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Management Labour and Employment Lawyers

THE EMPLOYERS' Edge

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The Final Stop on OC Transpo

In the Spring 2005 edition of the *Employers' Edge*, we discussed the progress of the appeal of two 2003 decisions of the Canadian Human Rights Tribunal (the "Tribunal") involving Ottawa-Carleton Regional Transit Commission ("OC Transpo") and two former bus operators named Francine Desormeaux and Alain Parisien. These employees had records of excessive innocent absenteeism. In a single 2004 decision, the Federal Court released a judgment that was very encouraging for employers who are dealing with these situations in their workplaces. However, the Federal Court of Appeal recently overturned the Federal Court's judgment, and the Supreme Court of Canada denied OC Transpo's request to appeal.

At first glance, the Federal Court of Appeal's decision may seem to be a set-back for employers who were encouraged by the Federal Court's 2004 decision. However, a closer examination suggests that, in fact, the set-back may be more apparent than real. To explain, the Federal Court's encouraging statements were made with respect to Mr. Parisien. At the time of Mr. Parisien's dismissal, the prognosis for his regular and reliable attendance at work in the long term was poor. Accordingly, OC Transpo would have had to continue to tolerate a high level of absenteeism in the future. The Federal Court stated that tolerating continued excessive absenteeism was not a reasonable form of accommodation, but would instead impose undue hardship:

> *Excessive innocent absenteeism has the potential to nullify the employment relationship… there comes a point when the employer can legitimately say that the bargain is not completely capable of performance. The record here shows a horrendous level of absenteeism from the time Mr. Parisien began his employment… It is not reasonable...to require the employer to tolerate this.*

When discussing Ms. Desormeaux, the Federal Court found that it was unreasonable for the Tribunal to rely on a family physician's evidence to find that Ms. Desormeaux suffered from migraine headaches. In the Court's view, unlike a neurologist a family physician was not qualified to give such an opinion. Because there was no valid evidence that Ms. Desormeaux suffered from migraines, there was no evidence that she suffered from a disability.

In its recent decision, the Federal Court of Appeal dealt solely with the Federal Court's decision with respect to Ms. Desormeaux. This was because Mr. Parisien's case was never appealed. The

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Federal Court of Appeal held that it was unreasonable for the Federal Court not to defer to the Tribunal's decision that Ms. Desormeaux's migraines constituted a disability within the meaning of the Act. In addition, the Federal Court of Appeal stated:

> *According to the Tribunal there were non-driving jobs available which could reduce the complainant's level of absenteeism somewhat, or she could have been deployed on the "spare board" assignment which would lessen the impact of her intermittent absences. Moreover, Ms. Desormeaux's future migraine-related absenteeism rate was estimated to be about 6.5 full days and 1.25 part days per year, well below the absenteeism rate of the top 24% of OC bus drivers. These accommodation alternatives were not even explored by OC Transpo prior to the termination of Ms. Desormeaux's employment.*

The Federal Court of Appeal overturned the Federal Court's decision and restored the Tribunal's 2003 decision concerning Ms. Desormeaux. However, perhaps anticipating the concerns of the employer community, the Court stated:

> *There is nothing in the Tribunal's decision to require employers to indefinitely maintain on their workforce, employees who are permanently incapable of performing their jobs. Nor are employers required to tolerate excessive absenteeism or substandard performance. On the unusual evidence in this case, this complainant is fully capable of doing her job, when she is not suffering from one of her periodic lapses.*

Because the Federal Court of Appeal did not address the comments that the Federal Court made with respect to the accommodation of Mr. Parisien's condition, those comments may still be good law even though the Federal Court's decision was ultimately overturned in respect of Ms. Desormeaux. Add to those comments the Federal Court of Appeal's statements that employers are not required to maintain on their workforce employees who are permanently incapable of performing their jobs, and it can be argued that the Federal Court of Appeal's decision can be restricted to the specific facts of the Desormeaux case. Those facts included the fact that, unlike Mr. Parisien, Ms. Desormeaux's future anticipated absenteeism was lower than the average of the top 24% of OC Transpo's drivers.

Accordingly, while it may well have been possible to accommodate Ms. Desormeaux's absenteeism by placing her on the "spare" board or otherwise, given Mr. Parisien's excessive absenteeism and the fact that his prognosis for improved attendance in the future was poor, it was not possible to accommodate Mr. Parisien's excessive absenteeism without imposing undue hardship on the employer.

On this basis, we would suggest that employees may still take comfort in and, possibly rely upon, what was said by the Federal Court in 2004.

Evidence Heard at a Constructive Dismissal Trial Leads a Judge to Report Tax Evasion to the Canada Revenue Agency

While *Fedorowicz v. Pace Marathon Motor Lines* was a relatively straightforward constructive dismissal claim, the case is notable for the trial judge's decision to forward a copy of his reasons to the Canada Revenue Agency.

Mrs. Fedorowicz was the bookkeeper for Pace Marathon Motor Lines and a good friend of its owner George Mallouk. Fedorowicz went on several maternity leaves, during which she continued to work and received various top up payments that were paid by cash (i.e. without deduction for taxes, CPP or EI). Her salary also consisted of cash payments (also without deductions) and completed fraudulent expense forms.

While on maternity leave, Mrs. Fedorowicz was diagnosed with breast cancer, but continued to receive financial support from Mallouk. This abruptly ceased in the spring of 2000, ultimately leading to the suit for constructive dismissal. In the process, Mallouk suspected that Fedorowicz had been stealing from the company and, following an investigation, Fedorowicz was criminally charged, which charges were later dropped by the Crown.

Fedorowicz' constructive dismissal claim was successful at trial and she also obtained damages for the tort of malicious prosecution – the trial judge found that the amounts alleged to have been stolen from Mallouk were in fact authorized by him.

Significantly, in his reasons the trial judge stated that he was troubled by the parties' acknowledgment of various tax evasion schemes. The court determined that there was no legal impediment to him sending a copy of his decision to the Canada Revenue Agency, and did so. He held:

> *When parties pursue a matter through to trial what might otherwise be personal and private becomes part of the public record. The role of the Court is to adjudicate cases and not investigate or prosecute unlawful conduct. Where, however, parties invoke the judicial process which is funded by their fellow taxpayers, and freely admit unreported income and various tax evasions over many years, it seems to me to be appropriate and just that these reasons be provided to the responsible authority.*

This decision is significant in the warning it sends about the perils of litigation. In addition to the obvious financial risks of an adverse judicial determination, evidence led at trial could potentially lead to further liability that was unanticipated.

Upcoming Events

April 10, 2006
Laura Williams
Lancaster House Privacy Workshop
Toronto, Ontario

Collection and Disclosure of Employee Medical Information

May 16, 2006
refreshr: Labour and Employment Law Seminar
Crawford Chondon & Partners LLP
The Employers' Choice
(see brochure enclosed)

May 24, 2006
Karen Fields
Greater Barrie Home Builders' Association, Barrie, Ontario

Occupational Health and Safety Law in the Construction Industry

Karen Fields and Jayson Rider
Seminar series to the Niagara Construction Association
St. Catharines, Ontario

Occupational Health and Safety Law and Labour Law in the Construction Industry

Legislation Update

End of Mandatory Retirement

In an earlier edition of the *Employers' Edge*, we reviewed the Ontario government's proposed abolition of mandatory retirement. Essentially, Bill 211 *(Ending Mandatory Retirement Statute Law Amendment Act, 2005)* amended the definition of "age" in subsection 10(1) of the Ontario *Human Rights Code* to protect persons aged 65 and older against age discrimination in employment. In this regard, mandatory retirement for persons 65 and older would only be permissible if an employer is able to establish this as a "*bona fide* occupational requirement" under the Code. Bill 211 was finally passed by the Legislature on December 8, 2005 and is expected to receive Royal Assent early this year. To allow workplaces the opportunity to adjust to the elimination of mandatory retirement, the legislation will not take effect until one year after Royal Assent.

Emergency Powers

On December 15, 2005, the Ontario government introduced a Bill which has the potential to affect employers in dramatic ways. Aimed at addressing emergency situations, Bill 56, if passed, will amend the *Emergency Management Act*, the *Employment Standards Act, 2000* ("ESA") and the *Workplace Safety and Insurance Act,* 1997 ("WSIA").

The primary purpose of Bill 56 is to provide powers to the Cabinet and Premier to deal with emergencies. Under the Bill, "Emergency" is defined as: "a situation…that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease, or other health risk, an accident or an act whether intentional or otherwise." The Cabinet or Premier may declare that an "emergency" exists, and the Cabinet may make orders that it believes are necessary to address it. The Bill sets forth penalties for violating emergency orders.

Amongst other things, emergency orders may provide for the establishment of facilities for the care, shelter, etc. of individuals, and for the closure of places including hospitals. Orders may also authorize facilities to operate as is necessary to respond to the emergency, they may provide for the procurement and distribution of necessary goods, services, and resources, and they may authorize any person to provide services of a type that the person is reasonably qualified to provide. These latter orders may also provide for the terms and conditions of such service (including compensation), and further provide that the regular employment of the individuals shall not be terminated because they are providing such services.

The Bill states that it and any emergency order would prevail in the event of conflict with any statute or regulation, except conflicts with the *Occupational Health and Safety Act* ("OHSA") and any regulation made under it. Where a conflict with the OHSA and/or its regulations exist(s), the OHSA and/or its regulations will prevail.

As mentioned above, Bill 56 amends the ESA by renaming the existing emergency leave under section 50 "Personal Emergency Leave", and by adding an additional unpaid leave of absence called "Emergency Leave, Declared Emergencies". This new leave will be provided to employees if they are not able to perform their duties because of a declared emergency, and because an emergency order applies to that employee or that employee is needed to provide care to a specified family member. The leave will continue for as long as the employee is not performing his or her duties in such circumstances.

Finally, the Bill amends the WSIA by amending the definition of "worker" to include a person who is assisting with a declared emergency, and by providing that the Crown shall be deemed to be the employer of such a person in those circumstances.

While emergency situations will be rare, given the past outbreak of SARS and the potential outbreak of a virulent flu epidemic it is not beyond the realm of possibility that Ontario employers may well find themselves subject to Bill 56's measures some day in the future.

Crawford, Chondon & Partners LLP will continue to monitor the above legislative changes and provide updates in future editions of the *Employers' Edge*.

Employment Law Case Alerts

New Test for Determining Independent Contractor Status

On March 2, 2006, the Federal Court of Appeal broke with traditional judicial thinking in holding that the parties' intentions were paramount in determining whether a worker was engaged as an employee or an independent contractor for the purpose of Employment Insurance ("EI") and Canada Pension Plan ("CPP") remittance obligations. For decades the courts have held that the appropriate test for determining independent contractor status involves assessing the degree of control that the worker has over their activities; whether the worker provides his or her own equipment; the degree of financial risk undertaken by the worker; the degree of responsibility for investment and management held by the worker; and the worker's opportunity for profit in the performance of his or her work. It was only where these factors could not provide a definitive answer that the parties' intentions were considered. In the recent decision, *The Royal Winnipeg Ballet and the Minister of National Revenue*, the majority of the court held that the common understanding between the dancers and the Ballet that the dancers were self-employed ultimately outweighed the other factors that suggested an employment relationship. The Court was careful to note, however, that courts should be vigilant in examining the true relationship to ensure that the independent status has not been coerced or otherwise forced upon an individual who really wants to be an employee. Nonetheless, the case is an important departure from the courts' long-held approach, and is good news for those companies and contractors who, in good faith, intend to enter into an independent contractor relationship.

No "Cap" on Reasonable Notice Damages, But…

The recent Ontario Court of Appeal decision, *Lowndes v. Summit Ford Sales Ltd.*, affirmed that a notice period beyond 24 months is not to be awarded in the absence of exceptional circumstances. In this case, a 59-year-old employee was dismissed after 28 years of service and agreed to a package of 8.5 months notice plus vacation pay and bonus. At trial, the employee was awarded 30 months pay in lieu of notice plus four months for the bad faith manner of dismissal. The Court of Appeal found that the trial judge had erred in the calculation of the notice period because there were no exceptional circumstances in this case that would warrant an award beyond 24 months.

Thus, although there is no recognized "cap" on an award of reasonable notice, employers may take some comfort in the fact that Ontario's highest court has stated that only exceptional circumstances will warrant an award beyond 24 months.

Announcements

The lawyers and staff at Crawford, Chondon & Partners LLP are pleased to welcome Asha Rampersad as a Summer Law Student, and Jennifer Oliveira as our receptionist/ administrative assistant.

Workplace Bullying Leads to Constructive Dismissal Liability for an Employer and the Bullying Owner

In *Morland v. Kenmara Inc.*, Ms. Morland was hired in 2003 as a sales representative and resigned from her employment after only three months, alleging intolerable harassment and bullying by the owner and president of the company, Ms. Kenyon. For instance, Ms. Kenyon would tell her "I own this company, you do what I say". She would use foul language, kick trash cans and say to Ms. Morland "who do you think you are?" On one occasion, Ms. Kenyon prevented Ms. Morland from leaving the office while she stood in her face and began a tirade.

The court found that Ms. Kenyon had created a hostile work environment by continual use of foul language and abusive conduct towards Ms. Morland. Pursuant to well-established law, this conduct resulted in a constructive dismissal of Ms. Morland, and an award of three months salary and an additional payment of one month for the abusive conduct.

What makes this decision so noteworthy is the fact that the damages award was made against both Ms. Kenyon and the employer corporation jointly. This decision appears to be contrary to existing legal principles which would hold the employer corporation solely liable for Ms. Kenyon's actions through the concept of vicarious liability. Accordingly, management employees should be mindful that their actions in the workplace may come back to haunt them in the future.

Court Recognizes Action for Breach of Privacy

In *Somwar v. McDonald's Restaurants of Canada*, McDonalds asked the Ontario Superior Court of Justice, prior to trial, to dismiss an action in which the plaintiff claimed that the restaurant had violated his common law privacy rights. McDonalds argued that a tort of "invasion of privacy" under the common law did not exist and therefore the plaintiff did not have a proper claim to assert. In determining whether to dismiss the plaintiff's claim, the court considered whether or not a tort of invasion of privacy does in fact exist. After reviewing the different kinds of privacy interests that have been recognized under the law, the court declined to dismiss the action, reasoning as follows: "the time has come to recognize invasion of privacy as a tort in its own right". It is important to note that the court's decision was in the context of a preliminary motion to dismiss the action. However, it does suggest a potential significant development in the law of privacy. We will continue to monitor this case to determine if there is a conclusive finding at trial as to whether the law recognizes a tort of invasion of privacy.

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