BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Summer 2023

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

Court of Appeal Denies Disability Benefits to an Employee who was in an Accident while on Temporary Leave

In *Soave v. Stahle Construction Inc.*, 2023 ONCA 265, the Employer, ("Stahle") appealed a judgment requiring Stahle to pay damages to an employee after they terminated his long-term disability benefits coverage.

Stahle, a general contractor in the construction industry, implemented a company-wide benefits plan, which included long-term disability coverage. The employee ("employee" or "Respondent"), a construction supervisor for the employer, was covered under the benefits plan.

Due to a medical condition which required surgery, the employee took a leave of absence from work. Stahle issued the employee a Record of Employment indicating that the Respondent was on medical leave.

While on leave, but prior to his surgery, the employee was involved in a serious motor vehicle accident. The employee suffered serious injuries. When the employee went to pay for medication for his injuries, the insurance company informed him that he no longer had coverage, as he was no longer an "active employee".

The Respondent brought an action against the employer. The trial judge concluded that an employee on "temporary medical leave" was still employed with the employer and was entitled to long-term benefits. The trial judge awarded the Respondent, approximately $250,000 in general and special damages.

On appeal, Stahle challenged the trial judge's findings. Specifically, Stahle challenged the judge's interpretation of Stahle's insurance booklet ("booklet") which set out the eligibility terms for long-term disability benefits. The Ontario Court of Appeal agreed with Stahle.

Stahle's booklet addressed the instances under which an employee could be eligible for benefits, if their employment was temporarily interrupted. In addition, the booklet contained specific eligibility requirements for long-term disability coverage, including the requirement that an employee must be "actively at work" and the requirement that there must be a "qualifying period of 120 days of disability". Further, the booklet specified that an employee is not eligible for long-term disability coverage when on a leave of absence.

The Court of Appeal found that the trial judge's reasoning constituted a "fundamental misreading" of the insurance booklet's eligibility requirements, and granted Stahle's appeal.

This decision demonstrates why it is important to review the language of insurance policies to ensure that they are clear and concise for employers to protect themselves from lengthy and costly claims. In addition, this decision provides an example of how important it is for employers to properly assess an employee's entitlement to insurance benefits when the employee's work is interrupted due to a leave of absence. An improper termination that negatively impacts the employee's entitlement to benefits may result in potential liability for the employer.

Arbitrator Weighs in on the Reasonableness of a Hospital's Mandatory Vaccination Policy

In *Lakeridge Health v. CUPE, Local 6364*, 2023, Arbitrator Herman upheld a hospital's mandatory COVID-19 vaccination policy ("Policy"). The Arbitrator found that the hospital's Policy, which called for the termination of employees who refused to comply with the mandatory vaccination order, was reasonable.

In June 2021, Lakeridge Health ("Lakeridge" or "Hospital") implemented a voluntary vaccination policy that required employees to attest to their vaccination status, and for unvaccinated employees to make conscious efforts to protect themselves. Three months later, in response to the increasing spread of the virus, and the issuance of Directive #6 by Ontario's Chief Medical Officer of Health, the Hospital made the decision to revise its Policy to require mandatory vaccination.

The amended Policy required all employees to be vaccinated or face termination.

As a result of this policy, approximately 104 unionized employees were placed on unpaid leaves. Of those on leave, 47 were terminated.

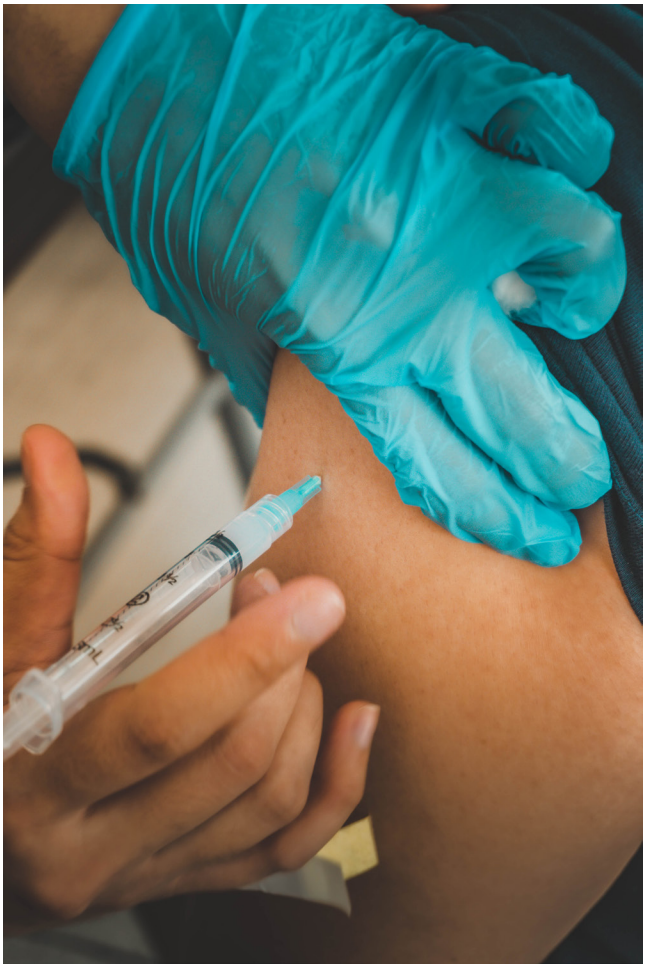

Photo © Ron Iligan

The Union who grieved the Policy argued that the mandatory vaccination policy was unreasonable.

In his decision, Arbitrator Hermon dismissed the Union's grievances and agreed with the majority of the Hospital's Policy. Arbitrator Hermon explained, that there was a sufficient need to protect the health of employees and patients. The rights of the individuals to preserve their employment when unvaccinated was overruled by the reasonable expectation to maintain a safe workplace. The Hospital's circumstances were specific to providing life-saving health services during the pandemic, which determined that automatic termination for unvaccinated employees was reasonable.

The Arbitrator did, however, disagree with the timeline of termination, stating that Lakeridge should have placed employees on unpaid leaves of absence for at least four weeks prior to terminating them. No remedy for lost wages was awarded, as the employees would have been on unpaid leave during the four weeks prior to termination.

In this first decision regarding the reasonableness of a mandatory vaccination policy in a hospital setting, the Arbitrator clarified that the decision to protect the health of its employees and patients outweighed the rights of individual employees to maintain employment if they decline to get vaccinated.

Although this is an encouraging decision for employers trying to ensure the safety of their employees, it is a reminder that it remains important to properly assess the reasonableness of their policies, prior to terminating an employee.

Ontario Court of Appeal finds Employer's Requirement for Proof of Canadian Citizenship or Permanent Residency Discriminatory

In *Imperial Oil Limited v. Haseeb* 2023 ONCA 364, the Ontario Court of Appeal found that an employer's condition for job applicants to provide proof of citizenship or permanent residency status during the job application process is discriminatory.

This decision restores the Ontario Human Rights Tribunal's decision that an employer is prohibited from discriminating against individuals in respect of employment, including during the recruitment phase, due to grounds protected under the Ontario *Human Rights Code* (the "Code").

The appellant in this matter, Muhammad Haseeb ("Haseeb") was an international student, in the Post-Graduation Work Permit program ("PGWP") that provided students a work permit with a fixed term of three years.

Post graduation, Haseeb applied for an entry-level engineering position with the Respondent Employer, Imperial Oil Ltd. ("Imperial"). Haseeb was the top candidate for the position, and as such, Imperial offered him the position. The offer, however, was conditional on permanent eligibility to work in Canada, as established by proof of either Canadian citizenship or permanent resident status. When Haseeb disclosed that he was neither a Canadian citizen nor a permanent resident, and would have to initially work on the three-year PGWP, Imperial withdrew its job offer.

The Court of Appeal concluded that federal immigration law treats individuals eligible to work in Canada equal to citizens and permanent residents. Imperial's requirement for proof of citizenship or permanent status, excluded the groups of individuals who are legally entitled to work full-time in Canada, like Haseeb was in this case. The Court of Appeal explained that under federal immigration law the PGWP made Haseeb eligible to work in Canada. The Court concluded that the requirement for the proof of either Canadian citizenship or permanent resident status would contradict the PGWP program and the initiatives of Canadian federal immigration law.

The Court of Appeal restored the Ontario Human Rights Tribunal's award of approximately $120,000, plus an extra $15,000 for costs of the appeal.

Prior to setting conditions on any job applications, employers are encouraged to review their policies and consult with one of our employment lawyers to ensure that any policies do not attract any claims for discrimination.

Groundbreaking Changes for Skilled Newcomers in Ontario

The Ministry of Labour, Immigration, Training and Skills Development in Ontario has announced its efforts to help internationally-trained immigrants to work in fields of their expertise. Professionals who have studied and trained in other countries will begin to be considered qualified to work in Ontario.

Studies from the Ministry of Labour have indicated that only 25% of immigrants in Ontario are working in their trained profession. Professional testing, however, has shown that newcomers are able to pass their professional licensing exams and equivalency tests in Canada. The barrier for newcomers to get a job in their profession, is often the requirement for them to have Canadian work experience.

In Canada, over 300,000 jobs remain unfulfilled, despite the thousands of newcomers who have the appropriate training, experience or expertise to fill the positions.

In the field of engineering, over 60% of job applicants are internationally trained engineers.

Following this legislation, Professional Engineers Ontario ("PEO") became the first regulated profession to remove the barrier of requiring Canadian work experience as a crite-rion for their application. PEO's approach to eliminating the Canadian experience requirement aims to help Ontario reverse the loss of productivity in engineering.

These efforts made Ontario the first province in Canada to ban unfair or discriminatory Canadian work experience requirements to help newcomers work in professions they are trained for. Many industries that are suffering labour shortages may consider following in PEO's footsteps and creating barrier-free opportunities for newcomers.

Bill S-211, an *Act* to Fight Modern Slavery in Supply Chains

After several years of unsuccessful attempts, Canada has passed its first bill to combat modern slavery. Bill S-211, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff* (the "*Act*") will require government institutions and private-sector entities to submit reports identifying the risks of modern slavery within their supply chain.

The term "entity" is broadly defined as a business that's either (a) listed on a stock exchange in Canada or (b) has a place of business in Canada, does business in Canada, or has assets in Canada and meets at least two of the following conditions for at least one of its two most recent financial years:

(i) it has at least $20 million in assets,

(ii) it has generated at least $40 million in revenue, and

(iii) it employs an average of at least 250 employees; or

(iv) is prescribed by regulations.

Starting in 2024, on or before May 31st of each year, the *Act* provides for an inspection regime applicable to entities and gives the Minister of Public Safety and Emergency Preparedness the power to require companies to provide an annual report. Each report will be required to include the steps taken in the past financial year that have contributed to preventing and reducing the risk of forced or child labour. The report must also include the following information in respect of each entity subject to the report:

(a) its structure, activities and supply chains;

(b) its policies and its due diligence processes in relation to forced labour and child labour;

(c) the parts of its business and supply chains that carry a risk of forced labour or child labour being used and the steps it has taken to assess and manage that risk;

(d) any measures taken to remediate any forced labour or child labour;

(e) any measures taken to remediate the loss of income to the most vulnerable families that results from any measure taken to eliminate the use of forced labour or child labour in its activities and supply chains;

(f) the training provided to employees on forced labour and child labour; and

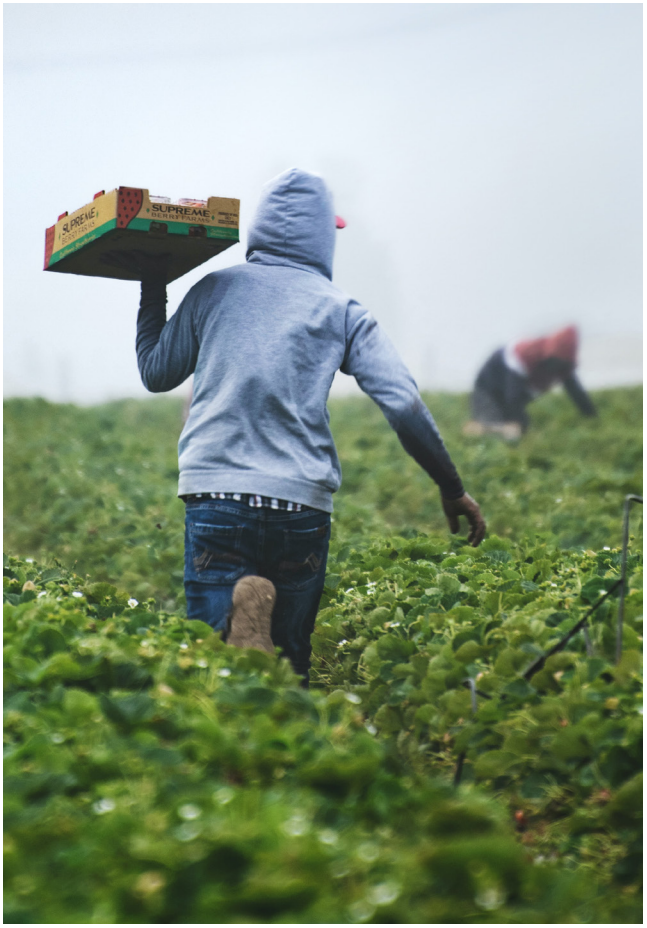

Photo © Tim Mossholder

(g) how the entity assesses its effectiveness in ensuring that forced labour and child labour are not being used in its business and supply chains.

The Ministry of Public Safety and Emergency Preparedness will be responsible for maintaining electronic registries of all submitted reports. It is the Minister's discretion as to the form and manner of publishing; however, the public will be able to view these reports on the Department of Public Safety and Emergency Preparedness website.

Though government organizations and business entities previously considered the modern slavery issues, this *Act* proposes a much more solid structure to ensure that employers are remaining compliant.

Failing to comply with the *Act* can result in a summary conviction with a maximum fine of $250,000. Any person or entity that commits an offence under the *Act* and any member who participated in its commission will be considered guilty.