BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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In this Issue

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Ontario Introduces Workplace Violence Legislation

On April 20th, 2009, the Ontario Government introduced Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009*. The Bill was carried after its first reading. If passed, it will place new and onerous obligations on employers in Ontario.

Application

The new workplace violence and harassment legislation will apply to all Ontario employers who are provincially-regulated.

The Bill defines workplace violence somewhat narrowly as "the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker" or "an attempt to exercise physical force against a worker in a workplace". The amendments apply only to physical violence, and not to psychological or emotional harm caused in the workplace.

Workplace harassment, on the other hand, is defined much more broadly as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome". Employers should note that this definition is not limited to harassment related to the grounds of discrimination that are outlined in Ontario's *Human Rights Code*. Rather, harassment that is completely unrelated to any of those grounds will be subject to the requirements set out below. Employers' existing anti-harassment policies may therefore need to be updated in order to ensure that they address this broader definition of harassment.

The Right to Refuse Work

Bill 168 gives employees the right to refuse work when they have reason to believe that they will be subject to workplace violence. However, the legislation does allow for the enactment of regulations to create exceptions to this right in specific situations where violence is inherent in the employee's work, or is a normal condition of his or her employment.

Obligations on Employers

Should Bill 168 become law, employers will be required to:

- Create workplace violence and harassment policies;
- Review the policies annually; and
- In workplaces with more than five (5) employees, post the policies.

Employers must then develop programs in order to ensure that their workplace violence and harassment policies are implemented. Specifically, the programs must include the following:

- Measures and procedures to control the risks of workplace violence;
- Measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur, or a threat of violence is made;
- Measures and procedures for employees to report incidents of workplace violence and harassment; and
- A method by which the employer will investigate and deal with incidents of workplace violence and harassment.

Employees must be given information and instruction regarding the above policies and programs.

Employers will also be required to assess the risk of workplace violence in their workplaces and advise the joint health and safety committee (or the health and safety representative or the employees themselves, as applicable) of the results of the assessment. The employer must then reassess the situation as often as is necessary in order to protect employees' safety.

Additional Obligations

The above requirements are similar to those set out in Part XX of the *Canada Labour Code*, which came into effect on May 8th, 2008. The requirements related to creating and implementing workplace violence policies are also similar to those found in other provinces' occupational health and safety legislation. However, Bill 168 places new, unique obligations on employers, including the following:

(a) Domestic Violence

The proposed amendments to Ontario's *Occupational Health and Safety Act* would require employers who are aware, or ought reasonably to be aware, that domestic violence that would likely expose an employee to physical injury may occur in the workplace to take every reasonable precaution for the protection of the affected employees.

(b) Persons with a History of Violent Behaviour

Bill 168 also places an obligation on employers and supervisors to warn employees about the risk of workplace violence from a person with a history of violent behaviour. If an employee can be expected to encounter a person with a history of violent behaviour in the course of his or her work, and the risk of violence is likely to expose the employee to physical injury, the employer is obliged to disclose personal information about the violent person to the employee. However, no more information than is reasonably necessary to protect the worker is to be divulged.

This obligation will likely be a difficult one for employers to meet. The legislation does not define a "person with a history of violent behaviour". Accordingly, it will likely be challenging for employers to correctly identify, and issue warnings to employees in respect of such persons.

What Does this Mean for Employers?

Since it is a Government Bill, Bill 168 is likely to become law. If it does, the changes it entails will come into effect six months after the Bill receives Royal Assent.

While employers will be required to establish new policies consistent with the requirements of the Regulation, the obligation is far more onerous than this – simply having a policy on workplace violence and harassment will not be sufficient.

The Regulations require procedures to identify potentially dangerous situations before they arise, and the implementation of response procedures. All employees must be trained in their roles and responsibilities under these policies, and the policies must be continuously monitored to ensure effectiveness.

Additionally, workplace violence and harassment policies and issues will overlap with human rights and

labour relations in the workplace. Federally regulated employers who are covered by the existing workplace violence and harassment regulations under the *Canada Labour Code* are discovering that employees and their unions are using the Regulations provisions as a new complaint mechanism for responding to performance management and acts of discipline. Incidents of Right of Refusal are occurring in response to supervisor/employee workplace interactions. As in the federal sphere, these Regulations will create new challenges for Labour Relations and Human Resources practitioners.

Ontario Tribunal Rules Duty to Accommodate Alcoholic Employee Not Unlimited

In *Cudmore v. Inter Cap Industries* (February 20, 2009), the Human Rights Tribunal of Ontario clarified that there are limits on an employer's duty to accommodate alcoholic or drug-addicted employees.

Cudmore violated a workplace rule by coming to work under the influence of alcohol on two occasions. On the first occasion, he was given a three-day suspension and warned that a repeated violation of the rule would result in his termination. Cudmore again came to work while intoxicated and was dismissed. Cudmore filed a complaint with the Tribunal, stating that he had been discriminated against on the basis of disability and that his employer had failed to accommodate his disability.

The Tribunal upheld Inter Cap's decision to dismiss Cudmore. The Tribunal found that Inter Cap had repeatedly asked Cudmore whether he required assistance or accommodation for an addiction or dependence problem, and had even offered him time off to attend a rehabilitation centre. However, Cudmore denied having a problem and refused accommodation. The Tribunal concluded that, in cases such as this one, where an employee refuses to acknowledge that he has a problem and refuses to accept accommodations for it, the employer will have met its duty to accommodate and termination may be justified.

This case confirms that an employer has an obligation to make inquiries as to whether an employee requires alcohol-related assistance. However, an employee who fails to cooperate may discharge the employer from its continued duty to accommodate.

Ontario Court of Appeal takes Restrictive Approach to *Wallace* Damages

In *McNevan v. AmeriCredit Corp.* (December 15, 2008), the Ontario Court of Appeal clarified that only conduct that is truly high-handed and in bad faith will warrant an award of *Wallace* damages.

McNevan was employed as an Assistant Vice President at one of AmeriCredit's call centres. After 13 months of service, AmeriCredit became concerned about McNevan's managerial skills. The employer terminated him and offered him three months' pay in lieu of notice. McNevan rejected the offer and brought an action for damages for wrongful dismissal. The trial judge found that McNevan was entitled to six months' notice, as well as six months of additional notice as *Wallace* damages, based on the employer's bad faith and unfair conduct. AmeriCredit appealed.

The Court of Appeal allowed the employer's appeal in part. While the six-month notice period was found to be within the appropriate range, the Court found that the trial judge erred in awarding a six-month *Wallace* extension.

The judge erred in awarding the first three-month extension because he took into account inappropriate factors, including the employer's failure to warn McNevan of his perceived shortcomings, its failure to provide a reference letter and assist in his job search, and its request for a release in exchange for three months' salary. The Court of Appeal stated that employers are under no obligation to provide feedback prior to a without-cause dismissal, and that it is not necessary to provide a dismissed employee with a reference letter unless the employment contract so requires. Additionally, asking a dismissed employee to sign a release before receipt of a severance package is neither unfair nor high-handed.

The trial judge based the second three-month *Wallace* extension on the employer's post termination conduct in mishandling McNevan's vacation pay, T4 slip, Record of Employment and bonus, and in carelessly shipping McNevan's personal property which became damaged. The Court of Appeal, however, found that this conduct was not untruthful, misleading, or unduly insensitive enough to justify a *Wallace* extension.

The Court of Appeal has confirmed that, while employers do have a duty of good faith and fair dealing in the manner of dismissal, *Wallace* damages will not be appropriate in every case. Courts will therefore not hold employers to a standard of perfection; rather, employers will be permitted some discretion in their approach to the termination of employees.

Update on Drug Testing for Employees Working in Safety Sensitive Areas

Drug and alcohol testing for employees in safety sensitive positions continues to be a hot topic for courts in Ontario. A recent decision of the Ontario Court of Appeal has provided the latest word on the ability of employers to conduct random drug testing of their employees. In *Imperial Oil Ltd v. Communications, Energy and Paperworkers Union of Canada, Local 900* (May 22, 2009), the Court of Appeal dismissed Imperial Oil's appeal and upheld the Divisional Court's ruling that the employer's policy of random drug testing violated its collective agreement with the union.

Imperial Oil's Alcohol and Drug Policy was initially challenged at the Ontario Court of Appeal in 2000. At that time, the Court held that Imperial's random drug testing of employees in safety sensitive positions by urinalysis was *prima facie* discriminatory because Imperial Oil perceived individuals who tested positive as being disabled by substance abuse. Further, the testing was not a *bona fide* occupational requirement because a positive test established only past use, and not present, on-the-job impairment. The employer temporarily ceased random drug testing, but eventually resumed it with a saliva swab test that could more effectively disclose current impairment by marijuana. The union brought a policy grievance to challenge this new form of drug testing.

An arbitration board allowed the union's grievance in part. While it upheld "for cause" and post-incident drug testing, it ordered Imperial Oil to cease random drug testing, finding that such testing violated the collective agreement requirement that all employees be treated with respect and dignity. The board found that it would require clear and unequivocal contractual language in order to conclude that employees had consented to random drug testing, and that no such language was present in this case. Finally, the arbitration board noted that the saliva swab test did not provide an accurate reading of current impairment.

The employer applied for judicial review of the board's decision. The Divisional Court dismissed the application and upheld the arbitration board's ruling that Imperial Oil's random drug testing policy violated the collective agreement. On May 22nd, 2009, the Ontario Court of Appeal agreed with the Divisional Court and dismissed the employer's appeal.

In this latest decision on random drug testing, the Ontario Court of Appeal makes it clear that the ability of the employer to require employees in safety sensitive positions to submit to random drug testing is limited by the provisions of the collective agreement, and the test's ability to show current impairment. Random drug testing will only be considered acceptable by the courts when there are reasonable and probable grounds to believe that an employee in a safety sensitive position is working under the influence of drugs.

However, employers are reminded that, even if testing is justified, disciplining an employee after a drug test has shown impairment may be discriminatory if the employee suffers from a disability. Drug and alcohol policies that result in automatic disciplinary action are *prima facie* discriminatory and are best avoided.

Legislative Update

In the last issue, we reported on changes to the *Employment Standards Act* affecting temporary help employees. Bill 139, which was introduced in December of 2008 to create additional protections for temporary workers, is now scheduled to come into force on November 6, 2009.

What's New at Bird Richard

We are pleased to announce that Alanna Twohey has completed her articles with Bird Richard and will be joining the firm as an Associate following her Call to the Bar on June 17, 2009.