BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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The Importance of Comprehensive Employment Contracts and Workplace Policies — *Boyer v. Callidus*, 2024 ONSC 0020

The Ontario Superior Court of Justice's decision in *Boyer* offers a cautionary tale to employers about the importance of drafting, documenting, and communicating workplace policies and employment contracts.

Mr. Boyer worked for Callidus as a Vice President of underwriting and portfolio management from 2009 to 2016. Notably, Mr. Boyer's employment agreement was oral.

Around 2014, Callidus introduced a deferred bonus program and stock option plan for certain Callidus employees. Mr. Boyer participated in both. He was also entitled to four weeks' vacation per year.

In the summer of 2015, Mr. Boyer notified his then manager that he intended on retiring at the end of 2016. However, Mr. Boyer departed in September of 2016 due to events that he perceived constituting a toxic work environment and reduced work responsibilities. Mr. Boyer commenced a claim seeking damages for constructive dismissal, unpaid vacation pay, deferred bonuses, and stock option entitlements.

Constructive Dismissal

The Court dismissed Mr. Boyer's constructive dismissal claim on the basis that a reasonable person would not have felt that the essential terms of his employment contract were being substantially changed in light of Mr. Boyer's upcoming retirement. The Court further found that Mr. Boyer's evidence of a toxic environment was not particularized, or did not directly impact him. Accordingly, the evidence advanced by Mr. Boyer did not amount to a breach of the employment contract.

Outstanding Vacation Pay

The vacation dispute centred on whether Mr. Boyer was entitled to carry forward his unused vacation time to subsequent years. Callidus argued that its policy was that vacation time had to be used during the year it was earned, but no evidence was advanced in support that the policy existed, or that it was communicated to Mr. Boyer. The Court awarded Mr. Boyer $93,076.92, the equivalent of 22 weeks' salary, for accumulated and unused vacation time.

Outstanding Deferred Bonuses

Mr. Boyer was paid an annual bonus, a portion of which was deferred. In withholding the deferred bonus, Callidus argued that its bonus deferral policy required the recipient to be an active employee at the time of payout. The Court found that Mr. Boyer's contract of employment did not include a condition that he would not be paid deferred bonuses after his employment with Callidus ended. The Court further found that if active employment was a condition of receiving the deferred bonus, Callidus did not advance evidence demonstrating Mr. Boyer's awareness or agreement to this condition. Mr. Boyer was entitled to damages for unpaid and deferred bonus amounts that were awarded to him for 2014 and 2015 in the amount of $525,000 plus 3% quarterly interest on the deferred amounts.

Stock Options

Callidus had a stock option policy in 2014 that was silent on the treatment of an employee's unvested options in the case of retirement. An amended policy was implemented in May of 2016 stating that any unvested portion of options would expire upon the termination of an employee's employment. Mr. Boyer's evidence, which the Court accepted, was that he was previously informed by a manager that his options would vest upon retirement and at no time was he made aware of an amended policy. Accordingly, the Court awarded equivalent damages of $1,251,945.58 representing the value of his stock options had they vested.

Takeaway for Employers

Boyer should be a stark reminder for employers that all employment contracts and policies need to be clearly written and communicated to employees. Callidus could have avoided much of its $1.8M liability by designing, implementing, and communicating comprehensive workplace policies.

Employers should regularly review their policies and their communication practices. Further, when introducing new compensation plans or policies, it is crucial that the employer properly document and communicate the change to its employees.

Electronic Monitoring of Employees

In today's dynamic work landscape, businesses are continuously seeking innovative ways to optimize efficiency and productivity. Among the myriad of strategies, leveraging Artificial Intelligence (AI) has emerged as a powerful tool for tracking and monitoring employee performance.

In 2022, the Ontario government amended the Ontario *Employment Standards Act, 2000* (the "*ESA*") to require employers that employ 25 or more employees to have a written policy on the electronic monitoring of employees. The policy must state whether or not the employer electronically monitors employees. If the employer does, the policy must include:

i) a description of how and in what circumstances the employer may electronically monitor employees;

ii) the purposes for which the information obtained through electronic monitoring may be used by the employer;

iii) the date the policy was prepared (the date must include the day, month and year); and

iv) the date any changes were made to the policy.

In simpler terms, the use of artificial intelligence to monitor workers, and whether the resulting data can be used to terminate an employee, depends on the specific details of the electronic monitoring policy.

The caselaw on electronic monitoring expands on the ESA requirement for an employer to have a policy and inform employees they are being monitored. Having an electronic monitoring policy does not provide the employer with a carte blanche to track their employees. The surveillance must be for a genuine business interest and balanced against the worker's interest to maintain their own privacy.

Generally, an employer may use the electronic monitoring data in the discipline or termination of an employee where their policy on electronic monitoring and its application are in compliance with the *ESA* or other statutory regimes, reasonably undertaken to address a legitimate business interest with consideration to the employees' legitimate privacy interests.

The following two cases highlight how monitoring technologies can aid employers in addressing time theft in the workplace.

i) *Enbridge Gas Inc. and Unifor*, Local 975, 2023 CanLII 2937 (ON LA)

In a 2023 labour arbitration matter, monitoring technology was used to uphold a termination for cause. After receiving a complaint that an employee was not showing up to his assigned work site, the employer discovered that the employee was paid for more than 200 hours of work he did not complete. The employer terminated the employee for cause and successfully upheld the termination grieved by the employee's union. Relying on GPS data in the employee's work vehicle, the arbitrator was satisfied that the employee committed time theft.

ii) *Besse v. Reach CPA Inc.* 2023 BCCRT 27 (CanLII)

The BC Civil Resolution Tribunal ("CRT") decision in *Besse v. Reach CPA Inc.* offers another instance of time theft and a welcomed outcome for employers concerned about productivity in the emergent remote work context. In this case, the CRT relied on evidence from a time-tracking program to dismiss a claim for wrongful dismissal and to order the repayment of wages for unworked hours.

Reach CPA Inc. became troubled by the performance of a relatively new hire working remotely. The employee was over-budget and behind schedule in their tasks. Further, the employer noted irregularities in the employee's timesheets, including hours billed to files that they did not appear to have worked on. The employer analyzed data from a time-tracking program installed on the employee's computer with their knowledge. It concluded there were 50.76 unaccounted hours reported on the impugned timesheets. The employer dismissed the employee for cause on this basis and the employee subsequently advanced a claim for wrongful dismissal.

The CRT found that the time-tracking program was likely to accurately record the employee's work activity and that it was reasonable to conclude that the employee engaged in time theft. Not only did the CRT find that dismissal for cause was appropriate in the circumstances, it ordered the employee to repay the wages she received for unearned hours.

Ontario Court Of Appeal Ruled Bill 124 Unconstitutional — *Ontario English Catholic Teachers' Association v. Ontario (Attorney General)*

In 2019, the Ontario legislature passed Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act* ("Bill 124"), which imposed a 1% cap per year on increases to salary rates and compensation for three years for employees in the broader public sector and was introduced by the Ontario government as a measure to control public sector costs and promote fiscal sustainability.

In response, ten organizations that represent employees in the broader public sector brought applications challenging the constitutionality of Bill 124. They specifically invoked sections 2(b) and 2(d) of the Charter, which protect freedom of expression and freedom of association, respectively, and argued that the legislation interfered with their ability to collectively bargain and advocate for their members.

The application judge granted the applications, finding that the *Act* violated the respondents' freedom of association and that this violation was not saved by s. 1 of the Charter. The application judge did not accept the arguments that the *Act* violated the respondents' s. 2(b) freedom of expression rights or their s. 15 equality rights.

Ontario appealed on the basis that the application judge's decision is contrary to decisions of the Supreme Court, the Ontario Court of Appeal and other appellate courts that have found similar wage restraint legislation to be constitutional. Ontario also argued that the application judge erred in his analysis of s. 2(d) by essentially turning the right to freedom of association, which the Supreme Court has said is a procedural right, into a substantive right. Ontario further argued that the application judge erred in his analysis and application of s. 1 of the Charter by failing to sufficiently defer to its policy choices in the face of a pressing need to address the deficit through control of public sector wages and compensation.

The Court of Appeal dismissed the appeal, holding that the legislation did indeed violate public sector workers' Charter rights. The Court emphasized the importance of freedom of association and collective bargaining as fundamental rights in a democratic society, particularly in the context of labour relations. The Court found that the government had not sufficiently justified the infringement of these rights and that the legislation went too far in limiting the ability of teachers' unions to represent their members effectively.

The decision of the Ontario Court of Appeal affirmed the protections extended to the collective bargaining rights for workers, and underscored the role of the judiciary in upholding constitutional rights against government actions that may infringe upon them. It also had broader implications for labour relations and the balance of power between governments and unions in the public sector.

Are You Compliant with Canada's *Fighting Against Forced Labour and Child Labour in Supply Chains Act?*

Canada's *Fighting Against Forced Labour and Child Labour in Supply Chains Act (the "Act")*, formerly known as Bill S-211, is the country's new legislation intended to combat modern slavery. Enacted in 2023, this *Act* addresses the presence of forced and child labour in global supply chains, requiring companies to report the measures they have taken to monitor, protect against, and reduce modern slavery. The *Act* applies to goods, not services.

Who Must Comply with the *Act*?

The *Act* applies to business entities that are a corporation or a trust, partnership or other unincorporated organizations that meet any of the following criteria:

i) Listed on Canadian stock exchanges;

ii) Have a place of business in Canada, conduct business in Canada, or have assets in Canada;

iii) Meet at least two of these conditions for at least one of their two most recent financial years:
   a. Have at least $20 million in assets
   b. Generated at least $40 million in revenue
   c. Employ an average of at least 250 employees

Additionally, the business entity must fall under one of the following to trigger reporting obligations:

i) producing, selling or distributing goods in Canada or elsewhere;

ii) importing into Canada goods produced outside Canada; or

iii) controlling an entity engaged in any activity described in paragraph (a) or (b).

Reporting Obligations

If your business falls under these categories, you have a reporting obligation. By May 31st each year, covered employers must report to the Minister on the steps taken during the previous financial year to prevent and reduce the risk of forced labour or child labour in the production of goods either within Canada or imported into Canada. The report must include:

- The entity's structure, activities, and supply chains
- Policies and due diligence processes related to forced and child labour

Photo by Jeffrey Riley Unsplash

- Identification of business and supply chain areas at risk of forced or child labour and the steps taken to manage that risk
- Measures taken to remediate any instances of forced or child labour
- Measures taken to address income loss to vulnerable families resulting from the elimination of forced or child labour
- Training provided to employees on forced and child labour
- Methods used to assess the effectiveness of ensuring no forced or child labour is present in business and supply chains

Approval Process

The report must be approved by:

- The governing body of a single entity for individual reports, or
- The governing body of each entity or the controlling entity for joint reports

There is no prescribed level of detail for the responses, but the Government advises that employers should use discretion and aim for a report generally not exceeding ten pages, proportionate to their size and risk profile.