BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Fall 2024

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

Changes to Temporary Foreign Worker Program

Recent changes to Canada's Temporary Foreign Worker (TFW) Program have introduced several important measures affecting both employers and foreign workers, particularly in Ontario. These updates, which took effect on September 26, 2024, are part of a broader strategy to recalibrate the program and reduce reliance on temporary workers in favor of Canadian talent.

Key Changes Include:

1. **Restrictions on Low-Wage Jobs**: Labour Market Impact Assessments (LMIAs) for low-wage positions will not be processed in regions where the unemployment rate exceeds 6%. Exceptions will be granted for seasonal and non-seasonal jobs in food security sectors (primarily agriculture, food processing and fish processing), as well as construction and healthcare.

2. **Workforce Caps**: Employers can now only hire a maximum of 10% of their workforce through the TFW Program under the low-wage stream, which is down from previous caps. This change aims to reduce dependency on foreign workers and encourage hiring locally. Exceptions will be granted for seasonal and non-seasonal jobs in the food security sectors (primarily agriculture food processing and fish processing), as well as healthcare and construction.

3. **Shorter Employment Duration**: The maximum period a low-wage temporary foreign worker can be employed has been reduced from two years to one, tightening the flexibility for employers relying on temporary foreign labour.

In Ontario specifically, new rules require staffing agencies and recruiters to be licensed, with penalties imposed for engaging with unlicensed entities. This aims to protect vulnerable foreign workers and ensure fair labour practices. Additionally, changes to the Ontario Immigrant Nominee

Program (OINP) have expanded eligibility for in-demand skills, allowing more opportunities for foreign workers in critical sectors like healthcare and construction.

These adjustments reflect the government's ongoing effort to address challenges such as rising unemployment and housing shortages, while balancing the need for foreign workers in certain industries.

Medical Evidence not Required for Mitigation, or Mental Distress Damages

In *Krmpotic v. Thunder Bay Electronics Limited*, 2024 ONCA 332, the Ontario Court of Appeal found that medical evidence is not required to establish an employee's physical inability to mitigate damages. Further, the Court considered the criteria for awarding aggravated damages, and whether they can be granted when an employer acts in bad faith.

The employee, a labourer who had worked for the company for 30 years, was terminated without cause or notice just hours after returning from medical leave, during which he was still recovering from back surgery.

The employee commenced an action claiming wrongful dismissal, seeking pay in lieu of notice, as well as damages for mental distress, and aggravated or moral damages.

At trial, the employer argued for a reduction in the notice pay, claiming the employee failed to mitigate his damages by seeking new employment. The employee argued that he was physically unable to perform significant labour during the notice period due to his ongoing recovery.

Despite advancing no medical evidence in support of his claim that he was physically unable to mitigate his damages and that he suffered mental distress, the trial judge awarded him 24 months' notice and $50,000.00 in general damages.

On appeal, the employer again argued that the employee had failed to mitigate his damages and contended that the trial judge should have required medical evidence in its determination that the employee was physically unable to mitigate, and that he suffered mental distress as a result of his termination.

The Court of Appeal rejected the employer's argument, holding that physical incapacity is a factual determination and does not always require medical evidence. The trial judge did not err in finding that Krmpotic took reasonable steps to mitigate his damages. While he made very little effort to find alternative employment after termination, Krmpotic was 59 years old, recovering from back surgery, and was significantly limited in his ability to perform the physical labour demanded by his work.

The Court of Appeal further dismissed the employer's argument that mental distress evidence is necessary to justify aggravated damages, finding that this view overly narrows the employer's duty of good faith during termination. The Court accepted on face value that, because of the manner of dismissal, Krmpotic suffered from anxiety, depression, fear, poor sleep, frustration, and feelings of helplessness, which was harm beyond the normal distress and hurt feelings resulting from dismissal. The Court agreed with the trial judge's finding that the employer breached this duty in several ways, justifying the award of aggravated damages to the employee.

Key Takeaways for Employers

1. Employers must take due care when conducting terminations; especially when dealing with long service, or injured employees.
2. An employee does not necessarily require medical evidence to successfully claim they were physically unable to mitigate their losses.
3. A breach of an employer's duty of good faith may attract aggravated damages, even where the employee does not establish through medical evidence, that they suffered a diagnosable psychological injury.

Duty to Investigate *Human Rights Code* Violations

In the recent decision *Rougoor v. Goodlife Fitness Centres Inc.*, 2024 HRTO 31, the Tribunal clarified employer obligations in handling harassment complaints; particularly those brought by former employees after their employment has ended. The Tribunal concluded that employers are not legally required to investigate complaints filed after an employee's termination. Additionally, the Tribunal examined the concept of a "poisoned work environment," distinguishing it from harassment.

The Applicant was briefly employed as a personal trainer by the Respondent. She claimed that shortly after starting her job, she was sexually harassed by a coworker.

The Tribunal found that the Applicant did not report the harassment to the Respondent until six months after her employment had been terminated. Since employers are not vicariously liable for sexual harassment committed by their employees under section 46.3(1) of the *Human Rights Code*, the Tribunal only had to determine whether Respondent had a duty to investigate the complaint. It ruled that because the complaint was made post-termination, the Respondent was under no obligation to investigate it. An employer has a duty to investigate in order to ensure a complainant is

not required to work in a discriminatory environment. The Applicant's right to be free from discrimination in her workplace could not be infringed by the Respondent's failure to investigate because she was no longer employed with the Respondent.

A "poisoned work environment" is considered endemic discrimination or harassment in the workplace such that enduring such conditions becomes a term or condition of employment. The Tribunal ultimately concluded that the Applicant's allegations did not meet the threshold required to establish a poisoned work environment. This was primarily on account of the employer having no knowledge of the harassment until after the Applicant's employment was terminated.

Employee Refusing to Vaccinate Frustrates Contract

In Croke v. VuPoint System Ltd., 2024 ONCA 354, the Ontario Court of Appeal examined whether the doctrine of frustration applied to an employment contract terminated due to an employee's violation of a mandatory COVID-19 vaccination policy. The court upheld frustration of contract in this context.

VuPoint had a service contract with Bell Canada, under which it subcontracted technicians to perform installation work in Bell customers' homes. The Appellant was one of these technicians.

In 2021, Bell Canada introduced a policy that required its subcontractors to be vaccinated against COVID-19. In response, VuPoint required installers to provide proof of vaccination. Non-compliant employees would be prohibited from performing work for Bell Canada and may not receive the assignment of any jobs.

The Appellant refused to disclose if he had been vaccinated, causing him to be ineligible to provide services for Bell Canada. Accordingly, the employer terminated his employment for non-compliance. The Appellant subsequently filed a wrongful dismissal lawsuit.

In response, the employer argued frustration of contract, claiming that Bell's vaccination policy was an unforeseeable event not anticipated when the employment contract was created. The motion judge agreed, stating that the new policy made the Appellant unqualified for the job, thereby frustrating the employment contract's core foundation.

The Appellant appealed, but the appellate court upheld the decision, confirming that the doctrine of frustration applied.

The Appellant argued that his personal choice to remain unvaccinated should prevent the doctrine from applying, but the Court disagreed. It held that the employee's voluntary

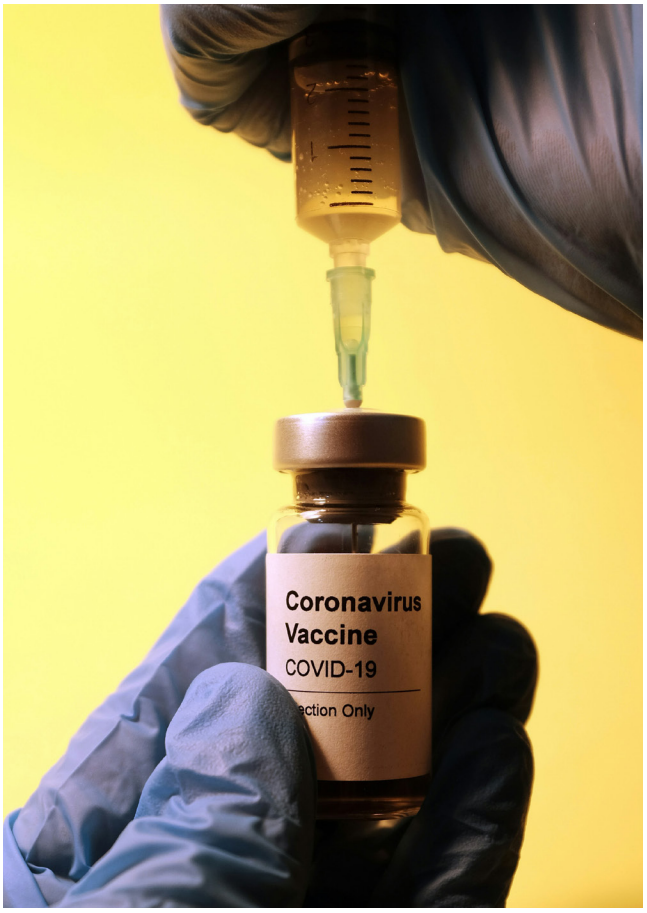

Photo by Hakan Nural Unsplash

choice was irrelevant; it was the introduction of a new job requirement that he did not meet that rendered him unable to work.

The Court further found that the motion judge reasonably concluded that the Bell's vaccination policy was a "supervening event" that was outside the control of VuPoint.

Refusal to comply with a COVID-19 vaccination policy can result in frustration of an employment contract, and employers can immediately terminate the agreement when it becomes frustrated. The employer does not necessarily need to provide the employee with an opportunity to resolve the underlying issue.

Federal Court Reaffirms the Importance of Procedural Fairness in Workplace Investigations

In Marentette v. Canada (Attorney General), 2024 FC 676, a Border Services Officer with the Canada Boarder Services Agency sought judicial review of an investigation report that found that the incidents which had occurred over a 25-year period rose to the level of workplace harassment, or violence.

The employer did not initiate an investigation for nearly a year. Investigators only interviewed four of the six supervisors involved, and the Applicant was not given the chance to respond to the supervisors' accounts. Between August and November 2022, the Applicant was informed on three occasions that the investigation was complete. However, contrary to the employer's own investigation policies, the Applicant was neither provided with the preliminary findings, nor given an opportunity to respond before the final report was issued.

The investigation concluded that the alleged incidents did not constitute workplace harassment, and the Notice of Occurrence was closed without further action.

The Applicant contested the procedural fairness of the investigation by filing a Notice of Application for judicial review with the Federal Court, arguing that he was denied the opportunity to respond to both the supervisors' evidence and the preliminary findings.

The Federal Court largely agreed with the Applicant's position, emphasizing that investigations into workplace harassment require a high degree of procedural fairness. The Applicant should have been granted a "reasonable opportunity" to respond to the evidence and the preliminary report, particularly since the employer's internal policies explicitly outlined this process.

On these grounds, the Federal Court granted judicial review and ordered the matter to be redetermined with a new investigator.

Key Takeaways for Employers:

1. This case underscores the critical importance of procedural fairness in workplace harassment investigations, particularly the right of the complainant to respond to opposing evidence.
2. Employers must strictly follow their own internal investigation policies. If employers choose to include procedural steps beyond what the law requires, they must ensure that those steps are consistently followed.

Modifications to Temporary Employment Agencies' Rate Setting

The WSIB recently completed a review of the rate setting system for Temporary Employment Agencies (TEAs), prompted by concerns from certain TEAs, particularly those supplying clerical labour. These concerns highlighted that the rate-setting approach initially planned for 2020 would lead to significant rate increases for some agencies. Accordingly, the WSIB has modified the TEAs' rate setting based on its consultation with stakeholders.

Key Aspects of the Modification Include:

- **New Clerical Labour Classification:** A classification specific to clerical labour and knowledge-based roles (similar to the pre-2020 classification) will be created.
- **Reporting Clerical Labour Separately:** TEAs will report clerical labour under this new classification, regardless of the client's classification. Non-clerical labour will continue to be reported according to the client's classification.
- **Placement in Class L:** The new classification will be part of Class L (Professional, Scientific, and Technical Services), reflecting a comparable risk profile.
- **Rate Assignment:** The new classification will have its own rate, allowing TEAs to maintain rates comparable to those assigned before 2020.

Effective Date:

The new classification is expected to take effect on January 1, 2025, allowing the TEA industry time to adjust, and the WSIB time to implement necessary changes.

TEAs will generally be assigned the Class L rate when the new classification is established, with their previous experience used to determine their prior year rate.

2024 rates for TEAs will continue to have rates set under the existing system. The modified approach will be subject to regulatory amendments in Ontario.

Closing Existing Operations for WSIB Reporting Purposes:

TEAs supplying clerical labour to various sectors will need to close those operations for WSIB reporting purposes in 2025, as all clerical labour will fall under the new classification.

For example, a TEA may exclusively supply clerical labour to clients in several classes and they are assigned a rate of $0.18 for each of those operations. In 2025 they will close those operations when the new classification is opened. Their experience under those operations will transfer to the new classification and their $0.18 rates will be used to calculate their prior year rate in the new classification. They will then move from their prior year rate towards their projected rate.

Compliance and Monitoring:

The WSIB will continue to ensure all businesses, including TEAs, comply with reporting and premium payment requirements. TEAs' reported premiums under the new classification will be monitored as part of the WSIB's risk analysis, with corrective actions taken where non-compliance is identified.