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The Employers' Edge

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Ontario Court Awards $500,000 in Punitive Damages in a Wrongful Dismissal Case

In a recent Ontario Superior Court decision, Honda Canada Inc. ("Honda") was found liable for wrongfully dismissing, discriminating against and harassing a chronically absent employee named Kevin Keays. Honda was ordered to pay Mr. Keays 24 months pay in lieu of reasonable notice and an additional $500,000 for punitive damages.

This troubling decision merits criticism in many areas. First, the amount ordered in punitive damages is unprecedented in a wrongful dismissal action in Canada, and a great deal of reasoning given to support the award was contrary to well-established case law and human rights commission policies.

Second, the lack of cited evidence for a number of the Court's conclusions gives rise to fears of judicial bias against employers by at least one judge in Ontario. By way of example, the Court makes a number of unsupported and inflammatory statements imputing malicious intent with respect to the actions taken by a highly regarded practitioner of occupational medicine and other professionals involved in attempting to manage Mr. Keays' absenteeism.

Third, other conclusions that the Court reached were either made without application of the relevant legal principles, or were contrary to well-established case law and policies. For example, the Court awarded 15 months reasonable notice, based in part on Honda's "egalitarian hierarchy". In Honda's operations there is no apparent distinction between employees from the president down to the production employees. All employees are called Associates, all wear white coats, there is no pecking order in the parking lots, and everyone is seen as a partner in the business process. Accordingly, the Court reasoned that when Mr. Keays was "terminated by Honda, it had the same impact on him as it would have on a member of senior management, up to and including the president." As a result, the Court held that the "management structure imposed and encouraged by Honda should tend to lengthen the notice period despite [Mr. Keays'] relatively modest status in the 'chain of command'".

The long-standing theory of assessing reasonable notice damages is to provide employees with a period of notice that is sufficient to allow them to obtain new employment. Unlike senior management, employees lower in the corporate hierarchy tend to have employment skills that are more transferable to positions within other organizations. Accordingly, less notice is required for such employees. The Court's reasoning in this case ignores this purpose of reasonable notice and, instead, tends to equalize the notice that is required for all employees in organizations that have a "flat" corporate hierarchy model. Not only is such reasoning contrary to the theory of reasonable notice, but it provides a disincentive for employers to implement such models.

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This case is being appealed to the Ontario Court of Appeal. For the reasons discussed above, it is hoped and indeed anticipated that this decision will be substantially or completely reversed on appeal. Crawford, Chondon & Andree LLP will continue to monitor the progress of this case and will provide updates in future editions of *The Employers' Edge*.

Upcoming Events

Crawford Chondon & Andree LLP will be hosting its second annual Employment Law Forum. This "must attend" full day seminar has been specially designed to bring employers up-to-date on the latest developments in labour and employment law. The seminar will also provide effective and practical strategies to minimize the risk and liability that can result from work-place related issues.

Invitations and registration information for the seminar will follow shortly…stay tuned!

The End of Mandatory Retirement

Recently, the Ontario government introduced legislation which, if passed, would end mandatory retirement in Ontario, following a one year transition period. This significant change will entail amendments to several Ontario statutes, most notably the Ontario *Human Rights Code (the "Code")* and the *Employment Standards Act, 2000 ("ESA")*.

At present, the *Code* prohibits discrimination on the basis of age only for those persons between the ages of 18 and 65. The new legislation would extend this protection to persons 65 years of age and over. Forcing an employee to retire because of his or her age would only be acceptable if the employer could establish that age was a *bona fide* occupational requirement. That is, that the age-motivated cessation of employment was a requirement or qualification necessary for the performance of the essential job duties of the position. Of course, all other protections under the *Code* would continue to be available to employees aged 65 and over.

The new legislation would also amend the *ESA* provision that currently disentitles individuals 65 years of age and over to notice of termination or pay in lieu. The elimination of mandatory retirement would mean that all eligible employees, regardless of age, would be entitled to receive notice of termination or pay in lieu of notice when their employment is terminated.

The new legislation contains some notable exemptions and exclusions that will affect age 65 and older employees in an important way. For example, under the *Workplace Safety and Insurance Act, 1997 ("WSIA")*, injured workers 65 and older will continue to be ineligible for the loss of earning benefits. In this regard, the *WSIA* will be amended such that any distinctions based on age within the Act will be permissible, despite the changes to the *Human Rights Code*.

Similarly, the *ESA* provision prohibiting discrimination on the basis of age in providing benefits to employees aged 18 to 64 would not be changed. Although forcing employees to retire at 65 will no longer be permissible, the denial of health related benefits to employees aged 65 and over would not be discriminatory. Individuals aged 65 and over would continue to be eligible for government health related benefits like the Ontario Drug Benefit Plan.

The end of mandatory retirement will not impact pension benefits already earned and employees will be entitled to continue their membership in pension plans and accrue benefits past age 65 subject to service or contribution gaps. The new legislation would not affect the ability to access Canada Pension Plan benefits at age 65.

The end of mandatory retirement will mean significant changes for many workplaces in Ontario. It will no longer be permissible to mandate retirement at a certain age in collective agreements and employment contracts or policies, unless doing so would constitute a *bona fide* occupational requirement. As a result, employers will be required to exercise care in ensuring that age is not a consideration taken into account when terminating employees who are 65 or older. Employers will have to assess individual employees' performance on a case-by-case basis and only terminate when it is appropriate to do so. Where performance issues result from a "disability", employers will be further obliged to meet their duty to accommodate under the *Code*.

The Lawyers at Crawford Chondon & Andree LLP will be monitoring the progression of this Bill and will provide updates in future editions of *The Employers' Edge*.

No Right to Lay-off in Absence of Employment Agreement

In the Spring 2004 edition of *The Employer's Edge*, we discussed an Ontario Court decision that underscored the utility of employment agreements for limiting employees' entitlement to pay in lieu of notice of termination of the employment relationship. We also outlined a number of restrictions on the actions of employers in the absence of employment agreements. In denying an employer's right to lay off an employee, another recent decision of an Ontario Court similarly highlights the value of implementing written employment agreements that minimize potential employer liabilities and establish key employer rights.

In 2001, Mr. Chen began his employment with Sigpro Wireless Inc. as a software engineer. After his mother became ill in February 2003, Mr. Chen requested that he take his vacation leave in order to visit her in China. Sigpro responded by placing Mr. Chen on temporary layoff pursuant to the *Employment Standards Act, 2000*. The terms of the layoff were that Sigpro could recall Mr. Chen back to work within 35 weeks of commencing the layoff, failing which Mr. Chen would become entitled to any termination pay and vacation pay that may be owed. On his return, Mr. Chen was advised that there was no work for him at Sigpro at the time. In August 2003, Sigpro advised Mr. Chen in writing that it was permanently laying him off.

The key issue in this case was whether or not Sigpro had the right to layoff Mr. Chen in the first instance. The Court found that Sigpro did not have this entitlement and that Mr. Chen was constructively dismissed as a result. Although the company purported to rely upon the *Employment Standards Act, 2000*, the Court affirmed that the right to layoff off an employee must derive from the contract of employment. Accordingly, Sigpro was ordered to pay Mr. Chen $47,402.08, representing 5 months reasonable notice, vacation credits, mitigation costs and Canada pension contributions. The Court of Appeal recently affirmed the Court's decision in all respects.

Bill 144 Now Law

In the Fall/Winter 2004 edition of *The Employers' Edge*, we summarized Bill 144, a bill that the Ontario Government had introduced in order to amend certain provisions of the *Labour Relations Act, 1995* (the "Act"). Bill 144, amongst other things, would allow the Ontario Labour Relations Board to automatically certify a union in certain instances, and would provide for a card based certification process in the construction industry.

Bill 144, now entitled the *Labour Relations Statute Law Amendment Act, 2005* received Royal Assent on June 13, 2005 and is now in force. However, the Bill's provision regarding the bargaining and dispute resolution regime for the residential construction industry in the City of Toronto and surrounding municipalities, was made retroactive to May 1, 2005.

We urge you to review our Fall/Winter 2004 article which reviewed these amendments, a copy of which can be obtained on our website at www.ccaemployerlaw.com. The lawyers at Crawford Chondon & Andree LLP would be pleased to discuss the potentially wide-ranging effects that these amendments will have on Ontario employers.

Ontario Anti-Smoking Legislation Passes

In the Spring 2005 edition of *The Employers' Edge* we discussed the Ontario government's introduction of tough new anti-smoking legislation. The Legislature passed Bill 164 on June 8, 2005 and, from an employer's perspective, the relevant provisions are scheduled to come into force on May 31, 2006.

The employment related provisions of Bill 164 as passed are largely the same as those that were discussed in our earlier newsletter. Generally speaking, the Bill prohibits smoking or holding "lighted tobacco" in any enclosed public place or enclosed workplace. The original version of the Bill contained exemptions from this prohibition for certain establishments such as residential care facilities (as long as specific requirements are met). The final version of the Bill added further exemptions for "psychiatric facilities", "facilities for veterans", and certain facilities where traditional Aboriginal use of tobacco may be permitted (again, so long as specific requirements are met).

Statutory Denial of Severance to Disabled Employees Discriminatory

The Ontario Court of Appeal recently upheld an Ontario Divisional Court's decision that Section 58(5)(c) of the *Employment Standard's Act, 2000 ("ESA")* discriminates against people with disabilities by denying them their entitlement to severance pay upon termination. The provision in question gave Ontario employers the right to refuse the payment of severance pay to employee's whose disability "frustrates" the employment contract by preventing them from carrying out the essential duties of their position.

Following thirteen years of employment, Christine Tilley was dismissed from her job as a nurse at Mount Sinai Hospital in 1998 due to excessive absences caused by a 1995 non-work related injury which caused Ms. Tilley to develop depression and bulimia. Upon termination, the employer withheld severance pay to Ms. Tilley, relying upon the exemption in s. 58(5)(c) to argue that her disability frustrated the employment contract.

The union grieved the Hospital's refusal to pay severance, arguing that the denial violated Tilley's right to equality under s. 15 of the *Canadian Charter of Rights and Freedoms* by discriminating against her on the basis of disability. The Hospital argued that the purpose of severance pay was to compensate employees for capital losses, such as reduced wages and benefits and retraining costs, which they would experience following the termination of employment. Denying severance pay to those employees whose contract of employment was frustrated due to their disability was not discriminatory because these employees were unlikely to re-enter the workforce. Moreover, the Hospital argued that the disabled employee's financial needs would likely be satisfied through the payment of CPP or disability benefits. While the arbitrator dismissed the grievance, finding that s. 58(5)(c) was not unconstitutional, the Divisional Court reviewed that decision and found that it was discriminatory and therefore unconstitutional.

...employers are no longer entitled to deny severance pay to those employees whose disability has frustrated their ability to fulfill the duties of their position.

On appeal, the Court of Appeal held that the legislation was discriminatory because it relied on an ill founded and false presumption that persons with severe disabilities were not likely to become members of the workforce in the future. The Court noted that the fact that an employee could not be employed in one workplace did not mean that he or she would be incapable of working elsewhere. In this respect, the legislation perpetuated a stereotype about the capabilities and value of disabled persons.

The Court also noted that s. 58(5)(c) was inconsistent with the objective of the legislation, namely to facilitate an employee's transition following the termination of employment, because the needs of disabled employees "may [well] be even more pressing than that of other terminated employees".

Finally, the Court held that denying severance pay to disabled employees diminished their dignity by suggesting that their past contribution to the employer was of less value than that of others. The Court held: "[By excluding] employees whose employment has been frustrated by disability, [the result is that these employees] are not compensated for their years of service and investment in the employer's business. This devalues their contribution and treats their years of service as less worthy than others."

The clear implication of this decision is that employers are no longer entitled to deny severance pay to those employees whose disability has frustrated their ability to fulfill the duties of their position. The Hospital may appeal the decision to the Supreme Court of Canada and we will continue to monitor this any developments. In the meantime, should you have any questions about the decision or its implications for your workplace, feel free to contact any one of our lawyers.

The Hazards Of Heat

With the recent onslaught of hot weather, it is important to assess your workplaces to determine if heat poses a danger to your workers' health. It is especially a danger to employees who work outside in the summer. Health related illnesses can include, heat strain and stroke, and such potentially fatal conditions require immediate attention. It is important to recognize symptoms and as part of your emergency planning you should know what to do if someone is exhibiting the symptoms.

Symptoms of heat stroke may vary, however, they usually include dry hot skin, body temperature exceeding 41°C and may result in a complete or partial loss of consciousness. Symptoms of heat exhaustion may include heavy sweating, severe shivering, weakness, dizziness, nausea, vomiting, muscle cramps, and tingling or numbness or pain in the hands and feet.

For prevention of the above-noted symptoms:

- Avoid sun exposure where possible; if not possible, then allow frequent breaks to reduce body temperature;
- Ensure workers stay hydrated; drink plenty of water; and
- Wear loose fitting, light fabric clothing.

It is important that employers establish an emergency response plan in situations where heat stress can occur. The plan should include:

- Procedures for getting a worker first aid and immediate care;
- Conditions should be monitored; and
- More frequent rest periods may be required.

What's New in Occupational Health & Safety?

Worker Jailed 20 Days

On May 26, 2005, Justice of the Peace Woodworth in Guelph, Ontario sentenced a truck driver to twenty days in jail with respect to charges laid under the *Occupational Health and Safety Act*. The 20-day jail term was ordered following a three-day trial where the truck driver was found guilty. The charges stemmed from an accident, which occurred on August 30, 2002, where a worker was struck by a reversing truck and subsequently died from the injuries sustained. The truck driver was charged as a worker and was found guilty of 1) operating equipment in a manner that endangered another worker and 2) operating a vehicle without the assistance of a signaller in circumstances which would have required a signaller.

New Training To Protect Young Workers

The Ontario government has announced that it is helping to protect students with special education needs from workplace injuries. This will be done by providing teachers with a new health and safety education resource. *The Live Safe! Work Smart! Special Needs Resource* provides lessons, handouts and exercises that high school teachers can use to prepare students with special needs. This resource has been provided to all district school boards for distribution to secondary schools across Ontario.

The Ontario government states that this new incentive is designed to help prevent injuries among young workers, which they estimate are six times more likely to be injured in their first month on the job than at any other time. This program is part of the government's stated commitment to reduce workplace injuries in Ontario by 20% or 60,000 per year by the year 2008.

22 New Inspectors for Peel Region

22 new Health and Safety inspectors have begun working in Peel Region, bringing the total from 19 to 41. The new inspectors will be targeting 6000 workplaces with the highest lost-time injury rates, and will visit those employers four times a year.

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Short Service Does Not Equal Short Notice

Wallace Damages Double Award

Mr. McCullough left his employment of ten (10) years for more money and to continue to work with the same boss. In rejecting his argument for more notice because he was induced to leave his previous employment, the Court found that Mr. McCullough was a "willing seducee" and was ready and very willing to change employers. Mr. Justice Echlin compared the recruitment of employees to "the dating game" and stated that both employers and employees "preen themselves, put on their best faces, sometimes overstate themselves, and try to look attractive to the other". The Court confirmed that a successful argument of inducement requires more than an initial overture and a show of interest.

Despite his finding that Mr. McCullough was not induced to accept new employment, the Court found that Mr. McCullough was entitled to **3 months' notice** of termination notwithstanding he had been **employed for only 105 days.** This is consistent with the general trend in the case law which indicates that few employees, despite very short periods of service, will be awarded less than 3 months' notice of termination. This appears to reflect a generally held view that it will take most employees that period of time to recover from the "trauma" of termination, engage in the job search process, attend interviews with prospective employers, engage in negotiations regarding the terms of employment and actually commence employment.

In rejecting the employer's defence of cause for termination, the Court relied upon the failure of the employer to warn Mr. McCullough regarding his poor performance or to produce evidence of such warnings, and the absence of any notice to Mr. McCullough that his employment was in jeopardy. The Court's findings remind employers that any warnings upon which the employer seeks to rely to establish cause must be documented or they are likely to be found to be inadequate or to not have occurred at all. Employers must also be clear with employees that the conduct will lead to termination if continued or repeated.

Finally, the Court reminded employers of the type of conduct which will lead to an extension of the notice period (Wallace Damages). "The defendants maintained just cause allegations throughout the trial of this matter on the basis of undocumented performance–related complaints. They failed to provide a letter of reference. They failed or refused to provide insurance claims forms to him. They delayed in paying statutory entitlements..." As a result of the employer's conduct the Court extended the notice period by a further 3 months to make its displeasure with the employer's conduct clear. The Court also found that the Wallace Damages were not to be reduced by amounts earned in mitigation during the period of the Wallace Damages.

Mr. Justice Echlin was a well-regarded employment law lawyer prior to his appointment to the Bench. His decisions in this area are particularly persuasive and are likely to be followed by other courts.

This case illustrates poor conduct and strategy on the part of the employer and its counsel from the time prior to termination through the trial. Employers are encouraged to avoid the same mistakes.