OCTOBER 2005

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Employment Notes

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Labour and Employment Group

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LABOUR RELATIONS CHANGES

Mark E. Geiger

Amendments to the *Ontario Labour Relations Act* which were passed by the Government received Royal Assent last month.

There are two major changes to the *Ontario Labour Relations Act* (the "*Act*").

Automatic Certification in the Construction Industry

Prior to the introduction of the current *Act* in 1998, certification in the Province of Ontario was "automatic". Unions could organize by simply having employees in a bargaining unit sign application for membership cards. If 55% or more of the employees in the bargaining unit found to be appropriate, signed membership cards, absent any irregularities or improper behaviour in the signing of those cards, the union would be certified as the bargaining unit without a vote.

As part of the major changes made to the *Act* in 1998, the government introduced a mandatory vote as part of the certification process under the *Act*. The government was under tremendous pressure from unions to reintroduce automatic certification. Although they did not do so for other sectors, they did reintroduce automatic certification for the construction industry. This then returns the construction industry to the rules as they were prior to the 1998 changes. To date we have received no indication that the Board intends to change the rules with respect to the way in which it will handle other aspects of the certification process in the construction industry.

Many people have commented on the seeming arbitrary nature of the way in which unions can become certified even under the current rules in the construction industry. Unlike other applications for certification, only those employees who were actually working on the day the certification application was made are counted when determination of who will vote, or now under the new regime, who will count as part of the 55% required. This creates what can only be described as artificial situations. Construction companies often have very small crews working on Saturdays or on other public holidays. If unions are clever they can make the day of application coincide with a day when very few employees in the bargaining unit were actually working, and ensure that union supporters are the only

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individuals actually working on the day of application. If unions are able to arrange this, they will succeed in being certified when only a small minority of the employees who work for the construction company in question are actually interested or in favour of unionization. This point has been made forcefully to the Board on numerous occasions but to date those rules remain in effect. It remains to be seen whether construction companies will take steps to ensure that small numbers of employees are never working on their own, thus allowing an application of this sort to succeed when only a minority of employees approve.

Certification as a Remedy for Unfair Labour Practices

The government has also reinstated the power of the Board to certify employers when they engage in unlawful tactics to avoid unionization. The Board had that power between 1975 and 1998. This was again the subject of very intense lobbying by the labour movement which argued that there really was no other effective sanction to prevent employers from engaging in unfair labour practices in an attempt to avoid unionization.

In order for unions to be certified on this basis, the Labour Relations Board must find that the employer contravened the *Act* and that as a result of the contravention the union would not be able to acquire sufficient support to file an application for certification under the normal procedures, or that as a result of the contravention the employees' true wishes would not be reflected in a vote. Finally, the Board must be satisfied that no other remedy available to it would be sufficient to counter the effects of the employer's contraventions.

The legislation does not require the Board to certify in these circumstances. In fact, other approaches short of certification are specifically mentioned in the *Act*, including taking steps to ensure that a representation vote that the Board does order, will in fact reflect the true wishes of the employees. The Board is given very wide jurisdiction in making Orders as to what should be done to ensure an "honest" vote take place. In this regard, the Board can consider the results of any previous representation vote and whether the union appears to have adequate support for the purpose of collective bargaining in determining whether or not to exercise its remedial certification power.

This change in the legislation makes it all the more important to ensure that supervisory employees do nothing to jeopardize the company's position if an organization campaign is taking place at your premises. Very often in the past, supervisory employees have taken steps, which they consider to be in the best interests of the company, but which have resulted in Boards throughout Canada certifying the union. These steps have included in other cases:

- discharging employees who are organizing the union for reasons that could not be justified;

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- informing employees that, in their opinion, the plant would close if the union-drive was successful;

- negotiating directly with employees with respect to their grievances and attempting to resolve them in order to undercut the union's drive.

It is thus, vitally important, that members of management, down to the level of foreman or supervisors, understand what they can and cannot do during a union-drive. In several cases in which we have been involved, the unauthorized actions of a lower level supervisor have caused a union-drive which would otherwise have been unsuccessful to be successful.

Union Misconduct

As part of this initiative, Bill 144 also reintroduced the power of the Board to decline to certify a union where it has committed an unfair labour practice which would have the same effect, namely preventing the true wishes of the employees in the bargaining unit from being reflected in a representative vote. In our view, this change is really not significant. The Board has always been reluctant to find that actions on the part of the union are likely to influence the vote of employees because unions are not seen as having the same potentially coercive influence on them. Employers exercise economic power over employees including the power to hire and fire. Thus, the actions of the company are often seen as more coercive than similar actions taken by union members or the union itself. While the Board has on rare occasions disallowed a vote where employees were physically threatened, or other serious similar actions, in our view it will be very difficult to persuade the Board to exercise this power except in the clearest of cases.

Interim Remedies

Prior to the changes in 1998, the Ontario Labour Relations Board also had the power to order interim remedies in appropriate cases. The *Act* has gone some measure to reintroduce that power but has made it clear that interim orders reinstating a terminated employee or restoring altered terms and conditions of employment require the Board to be satisfied that a number of criteria are present. They are as follows:

- a union organizing campaign is taking place;

- there is a serious issue to be decided in the proceeding about which the interim order is requested;

- the interim order is necessary to prevent irreparable harm or to achieve other significant labour relations objectives; and

- the "balance of harm" favours granting the relief.

The Board is not to exercise these powers if it appears that the alteration of terms and conditions, dismissal, or other action by the employer was unrelated to the employees

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exercising their rights during the union-drive. While the union has the burden of establishing the pre-conditions, in our view the employer will have the obligation to demonstrate that whatever was done was not related to the union organizing drive. The fact that a union organizing campaign was under way will be easily established. Establishing that a serious issue needs to be decided in the pending proceeding will prevent frivolous applications, but would certainly be available in most circumstances where an individual has been terminated, terms and conditions of employment have been changed or other significant events have occurred during the currency of a union organizing drive. The requirement that the union show there be "irreparable harm" will be more difficult to establish. However, the Board may be prepared to make interim orders in order to achieve other significant labour relations objectives, one of which could be to ensure that employee rights during a union organizing drive are respected. The onus will then shift to the employer to demonstrate either that its actions were entirely unrelated to the organizing drive or, that the interim order would severely compromise the company.

All of these changes taken together increase the likelihood that unions will be both more aggressive in their union organizing attempts, and more likely to challenge actions of management during a union drive. They also significantly increase the risk to a company when it takes steps of any sort to counteract a union drive. It again becomes vitally important that all levels of management understand what they can do and what they cannot do during a union drive. ■

ONTARIO GOVERNMENT MOVES TO "RETIRE" MANDATORY RETIREMENT

Neal B. Sommer

On June 7, 2005 the government of Ontario introduced Bill 211 to amend various Ontario statutes in order to extend the protection of the *Human Rights Code* to prevent discrimination in employment to those aged 65 years of age and older.

Key Aspects of the Bill

Though the content of the bill may change in significant ways prior to its adoption by the legislature, the following are key elements of the bill:

- No employment discrimination based on any age in excess of 18 years – the upper cap on age discrimination (currently 65 years), will be eliminated;
- Termination and Severance Pay payable under the *Employment Standards Act, 2000* – unless an employee is subject to lawful mandatory retirement, both notice or pay in lieu of notice of termination and severance Pay will be payable to the employee upon termination;

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- Employees who are members of pension plans will be permitted to accrue benefits past the age of 65, subject only to such service or other contribution caps which are part of the plan; and

- Collective Agreements will not be able to contain mandatory retirement provisions, however voluntary early retirement programs will remain lawful.

There are some limits on the changes being introduced by the government:

- Employment benefit plans not to be affected – The *Employment Standards Act, 2000* permits discrimination in employment benefits relating to employees aged 65 or more, this will continue to be permitted;

- Workplace Safety & Insurance Benefits unaffected – the elimination of mandatory retirement will not have an impact upon the age-related limitations on benefits under the Workplace Safety and Insurance Act ;

- Federal Benefits unaffected – Canada Pension Plan, Old Age Security and Guaranteed Income Supplement benefits provided by the Government of Canada are unaffected by this provincial legislation;

- Mandatory Retirement in certain cases – Employer will continue to be permitted to establish a bona fide occupational requirement to employ only people below a certain age. If they can, then retirement at that age will be permissible;

Finally, Ontario employers will have sufficient time to adjust their human resources planning. The prohibition on mandatory retirement will not come into force until one year following passage of the amendments.

Blaney McMurtry's employment and labour counsel are available to answer any questions you may have regarding implementation of this change. ■

KEAYS V. HONDA: A WARNING TO EMPLOYERS?

Maria Kotsopoulos

A recent decision of the Ontario Superior Court has made the legal world take note. In *Keays v. Honda Canada Inc.*, a fourteen year employee of Honda suffering from chronic fatigue syndrome was awarded 24 months' notice of the termination of his employment (15 months notice and an extension of the notice period for the bad faith manner of his termination) and an unprecedented $500,000.00 in punitive damages. This case serves as a warning to employers managing the attendance and employment of an employee with a significant and misunderstood medical condition.

Kevin Keays, a reportedly "dedicated and conscientious employee", was employed by Honda on its production line. Throughout his employment he received glowing work reports

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save for consistently negative assessments in relation to his attendance. Starting in 1996 and continuing to 1998, Keays' health condition deteriorated such that he was off work on disability. Despite a diagnosis of chronic fatigue syndrome in 1997, Keays' long-term disability benefits were terminated (wrongly in the trial judge's estimation) on the basis that there was "no objective evidence of total disability" and because of an assumption that Keays was able to return to work on a graduated and then a full-time basis.

Within one month of returning to work in 1999, Keays began to experience work absences as predicted by his own physician. As a result of the absences, the progressive discipline procedure at Honda was engaged and Keays was initially "coached" by way of a written report. Keays then applied and was admitted to a special program exempting him from attendance-related progressive discipline based on a disability recognized by the Ontario Human Rights Code. However, entrance to this program required each of Keays' absences to be validated by a doctor's note, something that was not required for other employees suffering from more "mainstream" illnesses and seemed of little sense to the trial judge.

As the process continued, the trial judge found that there was further "stone-walling", which resulted in the aggravation of Keays' symptoms and further absences, and a threat by the company doctor that Keays should be returned to the production line. The culminating incident, however, was the unilateral cancellation of Keays' accommodation and the requirement that Keays' meet with an occupational health specialist in response to a "conciliatory in the extreme" letter from counsel retained by Keays. Honda indicated that it no longer accepted the legitimacy of Keays' absences and that any refusal to meet with the specialist would lead to Keays' termination. Keays' request for clarification was refused and Keays' employment was ultimately terminated.

At trial, McIsaac J. stated that termination was totally disproportionate to the alleged insubordination citing Keays' 14 years of service, his legitimately motivated concern that his rights were being violated, and the fact that there was no evidence that the refusal to see the specialist would disrupt production. In awarding an extension of the notice period, McIsaac cited among other things, Honda's misrepresentation of the medical information for the purpose of forcing Keays to meet with the specialist.

McIsaac J. also found that Honda had committed independent actionable wrongs, namely discrimination and harassment, and awarded one of the largest punitive damages awards in Ontario legal history. McIssac J. stated that "[he had] no difficulty in finding that the plaintiff [had] proved that Honda had committed a litany of acts of discrimination and harassment in relation to his attempts to

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resolve his accommodation difficulties. When he began to push them on his concerns by having his lawyer attempt to advocate for him, they imposed the most drastic form of harassment possible: they terminated him." The quantum of the punitive damages awarded clearly illustrates that the court was convinced that Honda's "planned and deliberate" conduct "formed a protracted corporate conspiracy" and was, thus, deserving of punishment.

Not surprisingly, this case is under appeal. We will keep you updated as it makes its way through the court system. ■

DISABLED EMPLOYEES ENTITLED TO SEVERANCE PAY UNDER THE *EMPLOYMENT STANDARDS ACT*

William D. Anderson

In *Ontario Nurses' Association v Mount Sinai*, the Court of Appeal has increased the complexity and uncertainty of what to do with employees who become permanently disabled and are unlikely to ever be able to return to their former positions.

If an employee becomes incapable of working because of a permanent disability, an employer is called upon to make an informed determination as to whether the disability would foreclose the employee's return to the workplace. If the answer is yes or maybe, the employer must look for a way to accommodate the position or workplace to return the employee to work, as required by law. Historically, if the answer was no, then the employer was able to advise the employee that the contract of employment had been "frustrated' through no fault of either party and was at an end. The doctrine of frustration of contract has long been accepted at common law and was incorporated into the *Employment Standards Act*. Essentially, a contract is frustrated if it cannot be performed by one or both of the parties as a result of some unforeseen circumstance. An employee who becomes permanently disabled and incapable of performing the essential duties of the job, with or without accommodation, cannot satisfy his or her side of the bargain and the employment relationship is therefore terminated automatically by operation of law.

In this case, the Court of Appeal was convinced by the Union that severance pay under the *Employment Standards Act* should be seen as a reward or payment for past service to the employer. Accordingly, when an employee is terminated, absent just cause, that employee is entitled to his or her severance pay under the *Act*. The Union described it as the employee's investment in the company or "sweat equity". The Court accepted that it would be unfair to provide terminated active employees with severance pay while their disabled counterparts were not eligible to receive the same severance entitlements. The Court found such conduct to be discriminatory and a violation of

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Section 15 of the *Canadian Charter of Rights and Freedoms*.

The concept of "sweat equity" is one not infrequently advanced by unions but has not been widely accepted otherwise. Employees who voluntarily retire, resign or are terminated for cause are not entitled to severance pay or their "sweat equity". Notwithstanding, employees who are effectively required to resign by virtue of their health are now entitled to these payments.

The difficulty with which employers are now faced is what to do with a permanently disabled employee who will never return to the workplace. If the employer confirms that the employment relationship has ended and acknowledges the termination, the employer will arguably trigger the severance provisions of the *Employment Standards Act* (the *Act* has since been amended slightly, however the same argument still applies that the employee is entitled to severance pay). The employee may also be entitled to payment in lieu of notice under the *Act*.

Alternatively, employers may say or do nothing in respect of the disabled employee's employment status. The employee is neither an active employee nor has he/she been terminated but remains in limbo. If the employer does not trigger a termination, then no severance obligation will ever arise. However, the individual is still considered to be an employee, accruing seniority, and if for some reason the employee is terminated (for example, as a result of a plant closure or otherwise) at any point in the future, the employee will arguably be entitled to his/her notice and severance pay pursuant to the *Act* for the entirety of the period of employment, including the period of disability however long. This somewhat anomalous result is difficult to reconcile for some employers.

With the ever increasing difficulties in recognizing and complying with an employer's obligations to a disabled employee under the *Human Rights Code, Employment Standards Act, 2000* and at common law, it is ever more important to navigate carefully through these waters. Each case must be analysed and acted upon on its own particular facts. ■

EXPECT THE BEST

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