BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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New Legislation — *Working for Workers Act, 2021*

The government of Ontario has passed *Bill 27, Working for Workers Act, 2021*, which amends the *Employment Standards Act, 2000* ("*ESA*") and other legislation. The Bill has received royal assent as of December 2, 2021 and is now officially a statute.

Right to Disconnect

The *Act* imposes an obligation for employers who employ 25 or more employees to create and implement a right to disconnect from work policy. *"Disconnecting from work"* is defined as follows:

> *not engaging in work-related communications, including e-mails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.*

The policy must be implemented within 6 months after the *Working for Workers Act, 2021* receives royal assent, or by June 1, 2022. The policy must be provided to new employees within 30 days of the commencement of employment.

Prohibition against Non-Competition Agreements

The *Act* also prohibits employers from entering into non-competition agreements, or employment contracts which include a non-competition clause.

A "non-compete agreement" is defined as:

> *an agreement, or any part of an agreement, between an employer and employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends.*

The prohibition does not apply to executives which are defined as:

"any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position".

This prohibition also does not apply where the non-competition clause or agreement forms part of a sale of business transactions and the seller becomes an employee of the purchaser.

Employers should review their employment contracts and workplace policies to ensure that they comply with this change to the *ESA*.

Temporary Help Agencies

Temporary help agencies and recruiters will be required to hold a license in order to operate a temporary help agency. An agency or recruiter can apply to the Director of Employment Standards for a license. The legislation sets out the details which must be included in the application.

If you have any questions about the new legislation, please contact us.

Ontario Extends COVID-19 Worker Income Benefit Program and IDEL

The Ontario government announced that the Worker Income Benefit Program will be extended until July 31, 2022.

As we have previously indicated, the program was in order to provide aid to employees who had no sick day coverage. In particular, this program provides employees with up to 3 days paid leave in the following circumstances:

- going for a COVID-19 test
- staying home awaiting the results of a COVID-19 test
- being sick with COVID-19
- getting individual medical treatment for mental health reasons related to COVID-19
- going to get vaccinated
- experiencing a side effect from a COVID-19 vaccination
- having been advised to self-isolate due to COVID-19 by an employer, medical practitioner or other specified authority
- providing care or support to certain relatives for COVID-19 related reasons, such as when they are:
  - sick with COVID-19 or have symptoms of COVID-19
  - self-isolating due to COVID-19 on the advice of a medical practitioner or other specified authority
  - providing care or support to their child who is getting vaccinated against COVID-19 or is experiencing side effects from the vaccine

For more information on the Worker Income Benefit Program, you can visit the following link: https://www.ontario.ca/page/covid-19-worker-income-protection-benefit

In respect of the extension to the Infectious Disease Emergency Leave, this will be extended until July 31, 2022. The regulation exempts layoffs or reduction in wages/hours from being considered as a constructive dismissal under the *Employment Standards Act, 2000.*

Court of Appeal upholds Decision to Terminate Employee for Failure to Apologize for Inappropriate Comments

In the case *Hucsko v. A.O. Smith Enterprises,* [2021] O.J. No. 6307, a long service employee was terminated for cause following an investigation into allegations of sexual harassment and his refusal to apologize for the misconduct.

Leading up to the termination of employment, there were several incidences of inappropriate conduct ranging from asking a female co-worker whether she danced on the tables at a managers' meeting to inviting the employee to sit on a male co-worker's lap to obtain information about a project. There were other vulgar, inappropriate comments and gestures made by the male employee to the female co-worker.

A complaint was made to HR, and an investigation followed. The investigators determined that harassment had occurred. The employer sought to give the employee corrective training, and for the employee to apologize to the complainant. The employee sought legal advice, his lawyer responded and indicated that he would take the training but would not apologize.

The employer suspended the employee and subsequently terminated the employee's employment for cause. The employer stated that there was "an irreparable breakdown of the employment relationship" based on:

- Making inappropriate and vexatious comments to a co-worker;
- The failure to show remorse; and
- Willful insubordination based on a refusal to accept and comply with corrective action determined to be appropriate.

At trial, the judge determined that it was not necessary to categorize the comments made by the plaintiff as sexual harassment or not. The trial judge determined that the employee's conduct did not justify the termination of the plaintiff's employment for cause. The Court noted that the employer

did not dismiss the employee because of a finding of sexual harassment. Rather, it was because of the employee's serious and willful insubordination in response to a direction from the employer to undergo training and provide an apology. The judge also concluded that the decision to consult a lawyer was a factor in the decision to terminate the employee's employment.

On Appeal, the Court of Appeal reversed the decision and determined that the employer had cause to terminate the employee. The Court determined that the judge erred for three reasons:

1. The judge made an error of fact finding when he did not conclude that the comments amounted to sexual harassment;
2. The judge failed to correctly apply the test for determining whether the employer had just cause to dismiss the employee; and
3. The judge failed to find that there was just cause for termination of employment.

In respect of the first issue, the Court of Appeal determined that the judge made an error of fact when he stated it was unclear whether the employer had determined that the comments constituted sexual harassment. The Court also determined in the decision that the comments did constitute sexual harassment.

In respect of the second issue, the Court determined that the test for cause was not correctly applied. The Court laid out the test for cause as *whether the employee has engaged in misconduct that gave rise to a breakdown in the employment relationship or that was irreconcilable with sustaining the employment relationship*. The Court outlined a three-part test for determining whether cause was justified as follows:

1. Determining the nature and extent of the misconduct;
2. Considering the surrounding circumstances; and
3. Deciding whether dismissal is warranted.

At the first step, the nature and misconduct must be determined, and the employer is entitled to rely on wrongdoing by the employee that is discovered both before and after termination. The second step considers the employee within the relationship, including age, history, seniority, role and responsibilities, and for the employer the type of business and any policies and practices, the employee's position in the organization and the degree of trust reposed in the employee. The third step assesses whether the misconduct is reconcilable with sustaining the employment relationship, and whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship.

Applying these to the case, the Court of Appeal determined that the first step included consideration of the sexual harassment gestures and comments, and the refusal to apologize. The trial judge had to consider whether the comments amounted to sexual harassment or not. The refusal to apologize could not be considered in a vacuum, rather all of these factors had to be considered contextually.

The Court also determined that the trial judge failed on the second step, in that there was no consideration of important factors such as the Workplace Harassment Policy of the employer, the recent training, the degree of trust, or the senior position the employee held.

On the third step, the Court determined that a the failure of the employee to issue an apology, and show remorse for the serious conduct, the employer could have only reached one conclusion in the circumstances: (i) that the employee was unwilling or unable to understand the purpose and effect of the Workplace Harassment Policy and take its requirements seriously; or (ii) that the employee was unwilling to accept the discipline imposed on him as a consequence of his misconduct of sexually harassing a co-worker. The end result being that the employer could have no confidence that the employee would not continue with the same type of conduct in the future. As a result of the lack of contrition, lack of understanding of the seriousness of the conduct, and the failure to comply with an essential requirement of an apology to the complainant, the Court found that the employer's decision to terminate the employment for cause was justified.

New Arbitration Decisions on Mandatory Vaccination Policies

There has been a recent flurry of arbitration decisions released in the last 3 months that provide guidance to employers concerning vaccination policies, and other requirements for COVID-19.

In *United Food and Commercial Workers Union, Canada Local 333* v. *Paragon Protection Ltd.* [unreported] the employer imposed a mandatory vaccination policy on its employees. It employed approximately 4400 security guards represented by the Union. The Union argued that it was a violation of the *Ontario Human Rights Code,* the policy was unreasonable and not in compliance with the *KVP* test which requires that a policy or rule created by the employer must comply with the following requirements:

- It must not be inconsistent with the collective agreement;
- It must not be unreasonable;
- It must be clear and unequivocal;

- It must be brought to the attention of the employees affected before the company can act on it;
- The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge; and
- Such rule should have been consistently enforced by the company from the time it was introduced.

Paragon took the position that because the majority of its clients implemented their own mandatory policies for staff on-site, and as such there was no other option. It was required to implement the policy to serve its clients, to maintain a safe and a healthy work environment for its employees, staff, and public. It also argued it had the power to impose this policy because of its management rights clause, and Article 24.05 which stated:

> If an employee is assigned to a site where specific vaccination and or inoculation is required by law or where the conditions of contractors having access to the site stipulates specific vaccination and inoculation requirement, the employee must agree to receive such vaccination or inoculation.

The Arbitrator determined that the policy was reasonable, enforceable and compliant with the *Ontario Human Rights Code,* and the *Occupational Health and Safety Act.* In deciding that there were no *Code* issues, the Arbitrator considered the comments from the *Ontario Human Rights Commission,* that personal preference, or singular belief against vaccinations do not amount to a creed for the purposes of the *Code.* Finally, the Arbitrator noted the employer's introduction of the policy was reasonable pursuant to its management rights clause.

In *Electrical Safety Authority v. Power Workers' Union* [unreported], the result was different. In that case the Union filed a grievance in respect of the COVID-19 mandatory vaccination policy, arguing that it was unreasonable and a significant over-reaching exercise of management rights, which violated the collective agreement and employee's rights to privacy and right to bodily integrity. The employer argued that there was no violation, that it was a reasonable exercise of management rights under the *KVP* test, and fulfilled their duties to take every reasonable precaution to protect their workers and the public under the occupational health and safety legislation.

In terms of the policy itself, the policy stated that all staff were required to be fully vaccinated unless exempt on the basis of a valid *Human Rights Code* ground. All staff were required to provide proof of their second vaccination by December 22, 2021. In the circumstance where there was no exemption under the *Human Rights Code,* the employee was subject to discipline up to and including discharge from employment and could also be put on unpaid leave.

The Arbitrator determined that the vaccination policy was unreasonable given the disciplinary consequences. He also determined that it was unreasonable to put employees on administrative leave without pay in the event that they did not get fully vaccinated. Notably, the Arbitrator did not find that it was unreasonable for the employer to require employees to confirm their vaccination status as long as the personal information is adequately protected and only disclosed with their consent, but he did have an issue with the consequences of any refusal.

While there are two differing cases; one that holds that the vaccination policy was reasonable, and another that holds that a portion of the policy was unreasonable, future cases will no doubt be decided on the individual circumstances of the employer as the *KVP* test requires that an employer consider aspects that are unique to its own circumstances when imposing a policy or rule. The takeaway for employers is that there will be no "one size fits all" approach and each industry and workplace will have different factors to consider, including the consequences of refusing to comply with a policy, when assessing the legitimacy of a mandatory vaccine policy.

In *Ontario Power Generation and The Power Workers Union,* the Arbitrator considered testing requirements related to COVID and in particular, whether self-administered tests, twice a week, mandated by the employer was a reasonable rule, at the employees cost of $25/week. An employee could be placed on an unpaid leave or discharged if he or she refused. The Arbitrator ruled that the cost should be borne by the employer, but also determined that the policy was reasonable given the requirements for an employer to ensure a safe workplace under the *Occupational Health and Safety Act*. The Arbitrator noted that being placed on an unpaid leave for refusing simple testing requirements was reasonable and a minimally intrusive measure to ensure fitness for work. The arbitrator said:

> It is important for those individuals who are fired for choosing to not be tested to understand that they are very likely to find the termination of their employment upheld at arbitration. Effectively, employees who refuse testing will likely have made a decision to end their career with this company.

The decision is helpful for employers looking to ensure that employees comply with reasonable safety policies imposed in the workplace designed to protect against COVID-19 in the workplace.