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Blaney McMurtry
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Employment Notes

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THE END OF MANDATORY RETIREMENT IN ONTARIO?

Maria Kotsopoulos

On August 18, 2004, the Ontario provincial government announced that it was committed to ending mandatory retirement and making the age of retirement a matter of personal choice for Ontario workers.

By taking this step, Ontario is by no means setting the tone. Both internationally and at home, governments are moving away from mandatory retirement. For example, Manitoba, Quebec, Alberta, the Yukon and Prince Edward Island have already taken steps to end mandatory retirement, except in limited circumstances.

In Ontario, the Ontario Human Rights Code currently prohibits discrimination in employment on the basis of age. However, for the purposes of employment, the Code defines "age" as being "eighteen years or more and less than sixty-five years." As a result, mandatory retirement provisions in workplace policies, employment contracts and collective agreements requiring a worker aged sixty-five or older to retire have to date been deemed lawful.

The impetus behind the elimination of mandatory retirement in Ontario appears to lie, at least in part, with a 2001 report of the Ontario Human Rights Commission, citing the demographics of the province's aging population and concerns related to the dignity and self-worth of older workers who are forced to retire before they are ready or inclined to do so. In addition, the government has noted the disproportionate economic effects of mandatory retirement policies on new immigrants and women as an important motivating factor for new legislation.

There will, of course, be exceptions to the ban on mandatory retirement policies and, in certain circumstances, an employee may still be required to stop working before age sixty-five. In these cases, however, the employer must show that there is a bona fide occupational requirement that an employee retire at age sixty five. The employer would also have to show that the employee cannot be accommodated without causing undue hardship to the employer having regard to cost and health and safety concerns.

While the government is intent on tabling such legislation, it hopes to protect existing entitlements to benefit and pension plans and

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not undermine existing early retirement rights. Accordingly, a series of public consultations and meetings with experts were scheduled throughout September 2004 to solicit information about the potential effects of this proposal. Specific questions posed by the government include whether ending mandatory retirement will reduce skills shortages in nursing, teaching and skilled trades and whether there will be any effect on recent entrants to the workforce.

Given that the number of Canadians aged sixty-five and older is expected to double from nearly four million in 2000 to almost eight million by 2028, the mandatory retirement issue will be a matter of particular interest to all Ontarians in the upcoming months and years. ■

JUST CAUSE FOR TERMINATION OF EMPLOYMENT: NOW MORE COMPLICATED?

Kevin Robinson

Earlier this year, the Ontario Court of Appeal had another opportunity to consider a case in which an employer had taken the position that it had just cause to terminate the employment of an employee.

The plaintiff, Ms. Black, was employed as an account manager with the defendant employer for approximately twelve years. At the time of the conclusion of her employment, she was sixty-one years old (although that factor was not specifically identified by the Court of Appeal, her age may have played a role in their ultimate determination).

The employer ultimately learned that, for several years prior to the termination of her employment, Ms. Black had taken the liberty of giving herself and another employee unauthorized pay increases on an annual basis. When the employer learned of this, they decided to terminate Ms. Black's employment taking the position that it had just cause to do so.

At trial, the judge found that the plaintiff had a duty to inform her boss when she increased her salary. However, there was also evidence that the employer, prior to learning about the unauthorized pay increases, had considered terminating Ms. Black's employment for unrelated reasons.

Using a contextual analysis, the trial judge noted that the employer had already considered terminating Ms. Black's employment. The judge found that the employer decided to take the position that it had just cause to do so only after learning of the pay increases. Because of that background, and because the "misconduct" must be considered in proportion to the sanction imposed, the judge determined that there was no just cause for the termination of the employment and the plaintiff was awarded pay in lieu of reasonable notice of the termination of her employment.

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The employer appealed. The Court of Appeal approved of the contextual approach taken by the trial judge and upheld the award for damages.

Between the decision of the Ontario Court of Appeal in *Black v. Robinson Group Ltd.*, and the Supreme Court of Canada's decision in *McKinley v. BC Tel*, it appears that it is becoming more and more difficult for employers to successfully make out a case for just cause of the termination of an individual's employment. When assessing whether an employer has just cause at the time of termination, not only does the conduct of the employee need to be considered, but the surrounding circumstances within the workplace, the employer's relationship with the employee and the proportionality of the conduct to the sanction will be important additional relevant factors to consider. ■

COMPASSIONATE CARE LEAVE NOW LAW

Maria Kotsopoulos

Since our earlier article describing the introduction of compassionate care benefits to the federal *Employment Insurance Act*, the Ontario government has passed Bill 56, *An Act to Amend the Employment Standards Act, 2000* in respect of family medical leave and other matters.

Following the amendments to the federal *Employment Insurance Act*, this Act amends the ESA to provide up to eight weeks' leave of absence without pay to provide care or support to certain family members who are gravely ill and facing a significant risk of death within twenty-six weeks. This period of leave is in addition to the existing emergency leave entitlement already provided for in the ESA.

As in the amendments to the *Employment Insurance Act* and regulations, a qualified health practitioner must issue a certificate stating that the family member has a serious medical condition with a significant risk of death within twenty-six weeks.

An employee who wishes to take this leave must also provide notice to his or her employer in writing prior to taking the leave or as soon as possible after starting the leave. ■

PERSONAL HEALTH INFORMATION PROTECTION

Kevin Robinson

On November 1, 2004, the new *Personal Health Information Protection Act, 2004* (PHIPA) comes into force in Ontario.

PHIPA is a brand new piece of legislation which establishes a protocol regarding the collection, use and disclosure of personal health information of individuals. The Act requires health care practitioners and custodians of personal health information to obtain the consent of an individual before the collection, use and/or disclosure of their personal health information. Where the information is to be

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disclosed to a third party outside of a so-called "circle of care" then the health care practitioner must obtain, in every case, the express consent of the individual. That express consent can be withdrawn at any time by the individual.

What are the implications of PHIPA for employers?

The implications remain to be seen. However, it is likely that it will more cumbersome for employers to obtain medical information about their employees who are absent due to illness, injury or disability. Health care practitioners are likely to be even more protective over information than before.

Perhaps more importantly, employees now have the statutory right to maintain the confidentiality of all personal health information held by health care practitioners or health information custodians and can restrict an employer from gaining that information and, as noted above, withdraw their consent at any time.

However, the fact remains that employers still have a duty to accommodate their employees when absent due to illness or disability, pursuant to the provisions of the Human Rights Code and as such are entitled to certain health information. If an employee refuses to allow an employer to have a certain degree of health information, then it will be much more difficult for the employer to determine how and to what extent an employee needs to be accommodated.

In its policy on employment related medical information, the Ontario Human Rights Commission has stated that, "a person who requires accommodation in order to perform the essential duties of a job has the responsibility to communicate her or his needs in sufficient detail and to cooperate in consultations to enable the person responsible for accommodation to respond to the request."

Therefore if an employee relies on his or her rights under PHIPA to prevent the disclosure of medical information to his or her employer and that interferes with the employer's ability to assess its obligations to accommodate that employee, then that employer is more likely to be successful in demonstrating that it has in fact met its duty to accommodate an ill or disabled employee. ■

EXPECT THE BEST

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