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Blaney McMurtry
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Employment Notes

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FREEDOM 65?

Elizabeth J. Forster

On May 29, 2003, the *Mandatory Retirement Elimination Act*, 2003 received first reading in the legislature. If passed, the effect of this Act will be to eliminate the right of an employer to implement a mandatory retirement policy.

The *Human Rights Code* has always prohibited discrimination in employment based upon age. However, in the past, age was defined as "18 years or more, and less than 65 years". This meant that an employer was free to implement a mandatory retirement policy providing for mandatory retirement at age 65 or older.

The proposed statute will redefine "age" to mean "18 years or more", and eliminate the upper limit of age 65.

If this statute is passed it will have a number of implications for employers.

DUTY TO ACCOMMODATE

Older workers will have to be accommodated unless the employer can establish that an age restriction is reasonable and *bona fide* in the circumstances.

TERMINATION OF EMPLOYEES AGE 65 OR MORE

Because mandatory retirement policies will no longer be allowed, employers will face the same issues with respect to terminating employees over age 65 as they do with the rest of their employment population. This means that in order to terminate an employee over age 65, the employer will either have to have just cause, or provide the employee with reasonable notice of termination (unless there is a written employment contract with a different notice provision).

The courts in the past have determined the amount of reasonable notice based on a number of factors peculiar to the individual employee, including the employee's age. Normally, the courts have recognized that the older the employee, the more notice will be required to obtain comparable employment. It remains to be seen how the courts will treat the termination of an employee aged 65 or more under these circumstances.

PENSION BENEFITS ACT

Employees who attain age 65 will have the option of continuing to participate in their employer's pension plan after age 65 or retiring with a full unreduced pension one year after reaching age 65. However, employees working past age 69 are required to take their pension income and therefore, may be in receipt of a pension income and income from employment at the same time.

BENEFIT PLANS

Many employee benefit plans, including long term disability plans limit the payment of benefits to age 65. These restrictions will no longer be permissible and presumably group benefit plans will be amended to reflect these changes.

EMPLOYMENT NOTES

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Elizabeth J. Forster can be reached at 416.593.3919 or eforster@blaney.com.

There will be a grandfathering provision for anyone about to retire in accordance with a mandatory retirement policy contained in a collective agreement that was in operation on May 29, 2003.

There are a number of statutes which contain mandatory retirement ages for officials appointed under those statutes. They will need to be amended in similar fashion. These statutes include the *Audit Act*, the *Election Act*, the *Health Protection and Promotion Act*, the *Ombudsman Act* and the *Public Service Act*.

The Act is scheduled to come into force on January 1, 2005. We will keep you advised of the status of this proposed legislation. ■

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UPDATE ON PROVINCIAL PRIVACY LEGISLATION

Kevin Robinson

This is an update on the article that was included in our October 2003 newsletter regarding the draft of a new *Provincial Privacy Act*.

To date, the draft *Privacy of Personal Information Act*, 2002 has not been tabled as a Bill. The Ontario Government has not given any indication that it intends to table this or similar legislation this year.

As we earlier reported, the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") came into force on January 1, 2001. Although PIPEDA applied only to federal organizations as of January 1, 2001, that Act indicates that it will apply to all organizations (including provincially regulated organizations) as of January 1, 2004 unless the province with jurisdictional responsibility enacted "substantially similar" legislation prior to that date. Given that it does not appear that Ontario will be enacting substantially similar legislation this year, then PIPEDA may apply to Ontario employers.

However, regulation of employment within Ontario is an area which traditionally falls within the exclusive jurisdiction of the Province for most employees. Therefore, it is unclear how and whether PIPEDA will apply to Ontario employees in provincially regulated organizations.

The former Privacy Commissioner of Canada, George Radwanski, has stated in speeches on this issue that PIPEDA will not apply to employees in the provincially regulated private sector as of January 1, 2004. However, the former Privacy Commissioner also stated that the spirit of PIPEDA is one that will ultimately set the standard for privacy standards in most of Canada. The draft *Privacy of Personal Information Act*, 2002 released by the Government last year confirms that view.

Therefore, although it appears that PIPEDA will not specifically apply to employees and employers in Ontario as of January 1, 2004, employers may be wise to begin, if they have not already done so, adjusting their practices to comply with the principles and guidelines from PIPEDA.

If you wish to obtain further information about this or a copy of PIPEDA, please contact us. ■

DAMAGES FOR MENTAL DISTRESS IN WRONGFUL DISMISSAL ACTIONS

Natalia Krayzman

It is becoming more common for wrongful dismissal actions to include claims for damages for intentional infliction of mental distress.

EMPLOYMENT NOTES

"Employers must take care in ensuring that dismissals are handled with care."

We are pleased to welcome and introduce a new associate lawyer to the Labour and Employment Group.

Natalia Krayzman completed her Law degree in 2002 at Queen's University and was awarded a prize in Labour Law. She was called to the Bar in 2003. She is returning as an associate after completing her articles with our firm.

Natalia's focus in law school was on Labour Law, Employment Law and Alternative Dispute Resolution. She is also a Certified Mediator.

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Two recent Ontario decisions have shed some light on what circumstances may trigger such damages.

In *Prinzo v. Baycrest Centre for Geriatric Care,* the Court of Appeal upheld an award of $15,000 for intentional infliction of harm causing mental distress.

The Court set out three factors that must be present to justify an award for damages for intentional infliction of mental distress. They are:

1. flagrant or outrageous conduct,
2. that is calculated to produce harm, and
3. that results in a visible and provable illness.

What do these requirements mean? "Flagrant or outrageous conduct" can mean severe harassment by a superior who has knowledge of an employee's fragile condition. It could also include sexual harassment or a confrontational, brash and contradictory management style.

In *Prinzo,* the plaintiff was employed for almost 18 years. She had only positive reviews prior to the arrival of a new supervisor who gave her a relatively poor assessment and eventually recommended that her position be eliminated. Before this recommendation could be implemented, the plaintiff injured herself and had to stay home from work for a number of months, during which time her doctor repeatedly told her employer that she was medically unfit to return to work on even modified duties.

Despite her doctor's recommendations, the plaintiff received regular phone calls from her supervisor and another employee asking her to return to work on modified duties. At one point, the plaintiff's supervisor sent her a letter implying that her doctor had approved her return to work.

The plaintiff's employment was terminated soon after her return to work.

The trial judge described the acts of the employees involved in the distressing calls as "so extreme and insensitive that they constituted a reckless and wanton disregard for the health of the plaintiff" warranting an award for mental distress. The Court of Appeal agreed.

The second element, that the conduct be "calculated to produce harm", means conduct intended to harm the individual or conduct which is likely to have harmful consequences.

With respect to the third requirement of a "visible and provable illness", it should be noted that the absence of a medical expert will not necessarily be fatal to the plaintiff's case. Symptoms of depression and physical illness resulting from the employer's conduct may be apparent and accepted by a court without the aid of a medical expert's testimony. However, temporary and transient upset that causes nothing more than injury to one's feelings may not be enough to prove a "visible and provable illness".

In *Sandy v. Beausoleil First Nation,* a decision released this year, the plaintiff was terminated after a single confrontation with a superior without first being subjected to progressive discipline or even being made aware of the seriousness with which the defendant had viewed her actions. She was also not given an opportunity to respond to allegations made against her including breach of confidentiality, presenting false information and insubordination. The plaintiff was awarded $25,000 for intentional infliction of mental distress and shock. However,

EMPLOYMENT NOTES

"Employers should be very careful to consider an employee's rights to disability benefits or payments at the time of termination of employment."

We are pleased to welcome and introduce another new associate to our group.

Maria Kotsopoulos received her B.A. in History and Legal Studies from the University of Waterloo (1998), her M.A. in History from the University of Toronto (1999) and her LL.B. from the University of Ottawa (2002). Maria was called to the Bar in July, 2003. She articled with Blaney McMurtry and she now joins the firm as an associate in the Labour and Employment and Insurance groups.

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the trial judge did not provide much guidance on what specific conduct by the employer amounted to an independent actionable wrong, or how the three elements set out in *Prinzo* were met. It remains to be seen how this case will be treated by the courts.

Employers must take care in ensuring that dismissals are handled with care. Turning your mind to planning how dismissals should properly be handled today could save you from a potential action for damages for mental distress tomorrow. ■

DAMAGES FOR LOSS OF DISABILITY BENEFITS

Maria Kotsopoulos

Employers who do not address the issue of the continuation of disability benefits to terminated employees during any notice period may face potential liability in the event the employee is found to have been disabled at the time of termination or during the notice period. Where a Court determines that an employee was wrongfully dismissed, an employer may be obligated to pay both salary in lieu of notice as well as damages for the loss of disability benefits.

A recent case dealt with a plaintiff who was employed as a sales representative for over 20 years. In January, 2000, medical problems relating to fibromyalgia rendered the plaintiff unable to continue working. In accordance with the company's disability plan, the plaintiff was paid full salary to May 2000 and 70 per cent of her salary thereafter until August, 2000.

In August, the company advised the plaintiff that she could return to work in a new, unfamiliar position at half the plaintiff's salary, or receive a lump sum payment of $70,000 to settle all potential claims. The plaintiff was given seven days to decide between these options. The plaintiff took the position that she was disabled and had been wrongfully dismissed.

The Court held that the August offer constituted a wrongful dismissal as of the date of the offer and that the notice given by the company was inadequate. The Court found that the plaintiff's disability commenced in January, 2000, that the plaintiff was totally disabled at the time of her termination and that the plaintiff was entitled to receive disability benefits after the termination. The Court held that there was insufficient evidence to support a declaration of indefinite disability and therefore ordered the defendant to make disability payments to December 30, 2000 (5 months) and, in addition, to provide salary in lieu of notice for 12 months from December, 2000. This case thus suggests that the plaintiff's damages for loss of disability benefits would have been greater had the plaintiff's evidence proven indefinite disability.

Employers should be very careful to consider an employee's rights to disability benefits or payments at the time of termination of employment. Additionally, this case demonstrates one of the risks an employer faces when seeking to terminate an employee who is absent due to illness. ■

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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