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Employment Notes

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RANDOM DRUG TESTING: AN UPDATE

Elizabeth J. Forster

In our April 2007 newsletter, we advised you of an arbitration award in which an arbitration board had concluded that use of new technologies for saliva drug testing were still contrary to the provisions of the *Ontario Human Rights Code*. On January 31, 2008, the Ontario Superior Court dismissed an application by Imperial Oil Ltd. for judicial review of the award and found no reviewable error in the original arbitration award.

Recently, the Alberta Court of Appeal took a different approach to the issue of random drug testing. It upheld the right of employers in the construction industry to prohibit recreational drug users from working on jobs with a high risk of accident.

The case involved a Mr. Chiasson who was offered employment by Kellogg, Root and Brown (Canada) Company to work on a project involving the expansion of a Syncrude upgrader refinery in Fort McMurray.

Mr. Chiasson's offer of employment was subject to successful completion of both a pre-employment medical exam and a drug screen. Shortly after Mr. Chiasson began working, Kellogg, Root and Brown received the results of the pre-employment drug screen which showed the presence of marijuana in his system. The company terminated Mr. Chiasson as a result of the positive drug test.

Mr. Chiasson admitted to using marijuana five days before the drug screen. However, there was no evidence that Mr. Chiasson was under the influence of drugs while he was working. There was also no evidence that he was dependent on drugs in any way.

Mr. Chiasson filed a complaint with the Alberta Human Rights and Citizenship Commission alleging that the pre-employment drug testing was discriminatory on the grounds of physical and mental disability. The Human Rights Tribunal dismissed his complaint. The Tribunal found that the company's drug testing policy was *prima facie* discriminatory against drug dependent individuals. However, it found that there was no discrimination against Mr. Chaisson as he was not dependent upon drugs, and therefore not disabled.

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The case was appealed to the Alberta Court of Queens Bench. The Court allowed the appeal and said that the effect of the pre-employment drug testing was to exclude individuals suffering from actual addiction (and thus a disability) and those who are not addicted based upon a *perceived* disability. Both exclusions were contrary to human rights legislation. In short, the court adopted the same line of reasoning as used in Ontario.

There was a further appeal to the Alberta Court of Appeal. The company's appeal was allowed and the decision of the Human Rights Tribunal upheld. The court concluded that Mr. Chiasson did not suffer from a disability as a recreational drug user. His termination was not based upon a perception that he was a drug addict, nor did the policy perceive anyone who used drugs as being an addict and therefore disabled.

The Court of Appeal recognized the legitimate rationale behind such a policy which is aimed at safety.

With such divergent rulings on this important issue we expect that the issue will eventually be tested before the Supreme Court of Canada.

However, in Ontario, the law remains that random drug testing is contrary to the *Ontario Human Rights Code*. ■

HUMAN RIGHTS TRIBUNAL PUBLISHES DRAFT RULES FOR ALL COMPLAINTS MADE AFTER JUNE 30, 2008

Mark E. Geiger

As we have mentioned in previous newsletters, the *Human Rights Code* was significantly amended last year. The amendments come into force on June 30, 2008. Complaints after that date will not be made to the Human Rights Commission, but instead to the Human Rights Tribunal.

New Rules

Recently, the Human Rights Tribunal has posted draft rules on its website in order to allow consultation with the public before the rules are finalized. Although the rules may change as a result of this consultation, it is clear that the Tribunal intends to take a very different course of action in dealing with complaints under the new Code. Under the old rules, an individual who thought s/he had a Human Rights complaint would go to the Commission and would discuss the matter with an Intake Officer. At the time, it was not at all uncommon for Intake Officers to actually draft the complaint on behalf of the individual complaining. Although that practice ended some time ago, it is still not uncommon for human rights officers to assist individuals in properly setting down their complaint. Once the complaint was actually filed with the Commission, the Commission took carriage of the complaint, was responsible for conducting an investigation and for deciding whether the matter would be referred to a hearing. That role of the Commission will be essentially over as of June 30.

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constitutes "workplace harassment" under this regime, there may be a rash of complaints attempting to seek redress for behaviour that is not harassment but really appropriate workplace management. The Quebec example is instructive in this regard in that there has been a subsequent attempt to differentiate "psychological harassment" from conduct that is within the normal exercise of management rights, including the assignment of tasks and discipline. Finally, with any such new development, we may see significant numbers of such complaints, in tandem with other judicial processes.

What Can You do to Ready Your Organization?

As always, the development and revision of policies and the training of staff, managerial or otherwise, regarding what constitutes inappropriate behaviour will be key. In this regard, a clear statement of the types of behaviours that constitute workplace harassment can be incorporated into policies and training workshops.

With the potential for liability for conduct and behaviour outside the workplace to constitute harassment, including conduct by third parties, the monitoring of inappropriate behaviour will become more difficult for the employer. In this respect, ensuring effective channels of communication to address these concerns will be of utmost importance. Employers may seek to make employees aware of an individual or individuals within the organization to whom complaints or concerns with respect to inappropriate behaviour and/or harassment can be made.

A formalized and established process such as this may assist employers to both deal with harassment at the workplace in an effective, efficient and constructive way, and to limit its liability.

We will keep you updated on these judicial and legislative developments. ■

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1 While not the subject matter of this article, it should also be noted that the amendments to the *Human Rights Code* allowing Code-related matters to be litigated in civil courts will also impact the nature of claims brought before the court and the quantum of damages.

AMENDMENTS TO EMPLOYMENT STANDARDS: RESERVIST LEAVE AND FAMILY DAY

Goli Garakani

Reservist Leave

The *Employment Standards Act, 2000* ("ESA") has been amended to provide job protection for members of the Canadian Reserve Forces. The ESA establishes the right of employees who have worked for an employer for at least six months and who are in the Canadian Reserve Forces, to take unpaid leave if deployed to a Canadian Forces operation outside Canada, to an operation inside Canada that provides assistance in dealing with an emergency, or to participate in military training. Such employees are entitled to reinstatement upon their return from military service or training.

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void. *Bill 29, An Act to amend the Occupational Health and Safety Act to protect workers from harassment and violence in the workplace* ("Bill 29"), seeks to provide workers with the right to refuse work when faced with harassment or violence, to require an investigation of allegations of workplace related harassment and violence and to require employers to remedy and prevent further occurrences of workplace related harassment and violence. If this proposed legislation is carried, new duties will be imposed upon an employer including the duty to ensure that every worker is protected from workplace related harassment and to develop and deliver regular harassment prevention training for workers and managers.

In Bill 29, "harassment" is defined as "engaging in a course of vexatious comment or conduct that constitutes a threat to the health and safety of a worker and that is known or ought reasonably to be known to be unwelcome and that may adversely affect the worker's psychological or physical well-being". Bill 29 also includes a definition of "workplace related harassment or violence" which includes:

(a) harassment or violence, whether or not the harassment or violence occurs at the workplace, by,

(i) a workers' employer or supervisor,

(ii) another worker who works at the same workplace,

(iii) a client, patient, customer or other person who receives services from the employer,

(iv) an agent, representative or family member of a person described in (i) to (iii), or

(v) any other person on the employer's premises, or

(b) harassment or violence that has the effect of interfering with the performance or safety of any worker at the workplace or that creates an intimidating, hostile or offensive work environment for any worker.

Repeated conduct or comments or a single, serious occurrence that has lasting and harmful effect constitutes harassment for the purposes of this proposed amendment. And, in a significant step, Bill 29 proposes that a worker may refuse to do work or do particular work where s/he has reason to believe that workplace related harassment is likely to endanger him/herself or another worker. In these cases, an inspector will be appointed to investigate and the person will be deemed to be at work and will continue to be paid.

At this early stage, what the impact of such proposed changes will be is unclear. That being said, it is foreseeable that the existence of a forum and process to address workplace harassment concerns short of a constructive dismissal claim will result in numerous intermediate complaints. Further, until there is a body of jurisprudence defining the parameters of what

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The new rules provide that an individual has the right to bring a complaint and to have it heard by the Tribunal. Because the Commission will no longer be involved (except in unusual cases) in the actual drafting or investigation of complaints, the Tribunal wants to ensure that sufficient information is provided at the front end of the case to properly inform both the Tribunal and the respondents of the case they have to meet. The draft rules currently proposed require complainants to not only identify key documents they will be relying upon to prove their case, but also to identify key witnesses who could provide evidence at the hearing. A brief summary of the evidence they will give is required, but this is not shared with the respondents at this stage. In addition, the complainant will be required under these draft rules to identify important documents in the possession of the respondents that would be relevant to the issues that will be before the Tribunal.

If a complaint does not meet these criteria, the Tribunal staff will return it to the complainant and provide the complainant with a period of time in which to supplement the information so that it meets the criteria set by the Tribunal. Clearly, this will involve a great deal more work for the intake staff of the Tribunal than has been the case previously. The intention of these rules appears to be to force both complainants and respondents to set out all of the particulars which they intend to prove at the hearing as well as to identify the important documents they will introduce and the main witnesses which they will call upon.

For employees who wish to take advantage of the *Human Rights Code* a great deal more preparation will be required than has been the case in the past. For employers who are called upon to respond to a complaint, a fairly intensive investigation will be required over a fairly short period in order to provide all of the information which these draft rules require. Unlike the Human Rights Commission, the Tribunal has no jurisdiction to refuse to hear a case unless the case is outside its jurisdiction, has already been settled with a signed release or is currently before another tribunal such as a board of arbitration under a collective agreement.

The current rules which were published and came into effect on January 31, 2008, will continue to apply to all cases brought to the Human Rights Commission before June 30 2008. All cases brought after that time will be covered by these new rules. There are a third set of rules yet to be developed which will deal with all of the cases filed with the Human Rights Commission prior to June 30, which have not been finalized by December 31, 2008. All such cases will be referred directly to the Tribunal, but as yet the rules that will apply to these cases have not been published in draft form.

Stay tuned. ■

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WORKPLACE HARASSMENT: BEYOND CONSTRUCTIVE DISMISSAL?

Maria Kotsopoulos

If the numerous results of an internet search regarding "workplace harassment" are any indication, there is an increasing focus on workplace harassment and abusive workplace behaviour outside of the human rights regime. Recent judicial and provincial legislative comment in Canada similarly demonstrates a burgeoning interest in this issue and an attempt to remedy non-human rights related harassment in the workplace beyond or in conjunction with existing legal doctrines. In this emerging landscape, unionized and non-unionized employers alike should be increasingly mindful of ensuring appropriate regulation of their workplaces as a result of two new trends: (1) tort claims for damages for the intentional infliction of mental distress/suffering; and (2) "harassment" falling under provincial occupational health and safety regimes.

"Workplace harassment" that is not related to an enumerated ground under human rights legislation is a relatively amorphous concept which encapsulates behaviours such as harsh and abusive criticism from management or supervisors, bullying by supervisors and/or colleagues, belittling, degrading or demeaning communication, highly critical performance management and other inappropriate and unwarranted conduct, combined with a disinterested or ineffectual employer response, the result of which often leads to absenteeism, periods of leave for stress, or more prolonged disability leave on the part of the employee. I think it is fair to say, as with harassment which may fall under human rights legislation, there is greater focus on the perception and the impact of such conduct by the employee. In this regard, while there is an objective standard of reasonableness imposed at law, the key consideration will be in regards to a similarly situated employee.

Traditionally, where satisfied that the employment relationship was no longer tenable due to ongoing harassment and/or abuse, courts have applied the doctrine of constructive dismissal; that is, the employee is permitted to view his/her employment as having come to an end as a result of the employer's conduct. This premise arises first and foremost from the employer's duty to treat employees fairly, "with decency, respect and civility", and its concomitant responsibility to "ensure that the work environment does not otherwise become so hostile, embarrassing or forbidding as to have the same effect" according to Mr. Justice Dambrot in *Stamos v. Annuity Research & Marketing.*

In *Shah v. Xerox Canada*, Mr. Justice Cullity characterized the test as follows:

> Where the conduct of management personnel is calculated to cause an employee to withdraw for the employment, it may, in my judgment, amount to constructive dismissal. The test, I believe, is objective: it is whether the conduct of the manager was such that a reasonable

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> person in the circumstances should not be expected to persevere in the employment…

Clearly, the doctrine of constructive dismissal provides an important mechanism by which employees suffering from harassment at work may seek a remedy and it continues to apply in these circumstances, in addition to concepts of increased notice as a result of egregious conduct by the employer at the time of termination and increased damages for harsh and vindictive conduct in the form of aggravated and/or punitive damages. In addition to these claims, Canadian courts have begun to remedy workplace harassment with significant damages awards arising from tort claims.[1]

In a recent Employment Notes, we wrote about the decision of the Court of Appeal for British Columbia in *Sulz v. Canada*. In that case, a former RCMP officer successfully sued her former employer for damages for the intentional infliction of mental suffering from conduct that amounted to workplace harassment - including "angry outbursts" and "intemperate, and at times, unreasonable behaviour". The trial judge found that "the harassment which [Sulz] experienced in 1994 and 1995 was the proximate cause of her depression, which in turn, ended her career with the RCMP." As a result, the trial judge assessed damages at $950,000 ($125,000 general damages, $725,000 for past and future wage loss), which assessment was affirmed on appeal, and which represents damages beyond what is ordinarily seen in cases of wrongful and constructive dismissal.

A newer and potentially more significant trend in respect of the regulation of conduct at Canadian workplaces has emerged in Quebec and Saskatchewan in the form of the inclusion of "psychological harassment" and "harassment" in their respective provincial occupational health and safety regimes. In Quebec's *Act Respecting Labour Standards*, "psychological harassment" is defined as "any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological integrity and that results in a harmful work environment for the employee". "Vexatious behaviour" can include "a single serious incidence of such behaviour that has a lasting harmful effect on an employee". Every employee has a right to a work environment free from psychological harassment and employers have a duty to take reasonable action to prevent and stop psychological harassment. The legislation impacts unionized employers as well by deeming these provisions to be an integral part of every collective agreement.

Currently in Ontario, there is no legislative prohibition against workplace abuse and/or harassment that is not based on an enumerated ground under the *Human Rights Code*. As such, while the *Human Rights Code* prohibits harassment based on sex or race (or another enumerated ground), harsh treatment and workplace harassment does not form part of that regime. A recently proposed private member's bill received first reading in December 2007 may fill this

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On February 4, 2008, the federal government introduced a bill in the House of Commons to provide job protection for reservists who work for employers in federally regulated industries and in the federal public sector. This legislation will also provide relief to student reservists. The proposed legislative amendments will be made to the *Canada Labour Code*, the *Public Service Employment Act*, the *Canada Student Financial Assistance Act*, the *Canada Student Loans Act* and other statues and regulations as necessary.

Family Day

With the addition of the new Family Day under the ESA, the minimum number of public holidays in Ontario increased from 8 to 9 holidays per year. Family Day will be held on the third Monday in February every year. However, there are three categories of employees who may not have the right to the day off. These are employees who are: (1) not covered by the ESA, (2) covered by the ESA, but fall within a special rule or exemption involving public holiday provisions, or (3) covered by a collective agreement or employment contract which is more generous in relation to public holidays.

New Poster Under ESA

A new version of the poster which outlines workers and employer rights and obligations under the ESA is soon to be published. The poster will outline the recent changes to the ESA regarding: 1) minimum wage; 2) reservist leave; 3) declared emergency leave; 4) Family Day; and 5) Employees who qualify to take a family medical leave. ■

EXPECT THE BEST

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