BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS'™
UPDATE

Winter 2024

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

- **Ontario Superior Court Provides Guidance on the Interpretation of Arbitration Clauses in Employment Agreements** 1
- **Employer's bad Faith Smear Campaign of Dismissed Employee Proves Costly** 3
- **Ontario Employers may be Obligated to Remove the Requirement of "Canadian Work Experience" in their Job Postings and Hiring Process** 3
- **The *Working for Workers Four Act*, 2023, to Provide Greater Protections for Employees in the Restaurant, Service and Hospitality Industry** 4

Ontario Superior Court Provides Guidance on the Interpretation of Arbitration Clauses in Employment Agreements

In *Nohdomi v. Callidus Capital Corp.*, 2023 ONSC 4469, the Ontario Superior Court of Justice confirmed that an arbitration clause is invalid and unenforceable if it contracts out of the *Employment Standards Act, 2000, S.O. 2000, c. 41 ("ESA").*

In this matter, the plaintiff employee, Daizo Nohdomi ("Nohdomi"), and his employer, Catalyst Capital Group Inc. ("Catalyst"), entered into an employment agreement. The employment agreement contained an arbitration clause which provided that any controversy or claim arising out of or relating to the employment agreement would be settled by arbitration. The arbitration clause further stipulated that an arbitrator would have the right to determine all questions of law and jurisdiction. In addition, the clause provided an arbitrator with the right to grant interim and/or final damages awards.

When the employment relationship ended, Nohdomi brought a wrongful termination action against Catalyst and co-defendant Callidus Capital Corp. As a response, the defendants brought a motion for an order to stay or dismiss the plaintiff's action. The defendants claimed that the matter was required to be settled by arbitration, pursuant to the employment agreement between the parties.

The plaintiff's position was that the arbitration clause was invalid as it violated the *ESA* in two respects. First, the arbitration clause limited Nohdomi's right to make a complaint under the *ESA*, and second, it was part of a termination provision that also violated the *ESA*.

The Court agreed with the plaintiff, concluding that the arbitration clause amounted to an illegal contracting out of an employment standard.

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

Readers are welcome to reproduce articles contained in this newsletter, with attribution. Comments or suggestions for future articles are always welcomed. The articles contained in EMPLAWYERS'™ UPDATE are intended to provide readers with general information on the subject matter contained therein. They should not be regarded or relied upon as legal advice or opinion.

Photo by Gabrielle Henderson on Unsplash

The Court explained that under section 1(1) of the *ESA*, an employment standard is defined as follows:

- "[E]mployment standard" means a requirement or prohibition under this Act that applies to an employer for the benefit of an employee.

The Court also pointed to section 96(1) of the *ESA*, which provides an employee with the right to make a complaint to the Ministry of Labour. Section 96(1) reads as follows:

- A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director.

The Court further clarified that the investigation process triggered by section 96(1) institutes an employment standard.

The Court clarified that one of the benefits of the *ESA* was an employee's right to make a complaint to the Ministry of Labour should their employer contravene the *ESA*. The statute further provides the employee with the right to have the Ministry investigate a complaint. A right which the Court additionally confirmed was also an "employment standard".

Although Nohdomi took no steps to file a complaint under the *ESA*, the Court determined it had no bearing on the matter because a clause that deprives an employee of an *ESA* standard is enough to render an agreement invalid. As such, the arbitration clause found in Nohdomi's employment agreement constituted a contracting out of the *ESA*, as it deprived Nohdomi of the right to make a complaint with the Ministry under the *ESA*.

In addition, the Court weighed whether an invalid termination clause would also invalidate other provisions of the employment agreement such as an arbitration clause. On this issue, the Court declined to answer, stating the following at paragraph 31:

- "Given that I have found that the Arbitration Agreement is invalid because it violates the ESA with respect to the filing of a complaint, it is not necessary for me to decide if the termination provision is invalid and whether the Arbitration Agreement is part of the termination provision. The issue of the validity of the termination provision is best left for another day."

Employers must ensure that, when drafting employment agreements, they do not include any provisions that would potentially fall below the minimum standards set out in the *ESA*. Should a Court determine that a clause is less than what the *ESA* prescribes, employers may run the risk of being exposed to costly liability.

Employer's bad Faith Smear Campaign of Dismissed Employee Proves Costly

Koshman v. Controlex Corporation, 2023 ONSC 7045 was a wrongful dismissal action which proceeded on a default basis. The Ontario Superior Court awarded a terminated employee over $570,000, including $100,000 in aggravated and punitive damages, after finding that the employer attempted to destroy the employee's reputation.

The plaintiff, Martin Koshman ("Koshman"), was employed with the defendant, Controlex for over 18 and a half years. At the time of his termination, Koshman, a 69-year-old, was the vice president of the company and earning an annual income of approximately $228,000, plus benefits and a car allowance.

As an engineer by trade, Koshman directed the operational and property development management of the business. Although Koshman had a great deal of autonomy and independence in his business decisions, he reported to Controlex president and founder, Peter Dent.

In 2020, Peter Dent suddenly passed away. Immediately following Peter Dent's death, his wife, Susan Dent, who did not have previous direct involvement in the company, took over the business affairs and immediately took away Koshman's signing authority. Susan Dent had no email, rarely attended the workplace and refused to return any communications from Koshman, making his job nearly impossible to carry out.

In the 8 weeks following Peter Dent's death, Koshman learned from various clients that Susan Dent had been making "bizarre and defamatory statements" about him. Of the comments, Susan Dent had been said to say that her husband was murdered and Koshman was involved. She also claimed that Koshman took kickbacks and made claims which would put his professionalism and character into question. Further, prior to providing Koshman with any notice of his termination, Susan Dent told clients that Koshman was fired, and offered his position to one of his subordinates.

Koshman's termination later followed when he received a notice via courier. The notice provided no cause for the termination, failed to pay the minimum statutory notice entitlements for someone with his extended years of service, and failed to pay any accrued vacation entitlements.

Given that there was no employment contract, the Court held that Koshman was entitled to a common law notice of 24 months amounting to approximately $470,000, which includes loss of salary, benefits and car allowance.

Koshman also sought aggravated and punitive damages. In their analysis for aggravated damages the Court concluded that Susan Dent acted in bad faith by taking away Koshman's signing authority; criticizing his character and honesty to clients; failing to meet with him; sending his termination by courier; failing to initially pay *ESA* entitlements; repeatedly stating that he was accepting bribes; and suggesting that he murdered her husband.

As such, the Court awarded the plaintiff $50,000 in aggravated damages. For the same reasons, the court also awarded the plaintiff $50,000 in punitive damages.

This matter serves as a reminder to employers of the importance of acting in good faith when terminating employees. Employers who make false accusations, defame or treat employees in bad faith, may face substantial legal consequences, including additional hefty damages and costs.

Ontario Employers may be Obligated to Remove the Requirement of "Canadian Work Experience" in their Job Postings and Hiring Process

The Ontario government has proposed legislation, that if passed, intends to address the labour shortage issues in the province. The changes aim to remove barriers for internationally-trained immigrants by helping more qualified candidates progress in the interview process.

Due to the long-standing practice in some regulated industries to require job applicants to have Canadian work experience, many newcomers are being denied job opportunities. Currently in its second reading at the Legislative Assembly of Ontario, the new legislation will prohibit regulated professions and trades in over 30 occupations such as law, accounting, architecture, engineering, electrical and plumbing from requiring Canadian work experience requirements in their licencing process.

The proposed legislative changes will expand actions already introduced by the *Working for Workers Acts, 2021, 2022* and *2023,* in an attempt to help newcomers contribute to the existing labour shortages in the province.

Currently, internationally-trained immigrants who often have the appropriate training, qualifications and experience, are being denied opportunities to apply to positions in regulated industries, despite the growing shortages in these areas. In 2021, the labour shortage accounted for roughly 300,000 jobs in Ontario remaining unfilled, costing the province billions in lost productivity.

In some regulated professions, licensing time can take up to 18 months or more. The Ministry of Labour, Training and Skills Development has stated that the requirement

for Canadian work experience and costly language testing creates further unnecessary and unreasonable processing times for newcomers trying to get licenced.

In addition to the prohibition of the Canadian experience requirement, the government of Ontario is also proposing changes to improve oversight and accountability of third-party organizations used in regulated professions like accountants, architects and geoscientists to assess international qualifications. The goal is to ensure assessments of immigrant qualifications are evaluated fairly and transparently.

If passed, Ontario will be the first province to include provisions in its employment standards legislation to address the Canadian experience requirements.

Employers should be aware that violations of these proposed changes could result in discrimination liabilities under the Ontario *Human Rights Code*. Employers are encouraged to consult with an employment lawyer before starting their recruitment process, to ensure that their hiring practices align with the proposed amendments and adhere to Ontario's Human Rights legislation.

Photo by Jessie McCall on Unsplash

The *Working for Workers Four Act*, 2023, to Provide Greater Protections for Employees in the Restaurant, Service and Hospitality Industry

The Ontario government is introducing legislation, that if passed, would update the province's *Employment Standards Act, 2000, S.O. 2000, c. 41 ("ESA")*. The proposed updates under the *Working for Workers Four Act, 2023*, ("*Act*") are aimed at protecting employees in the restaurant, service and hospitality industries.

According to studies, 1 in 20 diners left a restaurant without paying their bill, while gas thefts cost Ontario businesses over $3 million in 2022. Although it is a contravention of the *ESA* to deduct certain wages, requiring staff to pay for revenue loss from "dine and dashers", it remains a common practice in the restaurant and service industry.

The *Act* aims to ensure employees' earnings are safeguarded by prohibiting employers from deducting an employee's wages from "dine and dash" and "gas and dash", and would ban the practice of unpaid trial/training shifts.

The Minister of Labour, Immigration, Training and Skills Development, David Piccini, stated, "[i]t is unacceptable that any worker in our province should have their wages deducted or see themselves put in harm's way because of someone else's criminal activity."

In addition, the Ontario government is recommending changes to ensure service workers who are paid in tips are being paid what they are owed. This will include the requirement to ensure that employers may only share in employee-pooled tips if they are performing the same work as the staff. Furthermore, employers will be required to post in the workplace if they have a policy of sharing pooled tips.

With the use of digital payment platforms rising in the service industry, the proposed changes would also require employers who pay tips using direct deposit to allow their employees to select the account tips are to be deposited into. This would help workers avoid unwanted banking fees and provide them greater access to their tips when needed.