LTC facilities is unprecedented. Managers in these facilities are faced with difficult challenges related to management of scarce resources. The Court's decision does represent an infringement on management rights to control and direct the workplace. At the same time, the preservation of resources in these uncertain times should not come at the expense of workplace safety. In doing so, employers risk injunctive relief against them requiring the provision of PPE, as was the case here, but could also face quasi-criminal penalties under the *Occupational Health and Safety Act* if there is a failure to take all precautions that are reasonable to protect the health of workers.

Could the COVID-19 Pandemic Result in a Frustration of Contract?

Many businesses have been forced to shut down due to Ontario's *Emergency Management and Civil Protection Act*, which is an emergency declaration that has been extended until June 2, 2020. These are uncertain times and the fact is that the pandemic may have significant, lasting and permanent impacts on business. In particular, the impact of this emergency could radically change the nature of existing employment relationships, and importantly, could even render some existing employment agreements impossible to perform. In such a case, the doctrine of frustration of contract may apply to relieve an employer from the contractual commitments.

The application of the doctrine of frustration is rare in employment circumstances. It typically arises in cases of a permanent disability that prevents an employee from ever returning to the workplace. In other words, the contract of employment becomes impossible to perform. If, by no fault of either party, an unexpected, radical or intervening event has occurred (such as a pandemic) and it becomes impossible to perform, an employment contract could be frustrated and both parties would be discharged from further performance of their obligations under the contract.

Here are some general considerations:

- A significant drop in business on its own is likely not an adequate basis to result in a frustration of an employment contract. Employers are expected to endure economic slowdown and cannot rely on this doctrine to be relieved of contractual commitments because business has dropped;
- If your business has remained opened during the pandemic, the doctrine of frustration will be significantly more difficult to assert. In order for the doctrine to apply, "impossibility" of performance is required. So, if your employees are able to work from home, the condition of impossibility is not present. In other words, if measures can be implemented to allow an employee to continue working, the doctrine of frustration will not likely apply; and
- If the impact of COVID-19 is temporary in nature, the doctrine of frustration will not likely be successful. On the contrary, if the impact is permanent, lasting and radical changes to the business model that existed before the pandemic struck are necessary, the doctrine of frustration may apply.

Employers should consider whether the doctrine of frustration applies. Each employee relationship will need to be assessed on an individual basis. If the doctrine does apply, this may offer employers some relief from onerous contractual commitments, common law obligations such as reasonable notice of termination and/or relief from statutory termination pay as required by the Ontario *Employment Standards Act, 2000*. It is important to seek legal advice before taking this position given the high onus that is required and the various exceptions that may apply. Please contact one of our lawyers if you have any questions about the doctrine of frustration.

Right to sue for Constructive Dismissal caused by Harassment taken away by Workplace Safety and Insurance Tribunal

A key principle of the workers' compensation regime in Ontario is that in exchange for insurance coverage in the event of an injury that arises at the workplace, injured workers are not entitled to sue his or her employer. In particular, section 26 of the *Workplace Safety and Insurance Act, 1997* (WSIA) states that entitlement to benefits under the WSIA are in lieu of all other rights of action in respect of a workplace accident. Moreover, section 28 of the WSIA provides

that any worker employed by a Schedule 1 employer (mandatory coverage) is not entitled to commence an action against a Schedule 1 employer. Finally, it is important to note that the Workplace Safety and Insurance Tribunal (the "Tribunal"), by virtue of section 31 of the WSIA, is empowered to make determinations regarding whether a worker's right of action bars any civil claims.

In 2018, section 13 of the WSIA was amended to allow employees to claim for benefits arising from "chronic mental stress", which includes claims related to harassment in the workplace. the Workplace Safety and Insurance Board (WSIB) established policies for entitlement, which included the requirement to have a "substantial workplace stressor" which is defined as something that is "excessive in intensity and/or duration in comparison to normal pressures and tensions experienced by workers in similar circumstances." Workplace harassment is generally considered a substantial workplace stressor.

On October 17, 2019, the WSIAT made a ruling that impacts whether an employee with a Schedule 1 employer can advance a civil claim in Superior Court for constructive dismissal where harassment is alleged. *Decision No. 1227/19* involved an employee who was employed by Hospitality Fairview Holdings Inc. (HFH) in the housekeeping department as a supervisor. HFH is a Schedule 1 employer with WSIB coverage. The employee resigned from her position with HFH claiming constructive dismissal as a result of harassment and bullying in the workplace. She filed a Statement of Claim in the Ontario Superior Court where she alleged constructive dismissal, bullying, harassment and a poisoned work environment, punitive, aggravated and moral damages.

She alleged that the other employees subjected her to abusive, humiliating and cruel conduct over a course of 17 months and that the conduct was supported by management. The issue commenced when a number of employees had sprayed the employee with Lysol claiming she smelled. This behaviour continued, and on some occasions the employee would find bath mats on her chairs. The housekeeping manager advised the employee that some employees had complained that she had a certain odour and again asked if she considered using feminine products.

The employee claimed that as a result of the continuing harassment and bullying she experienced by co-workers and management she went on medical leave. After consulting with her doctor she claimed she was unable to return to work due to the harassment and her fragile mental state resulting from the harassment in the workplace. She filed a claim for constructive dismissal, damages for mental stress, self-worth, feelings of guilt and self-blame, moral, aggravated and punitive damages, damages for harassment and the creation of a poisoned work environment.

HFH applied to the Tribunal to determine whether or not the employee's right to sue was taken away pursuant to section 31 of the WSIA. HFH's argument was that the employee's claim for damages in this case was taken away by the WSIA because the Statement of Claim was effectively a claim for chronic mental stress.

The Tribunal ruled that the claim fell within the jurisdiction of the WSIA and her right of action against HFH was statute barred. This was because:

1. HFH was a Schedule 1 employer;
2 The workers and managers were in the course of their employment when the incidents of harassment and bullying took place; and
3. The constructive dismissal claim was inextricably linked to the harassing and bullying conduct of co-workers and management that caused her employment to be terminated and her mental distress that forced her to take sick leave.

The Tribunal noted that the Statement of Claim was essentially a claim for injury resulting from alleged workplace harassment and bullying that fell within 13(4) of the WSIA. It further noted that, even where remedies claimed by the employee are different than those compensated under the WSIA, actions for damages flowing from an injury are statute barred if they fall within the WSIA. It should be noted that generally speaking that Tribunal has found that the right to bring an action for wrongful dismissal has not been removed by the WSIA, except in cases, as here, where the claim is inextricably linked to the work injury. In this case, the Tribunal found that the fundamental nature of the civil claim was for injury resulting from harassment and bullying in the workplace and was therefore statute barred.

The end result is that in certain circumstances where an employer is a Schedule 1 employer, and an employee claims constructive dismissal based on harassment, the employee may be barred from bringing a civil claim. Instead, the employee will have to pursue benefits through the WSIB process. Employers should seek legal counsel if faced with allegations of constructive dismissal, and in cases where benefits are available through the WSIB, a civil claim could be barred by statute.