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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Employment Notes

"Employers should consider the applicable legislative and public workplace health regimes which may impact any decision or policy it implements in the wake of threats like SARS..."

Labour and Employment Group

William D. Anderson
Direct 416.593.3901
wanderson@blaney.com

Christopher J. Ellis
Direct 416.593.3954
cellis@blaney.com

Elizabeth J. Forster
Direct 416.593.3919
eforster@blaney.com

Mark E. Geiger, Chair
Direct 416.593.3926
mgeiger@blaney.com

Michael J. Penman
Direct 416.593.3966
mpenman@blaney.com

D. Barry Prentice
Direct 416.593.3953
bprentice@blaney.com

Kevin Robinson, Editor
Direct 416.593.3944
krobinson@blaney.com

Jack B. Siegel
Direct 416.593.2958
jsiegel@blaney.com

Robert C. Taylor
Direct 416.593.2957
rtaylor@blaney.com

David S. Wilson
Direct 416.593.3970
dwilson@blaney.com

EMPLOYER REACTION TO EMERGENCIES

Kevin Robinson

We are living in somewhat unusual times during which the workplace is less of a secure haven from the circumstances around us. From terrorism alerts to severe acute respiratory syndrome ("SARS"), it is more timely than ever for employers to consider their response to new issues and concerns that impact the workplace. SARS has had a significant, and growing, impact on social discussion and behaviour this spring in Ontario and throughout much of the world. Many foreign employers have taken the drastic step of banning their employees from visiting Toronto.

Employers should consider the applicable legislative and public and workplace health regimes which may impact any decision or policy it implements in the wake of threats like SARS, but should also consider the human resources implications of those decisions.

Many of the principles that typically arise with ill employees, employees absent due to workplace injury or employees with accommodation needs will apply and effect employers' responses to issues arising because of SARS. However, in addition to those more familiar responses, employers should remember that the uncertainty and attention surrounding SARS will be considered by a court or tribunal should an employer take an aggressive position with respect to an employee absent from work due to actual or suspected exposure to SARS.

Employers maintain the ability to request and receive sufficient medical documentation to substantiate a leave due to illness. It is important in these current circumstances that the employer ensure that in cases where there is some risk that an employee has been exposed to SARS that he/she be given every opportunity, and if appropriate, encouraged, to take sufficient time away from the workplace to avoid infection of other employees. This is not only likely an obligation of the employer but a prudent decision if the employer wants to continue to conduct business without serious interruption due to absences or the potentially disruptive involvement of public health authorities. Having regard to maintaining the health of the employees that have not been exposed to the virus, it is also prudent for the employer to require medical documentation confirming that the employee is healthy and no longer required to be quarantined prior to his/her return to work. The employer should also consider a proactive approach in bringing high risk activities and prevention strategies to the attention of employees.

Overall, it is encouraged that in dealing with issues such as these the employer maintain an open communication with the employees (or the union in a unionized workplace) regarding the expectations of all parties so that the health, morale and productivity of the workplace will be maintained. ■

EMPLOYMENT NOTES

"Courts are beginning to adopt at least some of the concepts which underlie the arbitral jurisprudence regarding discipline and discharge in unionized settings."

Kevin Robinson can be reached at 416.593.3944 or krobinson@blaney.com.

Mark E. Geiger can be reached at 416.593.3926 or mgeiger@blaney.com.

UNIONIZED V. NON-UNIONIZED WORKERS: ARE THE DIFFERENCES DIMINISHING?

Mark E. Geiger

As anyone who works in a unionized environment knows, there are significant differences between the rules which apply to unionized workers and those that apply to non-unionized workers. The theory is easy to state: most statutory provisions apply to all workers whether or not unionized. However, the common law rules of employment do not apply to unionized workers and are replaced by the rights and obligations under the *Labour Relations Act* and any collective agreement in place.

For most unionized workers this has two main effects. First, the employer has the right to lay-off the employee subject to the seniority rules under the collective agreement. Second, the employer has the right to discipline and discharge the employee, but only in a case where just cause exists. Except in very unusual circumstances, the employer does not have the right to terminate the employment of a unionized employee absent just cause within the meaning of that collective agreement, or the arbitral jurisprudence.

Traditionally, courts were of the view that neither the right to lay-off nor the right to discipline existed at common law. Employers at common law were required to warn employees about inappropriate activity and, in appropriate cases, offer assistance to help correct that behaviour. If further inappropriate or inadequate performances continued, the employer may be able to justify a termination for just cause. However, many courts have been of the view that certain discipline, including suspensions, would constitute constructive dismissal.

In a unionized setting, the concept of progressive discipline is well established. Until recently this approach has not seen favour in the common law courts. Progressive discipline, as interpreted in the arbitral jurisprudence, approves of the employer imposing "discipline" to an employee where that employee has neglected to do something they were required to do or performed some action that is deemed to be worthy of discipline. Usually, progressive discipline schemes commence with a verbal warning (which is usually recorded in writing), followed by a written warning, an initial suspension, usually a more lengthy suspension and finally, in appropriate cases, discharge. The employer is able to rely upon the discipline record to justify termination for a subsequent offence which, by itself, would not justify termination where the employer can show that progressive discipline has failed to correct inappropriate behaviour.

Over the last several years, there has been an observable trend. Courts are beginning to adopt at least some of the concepts which underlie the arbitral jurisprudence regarding discipline and discharge in unionized settings.

A discipline free record is a very important consideration in any termination for cause in a unionized setting. Many collective agreements have "sunset clauses" which effectively remove from the discipline record previous discipline after a certain length of time (or a certain length of time during which there is no further discipline). Arbitrators have often reinstated dismissed employees notwithstanding the fact that their conduct would, in normal circumstances, justify immediate termination. These cases usually involve situations where a long-term employee has a relatively discipline free record.

EMPLOYMENT NOTES

"Where there has been a long-term employment relationship, recent cases have suggested that an employer must take into account a lengthy blemish-free record before terminating the employee"

A number of recent wrongful dismissal cases have adopted similar rationale. Where there has been a long-term employment relationship, recent cases have suggested that an employer must take into account a lengthy blemish-free record before terminating the employee. Thus, an action on the part of the employee which would justify termination in other circumstances might not justify termination in a case where the employee had long service. The recent case of *Reininger v. Unique Personnel Canada Inc.* is an example of this emerging trend.

Richard Reininger was a truck driver for Harmac Transportation. He drove a petroleum double tank trailer with a total weight in excess of 70 tons and had done so for about 12 years.

Following his success in a company fishing derby and a celebration thereafter, he was charged with impaired driving under the Criminal Code. As a result, his employment was suspended by his employer.

A question before the Ontario Court was whether or not, in a non-unionized environment, an employer could suspend an employee without being found to have constructively dismissed him. In a previous case, *Haldane v. Shelbar Enterprises*, the Court of Appeal considered the question of whether or not an employer has the right to suspend without pay as an exercise of reasonable discipline. The Court found that such a right can be implied into the employment contract, but it was a question of fact depending on usage or the presumed intention of the parties. Referring to that case, and the evidence in the case at bar, Mister Justice Howden found in *Reininger* that there was an intention to include a term in the employment contract giving the employer the right to use progressive discipline, including the right to suspend with or without pay. Evidence was given in this case that in fact there had been previous suspensions in the past with other employees in other circumstances.

What is particularly interesting about the judgment in this case is that the judge in question referred to several arbitral decisions dealing with the principles to be applied when exercising the discretion to suspend.

This case demonstrates that concepts well developed in the arbitral jurisprudence are beginning to creep into the common law. Other examples involve condemnation, the necessity for fairness in terminating probationary employees, and now the concept of progressive discipline and the right to suspend. This case specifically refers to the decisions of two well-known arbitrators and adopts their reasoning in coming to the Court's final conclusion.

These developments suggest at least two conclusions. First, both employment lawyers and employers in non-unionized environments can learn a great deal from the arbitral jurisprudence which has developed in unionized settings. Situations arise in the non-unionized setting which are often very similar to circumstances in unionized settings. It is often very difficult to find a coherent body of law to assist an employer (or an employment lawyer advising an employer) in determining the appropriate response. The arbitral jurisprudence is complete and well organized and available to assist both employers and their advisors, in appropriate cases, in dealing with circumstances including those where discipline as opposed to discharge might be the appropriate remedy.

Second, this is a trend which we expect to continue. The difference between unionized and non-unionized employment rules may well lessen as time goes on. ■

EMPLOYMENT NOTES

"According to the budget plan, effective January 4, 2004, the federal government will implement an Employment Insurance Compassionate Family Care Leave Benefit."

Jack B. Siegel can be reached at 416.593.2958 or jsiegel@blaney.com.

COMPASSIONATE FAMILY CARE LEAVE BENEFITS

Jack B. Siegel

On February 18, 2003, the Minister of Finance delivered this year's federal budget. Usually, announcements in the budget affect areas of law outside of the field of employment, however, this budget does suggest something that may be on the horizon.

According to the budget plan, effective January 4, 2004, the federal government will implement an Employment Insurance Compassionate Family Care Leave Benefit. According to this proposal, individuals who meet the eligibility requirements for EI Special Benefits, and have served the two-week waiting period, will be entitled to a six-week EI Compassionate Family Care Leave Benefit to care for their gravely ill or dying child, parent or spouse.

The budget indicates that the federal government will propose legislative changes so that permanent employees under federal jurisdiction governed by the Canada Labour Code can benefit from the new leave provision by making sure that their jobs are protected during the leave period.

The most recent employment insurance benefit change implemented by the federal government was the extension of maternity leave benefits a few years ago. Within several months of adopting that legislative change, many provinces, including Ontario, adopted corresponding changes to their own employment standards statutes to correspond to the new one-year leave provision. If a similar trend is followed, employers may anticipate there being a new obligation falling upon them sometime over the next year or so with respect to the new Compassionate Family Care Leave. Given the provision of the Employment Insurance benefit, it would appear overwhelmingly likely that any such leave requirements will be unpaid, however, it may well be that job security will be protected during the Compassionate Family Care Leave period.

While provincially-regulated employers may wish to await such legislation prior to making any modifications to policies, it may be advisable at the present time to start to consider the possibility of such a requirement being imposed at some point in the foreseeable future. In particular, it would be worthwhile to consider necessary planning adjustments or changes to employment policies and agreements that might subsequently arise so as to ensure that they are approached with a sufficient degree of foresight. Federally regulated employers should most certainly be looking at the situation now. ■

Employment Notes is a publication of the Labour and Employment Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

20 Queen St. West, Suite 1400
Toronto, Canada M5H 2V3
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com