In the know

WILLIAMS HR LAW
LEGAL EXPERTISE AT WORK

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2011 IN REVIEW: TOP 10 LABOUR AND EMPLOYMENT LAW DEVELOPMENTS

1 *Employer Slammed for Hard-Ball Approach: Failing to Continue Benefits*

In *Brito v. Canac* Kitchens, the employer continued salary and benefits strictly for the minimum statutory notice period notwithstanding the fact that the terminated individual was 63 years old at the time of termination and had worked for the company for a period of 24 years. Canac chose to take a hard-ball approach and provide only statutory minimums, hoping Mr. Olguin would re-employ quickly and stay "healthy". However, within 6 months of being terminated, the former employee was diagnosed with cancer and ultimately, Canac was found to be liable for all short term disability and long-term disability payments (which would have been made by the insurer had the employer continued benefits beyond the statutory notice period) in order to make the employee whole for the entire common law notice period. Had Mr. Olguin simply been provided with a working notice period for 22 months, which the court ultimately awarded as the proper period of reasonable notice, he would have been paid his regular salary and received full benefit coverage when he was diagnosed with cancer. However, Canac had prematurely cut him off of group benefits leaving him without any recourse when he became ill. The court found that the employer's decision to go the "bare minimum" route was cavalier, harsh, malicious, reckless, outrageous and high-handed and ultimately, awarded additional punitive damages reprimanding the company for its "hardball approach".

In this issue

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Significance for Employers:

The court sends a strong message to employers that they must carefully consider the impact of benefit cessation on the individual employee upon a termination of employment. The continuation of benefit premiums consistent with an individual's reasonable notice period may be slightly more expensive and require more administration for employers in the short-term, however it is a small expense in comparison to the risk of being exposed to significant disability costs in the long-run.

2 *Bill 168 "In Action" – Workplace Harassment Redefined*

In 2011, we saw the first decision arising from the enforcement of Bill 168, *An Amendment under the Occupational Health and Safety Act* ("OHSA") after employers implemented Workplace Violence and Harassment policies in order to comply with the new legislation which became effective in 2010. In *Kingston (City) and CUPE, Local 109* [2011] CanLii 503/3, companies can now see Bill 168 "in action". In this decision, the arbitrator upheld the summary dismissal of a municipal employee who had recently returned from a lengthy medical leave of absence. The termination occurred after the employee uttered a death threat against the union president. The employer terminated the individual for cause after an investigation into her misconduct revealed a long history of aggression and anger, failed corrective action including an anger management course and a complete lack of remorse or acknowledgement of wrongdoing.

Significance for Employers:

Employers' obligations have now been clarified under the new Bill 168 legislation. In particular, companies will be held to a high threshold to ensure workplace safety for all of its workers and in certain circumstances, termination for cause may be an appropriate response to a threat of violence. Businesses must continue to do risk assessments on an annual basis to comply with the legislation and in the event of a violent occurrence, employers must respond immediately by investigating and engaging in remedial action.

3 *Mitigation: Contractual Presumption*

In *Bowes v. Goss Power Products Ltd.* [2011] O.J. No. 3411, the Court determined that the obligation of an employee to mitigate their damages applies 'across-the-board' even in instances where an employment contract expressly provides for the precise period of reasonable notice to which the employee is entitled, upon termination of employment. Of most importance is the intention of the parties at the outset of the employment relationship and the contractual language which has been expressly agreed upon. This decision reaffirmed an earlier decision *(Graham v. Marleau, Lemire Securities Inc.)* concluding that it is settled law in Ontario that mitigation will be assumed as a general principle of contract law unless the parties rebut the presumption clearly and unequivocally in the contract itself by stating that "the employee is entitled to a lump sum payment upon termination which is not subject to mitigation". In all other cases – even where the contract specifics the length of the notice period (i.e. 6 months), the basis for calculating wages during the notice period (i.e. base salary only), the scope of the release and the boundaries of the agreement – mitigation will continue to apply.

Significance for Employers:

Employers should get proper legal advice when drafting employment agreements/contracts as the courts will automatically presume a number of principles without the inclusion of express language to the contrary. Companies should also consider the advantages of offering salary continuance severance proposals as opposed to lump sum payments as the court has made it abundantly clear that an employee will always be required to mitigate their damages upon a termination of employment, particularly when the employee has sued for wrongful dismissal damages.

4 *Privacy in the Workplace*

In the case of *R. v. Cole* [2011] O.J. No. 1213, the search of a teacher's school board issued laptop was held to be a violation of the teacher's right to privacy. Although the laptop was the property of the school board, and the view has generally been that ownership means control of privacy, the Court held that Mr. Cole had a limited reasonable expectation of privacy for many reasons.

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These reasons included the fact that teachers at the school were provided with exclusive possession of the laptops and were allowed to take them home on evenings, weekends and vacations; teachers set passwords on their laptops and stored information on the hard drive; and there was no clear policy governing the use of the laptops or the right of the school board to search or monitor them.

In this particular case, Mr. Cole's expectation of privacy was limited only to the extent that he knew, or ought to have known, that the laptop could be accessed by the school board for the purpose of maintaining the technical integrity of the school's network. However, when the laptop was turned over to the police by the school board for a warrantless search, the Court found that this was a violation of the teacher's section 8 rights under the *Canadian Charter of Rights and Freedoms*.

Significance for Employers:

While most employers will not be subject to a *Charter* analysis regarding the search of company issued equipment (the *Charter* only applies to governmental authorities, public sector employees and the police), this decision can be expected to have broader implications on the evolving issue of privacy in the modern workplace and the growing scope of employee privacy rights.

5 *Protecting Privilege of Investigative Findings*

In the case of *North Bay General Hospital v. Ontario Nurses Association* [2011] CanLii 68580 the Union grieved the discipline of a nurse for actions characterized as bullying and harassment. Prior to the discipline being levied, the Hospital had hired a lawyer for the sole purpose of investigating the validity and circumstances of the claims made against the grievor.

Right before the grievance hearing, the Union requested disclosure of, among other things, communications between the investigator and the Hospital`s HR personnel to which the Hospital objected on the basis that the communications were protected from disclosure by solicitor and client privilege.

Arbitrator Parmar in his ruling stated that employers often hire third-party investigators who sometimes are lawyers and sometimes are not and that because in the case of a non-lawyer third-party investigator no privilege would apply, there was no reason to treat a situation where a lawyer is retained for the same purpose any differently. He further held there was no reason to attach solicitor client privilege to a relationship that is not a solicitor-client relationship just because one of the parties happens to be a lawyer. The hospital was ordered to produce the communications as requested by the Union.

Significance for Employers:

This case illustrates the need for employers to approach the third-party investigator relationship with lawyers carefully where employers want to maintain privilege. This case should be contrasted with the oft-cited case of *Gower v. Tolko Manitoba Inc.* which demonstrated that where a lawyer is hired to conduct an investigation for the purpose of determining an employer's legal liability, solicitor client privilege will generally apply. The key difference to take note of is that in *North Bay General Hospital*, the lawyer`s role was that of a third-party investigator only. Hence, the take away is that employer`s must be mindful of the purpose for which the lawyer is being retained to properly ensure that best efforts are made to maintain solicitor client privilege.

6 *Constructive Dismissal Ruling Not So Sweet For Candy Manufacturer*

In the decision of *Russo v. Kerr Bros. Ltd.* [2010] O.J. No. 4654, Lorenzo Russo, a 53-year-old warehouse manager at Toronto based candy manufacturer Kerr Bros., successfully sued his employer for constructive dismissal after having his salary reduced from $114,000 to $60,000. What makes this successful claim so unique is that Mr. Russo continued to show up for work and perform his regular duties following the reduction to his pay, while at the same time bringing a lawsuit against his employer.

Traditionally, where an employee feels they have been constructively dismissed, they will immediately stop working so as not to be seen to accept the new terms of employment introduced by the employer. Rather than taking this approach, Mr. Russo notified his employer through a letter from his counsel stating that the new terms offered constituted a constructive dismissal, and that he objected and was not consenting to the change to his employment contract. Mr. Russo continued to perform his work duties on the basis that he was mitigating his damages.

Significance for Employers:

Employee consent, express or implied, is required for any fundamental change to an employment contract. The decision in Mr. Russo's case suggests that an employer should not assume that an employee who continues to work after a unilateral change to their employment contract has consented to those new terms, where that employee has appropriately notified the employer to the contrary.

7 A New ESA Leave of Absence

In December of 2011, the Minister of Labour introduced new legislation which, if passed, will establish a new leave of absence pursuant to the *Ontario Employment Standards Act*. The leave is specifically intended to provide job security (for up to 8 weeks) to those family members that have significant care-giving responsibilities of a sick or injured family member. As Minister Jeffrey publicly announced "the one thing working Ontarians need most when it comes to caring for seriously ill or injured family members is the time to be with their loved one. This proposed Family Caregiver Leave is a matter of compassion, and the right thing to do for Ontario families." Bill 30, *the Family Caregiver Leave Act (Employment Standards Amendment)*, 2011 is proposed to come into effect on July 1, 2012 and is intended to complement other leaves under the Employment Standards Act such as the Family Medical Leave and Personal Emergency Leave provisions. Similar to the existing Family Medical Leave, employees would be required to submit a medical certificate to establish the "serious medical condition" of the "family member", both terms which would likely be defined under the legislation. Ontario is also calling on the Federal government to extend Employment Insurance to those employees who would be forced to take the unpaid leave of absence while caregiving for their family members.

Significance for Employers:

If the legislation is passed and indeed comes into effect in July of 2012, employers will need to update their leave of absence policies and ensure that they are prepared to grant such requests for time away from work once an employee has established eligibility. Employers will also need to be cautious when imposing discipline and/or terminations for employees on such a leave or recently returning from a Family Caregiver Leave in order to avoid the risk of reprisal claims at the Ministry of Labour.

8 AODA In Effect

On July 1, 2011, the Integrated Accessibility Standards Regulation came into force under the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA"). This regulation sets out standards of accessibility for disabled individuals in the areas of: 1) Information and Communications; 2) Employment; and 3) Transportation.

These new standards now add to the process that began with the Customer Service Standards, of moving Ontario towards its goal of achieving complete accessibility for disabled individuals in this province by the year 2025. The specific requirements and compliance deadlines under the new standards depend on the size and type of organization in question.

Significance for Employers:

From a Human Resources perspective, the newly legislated regulations will set out employment accessibility standards that will significantly change the interaction between employers and disabled employees and employee candidates, introducing a proactive and formalized approach to the accommodation of disabled Ontarians throughout the entire employment process. Employers will need to familiarize themselves with the standards as they pertain to their business, and ensure that they meet all compliance requirements prior to the applicable deadlines.

TOP 10 LABOUR AND EMPLOYMENT LAW DEVELOPMENTS for 2011

9 OHSA: Independent Contractors Counted as Workers

Section 9(2)(a) of the *Occupational Health and Safety Act* requires a Joint Health and Safety Committee ("JHSC") at workplaces in which 20 or more workers are regularly employed. In a decision released on January 18, 2011 in the matter of *Ontario (Ministry of Labour) v. United Independent Operators Limited* [2011] O.J. No. 236, the Ontario Court of Appeal considered, for the first time, whether independent contractors should be counted when determining if a JHSC must be established and maintained under s.9(2)(a).

The Ontario Court of Appeal held that by excluding independent contractor truck drivers based on the nature of their employment relationship, the words "regularly employed" in the relevant provision had been interpreted too narrowly given the purpose and legislative scheme of the *OHSA*. The Court held that because the *OHSA* is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers, it should be interpreted generously. The Court emphasized the importance of JHSCs and their central role in achieving the objective of safe and healthy workplaces in Ontario, and in the internal responsibility system that is the underlying philosophy of the *OHSA*. With this in mind, in considering whether s.9(2)(a) intended to capture only those workers employed in a traditional employment relationship, the Court held that such an interpretation would "seriously curtail" the scope of s.9(2)(a) and run contrary to the legislative purpose of the *OHSA*.

Significance for Employers:

This decision has significant implications for employers who utilize independent contractors in their workforce. In addition to triggering s.9(2)(a) for those employers such as United Independent Operators Limited who are pushed over the threshold (20 workers), the section has implications for just how large a JHSC needs to be. For example, according to the *OHSA*, a workplace with less than 50 workers requires a minimum of 2 members on the JHSC, whereas a workplace with more than 50 requires a minimum of 4 members.

10 WSIB Reforms Return to Work and Increases NEER Window

The Workplace Safety and Insurance Board (WSIB) made some drastic changes to its work reintegration policies that came into effect in July 2011. The new program replaces the former Labour Market Re-Entry (LMR) program and signals the WSIB's increased scrutiny into the return to work process. The main focus of the WSIB policy overhaul is to ensure that injured workers return to work with the accident employer. One of the highlights of these changes is that the WSIB is now focussed on workers being trained to fill open positions with the accident employer thereby providing the worker with the required "alternate suitable work", instead of automatically having the worker retrained to do work in the general labour market. To further this objective, the WSIB will take a more active role in return to work, which will include closer scrutiny of the employer's assessment regarding the availability of suitable work. Further, where a capable employee has not yet returned to work the WSIB will meet with the workplace parties at the worksite no later than twelve weeks after the injury date. Where the WSIB determines that employers or workers are not being helpful in the process generally, they may levy a "non-cooperation" penalty after looking at the patterns of actions and behaviours of the workplace parties in the work reintegration process. In addition, the WSIB has increased the NEER window from three to four years, starting with the 2008 accident year.

Significance for Employers:

The implementation of the new work reintegration policies will mean that employers can expect the WSIB to take a more proactive approach to re-employment, accommodation and assessment. This means that actively managing WSIB claims has heightened importance as there could be significant cost consequences of poorly managing a worker's return to work. The WSIB also has new powers to levy penalties for non-cooperation, so employers must ensure they have a system in place to document and report all of their return to work initiatives. Employers should also take note of the increase in the NEER window and the potential cost consequences this may have when making decisions about an employee's return to work, as the employer's claims experience is now rated for a longer period. As always, we are here to provide any advice you may need in navigating through the increasingly complex WSIB return to work process.

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